

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

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

BETWEEN:

MEX CLEARING LTD

Claimant

-and-

(1) MEX SECURITIES SARL

(2) MULTIBANK FX INTERNATIONAL CORPORATION

(3) VON DER HEYDT INVEST SA

Defendants

Determined on paper:

Mr. Alex Hall Taylor QC, Mr. Simon Hall and Ms. Catherine O'Connell of Carey Olsen
for Von der Heydt Invest SA

Mr. Steven Gee QC and Mr. Caley Wright, with them Mr. Shane Donovan of Maurant
Ozannes for Multibank FX International Corporation

The other parties were not concerned with the application

2021 October 19

**JUDGMENT ON THE DISCLOSURE 2 APPLICATION
(SUBJECT TO TEMPORARY RESTRICTIONS ON PUBLICATION)**

- [1] **JACK, J [Ag.]**: This judgment concerns a further application by MBFX on 20th September 2021 for the disclosure of documents. This application, which I shall call the disclosure 2 application was made on the day before the resumption of the substantive hearing adjourned from July and was relied on in support of Mr. Gee

QC's application for a further adjournment of the substantive application. I refused to adjourn the substantive application and refused to allow the parties to adduce the further evidence which they had submitted. Among the documents which I refused to admit for the purposes of the substantive application was Mr. Priess' fifth affidavit of 17th September 2021.

- [2] The current application has two limbs. The first is production pursuant to CPR 28.16 of documents mentioned in this fifth affidavit. The second is disclosure of documents pursuant to CPR 28.5 and 28.6. I dealt with the legal principles in my judgment in this matter of 23rd August 2021. MBFX has sought to appeal against that judgment. The Court of Appeal has granted leave to appeal in respect of the CPR 28.16 point, but has not yet granted it in respect of the CPR 28.5 and 28.6 point. Mr. Gee QC says that that part of his appeal has been stood over, so that the Court of Appeal can consider whether to grant leave to appeal after it has determined the CPR 28.16 point.
- [3] In order to ensure that the Court of Appeal can deal with everything at the next sittings in January 2022, I directed that I would determine the disclosure 2 application on a preliminary basis on paper. The current judgment is thus merely preliminary. If the parties are happy that an order be made reflecting this preliminary judgment, then I will make it. Otherwise I shall hear argument. (My references to making orders below should be read in this context.)
- [4] So far as the CPR 28.5 and 28.6 point is concerned, the Court of Appeal has not yet granted leave to appeal. In these circumstances in my judgment I should follow the view I expressed in my judgment of 23rd August 2021. Disclosure 2 seeks similar relief. The documents sought are different, but MBFX has not in my judgment made out a sufficient case that there is anything which makes this a suitable case for making this unusual order. I therefore refuse this second limb of disclosure 2.
- [5] As regards CPR 28.16, it is submitted that I should revisit my view of the law as expressed in my judgment of 23rd August 2021. This is because I did not have cited

to me the first instance Hong Kong case of **SCC Venture VI Holdco G Ltd v Zhao Changpeng**.¹ This decision does not cite English caselaw after 1895 and is thus of less relevance to our jurisdiction. Order 24 rule 10 of the Hong Kong rules is in similar terms to our CPR 28.16. However, the Hong Kong rule is subject to Order 24 rule 13, which limits disclosure under Order 24 rule 10 to that which is “necessary either for disposing fairly of the cause of matter or for saving costs.” As I pointed out in my earlier judgment, this is a material difference between our CPR and now both the English and the Hong Kong rules: see also our Court of Appeal in **Renaissance Ventures Ltd v Comodo Holdings Ltd**.² There is no such override in our CPR, so a more restricted view of what constitutes a “document mentioned” is appropriate. The Hong Kong case does not cause me to change my view.

- [6] Applying that view of the law necessarily involves acceptance that the Court of Appeal may disagree with my holding. In order to ensure everything can be dealt with by the Court of Appeal I shall grant leave to appeal against this aspect of the decision, provided always any appellant files and serves a notice of appeal timeously, pursues the appeal with reasonable diligence and makes all reasonable endeavours to have the appeal heard in the January 2022 sittings of the Court of Appeal in this Territory.
- [7] Mr. Hall Taylor QC submits that since I refused to allow the fifth affidavit to be admitted, there is nothing on which a CPR 28.16 application could bite. I disagree. I did not strike the affidavit out. I merely refused to allow reliance on it at the substantive hearing for the reasons I gave. The affidavit has been filed. It is part of the evidence in the case. In my judgment CPR 28.16(1)(a) applies.
- [8] I turn then to the documents sought, using the schedule A to the disclosure 2 application. In each case where disclosure is ordered, this is subject to the relevant document being within the possession power or control of VDHI.

