

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

Claim No: BVIHC (COM) 2021/0073 and 2020/0215

BETWEEN:

VON DER HEYDT INVEST SA

Claimant

-and-

(1) MEX CLEARING LIMITED

(2) MEX SECURITIES S.A.R.L

(3) MULTIBANK FX INTERNATIONAL CORPORATION

Defendants

Appearances:

Mr. Tim Penny QC and Mr. Alexander Cook, with them Mr. Alex Hall Taylor QC and Mr. Simon Hall of Carey Olsen for the Claimant

Mr. John Carrington QC and Mr. Ben Woolgar instructed by Kendell Law for the First Defendant

Mr. Steven Gee QC and Mr. Caley Wright, with them Ms. Eleanor Morgan and Ms. Sophie Christodoulou of Mourant Ozannes for the Third Defendant

The Second Defendant has not appeared and is not represented

2021 July 28 and 29
September 21, 22 and 23
October 4 (written judgment)
October 19 (correction under the slip rule)

JUDGMENT (corrected under the slip rule)

(SUBJECT TO TEMPORARY RESTRICTIONS ON PUBLICATION)

- [1] **JACK, J [Ag.]:** There are a large number of applications before me. The most significant are (a) the application of the claimant (“VDHI”), a Luxembourg corporation, to continue a freezing order which I granted on 26th April 2021 and (b) the cross-applications of the first defendant (“Mex Clearing”) and third defendant (“MBFX”) to discharge that order on the substantive merits and for material non-disclosure. The second defendant (“Mex Securities”) has not appeared and is not represented.

The dramatis personae

- [2] Mex Clearing is incorporated in Dubai. MBFX is a BVI company, which runs a foreign exchange trading platform. Both are subsidiaries of Mex Group Worldwide Ltd (“MGW”), a company incorporated in Hong Kong, which operates a financial services group headed by Mr. Naser Taher (“Mr. Taher”). MGW’s general counsel is Mr. Adam Duthie (“Mr. Duthie”), an English solicitor. Another important entity is Von der Heydt AG (“VDH AG”), a wealth manager incorporated in Germany, headed by Mr. Michael Gollits (“Mr. Gollits”). Despite the similarity of name, the ultimate parent company of VDH AG only owns about 10 per cent of the shares in VDHI. Mr. Gollits has not participated in the current action and has given no evidence in it.
- [3] Two men were involved in the running of Mex Securities: Mr. Viacheslav Volotovskiy, referred to as “Slava” by everyone (as without disrespect shall I) and Mr. Colm Smith (“Mr. Smith”), an accountant based in Luxembourg. There are issues surrounding control of Mex Securities, which are summarised — in my judgment fairly — in VDHI’s skeleton as follows:

“23. It appears to be an issue in dispute as to whether or not Mex Securities... is under the control of Mr. Taher/the Multibank Group. Mex Securities is wholly owned by a legal entity established under Dutch law called Stichting MEX Holdings (‘MEX Holdings’). A ‘Stichting’ is a legal entity which has no shareholders, and is commonly used to keep the identity of its UBO confidential. Despite the fact that recent regulatory changes in the Netherlands require the UBO of a Stichting to be disclosed on a register, MEX Holdings has not complied with this requirement, so the Claimant does not know who owns it. What is known is that:

23.1. Mex Securities was incorporated in or around 30 July 2018.
23.2. Since 5 December 2019, the 'Manager' of Mex Securities was [Slava].
23.3. On or around 14 December 2020, [Slava] appears purportedly to have been replaced as Manager by [Mr. Smith]... (who is a consultant to the Multibank Group and communicates using an email address "colm@mex.hk" which is a domain belonging to the Multibank Group...) for the purposes of signing the Consent Order on behalf of Mex Securities;
23.4. notwithstanding that purported December 2020 replacement, [Slava] appears only to have resigned as Manager on 21 June 2021.

24. As with many of the issues which arise in this case, who owned and/or controlled Mex Securities at the material time is not a matter which the Court can decide on an interlocutory application — it will have to be determined at trial following disclosure and cross-examination. Suffice it to say, however, that, for reasons including those set out very briefly in this summary, it is VDH Invest's case that Mex Securities was — at least for the purposes of the commencement and settlement of the MCL Claim — under the ultimate control of Mr Taher/the Multibank Group."

- [4] The Luxembourg financial services regulator is the Commission de Surveillance du Secteur Financier ("CSSF"). It was the regulator for VDH. VDH AG was subject to the German regulator, BaFin. MBFX is regulated by the BVI Financial Services Commission.

The background

- [5] The background is stated in Mr. Kattoura's sixth affidavit. Some of the details are in dispute, but the overall background is largely common ground. Mr. Kattoura described the facts in this way:

"3.2. In late 2016, [VDH AG], a German asset manager, acting through its Chief Executive Officer, Mr. Gollits, established the Moser Alpha Index ('Alpha Index'). The Alpha Index was a Frankfurt Stock Exchange index backed by notes linked to a foreign exchange trading strategy. The underlying notes ('the [Old] Notes') were originally issued by a third-party special purpose vehicle, Oaklet GmbH ('Oaklet').

3.3. The index was called 'Moser Alpha Index' because at the time a Mr. Johannes Moser ('Mr Moser'), an Austrian national, was the sub advisor of VDH AG, who was responsible for the trading strategy underpinning the notes...

3.4. On or about the 10 January 2017, Oaklet opened a trading account with MEX Australia Pty Ltd ("MEX Australia") (the Australian regulated entity of [MGW]) depositing on 17 January 2017 an initial €8 million and then on 3 March 2017 an additional €1 million...

3.5. VDH AG, under the advice of Mr. Moser began trading the account of Oaklet on 17 January 2017. Over 99% of the volume of the trading was focused on the currency pair EUR/AUD.

3.6. The trading strategy of Mr. Moser was unsuccessful. By the end of March 2017, as a result of the trading strategy of Mr. Moser, Oaklet had suffered a substantial loss amounting to approximately half of its investment...

3.7. At that stage, [MGW] knew very little about VDH AG or the underlying arrangements. The only entity [MGW] was aware of was its client, Oaklet and Mr. Moser.

3.8. On or about middle of March 2017, Mr. Gollits approached the senior management of [MGW] ('the [MGW] Management Team'). On 26 March, Mr Gollits travelled to Beijing, China to meet with the [MGW] Management Team together with Mr. Moser in the former Beijing offices of [MGW].

3.9. Mr. Gollits stated that the performance of the Alpha Index was a calamity for him, VDH AG and its sister company [VDHI].¹ He stated that [VDHI] was a small company with only two employees set up for administrative purposes as VDH AG's branch in Luxembourg. He further stated that [VDHI] operated pursuant to a discretionary portfolio management agreement with VDH AG ('the DPM Agreement') and was under its full control...

3.10. Mr. Gollits sought the assistance of [MGW] to help VDH AG (and in turn [VDHI]) recoup the loss of circa €4.5 million. Mr. Gollits stated that if [MGW] paid €4.5 million into the trading accounts of Oaklet as he requested, then VDH AG would expand the business of [MGW] into the asset management sector in Germany. Mr. Taher understood that there was no impediment to the Notes (including the Alpha Notes and, when issued, the MultiBank Notes) continuing to trade to maturity. Accordingly,

¹ Whether the reference to VDHI as a "sister company" and the assertion of the control allegedly exercised over it by VDH AG are accurate is in dispute.

in reliance upon what Mr. Gollits had said, [MGW] paid €4.5 million into the trading accounts of Oaklet. It is unclear whether VDH AG informed the noteholders that the Notes were now being supported by external funds. The payment referred to in this paragraph was later documented in the Deed of Affirmation and the Letter of Undertaking as shall be described below.

3.11. After making its initial investment, in a further meeting held in the former Beijing Offices of [MGW], the [MGW] Management Team introduced Mr. Gollits to Raed Salahat, the CEO of the Capital Markets Group Limited ('CMG'). CMG is a company incorporated in the UAE and is an experienced financial technology developer. It was agreed that (i) CMG would replace Mr Moser as the new sub advisor to the Alpha Index wherein CMG would give trading recommendations and 'trading signals' to VDH AG and (ii) that CMG would join [MGW] as a co-investor in the project for the benefit of Oaklet and (iii) that the index would change its name from 'Moser Alpha Index' to 'Alpha Index' reflecting that Mr. Moser was replaced by CMG as the Sub Advisor.

3.12. On 29 March 2017, Mr. Gollits and Mr. Moser returned to Germany. During April and May, Mr. Moser continued to trade the account of Oaklet and more losses were incurred.

[The affidavit then explains that VDH AG instructed MGW to close the positions opened by Mr. Moser.]

3.13. On 1 July 2017, CMG started trading the Alpha Index and the performance of the Index improved. CMG was trading pursuant to a sub advisory agreement which was entered into between VDH AG and CMG dated 31 May 2017 ('the CMG Sub Advisory Agreement').

3.14. On 27 June 2017, Mr. Gollits shared with Mr. Taher by email a copy of a presentation that he would show to investors... Moreover, the [MGW] Management Team and Mr. Gollits agreed to hold further meetings in Frankfurt during the months of July and August 2017.

3.15. At a meeting in Frankfurt on 30 July 2017, [MGW] agreed to cooperate further with VDH AG in order to establish a new index. Mr. Gollits suggested that the new index should adopt the MultiBank brand name ('the MultiBank Index') and that it should include precious metals derivatives. The Multibank Index began trading in August 2017... the difference between the underlying products, of the MultiBank Index and the Alpha Index can be seen in their respective term sheets. The Termsheet of the Alpha Index states that it is an index 'that captures the performance of a selection of different FX contracts', whereas the Termsheet of the MultiBank Index states that it is an index that 'captures the performance of a selection

of different FX and commodities contracts'. The additional word 'commodities' was inserted in order to allow gold trading. Mr. Smith explained in a meeting of 9 December 2020 that gold trading was part of Mr. Gollits' investment strategy for the Notes...

3.16. Mr. Taher was the first person to purchase notes in the Multibank Index and is the largest individual private noteholder in the Notes. Immediately prior to the Consent Order, he held over 4,300 MultiBank index notes...

3.17. In a meeting held between Mr. Salahat, Mr. Gollits and the [MGW] Management Team in the Shangri La Summit Wing Hotel in Beijing, Mr. Salahat made a proposal and presentation to develop a Fintech software running on an artificial intelligence trading robot that can analyse in real time (nano second) the trading behaviour of [MGW] customers' trading and using that data to create trading algorithms with the ability to perform trading without human decision making ('CMG Fintech System').

3.18. It was agreed that CMG would be the party responsible to develop the CMG Fintech System and also continue to be responsible for trading the account of the Issuers. [MGW] would provide finance and the client data (customer signals). VDH AG would introduce Investments to the Issuers and its investors, including the 'Fund of Funds' (i.e [VDHI]), would not withdraw any investments until the maturity of the notes in 2026/2027, in particular that VDHI was a client of VDH AG and gave VDH AG discretionary powers subject to the discretionary portfolio management agreements referred to above. The Parties all shook hands on the agreement ('the VDH Agreement') and celebrated with a drink at the Atmosphere restaurant on the 80th floor of the Shangri La hotel.

3.19. For the period 2017 to 2019, Mr. Gollits made at least 8 trips to Hong Kong and China to meet with the [MGW] Management Team and Mr. Salahat and check on the offices and developments relating to the Fintech and Trading Operations and in particular the progress of the CMG Fintech System, in support of the Project, as defined in the Deed of Affirmation. Mr Gollits visited the Fintech Operations in Beijing and also the other operations department dedicated to the project in other cities in China and in Hong Kong... All the expenses of the travel of Mr. Gollits were paid for by [MGW] including airfare, accommodation and allowances.

3.20. From 2017 to 2019, the MultiBank Index outperformed the Alpha Index due to the presence of precious metals in the underlying trades.

3.21. However, by late 2018, VDH was not meeting its obligations under the VDH Agreement. In particular, it was not introducing new investors on the scale it had promised in the meetings in Beijing, Hong Kong and

Frankfurt. Mr. Gollits continued to make representations that there would be significant new investment. For example, on 18 December 2018, Mr. Gollits provided a presentation to the [MGW] Management Team wherein he described the progress of the project which he described as a 'Joint Venture' most of which was due to the investment of the MultiBank Group...

3.22. Moreover on 1 April 2019, Mr. Gollits entered into a consultancy agreement with MEX Asset Management GmbH, the German subsidiary of [MGW]... The consultancy agreement was entered into so that Mr. Gollits could assist Chris Kennedy, the CEO of MEX Asset Management GmbH, to bring more investors to the project, however again Mr Gollits failed to reach the levels of investments promised to [MGW].

3.23. A dispute arose between Oaklet and VDH AG when on 17 October 2019, Oaklet caused the calculation agents for the Notes to cease calculating daily prices and requested the withdrawal of the funds from its previous broker MEX Australia Pty Ltd. No explanation has ever been provided to Mr. Taher or to [MGW] as to the cause of this dispute or as to why Oaklet, and its related parties which were the issuers, wished to withdraw from its rôle. Mr. Gollits has always said that Oaklet was acting unlawfully and without any legal justification, as was set out in the Deed of Affirmation (below). Oaklet's action immediately resulted in a *de facto* suspension of trading of the Notes on the Frankfurt Stock Exchange. VDH AG, in its capacity as Investment Manager, rejected the withdrawal requests and sent a number of letters instructing MEX Australia not to comply with the withdrawal requests...

3.24. On 6 November 2019, Oaklet threatened to report VDH AG to its German regulator, BaFin, for failing to comply with its requests... While the email is written in German, the English translation provides:

'Hi Michael, Hello Christian, can you be reached? If yes, which number? We saw new trades in the account?!? That MUST be stopped immediately — we cannot "tolerate" it and have to take action (regulatory / judicial). And I'm afraid we would have to initiate this against you / VDH as well.'

3.25. Mr. Gollits proceeded to close the positions prematurely which resulted in significant losses. Thereafter on the same day, 6 November 2019, [MGW's] solicitors were copied into an email [from] Mr. Gollits to Sven Ulbrich (Oaklet) which stated, amongst other things:

'2. You and your colleagues are acting in breach of the Investment Management Agreements and the Notes. This was made clear to you in correspondence from Clyde & Co and Pinsents more than 2 weeks ago. Copies of this correspondence are attached for your ease of reference.

3. ...We have taken advice from leading Luxembourg lawyers and they have confirmed that, without question, you and your colleagues are acting in flagrant breach of both the IMAs, the Notes and the Law of Luxembourg.

4. ...Your ill-informed actions, in breach of the IMAs and the Notes, circumventing the role and responsibilities of von der Heydt as Investment Manager, have already caused millions of dollars of losses to our client. By your recent conduct and intermeddling you have single-handedly managed to turn a US\$5m profitable trading position into a loss of over \$3m.'

3.26. On 11 November 2019, [Mr. Taher], Chairman of MGW, sent an email to representatives of [VDH AG] and Oaklet and others setting out a calculation of the losses...

3.27. Mr. Gollits then requested that [MGW] advance a further sum of €5 million. [MGW] understood that this was to cover losses a result of the dispute between VDH AG and Oaklet. Against this background, the [MGW] Management Team insisted that Mr. Gollits provide certain guarantees.

3.28. In a Letter of Undertaking dated 26 November 2019 ('Letter of Undertaking')..., Mr Gollits, on behalf of VDH AG, referred to the Notes having a shortfall of equity in the order of €5 million and recorded [MGW's] agreement to provide a further €5 million 'Cash Injection' into the Notes, in consideration for which VDH AG agreed to maintain the equity position. Again, it is unclear whether VDH AG informed the noteholders that the Notes were being supported by external funds. At all times Mr. Taher and [MGW] believed that the Notes were being managed in a way that was compliant with any applicable laws and regulations, and that VDH AG was meeting its obligations to ensure such compliance.

[The reference is MGW's "agreement to provide a further €5 million" is potentially misleading. The letter of undertaking recorded Mr. Taher having "agreed personally to inject €5m of cash into the Notes... as a one-off *ex gratia* payment for the benefit of all Noteholders..." The fact that the payment is expressed to be *ex gratia* is important.]

3.29. Mr. Gollits was the main protagonist in a plan together with [Mr. Smith] whereby the outstanding Notes would be cancelled and replaced with new notes issued by Mex Securities. The Deed of Affirmation records at 2.3(i) that Mex Securities was established, [MGW] believes by Mr. Gollits, with funding provided by [MGW]. Mr. Smith is an experienced businessman of Irish nationality who resides in Luxembourg and who is the *de facto*

controller of Mex Securities (having, together with, [Slava] run the company from its establishment in 2019). The plan of Mr. Gollits was set out in a memo from [VDH AG] to [MGW] dated 5 November 2019...

3.30. Mr. Gollits and Mr. Smith procured the documentation required for the new notes. Thereafter, the Alpha Index was transferred to a new 'Alpha II Index' and the MultiBank Index was transferred to a new 'MultiBank Group Index'. It is important to note that unlike the original Alpha Index which did not include precious metals, the Alpha II Index included precious metals trading in its founding documents. [The legal documents creating the new index are then set out.]

3.31. Moreover, a Subscription Agreement dated 4 December 2019 was arranged for the new notes together with Schedule 1 thereto, between Mex Securities and VDH AG, clearly show that the entire note swap arrangement was approved by VDH AG. Furthermore, the Schedule to the Subscription Agreements confirms that [VDHI], represented Noteholders from the outset. The subscription agreement was in the exhibit to [Mr. Priess' first affidavit sworn for VDHI] but the Schedule thereto was not disclosed by the Applicant. Although Schedule 1 does not include the names of the Noteholders, at page 2 of Schedule 1 account numbers 808628, 808687 and 808679 which hold 215, 640, 1500 respectively with the European Depositary bank are listed which corresponds with the details of the 3 funds managed by VDHI...

3.32. On 4 December 2019, by a letter of instruction from VDH AG, signed by Mr. Gollits, VDH AG instructed the transfer of the funds from the previous issuers to Mex Securities' accounts (fiduciary estate 2 and fiduciary estate 3)... It is worth noting that during this process, on 23 December 2019, Ardilla, one of the issuers of the Old Notes, made an announcement which stated that its 'Index Sponsor' had concluded that it 'no longer had sufficient visibility and certainty to determine the value of the Index in a reliable manner and therefore terminated the Index'...

3.33. On 31 March 2020, by a further letter of instruction from VDH AG, signed by Mr. Gollits, wherein Mex Securities became a client of MBFX. The letter of instruction stated amongst other things this:

'In accordance with Directions given by Von Dey Heydt & Co AH [sic] pursuant to the Investment Management Agreements dated 27 December, 2019 (as amended)... we hereby instruction you on behalf of MEX Securities to transfer the balance of the accounts to... FE2 Account... FE3 Account to.. [MBFX]'

...

3.34. The application forms by which the Mex Securities account with MBFX was opened, signed by Mex Securities... states, under 'Client acknowledgment and declaration':

'You are (i) the ultimate beneficial owner(s) of this Account and that no person other than yourself have or will have any interest in, influence or control over this account whatsoever...'

3.35. [The exhibit to Mr. Priess' first affidavit] runs to 471 pages. However, despite producing the client agreements at pages 186 to 249... it omits the signed application forms.

3.36. The Mex Securities client agreement contains the following terms [which are then set out]. [The relevant terms are identified in Mr. Gee QC's skeleton and discussed below.]

3.37. Moreover, the noteholders including Mr Taher entered into new discretionary portfolio management agreements with VDH AG allowing VDH AG to manage their funds...

3.38. During the Oaklet dispute Mex Securities FE2 and FE3 issued proceedings against MBFX, freezing the money of Oaklet, in the BVI grounded by the Affidavit of Mr. Gollits dated 13 April 2020. In his sworn affidavit before the BVI Court, Mr Gollits confirmed, amongst other things, that the Issuers had opened the accounts with MBFX in order to implement the investment strategy and also confirmed that the monies were beneficially owned by Mex Securities wherein the definitions it stated this:

'7. ...These SPVs (the "Issuers") ...monies are almost entirely beneficially owned by [Mex Securities].'

and

'Trading Accounts: means the trading accounts opened with the Respondent for the purposes of the Applicant implementing the Investment Strategy on behalf of the Noteholders, in accordance with the terms of the IMAs, and where the Invested Amount is currently held...'

3.39. Oaklet issued legal proceedings against Mex Australia Pty Ltd ([MGW's] Australian subsidiary) in the Supreme Court of New South Wales. In an affidavit dated 8 September 2020, Mr. Gollits gave a detailed account of the note swap for the Australian court. At paras 6 to 8, of his Affidavit Mr. Gollits described that the VDH AG as a substantial group of financial companies headed by a German Bank wherein he stated this:

'6. [VDH AG] was established in 2002 and is an asset management firm based in Frankfurt, Germany, and established under the laws of Germany. It is authorised and regulated by the Federal Financial Supervisory Authority of Germany ("BaFin") to perform financial services...

7. [VDH AG] is the main asset management company of the Von Der Heydt Group, which was established in the year 1754 ("the Von Der Heydt Group"). At the centre of the Von Der Heydt Group is

the Von Der Heydt Bank, headquartered in Munich, Germany, one of the oldest banks in Europe and a highly reputable leading German Bank...

8. [VDH AG] has an extensive institutional and high net worth client network with assets under management of over €275 million and part of those assets were deployed into the Old Notes as I shall describe below.'

3.40. VDH AG also issued proceedings against Oaklet in Luxembourg...

3.41. During the litigation in Australia, Oaklet produced an expert opinion [by Maître Jacques] from Luxembourg Law that opined that the funds held by Oaklet were the property of Oaklet as Issuer and not the property of the Noteholders.

3.42. Mr. Gollits explained in conversations with Mr. Taher that the Luxembourg expert opinion provided by Oaklet was a turning point in the litigation, and under this background VDH AG had no choice but to settle with Oaklet and entered into a Settlement Deed dated September 2020. Section 1.2 of the Settlement Deed defines Mex Securities as a VDH Party...

3.43. In May 2020, Mr. Gollits requested that [MGW] advance a further sum of €2,447,385 in support of the Notes. He said that a shortfall had been left by Oaklet and as a result of the dispute.

3.44. By this time, [MGW] and CMG had paid a total of over €30 million, and rather than profiting as promised by Mr. Gollits, [MGW] and CMG had not received any profits from the project in some three years. The [MGW] Management Team believed that the promises, representations, and undertakings of Mr. Gollits had not been fulfilled. In particular, we believed that VDH AG had failed to introduce new investment into the Notes as had been promised.

3.45. It appeared to [MGW] from requests Mr. Gollits made of Mr. Taher that he was running out of liquidity to maintain the Project. He requested that Mr. Taher buy the notes of an investor by the name of Mr. Hinkel at the time worth around €2.5m.

3.46. The [MGW] Management Team insisted, as a condition precedent to the new requested loan of over €2.4m and to purchase further notes of €2.5m, that the arrangement be recorded in writing and discussions took place to negotiate the terms of a Deed of Affirmation, which recorded payments made by [MGW] in April / May 2020, together with payments made at earlier points in time, including the €5 million in November 2019. A true copy of the ledgers showing cash payments, totalling €5 million,

made into the accounts of MEX Securities in December 2019 and January 2020 to cover the losses as a result of the Oaklet dispute can be seen [in the exhibit].

3.47. VDH AG entered into the Deed of Affirmation ('the Deed of Affirmation') dated 15 May 2020 which recorded in writing the various promises and undertakings of [VDH AG] and the various ways in which MGW had provided financial support for the Notes since 2017. The Deed of Affirmation records [and he sets out various terms of it].

3.48. Mr. Taher also entered into a Novation agreement with Mr. Hinkel and purchased his notes worth around €2.5m... Over April May 2020, Mr. Gollits made an urgent requests [sic] for funds to be transferred in order to address urgent liquidity issues. According to the requests of Mr. Gollits, Mr. Taher transferred monies to his UBS account and purchased the notes of Mr. Hinkel...

3.49. It was also agreed that Alliance Fintech Corporation ('Alliance'), a BVI company owned by Raed Salahat and under the umbrella of the CMG corporate structure, would provide the loan to Mex Securities. Moreover, it was agreed that once the loan was provided the trading of the indices would resume and that Alliance, under Mr Salahat's management, would replace his other company CMG as the sub advisor and he would be again responsible for the trading strategy utilizing the CMG Fintech System.

3.50. Thus in May 2020, the following agreements were entered into:

- (1) The Loan Agreements between Alliance to Mex Securities dated 15 May 2020 ('The Mex Securities Loan Agreements')
- (2) The Sub Advisory Agreements between Alliance and [VDH AG] dated 15 May 2020 ('the Alliance Sub Advisory Agreement')
- (3) The Deed of Affirmation from [VDH AG] to [MGW] dated 15 May 2020."

The Deed of Affirmation

- [6] Pausing there, the Deed of Affirmation was made solely between VDH AG and MGW. There is no indication VDH AG was acting for anyone other than itself. The Deed provided:

“2.1 [VDH AG] Affirms that:

- (i) since 1 April 2017 until the date of this Deed, [MGW] has provided financial support for the Project amounting to no less than US\$10,000,000 ('Verified Amount') as referred to below; and
- (ii) prior to [MGW] paying the Verified Amount into the Project, [VDH AG] confirmed to [MGW] that [VDH AG] is the only party controlling the Old Notes and Investment Strategy and that the Oaklet Parties would not be able to interfere or intervene in the Old Notes or the Investment Strategy and [MGW] relied upon this confirmation when proceeding with the Project and paying the Verified Amount; and
- (iii) the Verified Amount was paid by [MGW] as a consideration in order to realise the objectives made by [VDH AG] in representations to [MGW] that the Investment in the Old Notes and the New Notes shall be in the region of €200 million. To this end in reliance on these representations, [MGW] invested the Verified Amount; and
- (iv) the Parties acknowledge and agree that the Verified Amount is not a final sum but rather a minimum sum paid by [MGW] and [MGW] reserves its right to add additional sums as in when it sees fit.

2.2 Dealing with the failure of the Moser Index

[VDH AG] Affirms that:

- (i) from the period 17 January 2017 until 28 March 2017, the Alpha Notes incurred as a result of the Moser investment strategy of Johannes Moser of approximately €2,621,617.26 from an initial investment of €9,000,000;
- (ii) it then sought the assistance of [MGW] to recoup the losses incurred by the Alpha Index as a result of the Moser investment strategy. These losses presented a serious threat to [VDH AG] as such a loss would cause it to lose many clients and the Alpha Index would be a failure and assistance was required order to maintain the viability of the Alpha Index; and
- (iii) in this regard, [MGW] injected the cash amount of circa € 2,600,000, in order to protect the intrinsic value of the Alpha Notes.

2.3 Establishment of the MultiBank Index, Mex Securities and other Costs

[VDH AG] Affirms that:

- (i) starting from July 2017, [MGW] funded significant amounts in order to establish the MultiBank Index, another 'Public Index' and later on Mex Securities; and
- (ii) upon the request of [VDH AG], [MGW] paid Allen & Overy from July 2017 to present amounts totalling approximately US\$476,321 in order to provide services for the benefit of the Project including, but not limited to, establishing the MultiBank Index, establishing another 'Public Index' and later on Mex Securities.

2.4 Acquisition of Mex Asset Management GmbH

[VDH AG] Affirms that:

- (i) [MGW] paid €510,000 (equivalent to US\$561,000) to purchase Mex Asset Management GmbH in accordance with a sale agreement dated September 2017;
- (ii) [MGW] purchased Mex Asset Management GmbH. This is particularly so because Mex Asset Management GmbH was placed as a fall-back company to promote the Old Notes.
- (iii) [MGW] continues to expend monthly sums for the running costs of Mex Asset Management GmbH; and
- (iv) the total expenses paid by [MGW] since purchasing this company, on the instructions of [VDH AG], tantamount to €197,657 in 2018, €420,000 in 2019 and €100,000 in 2020 making a total of €627,657 (equivalent to US\$690,422). These expenses include expenses paid to [VDH AG] and VDH staff pursuant to a number of consultancy agreements.

2.5 Marketing of the Old Notes

[VDH AG] Affirms that, as part of the marketing for the Old Notes, [MGW] paid to sponsor the Hamburg handball team at a cost of €150,000 for the 2018/2019 season and €170,000 for the 2019/2020 season making a total of €320,000 (equivalent to US\$345,600).

2.6 Trading Losses caused by Oaklet Intermeddling

[VDH AG] Affirms that:

- (i) the unlawful interventions of Oaklet Parties to close the positions of the Old Notes on 6 November 2019 caused the Old Notes to suffer a substantial loss of unrealised trading profit of approximately US\$14,133,810.00 (as calculated by [MGW] in Mr Taher's email dated 11 November, 2019) for the period 6 November 2019 to 8 November 2019;

- (ii) these interventions resulted in the Old Notes having a short fall of €1,855,424 for the MultiBank Notes and €1,903,116 for the Alpha Notes making a combined total shortfall for the Old Notes of €3,758,541 (equivalent to US\$ 4,134,395); and
- (iii) in December 2019 [MGW] made a cash injection of €3,758,541 this amount to protect the intrinsic value of the Old Notes ahead of a Note Swap.

2.7 Dispute with Oaklet Parties

[VDH AG] Affirms that since the commencement of the dispute with the Oaklet Parties in October 2019 until present, MEX, in accordance with the invoices and transfer confirmations at Appendix 1, has incurred legal and administration costs on its own behalf and on behalf of [VDH AG] of circa US\$1,134,351.

2.8 General Support

[VDH AG] Affirms that:

- (i) In terms of general support for the Project, [MGW] has contributed significant sums into the Project by way of management time.
- (ii) [MGW] has spent substantial sums on travel and accommodation costs for the benefit of the Project since its inception.

...

4.1 [VDH AG] Affirms that, since many of the Noteholders are clients of [VDH AG], the support which [MGW] has provided for the Project has benefitted the Project financially.

4.2 In the premises, [VDH AG] undertakes, in relation to the future management of the New Notes and in particular the maintenance of the level of investment in the New Notes, as follows:

- (i) The aggregate amounts of Deposits in the New Notes commencing the date hereof shall at any and all times exceed the amounts of withdrawals from the New Notes Mex Notes [*sic*] is maintained (or increased) over the term of the notes, subject to not exceeding the maximum percentage of the [VDH AG] asset pool that [VDH AG] clients can invest in the New Notes and any further notes.
- (ii) [VDH AG] will not actively advise noteholders to withdraw funds from the New Notes before the scheduled maturity date of those notes. Indeed, [VDH AG] confirms its belief that it will be in the interests of all concerned to increase the amount of equity in the Mex Notes and so will encourage our clients to add to their

investment in Mex Notes whenever possible, over the term of the notes.

(iii) [VDH AG] will use its best endeavours to introduce investment into the New Notes of at least €10,000,000 in total over the next 12 months.

4.3 In this Deed the undertaking by [VDH AG] made at paragraph 4.2 (inclusive) above, shall be collectively referred to as the 'VDH Undertakings'.

4.4 The key purpose and effect of the VDH Undertakings it to enable [MGW] to recoup the substantial losses it has suffered as result of its investment in the Project as described herein."

- [7] I find as a matter of construction that VDH AG was giving the undertakings in its own right, not as agent for the noteholders or for Mex Securities. It is also important to note that breach by VDH AG of the obligations in this Deed would only give rise to a claim for damages. There would be no basis for a debt claim by MGW in respect of monies previously advanced or expended for the benefit of the noteholders.

The Oaklet settlement agreement

- [8] On 15th September 2020, the dispute with Oaklet settled. There was a deed reciting the terms. VDH AG and Mex Securities were listed among the "VDH Parties". MGW, Mex Clearing and MBFX were listed as "MEX Parties". Clauses 6.1 and 6.4 are in wide terms. Clause 6.4, so far as material provides:

"The MEX Parties and the Issuer and Oaklet Parties enter into this Deed in full and final settlement of all and/or any causes of action, claims, rights, demands and set offs between the parties or any of them, whether subject to the exclusive or non-exclusive jurisdiction of the courts of New South Wales, the courts of Luxembourg, the courts of Germany or of any other jurisdiction, including but not limited to any causes of action, claims, rights, demands and set offs (whether individually or together) against the VDH Parties and/or any VDH Related Entities arising out of or in connection with (a) the MEX Australia Agreements; (b) the Investment Management Agreements; (c) the Claims; (d) the Proceedings; (e) the facts and matters pleaded in or relied upon in or in connection with the Claims or the Proceedings; and (e) the governance, management ownership or holding

of the Alpha Notes or Multibank Notes or the New Notes (together, the VDH Released Claims).

[9] “Claims” is widely defined in Recital J as:

“The Parties have settled their differences and have agreed terms for the full and final settlement of all aspects of the Dispute; the withdrawal of all Proceedings; and the mutual waiver of all present and future claims against each other and their respective related parties arising from or in connection with the Dispute and the Alpha Notes or Multibank Notes (Claims) and they now wish to record those terms, on a legally binding basis, in this Deed.

[10] In my judgment, these terms are sufficient to release the obligations, which we will see were later supposedly assigned by MGW to Mex Clearing and which were the subject of the Tomlin order.

The problem with gold

[11] Mr. Kattoura’s affidavit continued:

3.51. On or about April 2020, Alliance began trading the Mex Securities account using the CMG Fintech System. The global COVID-19 pandemic resulted in volatility in the global precious metals markets particularly with the price of Gold reaching all-time highs of above US\$2,000 per ounce. Due to the nature of the artificial intelligence trading strategy of the CMG Fintech System, this volatility proved to be extremely beneficial for the value of the trading account of Mex Securities with MBFX. The value of the accounts had gone from circa €31 million in May 2020 to circa €43 million in December 2020.

3.52. Mr. Gollits continued to make promises that he would fulfill his undertakings under the VDH Agreement. In an email dated 5 November 2020..., Mr. Gollits updated Mr. Taher on the resumption of trading from April 2020 and on meetings with external asset managers, who, it was intended, would bring further investment to the notes.

3.53. In December 2020, Mr. Gollits raised for the first time with Mr. Taher an issue regarding compliance of the Notes with Luxembourg regulations:

3.53.1. On 2 December 2020, Mr. Gollits telephoned Mr. Taher stating that VDH AG needed to withdraw all funds supporting the Notes because gold trading was not permitted due to a change in regulations. Mr. Taher made a proposal as to how it might be possible to reverse the gold transactions if compliant with the relevant Luxembourg regulations. MBFX has adduced expert evidence of Luxembourg laws which shows that there was no new regulation prohibiting gold trading, as Mr. Gollits said, but that the relevant regulation had been in force since at least 2014. That evidence shows that while there was a regulatory problem with respect to gold trading, it was not a new problem;

3.53.2. Mr. Gollits stated that this proposal was not an option for VDH AG. Mr. Gollits repeated his claim regarding gold trading in letters of 3 and 4 December 2020

3.53.3. On 4 December 2020, Mr. Gollits forwarded an email exchange to Mr. Duthie. In the email... Mr. Priess informed Mr. Gollits that VDHI was the subject of regulatory investigation by the CSSF, its regulator in Luxembourg. The letter suggests that the investigation relates to 'difficulties with illiquid securities' and 'that is why KPMG had resigned its mandate completely'. In his third affidavit, Mr Priess explains that KPMG was the auditor of the funds managed by VDHI and had resigned 'some months' before the letter from the CSSF which was received in October 2020.

3.53.4. In [Mr. Priess' third affidavit, VDHI] makes references to the CSSF investigation and states that 'the issues with the CSSF have been raised just as an attempt to try and tarnish VDH Invest.'

[12] The regulatory difficulties which Mr. Gollits explained to MBG in December 2020 were ignited by a long letter of the CSSF to VDHI on 14th October 2020. It identified a large number of deficiencies in VDHI's conduct of business.

[13] On 5th November 2020, Mr. Gollits sent an email to Mr. Taher attaching a presentation. Nothing was said about VDH AG's regulatory difficulties. Instead he gave a fairly upbeat report:

"Since issuance of the new structure, we have had a good performance of 9.07% in the MultiBank FX structure and 9.24% in the Alpha FX structure.

While there was almost no performance until June² and obviously only costs were charged to the notes, we have gained momentum, especially in July.

Only in the months June, July and August a positive performance could be achieved.”

[14] On 2nd December 2020, Mr. Smith emailed Slava and said:

“Hi Slava,
I spoke to VDH [AG] this morning. The Multibank indices allow for trading in gold, this is not permitted per certain VDH investor profiles. Despite looking at other potential alternatives, VDH must instruct the redemption of approx. EUR 10 million in total from FE2 & FE3. Maybe they can reinvest in a new note without gold at a future point, however, they must do the redemptions before year end. VDH will discuss this in advance with Multibank.”

They then exchanged emails about the fees which Mex Securities might be able to charge on the redemption.

[15] The following day, 3rd December 2020, Mr. Gollits sent an email to Mr. Duffy attaching a letter, which has been referred to as the “bitter pill” letter, to Mr. Taher.

“I was informed by our fund administrator and the auditor, that there have been recent regulatory changes and that we are not allowed to hold instruments which have gold included and we have to sell the position immediately. There is no choice for me to avoid this. [He then outlines possibilities, like issuing fresh notes.]

...

In addition to the problem with gold, the fact that PWC has resigned its mandate to audit the annual financial statements of Mex Securities is not conducive to the external image of the notes — especially since PWC also audits the annual statements of our fund of funds.

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

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

² Because of the trading hiatus during the Australian settlement negotiations.

...[W]e unfortunately have to swallow this bitter pill..." (Emphasis as in the original)

[16] It was common ground before me that what Mr. Gollits said about there having been "recent regulatory changes" was untrue. The new notes were always intended to be UCITS compliant. The rules on UCITS (imposed by European Union legislation) had always forbidden investment in commodities and precious metals.

[17] Later that day, there was a three way Zoom conversation between Mr. Gollits, Mr. Taher and Mr. Duffy, which has been transcribed. Relevant parts of the transcript are as follows:

"Taher: So when was the gold ... when was that new regulation imposed?

Gollits: I can't tell you an exact date.

Taher: Well, we need the exact date, Michael, because we don't want to be in breach of the German law."

Mr. Taher and Mr. Duthie proposed that any gold trades since the new regulation could be reversed. (This of course was not altruistic on Mr. Taher's part. Since the gold trades had been profitable, the profits would have transferred to MGW.) Mr. Taher threatened that he would have to withdraw completely if the regulatory issue was not resolved and added: "You can't benefit from something that is not legal." He urged Mr. Gollits: "Find out the date, Michael, so depending on the date, so we can actually do it from the date, and then we can make a calculation, so it doesn't affect the pockets."

[18] Following the Zoom meeting, Mr. Gollits sent Mr. Taher an email in these terms:

"Unfortunately I did not reach you after our Zoom Call. As discussed earlier on, I contacted our fund administrator [presumably VDHI] again.

Unfortunately the approach you suggested, which did sound nice, is not an option for them. They made it very clear to me once again that we have to sell the notes because of the changes in regulatory requirements and to set up a new note which is fully compliant in the new year. If you want I can set up a conference call with them to explain the issues.

I'm sorry that I can't come back to you with any positive feedback — this is not my decision.

In this respect, I ask you in my function as investment manager not to open any further trade positions until the transfer has been executed and to transfer the liquidity required for the redemption to Luxembourg."

[19] The next day, 4th December, Mr. Priess sent Mr. Gollits what has been called the "slap in the face" email. In it he said:

"I just wanted to briefly show you something and explain why it is so important to us that the certificates are not in the funds at the end of the year. We have recently received a letter from the CSSF in which we have to comment in detail on the various findings in the Long Form Reports."

The email then includes an extract from the CSSF Letter listing twelve "severe deficiencies", as to which Mr Priess says:

"The first two points, actually the first three, are already a slap in the face for us. These relate primarily to the difficulties with illiquid securities. We have these in your funds and in the Commodity Capital Funds and that is why KPMG had resigned its mandate completely. We assume that this is also a reason for the letter... [W]e now need annual statements without conspicuous findings."

[20] Mr. Gollits forwards the "slap in the face" email to Mr. Duthie emphasising "how important it [is to] sell the Notes" out of the Fund of Funds.

[21] The same day, Sabals Law wrote a letter before action on behalf of MGW to Mex Securities. The body of the letter said:

“We are instructed to demand immediate payment by Mex Securities SarL, acting in respect of its Fiduciary Estate 1 and Fiduciary Estate 2..., the sum of EUR 34,831,216... being sums advanced by [MGW] to Mex Securities and its predecessor on the basis of certain promises and representations made by [VDH AG] which have proven false and which were in any event repayable to [MGW] on demand.”

[22] The statement of claim pleads, in my judgment accurately, that the demand letter:

“42.1. was entirely bereft of any detail as to how the alleged indebtedness had been quantified [and in fact it differs from the sums agreed due under the Tomlin order];

42.2. lacked any particularity as to the basis upon which the alleged indebtedness was alleged to be repayable, and failed to explain why it was alleged to be repayable on demand;

42.3. failed, in particular, to explain why Mex Securities should be liable in respect of sums allegedly advanced to ‘its predecessor’ (presumably Ardilla and Suncap, who were the issuers of the Old Notes, and whose relations with the Multibank Group were pursuant to entirely distinct contractual relationships);

42.4. failed to address the fact that the liability alleged to arise was prohibited under the T&Cs, and could not attach to the Fiduciary Estates or the funds held within them;

42.5. lacked any particularity as to: (i) what representations were alleged to have been made by VDH AG; and/or (ii) why it was alleged those representations had ‘proven false’; and

42.6. unreasonably demanded ‘full repayment’ of the alleged indebtedness by close of business on Tuesday 8 December (i.e. within just 2 working days).”

[23] After these developments, on 7th December Mr. Smith flew to Dubai where there were what are described as “without prejudice” meetings between Mex Securities on the one hand and MGW on the other. On 8th December, Eversheds Sutherland (Germany) LLP wrote to VDH AG on behalf of Mex Securities to say that until

various issues about the UCITS status of the funds and the gold trading were resolved Mex Securities would not action the instructions of VDH AG.

The alleged conspiracy to defraud

[24] On 9th and 10th December, meetings were held between Mr. Smith, Mr. Taher and Mr. Duthie. It will be seen from the transcripts that the meetings were not in truth any arm's length negotiation. Instead, Mr. Smith was discussing the options available to Mr. Taher. Indeed Mr. Smith appears to be advising Mr. Taher as to how to benefit MGW at the expense of Mex Securities and the noteholders. Since these discussions are at the heart of VDH's case that the men were parties to a conspiracy to defraud investors in the new notes, I shall have to set out passages of the transcript, but these can only be a selection.

[25] In the first meeting, Mr. Smith explains the current position to Mr. Taher.

"Smith: So what I've discussed with them [VDH AG], so let me clarify. First of all let's point out what the structure is. So I have the investors, which are VDH clients. I'm using these numbers just to illustrate, because they're close enough. But VDH clients about \$30 million, and the VDH fund of funds for \$10 million, means a total of \$40 million Investments into the issuer Mex Securities, FE2 and NT3. Then we have an index, Alpha, or the MultiBank ones. There are two. As well as the portfolio FX investments. 2027 maturity. One of them matures 2026. Inside the index there are FX contracts, derivatives contracts, precious metals and cash. That's all it says. In the index rules, it doesn't describe leverage, any of that, it just says that's what's inside it. Over the other side, we have discretionary management, investment management, and index manager.

Taher: VDH has a discretionary management?

Smith: For their clients. It's not going to be very good in the [Fund of Funds] [inaudible], but effectively, they're paid to manage that there. They're paid to be the investment manager for the issue, and they have the function of investment advisor, but there's a no fee on that agreement. So, one of the items to look at is here, the issue is VDH requested a 10 million redemption for the Fund of Funds. He's citing the other issues and eligibility of the underlying assets. So, these investors cannot participate in that index is what he's saying.

So there's a note here saying they are not allowed to get a redemption. Investors are not allowed to request that. They can do a request to repurchase, which is what we've done on some transactions where there's been a bid back, blah, blah, blah, and been replacing the exiting investors with new ones coming in.

Per timing condition of the notes, term 5.4 we may repurchase. We don't have to. Nobody can tell Mex Securities to do anything. And [clause] 5.2B, we are not allowed to redeem early.

...

Duthie: Yeah. The note holders through VDH or otherwise can't get out early.

Smith: Correct. We have a fixed maturity date. That's settled. There's two of them, but there's the later one. 2027.

Taher: So how is he asking now?

Smith: He's asking us to repurchase. Not a redemption. Sometimes, he's using the two words interchangeably. But there is no redemption. The issuer has the right to redeem early if it wants. It could say, 'Okay, we're done with this index.'

Duthie: Mex Securities

Smith: Mex Securities can do that. So, for example, if this just were finished, if MultiBank is not a provider anymore, it's over, and we've said to investors, 'We are redeeming.' It's a fact. We don't ask the questions. We do it. But the investors cannot come to the issuer and say, 'I want you to redeem me.'

Taher: What can they say?

Smith: Nothing. They can say they want to repurchase.

...

Taher: So they have to find a buyer?

Smith: Yeah. And they want us to be the buyer.

Taher: But we don't have to be the buyer.

Smith: No. We stated clear in [clause] 5.4 that we may repurchase, and after the repurchase we can either cancel the notes or sell them to someone else. But that's only if we choose to do it. We do not have to do it. So the Ts & Cs are very clear on that [inaudible]. So that's where he's coming from."

[26] Later that day, they have further discussions which result in a deed of assignment being signed the same day. It is also clear from the last comment of Mr. Taher in the following extract that making a compromise in proposed BVI litigation was part of the plan. At the meeting, Mr. Smith does most of the talking:

“And then, go for liquidation. Now, in the liquidation discussion we had yesterday, we talked about a litigation against VDH. Is it possible to have other entries in here? I just don’t want to over-complicate it. But, what I could say is that we recognize that liability to MultiBank and on this side of the balance sheet, on the asset, we recognize a claim against VDH saying, ‘You fucked up. We’re having that 36 [million] from you.’ And, that’s important this next point here, if I could take in that claim but I also take in what we discussed, the 200 million claim that we’re going to get onto with Eversheds and the German process. That looks pretty towards the investor.

So, when they get four back, they go, ‘Oh, I’ve just lost 90% of my investment. That sucks. How do I get that back?’ Well, either, fuck off, you’re not getting it. Or, guess what? We’ve appointed a liquidator because you don’t need to keep running the company and then the liquidator, the [inaudible] has just joined liquidators, the liquidator will pursue VDH.

We have two people. You can have one but useful to have two. You can be more efficient and more expertise involved. So, I’ve written to Slava because he’s already on the board, so he knows the company. And, he’s allowed to be the liquidator. Yeah, we have to figure out what those details are but the different [sic] between last year and this year, so assume this is a open litigation where they’re saying to the investors we’re going to redeem you, they’re saying what we are, but to do that redemption they had to get these assets out of Australia, into Luxembourg to send out, and that’s what we blocked. In our situation we were going to take these assets up to here, but we’re going to pay them to the liability, pay them to MultiBank.

Practically we should go through the numbers, but practically what this balance is showing 4 we should probably say no. We’ll make a provision of four [million] for legal costs, liquidator costs, whatever. So, it could be that they get nothing, but what I’m saying, recognize the liquidator, recognize the liability, liquidate the indices, repay the loans, and then we redeem all the investors and go into liquidation.

When we had the 200 million claim the liquidator could say, ‘Right, well I’ve got a claim on this VDH guy, I have funding for the legal cost coming from the shareholder.’

...

The issuer has not had an event of default, therefore we go back to 5.2 which says that they cannot get an early redemption. It’s one line so we can ask A&O [Allen & Overy] for an opinion, no problem to do that but for

the purpose of me illustrating here, I'm relying on the text that says [inaudible]. And something was trying to understand in how we got there, so just by my notes that says 2017 VDH raised Investment Funds, about 9 million, they lost five, and MultiBank injected the cash to prop it up so they didn't have to tell the investors that had lost money and this is going to form part of our 36 up there. Then, you personally invested funds I think it's about 5 million...

I am only writing of things I am aware of. So when we issued the notes from bank securities, we were short just under 4 million which is the cash in the Luxembourg Bank account. So MEX Australia tops that up to keep the price the same. It went round into what we eventually sold as the settlement part of it but nonetheless it's cash being injected. And then the Alliance sweep up where the non VDH funds and the old entities were acquired by Mex Securities based upon a loan that came from from alliance which is repaid through investment management fees paid from there to there. Obviously of he's taking assets out of it less that an ability to pay that back, so that's about 3 million.

So, when I add all this together comes to about 21 million, [inaudible] is the performance of 19. So, in that timeline, it has earned about, let's see, 4, 5 million per annum. So, when we're looking at 40, what I'm trying to get what is the original amount that you put in back in 2017 from his investors.

Naser Taher: [inaudible]

Smith: Yeah. But that 9 million. And the rest is top ups

Yahya Taher (Naser Taher's son): Yeah, but that 9 million went down to four, four or five. With Moser.

Naser Taher: But Adam has exactly how the 36 million is actually divided.

Smith: Perfect.

Naser Taher: I mean, that's going to be in the court order.

Smith: Perfect, so obviously I didn't have it illustrated there and we were brainstorming to more or less see. What I'm trying to crack is, or pretty much have cracked is that we're seeing an asset of 40, and I'm examining where did that come from, and ultimately, he really only put in 9 million. This 5 you can add 2 and bring it to 14 because you put cash in as an investor but then we have two examples that I can show there. Seven million support from coming in and there are more bringing it up to 36 million. And that story, when we go back to note holders..."-

- [27] On 9th December 2021, MGW and Mex Clearing executed a deed of assignment whereby MGW assigned the “Indebtedness” of the “Debtor” to Mex Clearing. The “Debtor” was defined as Mex Securities. The “Indebtedness”, which was assigned, was defined as “loans and other claims in respect of payments made for the benefit of the Debtor in the total sum of €36,385,509.52.”
- [28] On 10th December 2021, there was a discussion between Mr. Duthie on the one hand and Slava and Mr. Smith on the other. Ostensibly it was an arm’s length “without prejudice” discussion about MBFX’s claims against Mex Securities, with Mr. Duthie acting for MGW. It records Mr. Duthie advising Slava and Mr. Smith to obtain independent legal advice. In the light of the previous discussions, it is difficult to accept that this was any genuine negotiation, but rather window-dressing for a deal which had already been made.
- [29] However, in the course of the day, Mr. Smith emailed Slava with copy to Mr. Duthie with what he described as “MB Claims Spreadsheet – a work in progress”. This email shows that Mr. Smith was working backwards to justify the €36,385,509.52 figure. He said he had “cross referenced the deed of affirmation into the spreadsheet to support what I can so far. I marked comments for discrepancies. Items not cross referenced are to be supported by other means.” Mr. Penny QC rightly points out that “far from seeking, on behalf of Mex Securities, to contest or reduce the claim which had been filed against it, Mr. Smith was instead seeking to justify a pre-conceived figure to be paid to Mex Clearing, specifically, a 90% loss for the Noteholders to provide a platform for a Multibank Group entity making an offer of 10 cents on the dollar.”
- [30] That same day Mex Clearing issued proceedings under action number 2020/0215 against Mex Securities, as first defendant, and MBFX, as second defendant. The statement of claim pleaded:

“4. [Mex Securities] in or about the month of December 2019 issued notes (‘the Notes’) that were intended to be used as part of a foreign exchange trading strategy managed by [VDH AG]. These Notes were applied to acquire notes issued by Ardilla Segur SA and Suncap Scoop SA, companies incorporated in Luxembourg.

5. [MGW] based on the representations and undertakings of [VDH AG], made payments of [sic] the benefit of the Notes and [Mex Securities], by way of loan finance... The outstanding balance due on such Loans is currently EUR36,385,509.52. MGW was induced to make the said Loans based upon promises and undertakings of [VDH AG] and its reliance on representations of fact made by [VDH AG], which representations have proven to be false.

6. [Mex Securities] holds monies derived from the Loans in accounts at [MBFX]. [Mex Securities] has thereby been constituted as a creditor of [MBFX] for the sums held by it on behalf of [Mex Securities].

7. By letter of demand dated 4th December 2020, MGW demanded repayment of all outstanding amounts due from [Mex Securities] under the Loans made by MGW to [Mex Securities].

[The assignment and notice of assignment are then pleaded.]

9. Wrongfully and in breach of the terms on which the Loans was [sic] made, [Mex Securities] has failed to repay the outstanding balance of the Loans as demanded by MGW by reason whereof [Mex Clearing], as assignee of MGW, has suffered loss and damage in the sum of EUR36,385,509.52.

AND [Mex Clearing] claims

1. Payment by [Mex Securities and MBFX] of the sum of EUR36,385,509.52.

2. Costs.

3. Such further or other relief as the Court deems just.”

[31] On 11th December 2020 Mr. Duthie and Mr. Taher each swore affidavits. Mr. Duthie’s was made in support of the application for the making of a Tomlin order, purportedly to settle a mooted summary judgment application. He swore to the truth of a table entitled “Loans and other payments made for the benefit of the issuers”, as being monies owed by Mex Securities to Mex Clearing:

Cash injunction to recover losses suffered in the Notes

(March-April 2017)	2,621,617.26
Acquisition of Mex Asset Management GmbH	510,000.00
Management fees of Mex Asset Management GmbH	1,842,305.40
Payments for technology, servers, offices	8,910,020.53
Payments for software and trading development team	6,285,078.33
Cash injection 4 December 2019	3,758,541.55
Cash injection 9 January 2019	1,248,073.53
Cash injection 24 June 2020	2,447,385.00
Sponsorship of Hamburg Handball team	358,400.91
Payments to Allen & Overy for the Public Index	476,321.00
Purchase costs of software for client profiling, back testing auto execution and other	5,240,314.89
Travel expenses for VDH from Germany to China and Hong Kong	286,000.00
Legal costs of dispute with Oaklet Parties	1,960,321.57
Miscellaneous legal costs associated with the Investment Strategy	441,129.55
TOTAL:	€36,385,509.52

Mr. Duthie makes no attempt to explain why this total differs from the €34,831,216.00 claimed in Sabals' letter before action.

- [32] Mr. Taher's said that MGW had been rated by ARC Rating as BBB+. Fitch Ratings Inc, a leading rating agency, was in the process of rating MGW. MGW was about to issue a bond for £500 million sterling. He continued:

"20. In the business of the bond issue, reputation is everything and litigation is looked upon in a dim light. If the involvement of the subsidiaries of [MGW]... is not kept strictly private and confidential, it is most likely to prejudice and cause substantial harm to the Multibank bond."

- [33] Looked at in the cold light of VDHI's submissions, this explanation of the need for secrecy cannot sensibly be accepted. Firstly, since the case was to be settled on terms already agreed, there was no need to issue proceedings at all. Secondly, if Mex Securities owed monies to Mex Clearing, then the BVI litigation was simply a debt-collecting exercise which was capable of being and was settled very speedily by Mex Securities discharging its indebtedness with monies held by MBFX. That

could not sensibly affect the approach of rating agencies to MGW's creditworthiness.

- [34] On 14th December 2020, Slava was temporarily replaced as the director of Mex Securities by Mr. Smith. The precise timeline is made difficult by virtue of the different time-zones on the emails. There also appears to have been a backdating of the shareholders' meeting appointing Mr. Smith, which may cast doubt on whether Mr. Smith was properly able to instruct BVI lawyers to agree the Tomlin order. I do not need to set out all the steps, which includes Mr. Taher emailing Slava to say: "[Y]ou confirm that Colm Smith is authorized to sign the Schedule to the Consent Order and instruct Solicitors on behalf of Mex Securities. If I do not hear from you to the contrary within the next 15 minutes, I shall take it as a confirmation as to the contents of the above paragraph."
- [35] VDHI rely on the change of directors as a further indication that the whole of the purported settlement was a fraudulent sham. It invites me to infer either that Slava refused to be a party to the fraud (and therefore Mr. Smith needed to be brought in to give the necessary instructions to John Greenwood of Fin Law, who were acting for Mex Securities in the litigation) or that it was further muddying of the waters (as evidenced by Conyers' letter of 22nd December 2020). I shall consider these points, when I take a holistic view of the evidence.
- [36] During the course of the day, MGW executed a deed of indemnity in favour of Mr. Smith promising to indemnify him against any claims arising out of his approving the Tomlin order. This is an extraordinary document in my judgment, if the compromise about to be embodied in the Tomlin order was a *bona fide* settlement.
- [37] The same day Lennox Paton entered an appearance on behalf of MBFX. There was then a hearing before Wallbank J attended by John Carrington QC and Reisa Singh for Mex Clearing, Andrew Emery of Emery Cooke for Mex Securities (instructed by Mr. Greenwood) and Scott Cruikshank of Lennox Paton for MBFX. The judge made two orders: first an order sealing the Court file and second a Tomlin

order staying proceedings in the claim on the terms of a confidential schedule to the order.

- [38] The confidential schedule to the Tomlin order stated that MGW had “advanced, directly or indirectly, to [Mex Securities]... certain sums as loans (‘the Loans’). The current outstanding balance due under the Loans is the sum of EUR36,385,509.52.” (I shall examine the truth of this as part of my holistic consideration of the evidence.) It then recited the deed of assignment, the notice of assignment and the earlier demand made by MGW on Mex Securities. The schedule continued:

“7. The Outstanding Amount is currently held by [MBFX] to the order of [Mex Securities], together with any accruing interest.

8. [Mex Securities] hereby agrees to procure, in full and final settlement of this claim and hereby instructs, as clients of [MBFX], that [MBFX] shall transfer to [Mex Clearing] the full sum of the Outstanding Amount [from identified Mex Securities accounts with MBFX].

9. [MBFX] shall pay the Outstanding Amount to [Mex Clearing] from the accounts... on or before 11 December 2020.

10.1 [MGW] shall assign to [Mex Securities] the benefit of claims and causes of action which [MGW] has against [VDH AG] contained in [the] Deed of Affirmation... estimated by [Mex Securities] to have a potential value well in excess of the Outstanding Amount;

10.2 [MGW] shall assist [Mex Securities] to pursue claims against [VDH AG] in German and shall assist [Mex Securities] in the payment of legal costs, at discretion of [MGW], in order to enable [Mex Securities] to pursue the claims against [VDH AG].”

- [39] To date, so far as appears, MGW have provided no assistance to Mex Securities to pursue the supposed claims against VDH AG. Mex Securities have taken no part in the current application. There is no evidence of Mex Securities intending, or ever having intended, to take legal proceedings in Germany, or anywhere else, against VDH AG.

[40] On 15th December 2020, Slava sent Mr. Gollits an email which said:

“This message is sent to you in your role as Investment Manager, Calculating Agent and Administration Agent, Bank Agent only. This letter is private and confidential. Any use of it or distribution is prohibited without Mex Securities SARL explicit consent.

This is to inform you that Mex Securities SARL received the claim documents by email on Friday, 11th of December. The claim is submitted to the BVI court by Mex Clearing Limited against Mex Securities SARL and Multibank FX International Corporation. The amount of the claim is EUR 36.385.509,52. The copy of the claim is in attachment.

For your information, I was replaced by a shareholder resolution and publication will be made by TMF.

On a separate note, since Friday I was in contact with various law firms to represent the company. Four of them declined. There is one that is currently making the conflict check.”

Nothing was said about the matter having settled the previous day. The statement about law firms is not true: Mex Securities was represented by Emery Cooke at the hearing on 14th December. Emery Cooke were instructed by John Greenwood in Fin Law.

Subsequent events

[41] On 18th December 2020, €36.4 million was paid out of MBFX to Mex Clearing.

[42] On 22nd December 2020, Conyers, purportedly instructed on behalf of the Mex Securities, wrote to Sabals (on behalf of Mex Clearing) and to MBFX to seek clarification of what had happened to the monies and seeking an undertaking not to remove the sums.

[43] On 5th January 2021, Slava wrote on Mex Securities’ behalf to Mr. Greenwood denying that he had given any instructions to him to agree the Tomlin order.

[44] On 12th January 2021, Mex Clearing issued proceedings under action number 2021/0003 against MBFX seeking a freezing order. The freezing order was over

the remaining monies held by MBFX in favour of Mex Securities. Mr. Duthie swore an affidavit in which he said that Mex Securities had, by Conyers' letter of 22nd December 2020, repudiated the settlement agreement embodied in the Tomlin order. Mex Clearing were therefore entitled to payment from Mex Securities of the "residual claims". These allegedly comprised:

Setup costs of Mex Securities	400,000.00
Payments to Sophie Grace Legal on behalf of Mex Securities	210,000.00
Payments to Eversheds on behalf of Mex Securities	184,272.92
Mr. Smith's travel expenses to Dubai	16,757.00
Interest on sums claimed in Mex Proceedings	1,965,977.62
TOTAL:	€2,777,007.54

[45] A seal and gag order was sought on the same basis advanced by Mr. Taher in support of the Tomlin order. Mr. Duthie did not mention in the body of his affidavit that Mex Securities and MBFX were both wholly owned subsidiaries of MGW. A reader of page 6 of the substantial exhibit to Mr. Duthie's affidavit would have seen a "family tree" (exhibited sideways) of some 32 subsidiaries. A very careful reader would have been able to find both parties there, but no one would have any reason to do so. Exhibited to the affidavit was a set of draft particulars of claim, which Mr. Duthie said, would be issued in Luxembourg by Mex Clearing in respect of the "residual claims" against Mex Securities, Mr. Smith and Slava. The freezing order was said to be in support of these proposed Luxembourg proceedings.

[46] Passing reference was made in the skeleton argument in support of the application to the parties being part of the MultiBank Group, but the Court's attention was not drawn to the fact that the injunction was therefore unnecessary. MGW and Mr. Taher had the *de facto* (and probably also the *de jure*) power to instruct MBFX not to allow Mex Securities to remove the funds. Nor was it explained why Mex Securities were not named as a party to the action. Mex Securities were directly affected by the order. Further the seal and gag order meant that Mex Securities

(and anyone else like VDHI) could potentially not be told of the order. The court was not asked to consider whether this use of the secrecy of a seal and gag order would be abusive.

[47] On 18th January 2021, after hearing counsel for both parties, Wallbank J granted both the seal and gag order and an interim freezing order in the sum of €20 million. On 28th January 2021, the judge extended the freezing order “[p]ending the determination of the substantive Luxembourg Proceedings.” Mex Clearing undertook as soon as practicable to commence proceedings in Luxembourg against Mex Securities. That undertaking was subsequently discharged by an order of 13th May 2021. The basis of the discharge was that Mex Securities had issued or threatened to issue proceedings itself in Luxembourg.

[48] On 19th January 2021, Mex Clearing sent VDH AG a letter before action claiming €200 million. The existence of the freezing order obtained the previous day was not disclosed, nor the basis on which Mex Clearing is said to have the claim, given the assignment by it to Mex Securities under the Tomlin order.

The procedural history

[49] On 2nd March 2021, a Luxembourg avocat, Maître Maillot, on behalf of Mex Securities sent Mr. Duthie a draft claim. This asserted that the making of the Tomlin order was part of a fraudulent “charade”. Mr. Smith had been put under a form of pressure by being kept in a “prison dorée” (a golden prison) in Dubai, so that his consent to the Tomlin order was vitiated. Further, Mr. Smith had never properly replaced Slava as the sole director of Mex Securities. It sought among other things a declaration that the Tomlin order was null and void.

[50] A copy of the proposed Luxembourg proceedings came into VDH AG’s possession. On 25th March 2021, VDH AG’s German lawyers sent a demand to MBFX requiring the payment of US\$26,032,324.79 to Mex Securities. No payment was forthcoming.

- [51] In early April, Mex Securities indicated to Mex Clearing that it had remitted the Luxembourg proceedings to the Luxembourg court's bailiff for service. Mex Clearing sought an anti-suit injunction from this Court in respect of the Luxembourg proceedings and an order preventing publication of the allegations in those proceedings. I granted the injunction on 9th April 2021.
- [52] Mex Clearing then sought a mirror order from the English High Court, which was granted by Bryan J on 16th April 2021. Shortly before the hearing before Bryan J, MGW became aware of two websites, "investor-alert.com" and "traderswatcher.com", which were publishing allegations of a "large scale fraud... masterminded by Taher and Duthie, by stage managing an order in the courts of the British Virgin Islands." Bryan J extended the order to enjoin persons unknown, namely the publishers of the two websites, from repeating the allegations.
- [53] The order of Bryan J was served on VDHI, but it was unclear to VDHI whether it was bound by the injunction. It took Mex Clearing's English solicitors, Clyde & Co LLP, a month to confirm that VDHI were not bound by the injunction. This caused disruption to VDHI's applications in this Territory, because they did not know what they might or might not disclose to this Court.
- [54] On 19th April 2021, the return date of the injunction granted by me on 9th April, I granted an extension of the order to include a similar injunction against the persons unknown to that granted by Bryan J.
- [55] On 23rd April 2021, VDHI issued an application in a new action 2021/0073 seeking a freezing order. On 26th April I heard the application and granted the order in the sum of €36,385,509.52 against Mex Clearing and €43,378,533.38 against Mex Securities and MBFX. There was a return date on 3rd May 2021.
- [56] On 3rd May, I heard Alex Hall Taylor QC for VDHI, David Lord QC for Mex Clearing and Stephen Auld QC for MBFX. Mex Securities did not appear. Because of the various seal and gag orders, it was necessary to create a confidentiality club so that

VDHI could properly take instructions. I extended the injunction and gave a listing of a short hearing on 28th May for further directions.

[57] On 28th May it was apparent that Mex Clearing and MBFX were not cooperating with VDHI to create a workable confidentiality club. In particular, it was important that a general meeting of Noteholders be held, but the parties were unable to agree what information should be provided to Noteholders and what confidentiality requirements should be imposed on them. I directed VDHI to file and serve its claim form and statement of claim by 4pm on 21st June 2021. I gave VDHI full access to the Court file in 2020/0215, without which settling pleadings would be difficult.

[58] On 21st June 2021 I made a representation order pursuant to CPR Part 21 appointing VDHI as representative of the holders of the New Notes. This application was technically heard *ex parte*, but Mr. Stephen Gee QC, who was now instructed for MBFX, was present. That day I also gave *inter partes* directions and extended time for service of VDHI's pleadings to the following day. I also varied (against strong, but in my judgment unreasonable, objections by Mr. Gee) the gagging order so that VDHI and VDH AG might comply with their statutory and regulatory requirements of their home states. I listed the discharge application for two days over 28th and 29th July 2021.

[59] On 24th June 2021, MBFX issued an application seeking fortification of VDHI's cross-undertaking in damages. That was returnable before me on 29th June for a short listing, which was wholly inadequate to determine the application. Mr. Gee QC wanted fortification before the substantive hearing on 28th and 29th July, however, I (and at that stage Wallbank J) had no availability for a one day hearing. I therefore listed the application for fortification to be heard on 28th and 29th July within the two day time estimate. Issues of fortification would inevitably overlap with the other issues on the injunction. Thus, although an earlier hearing was desirable, hearing all the matters together was a sensible use of the Court's time.

- [60] MBFX appealed my refusal to list the fortification application any earlier. The matter came before the Court of Appeal on 12th July 2021. Shortly before that, a date in Wallbank J's list was identified. The Court of Appeal remitted the application to be heard by that judge on 14th July. Counsel's submissions to Wallbank J could not be concluded that day and the matter was adjourned for a further hearing on 15th July and then to 27th July, from which it has been further adjourned. VDHI say that MBFX has made no attempt since then to have the fortification matter listed for a further hearing before Wallbank J.
- [61] The two day time estimate for 28th and 29th July before me proved inadequate, so the matter had to be adjourned. Originally an additional two days was discussed, but for safety's sake I agreed to list it for three days, 21st, 22nd and 23rd September 2021. At the end of August and start of September, the parties asked for an extra day of hearing. I considered that excessive and refused the requests. In the event, the hearing finished comfortably within the five days. Mr. Gee QC complained that he could not for want of time take me to as many documents as Mr. Penny QC had. That, however, is simply a matter of style. Mr. Penny preferred to reduce the time he spent making submissions and using the time for taking me through documents. Mr. Gee preferred to make longer submissions and give the references to documents instead of reading them out. Both men (with some allowance for Mr. Carrington QC and Mr. Woolgar to make submissions) had roughly equal time.
- [62] Shortly before the resumed hearing, both VDHI and MBFX filed further evidence. Neither had made any application to do so. Further neither side troubled to tell me that they had filed the evidence, so I in ignorance of its existence had not read the additional material. Allowing the material in would have led to a substantial delay in the hearing whilst I read it at the start of day 3. In any event, allowing the evidence to be adduced would have disrupted the proper presentation of counsel's submissions. Mr. Penny QC, who appeared for VDHI, had finished his submissions by lunch on the second day and Mr. Gee QC had started his submissions for MBFX.

Mr. Penny would potentially have had to reopen his submissions, thereby upending the timetable for hearing counsel, if I admitted the further evidence.

[63] When I announced my decision not to admit the evidence, Mr. Gee immediately asked for permission to appeal. I refused to entertain the application at that point, which would have been very disruptive, and said I would hear him after I handed down this judgment.

[64] In this context, it note that Mr. Taher has “form” for disruptive litigation behaviour such as non-cooperation (e.g. over the confidentiality club in the current case) and late service of evidence. In **Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc** (cited to me by Mr. Woolgar for another proposition),³ Teare J commented:

“8. It is to be observed from the history of this matter as set out in my previous judgment and in this judgment that Mr. Taher’s response to the contempt application brought against him has been characterised by a tendency to produce voluminous documentary material before a hearing is about to take place. Thus on 10 October 2007 he produced evidence and documents which caused the hearing before King J the next day to be adjourned. On 18 March 2008 he produced a substantial quantity of evidence by e-mail some 15 minutes before the hearing before Swift J was about to start. That caused that hearing to be adjourned. The next hearing was fixed before me on 11 June 2008 and was adjourned, though not because of the late production of evidence. Instead, Mr. Taher applied to have service of the contempt application set aside. I rejected that application. He also sought permission to give evidence at the hearing of the committal application by video link from Beijing. I granted that application but it followed that the June 11 hearing had to be adjourned to set up the video link. Although Mr. Taher did not arrange a video link and said, through his solicitors, that video conferencing was not available on 31 July, it was available and Mr. Taher gave evidence by video link on 31 July. In December 2008, when all that remained of the committal application was to hear final submissions, he produced a massive affidavit accompanied by 11 volumes of exhibits. Another large affidavit followed in January 2009. These latter affidavits were described by both counsel at the hearing in June 2009 as impenetrable. However, that may perhaps be an overstatement because counsel did make a few references to their contents.

³ [2009] EWHC 1445 (QB).

Nevertheless, vast tracts of those affidavits were not helpful although other parts did seek to respond to the allegations against Mr. Taher. Whatever may have been his motivation for conducting his defence in the way he has, the foreseeable effect of his conduct has been to delay the hearing of the contempt application brought against him.”

- [65] The judge found Mr. Taher guilty of contempt. An appeal was compromised with Richards LJ discharging the order of committal.⁴ However, the appeal was not allowed. (The English Court of Appeal rarely allows appeals by consent.⁵) The finding that Mr. Taher was guilty of contempt of court stands.

Good arguable case of fraud

- [66] Before I look at the technical issues surrounding VDHI’s case, it is useful to consider whether VDHI has shown a good arguable case that there was a conspiracy to defraud. Quite a lot flows from this determination. For example, VDHI complains that its ability to prosecute the current action has been materially hampered by steps orchestrated by Mr. Taher and Mr. Duthie to stymie any questioning of the litigation, in particular by the seal and gag orders obtained, which they say were part and parcel of an attempt to conceal the fraud from investigation.

- [67] The claims of MGW are put by Mr. Gee QC in this way in his opening skeleton:

“44. Mr. Gollits had reneged on the collaboration agreement made with MultiBank Group whereby MultiBank Group would provide financial support, and VDH AG would ensure that funds were not withdrawn from the Notes to allow MBFX to continue to earn commission, as set out in the Memo, the Letter of Undertaking and the Deed of Affirmation. The substantial sums MultiBank Group had expended were at risk, and MultiBank Group began to take steps to recover those sums. This was precipitated by the conduct of Mr. Gollits and of Mr. Priess who had asked Mr. Gollits to get the money from the trading account so as to satisfy the Regulator. On 4 December 2020 a letter of demand was sent to Mex Securities seeking immediate repayment of the sums MultiBank Group had credited to the Issuers’ accounts and had expended for the benefit of the Issuers (and the Noteholders). The MultiBank Group believed that it had

⁴ Appeal No A2/2009/1835, order of 19th March 2010.

⁵ English CPR Part 52A Practice Direction para 6.4.

bona fide claims against Mex Securities — as indeed it did — as a result of Mr. Gollits' reneging on his promise to maintain cash in the trading accounts and not to seek to withdraw funds.

45. Multibank Group had, and believed it had, *bona fide* claims:

45.1. It had credited substantial sums to Issuers' accounts (first with Mex Australia and later Mex Securities);

45.2. It had expended very substantial sums on supporting and marketing the Notes;

45.3. This had been done on basis of what Mr. Gollits had told them, that the Notes would reach maturity allowing MBFX to earn commission and on representations that Notes were compliant with applicable laws and regulations and that the circumstances enabled Mr Gollits and VDH AG to ensure that money was kept in the trading accounts until maturity of the notes in 2027 and enable commissions and profits to be earned as set out in the Undertaking and Deed.

45.4. MultiBank Group had also been told, in the Deed of Affirmation, that Oaklet had acted unlawfully and had had no reason to take action suspending the Notes, reinforcing the view that there was no reason the Notes would not reach maturity.

46. MultiBank Group also had claims under the Client Agreement, under which Mex Securities had warranted that it complied with all applicable laws. The account was being used by Gollits and VDH AG to carry out transactions that breached the Luxembourg law prohibition on UCITS trading in gold. As a result of that continuing breach and repeated breaches each time an order was placed, MBFX was set to lose very substantial sums in expected commissions over the period until maturity of the Notes, 2027. MBFX would under the Client Agreement have been entitled to deduct sums due to it, including those losses, from Mex Securities' account. There were also claims for misrepresentation inducing the credits and the outlays and inducing conclusion of the Undertaking and the Deed both of which are contractual.

[68] None of this stands much analysis. The advancement of monies had been expressly by way of *ex gratia* payments. Mr. Gee QC sought to argue (a) that these payments were subject to a condition subsequent that MGW could earn its commission over the lifetime of the notes, (b) that when that condition subsequent

was not satisfied this turned the advances into loans, and (c) that the other monies could be claimed by way of unjust enrichment.

[69] There is no satisfactory evidence of any condition subsequent. No doubt Mr. Taher hoped that the *ex gratia* injection of money would produce a return, but that is not sufficient for the Court to find an implied term that, if the prospect of making the return evaporated, the *ex gratia* payment would become a repayable loan. In particular, it is not possible to imply a term which is contrary to the express term that a payment would be *ex gratia*.

[70] I agree that MGW had reasonable complaints about Mr. Gollits' behaviour. In particular, he does seem to have deliberately lied to them about when gold ceased to be a proper investment for a UCITS fund. However, the claims under the letter of undertaking of 26th November 2019 and the deed of affirmation of 15th May 2020 were claims against VDH AG, not claims against Mex Securities. The false representation about gold caused no direct loss: the investments in gold had been profitable. The idea that MGW might have a realistic claim against VDH AG for €200 million is barely credible. It was almost certainly barred by the 15th September settlement agreement. Apart from that problem, even with a favourable wind, the prospect of showing recoverable loss of profit in such a vast sum was remote. Further there is no evidence VDH AG was good for the money in anything of the order of €200 million.

[71] When one looks at the list of claims which constituted the €36,385,509.52, the argument based on unjust enrichment falls away. The first payment in 2017 of €2,621,617.26 was before Mex Securities was even incorporated. Mex Asset Management GmbH was still held by MGW, so it was still an asset. Management fees paid to Mex Asset Management GmbH were payments to an MGW company and thus were retained by the group. Mex Securities was not enriched by the expenditure of those monies. The big items of payments for technology, servers, offices, software (including client profiling, back testing and auto execution) and the

trading development team were still assets held by MGW, so again could not enrich Mex Securities. Monies spent on the Hamburg Handball team largely predated the new notes and in any event had no ongoing value.

[72] The claims are all subject to the settlement agreement of 15th September 2020. The large item of €1,960,321.57 in respect of the legal costs of the Oaklet litigation springs to the eye. The failure to take the terms of the settlement into account is evidence of bad faith, not just in respect of this item but in respect of all the items on the list of “loans and other payments”. It was made only a few months before, so Mr. Taher and Mr. Duthie are unlikely to have forgotten it.

[73] The cause of action in action 2020/0215 is pleaded in the statement of claim as being the “outstanding balance due on [the] Loans [of] €36,385,509.52. The assertion that there were loans in that sum is obviously false.

[74] As I have noted above, there was no need for action 2020/0215 to be brought at all. If MGW had a legitimate claim against Mex Securities, then it could have been compromised without the need for any proceedings to be issued at all. Mr. Taher’s explanation for a seal and gag order in respect of that action does not stand examination. If it were true (as Mr. Taher asserts) that rating agencies “look at litigation in a dim light”, that would be a reason for reaching a pre-action out-of-court settlement rather than issue proceedings.

[75] Action 2020/0215 was in my judgment clearly collusive. The sole purpose of commencing the action was so that it could be settled on terms already agreed. The Tomlin order was made almost immediately after the action was commenced, as was always intended: see Mr. Smith’s “I don’t want to overcomplicate it” in the transcript above. (There are other transcript references showing this, which I have not reproduced.)

[76] Mr. Smith, whilst acting as a director of Mex Securities, paid no regard to the interests of noteholders, to whom Mex Securities owed fiduciary duties. Mr. Taher

and Mr. Duthie were well aware of this conflict. No independent legal advice was sought by Mr. Smith on behalf of Mex Securities. It is reasonable to infer that the reason he did not do so was that he knew the transaction would not withstand scrutiny. That is no doubt why he obtained the deed of indemnity from MGW. The need for the deed of indemnity is evidence of impropriety.

[77] Action 2021/0003 is even more suspicious. It is extraordinary for one wholly owned solvent subsidiary to seek and obtain an injunction against another wholly owned solvent subsidiary in the same group.

[78] There is further the point about these proceedings being sealed, so that they could be kept secret. The Court of Star Chamber does not have a good reputation, but one decision has stood the test of time. In **Twyne's Case**,⁶ one of the six indicia of fraud was identified as being that the impugned transaction "was made in secret". The "badges of fraud" identified in **Twyne's Case**, including specifically secrecy, were most recently approved by the United State Supreme Court in **BFP v Resolution Trust Corp.**⁷

[79] The improper purpose for obtaining the seal and gag orders is borne out by the subsequent history. I find that they were intended to, and did, make it difficult for any investigation to be carried out into what had occurred.

[80] Standing back and looking at these matters in the round, in my judgment VDHI have shown a good arguable case of fraud. I have taken into account the fact that Mr. Duthie is a solicitor of the Senior Courts of England and Wales and that Mr. Smith too is a professional man. However, the facts in my judgment speak for themselves.

The discharge application

[81] The fact that VDHI have established a good arguable case of fraud against MGW, Mex Clearing, Mex Securities, MBFX, Mr. Taher, Mr. Duthie and Mr. Smith is not

⁶ (1601) 3 Coke's Rep 80b, 76 ER 809.

⁷ 511 US 531 (1994) at p 541.

the end of the case. Mr. Gee QC says that the freezing order should nonetheless be discharged. He relied on the following points in his skeleton:

“59.1. Failures to ensure that fundamental safeguards, which are a requirement for granting freezing injunctions, were in place, and failing to draw the Court’s attention to the absence of those safeguards;

59.2. Presenting aspects of the application as if a proprietary injunction was being sought (with different tests and different considerations in terms of risk of damage) when in fact a freezing injunction on Mareva principles was sought;

59.3. Lack of a cause of action and lack of standing and a failure to draw the Court’s attention to these issues;

59.4. Misleading the Court as to the undertakings given, including changes to the standard form of order and failing to give required undertakings, which was not drawn to the Court’s attention;

59.5. Failing to draw the Court’s attention to potential defences;

59.6. Misstating in material respects the test for a freezing injunction and failing to draw the Court’s attention to counterarguments;

59.7. Relatedly, VDHI’s presentation on good arguable case, risk of dissipation and just and convenient, the three limbs of the test for a freezing injunction, was partisan and failed to draw any attention to weaknesses in the case. Properly analysed, VDHI’s case does not satisfy any of the limbs;

59.8. Material non-disclosures, including in respect of many of the matters above and particularly by the omission of relevant documents. This extended to stripping out relevant documents exhibited to documents which were put before the Court, in effect concealing them. These were plainly relevant documents that ought to have been before the Court;

59.9. Failing to rectify or correct any of these matters, a deficiency which subsists to date.”

Lack of standing and no cause of action

[82] Dealing first with 59.3, the lack of standing and lack of a cause of action, it is well recognised that the test for these two matters is not particularly onerous: see **Gee**

on Commercial Injunctions.⁸ As to standing, Mr. Penny QC summarises his evidence of Luxembourg law in this way:

“72. At para. 2.1.3 of his first report, VDHI’s expert Prof. Philippe considers this issue [of standing]. He explains the position as follows:

72.1. Under Articles 14(1) and (3) and 66 of the 20 December 2002 law on undertakings for collective investment, the management company manages the common funds in accordance with the management regulations and in the exclusive interest of the unit-holders;

72.2. VDHI represents the management of the Funds and is ‘invested of the corporate powers to do so’. He describes VDHI’s role as similar to the board of directors of a plc, being responsible for the administration and management of the mutual fund and ‘can exercise the Funds’ rights as Noteholders.’”

[83] In its skeleton on the *ex parte* application to me, VDHI said it brought “this application in its own capacity and in its capacity as management company of: (1) von der Heydt Strategiefonds I -defensiv-; (2) von der Heydt Strategiefonds II – ausgewogen; and (3) Eurotax All Invest.” Subsequently, on 21st June 2021 I granted a representation order to VDHI. Whether I was right to do so, is the subject of a separate application which I have stood over so that the parties could consider the position in the light of this judgment. However, I agree with Mr. Gee QC’s submission that whether or not I was right to grant the freezing order on 26th April cannot depend on the subsequent grant of a representation order. Standing had to exist as at 26th April.

[84] There are issues in relation to Luxembourg law which may need determination at trial. (I am fully cognisant of Mr. Gee QC’s points in para 124 of his submissions.) There is common ground that Fiduciary Estates 2 and 3 (which correspond to the funds managed by VDHI) are not legal persons. Nonetheless in my judgment the

⁸ 7th Ed (2020) at para 12-033.

report of Prof. Philippe is sufficient to show a good arguable case that VDHI had standing when the freezing order was sought.

[85] Mr. Gee QC submits that, even if VDHI had standing, there was no existing cause of action in existence on 26th April. The noteholders' only claim, he submits, was to be repaid in 2016 and 2017. Until then, they had no cause of action. I do not accept this. Various causes of action are pleaded in the statement of claim (and in argument Mr. Penny QC sought to add some more, although he will need to amend to do so). In paras 165 to 169 a claim for unlawful means conspiracy is pleaded. That alone in my judgment is sufficient to ground a cause of action in existence on 26th April. The evidence, as I have set out above, shows a good arguable case that there was an unlawful means conspiracy to defraud. As soon as the €36,385,509.52 was removed from Mex Securities' MBFX accounts, the noteholders suffered massive prejudice. (Just hours before the handing down of this judgment, the Privy Council promulgated its advice in **Broad Idea International Ltd v Convoy Collateral Ltd**.⁹ At paras [96] to [100] the majority held that there was no requirement for a pre-existing cause of action at the date of the grant of the freezing order. In the light of my conclusions on what had been understood to be the law, I do not consider it necessary to hear further submissions on this new development.)

[86] Mr. Gee QC argued that **Carl Zeiss v Herbert Smith (No 2)**¹⁰ was authority for the proposition that MBFX was not affected by suspicion of any alleged conspiracy committed by others. I do not accept that this principle is relevant in the current case. Mr. Taher was the controlling mind of MGW and MBFX: see para 26 of Mr. Duthie's first affidavit in 2021/0003 ("Mr. Naser Taher... is the sole beneficial owner of the MultiBank Group.") His participation in the conspiracy (assuming there was one) must on VDHI's case be attributed to MBFX.

⁹ [2021] UKPC 24.

¹⁰ [1967] 1 AC 853 (HL).

[87] The statement of claim pleads a deliberate procurement of breach of contract. Again, in my judgment, the elements of this tort are established. Mex Clearing and MBFX caused Mex Securities to breach its duties to the noteholders. Mr. Gee submitted that Prof. Philippe's view that Mex Securities was in breach of its duties to shareholders should be rejected, even at this interlocutory stage, because he:

"does not provide any actual analysis of the conclusion. He baldly states that Mex Securities' incurring the liabilities in Mex Clearing's claim is 'clearly in opposition to the Noteholders' benefit'. The conclusion does not stand up to scrutiny. It was plainly to the Noteholders' benefit that MultiBank Group introduced funds to make good losses suffered by the Notes and to provide liquidity. It would be astonishing if a claim could not be brought against Mex Securities for the repayment of sums credited to the fiduciary estate account. In his second report, Dr. Philippe phrases it slightly differently, saying 'Mex Securities could only act for the benefit of the noteholders'. Again Dr. Philippe has not analysed the position properly. In entering into the consent order Mex Securities plainly did act to the benefit of the Noteholders. The consent order compromised a potentially much larger claim and provided a fund for Mex Securities to pursue VDH AG for the losses it suffered."

[88] I do not accept this. There is, as I have held, a good arguable case that the payments made by MGW were not recoverable from Mex Securities, so there is nothing astonishing about no claim lying against Mex Securities at the suit of MGW (or Mex Clearing as assignee) in respect of those monies. The Tomlin order was extremely disadvantageous to the noteholders. To submit otherwise is to overlook the reality of the matter.

Fourie v Le Roux

[89] Mr. Gee QC argues (his points 59.1 and 59.4) that the freezing order should be discharged for the reasons identified by the House of Lords in **Fourie v Le Roux**.¹¹ In that case, Le Roux had fraudulently obtained a court order in South Africa allowing him to strip a local company of its assets, to the detriment of creditors. The liquidator of the company obtained a freezing order against Le Roux in England,

¹¹ [2007] UKHL 1, [2007] 1 WLR 320.

where he was now living. When the application was made, no claim form had been issued. It was unclear what cause of action was relied upon with counsel before the first instance judge canvassing the possibility of claims under South African insolvency legislation or perhaps a tort claim in England.

[90] The House of Lords held that the freezing order should not have been granted for two reasons. Firstly, the claimant had not identified a cause of action in existence at the time of the application for a freezing order. Secondly, the claimant had not issued proceedings, nor undertaken to issue proceedings. Although these were described as “jurisdictional” objections to the making of the freezing order, Lord Scott of Foscote, giving the leading speech, held at para [25] that the Court had “jurisdiction in the strict sense” to grant the injunction, notwithstanding these deficiencies. The reason an injunction should not have been granted was, he held at para [35], firstly that the claimant had not properly formulated a claim based on a viable cause of action, when he applied for the freezing order, and secondly, that the protection to be given to a defendant “ought to include directions about the institution of proceedings for substantive relief.” (Again I note that the status of **Fourie** needs reexamination in the light of **Broad Idea**. What follows is my earlier conclusion.)

[91] In the current case, this first ground for refusing an injunction falls away. I have held that VDHI did have a viable cause of action on 26th April 2021, which was properly evidenced to me. So far as the second ground is concerned, CPR 17.2(5) requires the Court, on the grant of an injunction before a claim is issued, to “require an undertaking from the claimant to issue and serve a claim form by a specific date.” VDHI did not give such an undertaking. The claim form and statement of claim were only issued on 22nd June 2021.

[92] Is this second ground fatal to the continuation of the freezing order? Here it is important to remember that VDHI wanted to set aside the Tomlin order, but it was stymied in being able to do that directly because the seal and gag order prevented

it having access to the papers in action 2020/0215 and because it did not want to tip off Mex Clearing and MBFX that it was seeking a freezing order. When I heard the application on 26th April, I anticipated that VDHI would be able to get access to the papers quickly and that the two actions 2020/0215 and 2021/0073 would either be consolidated or there would be some order made which had substantially the effect of consolidating the two actions. An extraordinary general meeting of noteholders was also envisaged. It seemed to me that there was no good reason to force VDHI to plead its case in a way which would require almost complete repleading once the consolidation or quasi-consolidation was effected. (Whether a longer delay so an EGM could be held could have been discussed at a case management hearing.) Mr. Hall Taylor QC expressly referred to giving an undertaking in para 42 of his skeleton. Responsibility for failing to require the CPR 17.2(5) undertaking seems to have been mine.

[93] I have not been referred to the transcripts of all the subsequent hearings in this matter (of which were many, due the parties' failure to cooperate). My recollection is, however, that MBFX (who played the lead to Mex Clearing) did want VDHI to plead its case. However, this was not on the second **Fourie** ground, but rather so that the weaknesses of DVHI's case could be exposed. At the same time, VDHI did not want to serve a detailed pleading until it had access to the 2020/0215 papers. Access to these was resisted by MBFX and Mex Clearing. It was only on 28th May 2021 that I ordered that VDHI have access and even then there were further interlocutory skirmishes about the terms on which a confidentiality club could be set up and information provided to noteholders. 21st June (subsequently varied to 22nd June) was fixed for service of VDHI's pleadings.

[94] It was only when Mr. Gee QC, replaced Mr. Auld QC, that **Fourie** was, so far as I recall, mentioned at all. I have to determine whether the second ground of **Fourie** is fatal to the continuation of the freezing order. It must be remembered that the failure to give an undertaking to issue proceedings does not rob the Court of jurisdiction (in the strict sense) to grant the injunction. Moreover, the Court can

always correct procedural errors: CPR 26.9. The case management I envisaged on 26th April of consolidation or quasi-consolidation did not occur. With hindsight, I should have insisted on the issue of proceedings in a shorter order than occurred. However, there was on 26th April a reasonable rationale for not insisting on the settling of pleadings immediately. Given the difficulties in which VDHI found itself as a result of the seal and gag orders obtained by Mex Clearing and MBFX, it would not in my judgment be in accordance with the overriding objective to discharge the freezing order on this ground.

Fortification of the cross-undertaking

- [95] Mr. Gee QC complains that VDHI did not offer a fortified cross-undertaking on the *ex parte* and indeed positively submitted that no such fortification was necessary. This all fell within his points 59.1, 59.2 and 59.4. It does not seem to me that I can properly deal with this matter. The question as to whether fortification should be required is currently before Wallbank J. If he determines that fortification is not required, then Mr. Gee's complaint under this heading largely falls away. Even if Mr. Gee were technically right that more should have been done to bring the point to my attention at the *ex parte*, that would at most have been a venial sin which would be unlikely to result in the discharge of the freezing order. If fortification should have been ordered, then the position on discharge may be different, but I cannot determine that without trespassing on Wallbank J's territory.

Proprietary injunction

- [96] As to 59.2, the proprietary injunction versus freezing order point, (which can be coupled with his point 59.6) Mr. Gee QC is correct that the first hurdle of the **American Cyanamid**¹² test for a proprietary injunction is slightly lower ("serious question to be tried") than the first hurdle for a freezing injunction ("good arguable case"). As to the latter, in **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen**,¹³ before Mustill J and the English Court of Appeal, it was held that "a good arguable case" was "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

- [97] However, as I noted in **Briefline Assets v Nikolay Anatolyvich Falin**:¹⁴

"Although there is this technical distinction, I have never heard of a case where it has been held that a party satisfied the **American Cyanamid** test, but not the **Niedersachen** test (or *vice versa* for that matter, although this

¹² *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

¹³ [1983] 1 WLR 1412 (CA only); [1984] 1 All ER 398, (Mustill J) at p 400, (CA) at p 415.

¹⁴ [2021] ECSCJ No 598, BVIHC (COM) 2020/0223 (17th June 2021) at [12].

might be thought logically impossible). At any rate on the facts of the current case, I find [the applicant] either succeeds on both or fails on both.”

[98] Although I raised the question as to whether VDHI was pursuing a proprietary injunction at the *ex parte* hearing, Mr. Hall Taylor QC made it clear that he was only seeking a freezing order. It is true that there was confusion in his skeleton as to the type of injunction he was seeking, but this was clarified. Again, although the test for an injunction was misstated in the skeleton, I was very well aware of the different tests due to the frequency with which this Court has to deal with such injunctions. I do not consider that I was misled, either about the basis on which the injunction was sought or about the relevant law.

Full and frank disclosure

[99] The duties of an applicant on an *ex parte* application to make full and frank disclosure is not disputed. In **Great Panorama International Ltd v Qin Hui and others**,¹⁵ I set them out as follows:

“[70] A party’s duty making an *ex parte* application is well-established. The *locus classicus* is the judgment of Ralph Gibson LJ in **Brink’s Mat Ltd v Elcombe**.¹⁶

“(1) The duty of the applicant is to make ‘a full and fair disclosure of all the material facts.’

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

¹⁵ [2020] ECSCJ No 278, BVIHC (COM) 2019/0180 (determined 13th August 2020).

¹⁶ [1988] 1 WLR 1350 at p 1356, citations omitted.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J¹⁷ of the possible effect of an Anton Piller order; and (c) the degree of legitimate urgency and the time available for the making of inquiries.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty.'

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded.' The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'"

¹⁷ Columbia Picture Industries Inc. v Robinson [1987] Ch 38.

[71] This was approved by our Court of Appeal in **Enzo Addari v Edy Gay Addari**¹⁸ and most recently in **Paraskevaides and another v Citco Trust Corp and others**,¹⁹ where Carrington JA said:

[31] ...The onus is on an applicant for *ex parte* relief to comply with the obligation to make full and frank disclosure as *ex parte* applications are, generally speaking, inconsistent with the adversarial nature of court proceedings under our system of law which usually permits a respondent to be heard before an order is made against them. The key elements are that the duty is not only to disclose what the party or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought. This requires not only objective consideration of the matters that the party puts before the court, but also an active duty to make proper inquiries so as to determine whether there is other material that may [be] available for him to place before the court on the application. This is because even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality may be a factor against him whereas a deliberate non-disclosure will always be a factor against him.

[32] A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. Whereas for the latter, the duty is to make proper inquiries as to the existence of further material facts. The extent of this obligation to make such inquiries is dependent on all the circumstances including the nature of the case being advanced, the order being sought, the effects of such an order, if granted, on both the applicant and potential respondent and the interplay between the degree of urgency of the application and the time available for making such inquiries.

[33] Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts, the Court must ensure that the party who failed to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the *ex parte* order but, even if it does, the Court may nevertheless grant a fresh order if

¹⁸ [2005] ECSCJ No 46, Civil Appeal No 2 of 2005 (determined 27th June 2005).

¹⁹ [2021] ECSCJ No 107, BVIHCMAP 2018/0046 (determined 30th March 2020). The citation given for Addari in Paraskevaides is to a later appeal in the same case, but the judgment in the previous footnote is the one intended.

the non-disclosure was innocent only and the balance of convenience in light of all the material facts of which the court is aware demands that a new injunction should be granted. However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief being sought.”

[100] However, I need to bear in mind the observations of Toulson J in **Crown Resources AG v Vinogradsky**,²⁰ as approved by the English Court of Appeal in **Kazakhstan Kagazy Plc v Arip**.²¹

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

Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion...

I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees... In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion.”

Failure to disclose defences

²⁰ Unreported, 15th June 2001.

²¹ [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36].

[101] Mr. Gee QC complains in 59.5 that MBFX's defences were not fairly put to me. He says in para [104] of his skeleton:

104. Instead of drawing potential defences to the Judge's attention, VDHI buried documents relevant to potential defences to the claim. This is further addressed below but in summary:

104.1. The Judge was misled that there was no plausible claim that MultiBank group could have brought against Mex Securities. That ignored the large quantity of documents demonstrating MultiBank group providing financial support to VDH AG, Mex Securities' agent. [Interjecting: VDH AG was Mex Securities' agent only for limited purposes, not generally.] Those documents were not shown to the Court and in many instances were actively excluded, such as being stripped out as enclosures to the letter before action.

104.2. The requirement to show fraud by MultiBank was not addressed properly. That is a particularly serious failing given that MBFX's role in VDHI's version of events was largely as a banker; it was Mex Securities' MBFX account which was the source of the disputed payment. Even if the credit balance on the trading account was held on trust by Mex Securities for Noteholders at the time of the settlement, MBFX as a third party to an alleged trust and not itself a trustee, would not thereby become liable on a money claim to noteholders for misapplication of trust assets by a trustee... The account holder was Mex Securities which declared in the account opening forms for the account that it did not hold the account on trust, and that it was the beneficial owner. Trading FX business was done on the basis that MBFX was under no legal responsibility to enquire into any trust claims which might be made against the account holder by third parties. Agents employed by trustees such as banks, solicitors, stock brokers and trading houses are entitled to deal with their clients and enter into agreements with them without legal responsibility for trust claims which may be made against their client.

104.3. The issues of establishing a trust angle under Luxembourg Law were not raised. Luxembourg law only recognises the concept of a trust for very limited purposes in the choice of law setting; the Hague Convention applies in BVI: see the **Recognition of Trusts Act 1987 (Overseas Territory) Order 1989**.²²

²² SI 1989 No 673. I have corrected the title of the legislation given in Mr. Gee QC's skeleton.

[102] I have dealt with 104.1. Claims against VDH AG are not claims against Mex Securities, so there is no relevant non-disclosure. As to 104.2, Mr. Taher was in control of MBFX, so his knowledge can be imputed to MBFX. The payment out of €36.4 million was anything but an ordinary banking transaction. It was on VDHI's case the culmination of a fraud to which MBFX was a party. As to 104.3, monies held by Mex Securities for Fiduciary Estates 2 and 3 were, as the title of the Estates implied, held under Luxembourg's Fiduciary Law of 2003. Mr. Gee QC submits that the noteholders only have a limited "action oblique" under Luxembourg law, if Mex Securities wrongly allowed Mex Clearing to remove assets held by MBFX. There are no doubt issues of Luxembourg law which may need to be aired in due course, but the thrust of VDHI's case is that there was a conspiracy to defraud. That is and was the main case made against MBFX and Mex Clearing. The setting aside of the Tomlin order, which was entered pursuant to the alleged fraudulent conspiracy, is subject to BVI law. Luxembourg law is of secondary importance.

[103] A failure fully to explain what appear to be complicated and contentious aspects of Luxembourg's Fiduciary Law is not relevant to VDHI's underlying case on Luxembourg law. The following in Mr. Hall Taylor QC's skeleton for the *ex parte* in my judgment fairly sets out the position and was in my judgment sufficient for the purposes of the *ex parte* application:

"5. The Funds are noteholders pursuant to two private placement memoranda... dated 27 December 2019, pursuant to which Mex Securities, acting as fiduciary on behalf two fiduciary estates... issued two categories of notes under each of the PPM...

6. The Notes were issued on a fiduciary basis in the name of the issuer, Mex Securities on behalf of the Fiduciary Estates, but at the sole risk and for the exclusive benefit of the noteholders.

7. Mex Securities has no economic interest in the underlying assets in which the noteholders' funds have been invested. The underlying assets are not Mex Securities' assets but are held by Mex Securities on a fiduciary basis for the benefit of the noteholders. ...[T]he noteholders are the only parties with an economic interest in the underlying assets].

8. The nature of the fiduciary relationship is of central and fundamental importance: the funds invested by the third party noteholders were invested on their behalf in assets held within the Fiduciary Estates. The assets did not belong to Mex Securities, Multibank and certainly not Mex Clearing. They were held for the benefit of the noteholders. They could therefore not, in any event, be used to satisfy any liability of Mex Securities, even if one were to exist as alleged.”

Failure to exhibit documents

- [104] As to 59.8, Mr. Gee QC complains of various failures to exhibit documents on the *ex parte*. I shall not reproduce the lengthy para 137 of his skeleton. The matters in 137.1 and 137.2 are complaints about VDH AG, not (as I have explained above) properly matters relevant to the claims of VDHI or the noteholders. As to 137.3, I have discussed the issues of Luxembourg law above. There was no improper non-disclosure. As to 137.4, the letter of undertaking and the deed of affirmation are (just like 137.1) relevant only to claims against VDH AG.
- [105] As to 137.5, the transcripts all refer to the regulatory issues surrounding VDH AG, but these were not relevant to VDHI’s claim. Likewise, the fact that VDHI had itself attracted regulatory attention was not relevant. It was bringing the current claim for the benefit of the noteholders. As to 137.6, the client agreement was, as Mr. Gee accepts, exhibited. VDHI should not in my judgment be criticised for not anticipating the points which MBFX would make on it.
- [106] As to 137.7, as a result of the failure to tell VDHI whether it was bound by the injunction granted by Bryan J, it was reasonable in my view for VDHI to take the view that they could not disclose that judgment to me. Mr. Gee’s suggestion that there might have been some half-way house where VDHI explained that there was an injunction, but they were enjoined from telling this Court about it is at most a counsel of perfection. VDHI were put in a difficult position by MultiBank. It does not lie in their mouths to criticise VDHI.

[107] As to 137.8, Oaklet merely forms part of the background. The Oaklet litigation is only relevant to MGW's claims against VDH AG.

Hearing the application *ex parte*

[108] Mr. Gee QC at para 66 of his skeleton submitted that I should not have entertained VDHI's application *ex parte*, but should instead have adjourned it to be heard *inter partes*. He relied on **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd**.²³ The case is not in fact authority for the point he raises, because Lord Hoffmann in **Olint** treats Marevas (as had been the traditional understanding) as an archetypal case for going *ex parte*. However, there is authority for Mr. Gee's proposition: **Cherney v Neuman**,²⁴ and in this jurisdiction: **Renova Industries Ltd v Emmerson International Corp**.²⁵ Adjourning for the matter to be heard *inter partes* is not how the matter appeared to me at the time. I was not misled by VDHI to hear the matter *ex parte*. The decision was mine. Any error should not be visited on VDHI. There was no material non-disclosure.

Service on Mex Clearing

[109] Mr. Woolgar submitted as a discrete point on Mex Clearing's behalf that Mr. Hall Taylor QC failed to disclose the problem of service of the proceedings in 2021/0073 on Mex Clearing, which it will be recalled is a Dubai company. As I explain above, the *ex parte* application proceeded on the basis that at an early stage the 2021/0073 action would be consolidated (or quasi-consolidated) with the 2020/0215 action. If that occurred, there would be no need to serve MBFX outside the jurisdiction. I was aware of the possible issue of service. There was no non-disclosure.

Risk of dissipation

[110] As to risk of dissipation (the limb of 59.7, with which I have not already dealt), Mr. Gee QC spoke very eloquently about the potential effect of a freezing order on the

²³ [2009] UKPC 16, [2009] 1 WLR 1405 at [13].

²⁴ [2009] EWHC 1743 (Ch).

²⁵ [2019] ECSCJ No 328, BVIHC (COM) 2013/160 (Jack J, 19th June 2019) at [133] to [141].

reputation of a trading company like MBFX. He said there was no risk of dissipation and in any event as a discretionary matter, an injunction should be refused.

[111] The leading authority in this jurisdiction is **Green Elite v Fang Angkong**,²⁶ where the Court of Appeal said:

“[56] In **Broad Idea International Limited v Convoy Collateral Limited**,²⁷ this Court approved the test as stated by Gloster LJ in **Holyoake v Candy**,²⁸ as follows:

‘...the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.’

[57] On assessing whether there was a real risk of dissipation, Males J, at paras [69] to [70] in **National Bank Trust v Yurov** had this to say:²⁹

‘As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label “risk of dissipation”... Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

- a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.
- b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
- c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

²⁶ [2021] ECSCJ No 589, BVIHMAP2019/0030 (determined 11th June 2021).

²⁷ Also known as Broad Idea (No 2), [2020] ECSCJ No 174, BVIHMAP 2019/0026 (determined 29th May 2020) at [55].

²⁸ [2017] EWCA Civ 92, [2018] Ch 297.

²⁹ [2016] EWHC 1913 (Comm).

- d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.
- e. The nature, location and liquidity of the defendant's assets are important considerations.
- f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.
- g. So too is the defendant's behaviour in response to the claim or anticipated claim."

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

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

[114] So far as the damage to MBFX's commercial reputation is concerned, that can be minimised by paying €43,378,533.38, the amount frozen, into Court, or providing a

bank guarantee. No adequate explanation has been advanced for why these steps cannot be taken.

[115] Standing back and looking at the various competing considerations, in my judgment there is a real risk of dissipation by MBFX and in my discretion I should continue the freezing order against MBFX.

[116] As to the claim against Mex Clearing, Mr. Carrington QC was happy to adopt Mr. Gee QC's submissions. The same considerations apply to Mex Clearing. Indeed, since Mex Clearing is incorporated in Dubai, the risks are arguably even higher. Again in the exercise of my discretion, I shall continue the freezing order against Mex Clearing.

Conclusion

[117] Accordingly, I conclude that there was no material non-disclosure. For completeness, it follows that Mr. Gee QC's point 59.9 (failure to rectify matters) falls away as well.

[118] If there had been material non-disclosure, substantial blame would be able to be attached to Mex Clearing and MBFX for their attempts to suppress knowledge of the various actions through seal and gag orders. In my discretion, I would have extended the freezing order, notwithstanding a breach on VDHI's part.

[119] I therefore continue the freezing order which I granted on 26th April 2021 and dismiss the cross-applications of Mex Clearing and MBFX to discharge the same.

[120] In the light of my findings in relation to MBFX, I shall direct that a copy of this judgment and access to the electronic papers be given to this Territory's Financial Services Commission. Whether there should be a more general relaxation or discharge of the seal and gag orders in the three actions can be considered on the

consequential hearing. In determining that issue, I will have to take into account Brandeis J's observation: "Sunlight is said to be the best of disinfectants."³⁰

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

³⁰ Writing extrajudicially in Louis D Brandeis, *Other People's Money and How the Bankers Use it* (New York, 1932), Chapter V.