¹ [2018] HKCFI 670.

² [2018] ECSCJ No 202 (Court of Appeal) at [27].

1. Priess 5 at [10] “the ‘latest’ annual reports” 2. Priess 5 at [10] “management letters” 3. Priess 5 at [10] “reports on activity of the funds”

These are all documents mentioned in the affidavit. I order production.

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

A report can be oral. There is therefore no document mentioned. I refuse production.

5. Priess 5 at [23] “the auditors’ reports”

These are documents mentioned in the affidavit. I order production.

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

“Inventory” has two meanings. It can be a list, or it can be the “quantity of material, etc., in use or held in stock in an installation at any one time”: see definitions 1 and 2 contrasted with definition 3(b) in the **Oxford English Dictionary**.³ In my judgment the reference in the affidavit is more likely to be made in the latter sense, so no document is referred to. In any event, however, the statement is equivocal. In order to make an order for production under CPR 28.16 there must be an unequivocal reference to a document. I refuse to order production.

7. Priess 5 at [27] “the audit report” for 2020 8. Priess 5 at [29] the “ISAE report” 9. Priess 5 at [36] “the audit reports”

These are all documents mentioned. I order production.

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

The affidavit does not sufficiently identify any particular document (cf the specificity requirement for a witness summons to produce documents: CPR Form 12). I refuse production.

11. Priess 5 at [38] “the earlier auditors’ reports” which are the subject of our client’s appeal

These are sufficiently identified. I order production.

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

³ Online version, accessed 16th October 2021, article “Inventory”.

This does not state that the communication or giving of information was in documentary form. Indeed, as a matter of fact much may well have been oral. I refuse production.

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

Although it is unlikely that this agreement was oral, there is nothing in the affidavit to this effect. No document is therefore identified. I refuse production.

14. OAP-5 [the exhibit to Priess 5], pg.1 “Annual Reports, Management Letters and Long Form Reports of the Funds managed by Von der Heydt Invest S.A.” mentioned on Page 1 of the CSSF Letter in the subject line. 15. OAP-5, pg.1 “the latest annual reports ... , management letters ... and reports on the activity of the fund in accordance with CSSF Circular 6 02/81” mentioned on pg. 1 of the CSSF Letter in the first paragraph. 16. OAP-5, pg.1 “the Controls Report ... for the period from 1 July 2018 to 30 June 2019” mentioned on page 1 of the CSSF Letter in the final paragraph. 17. OAP-5, pg. 2 “former annual reports, management letters, long form reports or Controls Reports” mentioned on page 2 of the CSSF Letter in the final paragraph. 18. OAP-5, pg.3 “the Controls Report” mentioned on page 3 of the CSSF letter in the second paragraph. 19. OAP-5, pg.3 “the long form reports” mentioned on page 3 of the CSSF Letter in the penultimate paragraph starting “Given that”. 20. OAP-5, pg.3 “the Controls Report dated 30 June 2019” mentioned on page 3 of the CSSF Letter in the penultimate paragraph starting “Given that”.

There is extensive reference to this letter in Priess 5. In these circumstances in my judgment as a matter of fact there is sufficient reference in the affidavit to make these documents in the exhibit liable to production. I do so order.

21. OAP-5, pg.5 “electronic copy of the minutes of the 28 April 2020 board of managers meeting of the Company” mentioned on the first page of the Allen & Overy advice, paragraph 1.2(b). 22. OAP-5, pg. 6 Mex Securities’ resolution mentioned on page 2, paragraph 3.4 of the Allen & Overy advice: “[Mex Securities] has resolved at the Board Meeting that the Company shall, with respect to the Notes, invest only in eligible assets within the meaning of the UCITS Act.” 23. OAP-5, pg.10 The “UCITS’ prospectus” mentioned on page 6 of the Allen & Overy advice in the third paragraph under the heading “(b) Liquidity” 24. OAP-5, pg.11 “each investing UCITS’ prospectus” mentioned on page 7 of the Allen & Overy advice under the heading “(f) Compliance with the investment objectives and policy of the UCITS”. 25. OAP-5, pg.12 The minutes of the board meeting mentioned on page 8 of the Allen & Overy advice: “the Board has decided in the minutes of the Board Meeting that investments will be limited to eligible assets for UCITS.”

These are all in my judgment sufficiently referred to para 43 of Priess 5 to justify a production order and I so order.

- [9] The parties should indicate by 4pm on Thursday 21st October 2021 whether they want an oral hearing to revisit these preliminary findings. If they do not, I will hear submissions on costs at the next substantive hearing in this matter.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar