IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 193 OF 2018 (IKJ)

BETWEEN:

(1) FRONTERA RESOURCES CORPORATION

(2) FRONTERA INTERNATIONAL CORPORATION

Plaintiffs

-and-

(1) MR STEPHEN HOPE

(2) **OUTRIDER MASTER FUND, L. P.**

Defendants

IN CHAMBERS

Appearances:	Mr Jeremy Goldring QC of counsel and Mr Peter Hayden, Ms Sarah Lewis and Mr Nicholas Fox, Mourant Ozannes, on behalf of the Plaintiff
	Mr Fraser Hughes and Ms Roisin Liddy Murphy, Conyers Dill & Pearman, on behalf of the Defendants
Before:	**The Hon. Justice Kawaley**
Heard:	**18 December 2018**
Draft Ruling Circulated:	**20 December 2018**
Ruling Delivered:	**22 January 2019**

HEADNOTE

Application to discharge ex parte interlocutory injunction restraining secured creditor from enforcing its security-alleged breach of fiduciary duty by director exercising veto power to

prevent Board from raising debt financing out which secured creditor's claim could be satisfied-whether serious issue to be tried

Introductory

1. On October 11, 2018, following an ex parte hearing, I ordered that:

> "*1. The Defendants be restrained from taking any steps to enforce against property which is the subject of the Equitable Mortgage dated 20 December 2016 between the Second Plaintiff and the Third Defendant, whether pursuant to rights under that agreement or otherwise.*"

2. The Defendants applied ex parte to vary paragraph 1 of the October 11, 2018 ex parte Order ("Interim Injunction") on December 7, 2018. I granted that application by inserting the following new paragraph in the Interim Injunction:

> "*1A. The Plaintiffs shall not cause Frontera Resources Caucusus Corporation to incur any further indebtedness or obligations in excess of US $500,000 until 18 December 2018, or such other time as the return date in respect of the Injunction can be heard.*"

3. Having decided to reserve judgment at the end of the *inter partes* hearing at which the Defendants sought to discharge the Interim Injunction, and over the Plaintiffs' objections, I extended paragraph 1A until December 21, 2018. I indicated at the end of the December 18, 2018 hearing that I regarded the issue of whether the Interim Injunction should be continued to be a finely balanced one. The Plaintiffs' case can be summarised as follows:

   (a) the 1st Plaintiff ("FRC") is listed on the London Stock Exchange and is the holding company for the Frontera Group (the Plaintiffs are both incorporated in the Cayman Islands);

   (b) the Group's main asset is the oil and gas exploration rights indirectly held by Frontera Resources Caucusus Corporation ("FRCC") in Georgia under a Production Sharing Contract ("PSC") to which the Government of Georgia is a party and a Mineral Use License ("License") granted by the Government of Georgia ;

   (c) there is a risk that the Group will suffer irreparable harm if the Defendants enforce their security over the shares of FRCC because this may trigger a default under the PSC and the License may be revoked;

(d) the 2nd Defendant ("Outrider") is a company also incorporated in the Cayman Islands which promotes itself as specializing in investing in distressed companies. Following the settlement of a dispute with another Frontera entity in the US Bankruptcy Court in 2016, Outrider acquired the 2016 Notes issued by the 2nd Plaintiff ("FIC"). Outrider also acquired the right to have its nominee on the FRC Board of Directors and to have all material decisions approved on a unanimous basis. The 1st Defendant ("Mr Hope", a California resident, who controls Outrider) has at all material times been Outrider's nominee director on FRC's Board;

(e) the other FRC directors are Steve Nicandros, Zaza Mamulaishvili and Luis Giusti;

(f) the FRC Board's attempts to raise debt financing out of which the Company would be able to meet its financial obligations under the 2016 Notes to Outrider could be settled have been blocked by Mr Hope. His motivations have been said to be, very broadly, to enable Outrider to take control of the Group and to further the collateral interests of Outrider rather than the interests of FRC.

4. At the end of the *inter partes* hearing, as at the end of the ex parte hearing, it appeared clear that the Plaintiffs had established that (a) damages would be an inadequate remedy for the loss which would potentially be sustained if its main asset was lost and (b) that the balance of convenience favoured granting the Interim Injunction. The Defendants would suffer no comparable irreparable prejudice if their security enforcement rights were suspended until trial, even if the Plaintiffs ability to compensate them for any damage suffered was subject to some doubt. As will be seen below, however, the cogency of the risk on careful analysis is less compelling than it initially seemed. The most controversial and finely balanced question, nonetheless, was whether the Plaintiffs' substantive claims raised, as Lord Diplock famously framed the merits test in *American Cyanamid-v-Ethicon* [1975] AC 396 at 407G, a "*serious question to be tried*". It is never enough to justify restraining a defendant from exercising his own legal rights merely to show that such exercise will indirectly cause the plaintiff serious harm.

5. The Defendants' sought to discharge the Interim Injunction on two main grounds: (1) material non-disclosure and (2) the Plaintiffs had failed to establish a sufficiently serious claim to justify interfering with Outrider's rights as a secured creditor.

The commercial relationship between the parties

6. The First Affidavit of Steve Nicandros describes the uncontroversial background facts. Frontera Resource Holdings, LLC ("FRH") entered Chapter 7 bankruptcy proceedings in 2016. There was a dispute in those proceedings between FRC and Outrider (which held notes issued by FRH) in which FRC alleged that Outrider had facilitated a hostile takeover of the Group. A mediated settlement of this dispute resulted in a December

20, 2016 Note Exchange Agreement pursuant to which Outrider acquired FIC 2020 Notes in place of FRH 2016 Notes. The settlement also entitled Outrider's management company to designate a member of FRC's Board of Directors.

7. Outrider's Global Note is for the principal amount of US$22.9 million plus interest at the rate of 10%. Events of Default include failure to pay interest. Through a Third Amendment to the Note dated March 30, 2018, FIC and Outrider agreed to defer interest until September 30, 2018. In excess of $2 million was due on September 30, 2018 which has not been paid. The parties also executed a Collateral Agency Agreement and a Security Agreement which Outrider is entitled to enforce because an Event of Default has occurred.

8. Exhibited to the First Nicandros Affidavit was the Note Agreement dated December 20, 2018 in relation to the FIC 2020 Notes. Mr Goldring QC referred to the following clauses which shed light on Outrider's nominee's veto power under the Notes:

> "*7.2 ...(b)so long as no Default has occurred and is continuing, the Company and its Company Subsidiaries shall be entitled to Incur all Permitted Indebtedness or Permitted Noteholder Indebtedness....*
>
> ***SCHEDULE I***
>
> *... '**Permitted Indebtedness**' means any or all of the following:*
>
> (1) *Indebtedness of up to $200 million Incurred pursuant to a Credit Facility, with interest not to exceed LIBOR plus 1500 basis points, provided that any such indebtedness may only be incurred with the unanimous written consent of the members of the board of directors of FRC, and further provided that, absent such unanimous consent of the board of directors of FRC, any transaction incurring such indebtedness shall be void...*"

9. Failure of the Company (i.e. FIC) to pay interest under the Note Agreement is an "*Event of Default*" under Section 8.1 of the Note Agreement. It is clear from the Structure Chart at page 1 of Exhibit "SN-1", however, that these provisions operate as regards FIC, a wholly-owned subsidiary of FRC, and its subsidiaries, which include FRCC and its subsidiaries including Frontera Resources Georgia Corporation ("FRGC"). Nonetheless these provisions demonstrate that the settlement which resulted in Outrider acquiring the right to be represented on FRC's Board of Directors and for its representative to have a right of veto was accompanied by the issuance of a Note to Outrider by FIC on terms that any further indebtedness at the level of FIC and below could only validly be incurred with unanimous Board approval. Accordingly, Outrider had as of December 20, 2016 the ability to veto any further debt financing at the FIC

level and below through its representative on the FRC Board. This representation and veto power was also apparently grounded in a side letter of the same date.

10. Another document which appears in the same Exhibit (at pages 24-28) is FRC's mediation memorandum dated October 2016. That memorandum submitted that Outrider's asserted counterclaims would cause the Georgian Government to take action which would "*destroy all value in Frontera for the company's shareholders and other creditors, and also ensure that Outrider itself loses the **entire** value of its Notes.*" I do not recall this document being directly referred to at either hearing, but Mr Hayden at the ex parte hearing expressly referred to FRC's Complaint which preceded the mediated settlement. The Plaintiff's case is that the allegations made by FRC in the settled US proceedings were similar to and supported the present allegations against the Defendants.

11. The FRC Complaint alleged that Outrider was guilty of misappropriating trade secrets (Count II), tortious interference with contract (Count III) and fraud (Count IV). However, Count I merely sought declaratory relief in relation to FRH Notes which certain Noteholders and the estate of FRH itself contended were guaranteed by FRC. The mediated settlement does not appear to have given any or any material recognition to FRC's misconduct allegations against Outrider, because it placed Outrider in the position of being able to virtually control FRC's Board. In the previous dispute, the position appears at this interlocutory stage to be as follows:

    (a) Outrider asserted commercial rights in respect of FRH Notes which the FRH estate supported;

    (b) FRC made serious allegations of misconduct against Outrider which it abandoned in the context of a mediated settlement; and

    (c) Outrider, far from being banished from any intimate involvement in the management of FRC, obtained new 2020 Notes and a representative and a blocking vote on FRC's Board.

12. The practical effect of the current basis on which FRC's board operates is as follows. Despite of history of conflict between FRC's management and Outrider, with FRC's other directors likely to be suspicious of the motives of Outrider and resentful at the power wielded by its Board representative, the Board cannot validly make any significant commercial decisions which Mr Hope does not approve. Against this background, and in this commercial and legal context, the allegation that Mr Hope is motivated by improper motives is very easy to make. It is an allegation very likely itself to be motivated by a commercial desire to sidestep an innately difficult unanimity

requirement, and to impose the commercial preferences of the Board majority in circumstances where Outrider's representative is entitled put a roadblock in the path of the majority's views. It would be surprising if the majority of the Board did not, to some extent at least, look back on the mediated settlement of 2016 with deep regret as a 'Faustian bargain' the purgatorial consequences of which they now wish to escape.

13. There is also an obvious risk of an emotional and very human desire not just to settle old scores, but also to retain control of a cherished company in which much time has been invested. At least two of the other three directors (Mr Nicandros and Mr Mamulaishvili) are co-founders of the Frontera Group. They and the third other director (Mr Giusti) all appear to have considerable specialist knowledge of the oil and gas industry, expertise Mr Hope does not seem to share (Second Nicandros Affidavit, paragraphs 14-20). This 'clash of cultures' apart, the founders' perspective is quite obviously likely to be that of shareholders while Mr Hope's interest is that of a creditor. In his First Affidavit, Mr Nicandros noted that Mr Hope is the founder and principal of Outrider, a company which on its website proclaims:

> "*Outrider invests in distressed companies in the emerging markets…We try to capitalize on the systemic dislocations which often occur in developing financial markets to obtain the best entry points for our positions. Outrider seeks consensual restructurings where possible, but pursues active litigation and bankruptcy processes where necessary to obtain fair recoveries for our investors.*"

14. Accordingly, as I noted in the course of the ex parte hearing, the seriousness of the questions raised by FRC's allegations (that Mr Hope's refusal to approve the debt financing which will enable the Company to meet its most pressing obligations is improperly motivated) must be carefully scrutinised.

The Plaintiffs' claim

15. The General Endorsement on the Plaintiff's Writ pivotally asserted the following claim against the 1st Defendant:

> "*(1) Damages arising from his breaches of fiduciary duty owed to the First plaintiff in his capacity as director, to the detriment of the Plaintiff as the owner of the share capital of the Second Plaintiff. Such breaches include, inter alia:*
>
> *(a) attempting to deprive the First Plaintiff of assets for his own benefit and/or for the benefit of the Second Defendant;*

(b) promoting his own interests over, and in conflict with, the interests of the First Plaintiff;

(c) failing to act in what he believed to be in the best interests of the First Plaintiff;

(d) acting for an improper purpose;

(e) failing to exercise independent judgment;

(f) *failing to act with loyalty, honesty and good faith.*"

16. Damages are also sought against each of the Defendants for conspiring with each other in the above regard. A declaration is sought that Outrider is not entitled to enforce its security, together with an injunction restraining the 2nd Defendant from doing so. A Statement of Claim was filed after the ex parte hearing, which asserted additional claims and/or refinements to the original which it is proposed to add by way of amendment to the Writ. The main new causes of action are unlawful interference with the business of FRC and conspiracy to injure FIC by unlawful means.

The Plaintiffs' evidential case

17. The essence of the Plaintiffs' case is best captured in the following paragraphs of the First Nicandros Affidavit:

"*27. Unfortunately, it appears to FRC and its other three board members that Mr Hope's actions, and those of OMF, are driven by a desire to personally profit from FRC's assets, rather than to manage them in the best interests of the company and its creditors and shareholders. The conflicting interests have driven Mr Hope to disregard and breach his fiduciary duties.*

28. In particular, Mr Hope has repeatedly and systematically thwarted all efforts to obtain further funding that is required to pay the interest due to OMF under the Loan and continue funding field operations. The most vivid examples occurred on 26 March 2018 and 23 April 2018, when Mr Hope blocked substantial funding opportunities for FRC using his authority as director and veto powers under the Note...

34. Mr Hope steadfastly opposed any injection of funding that would take priority to [sic] *FIC's liabilities to OMF. In this manner, notwithstanding (as Mr Hope acknowledged) that the market capitalisation of FRC was far in excess of the revolving credit facility being offered by Mr Mamulaishvili (someone who had every interest in the ultimate success of FRC) Mr Hope used his position as an*

'independent' director of FRC and his effective veto of such funding to ensure that it did not take place (under the Note, unanimous voting of the board was required to approve such transaction, hence Mr Hope had the ability to veto it)...

37. However, on the same day, Mr Hope then advanced OMF's own funding proposal, which was to advance US$2million of funding, not subordinated (and in fact senior) to all other lenders, to be granted at the FEGL level.

38. Furthermore, OMF's funding was offered on terms that Mr Hope would effectively take complete control of FRC and its subsidiaries, to sell it at an offer approved ultimately by him (and him only), with returns going first to him (as CRO) and other advisors, then 90% to noteholders (including OMF) and only then to others. Under this proposal Mr Hope (as CRO) would have ultimate discretion as to which purchase offer(s) to accept. Therefore, there would have been little preventing him from selling the most valuable assets to himself/OMF, if that was his intention. In the circumstances, this proposal was highly unattractive to the other directors of FRC. "

18. These assertions were potentially supported by exhibited email correspondence; in particular, the fact of the counter-offer and its terms was not subject to any sensible dispute. The Defendants' counter-narrative was that the best interests of the creditors of an insolvent Group were best served by a restructuring and that Outrider's interests were aligned with other creditors. However, the Plaintiffs' evidence cast doubt on the purity of the supposed alignment of interests by reference to the fact that Mr Hope had "aggressively" proposed not simply a restructuring but one managed by himself and financed by his own company, Outrider.

Findings: material non-disclosure

Legal test

19. The Defendant's counsel primarily relied on Stephen Gee, '*Commercial Injunctions*', Sixth Edition, paragraphs 9.001-9.012[1]. The statement of general principles set out in paragraph 9. provides:

"*Any applicant to the court for relief without notice must act with the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, or on short notice...*

[1] Although these paragraphs were cited in the Defendants' Skeleton Argument, only paragraphs 9.001-9.002 were placed before the Court.

It applies not just to disclosure of facts but to absolutely anything that the judge should consider. It is part of the duty of the applicant for without notice relief to present the application fairly. Incorrect submissions or arguments, including erroneous legal submissions, will not amount to non-disclosure or material misrepresentation provided that such errors do not deprive the court of knowledge of any material circumstances. This is on the basis that the applicant has acted fairly and is entitled to advance his arguments as he wishes provided that the court receives a fair presentation of the case."

20. In the Defendants' Skeleton the following additional principles extracted from *Gee* were set out as follows:

> "*g) If material non-disclosure is established, the Court should 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 the breach of duty.*
>
> *f) Although the Court has discretion notwithstanding proof of a material non-disclosure which justified or requires the immediate discharge of the ex parte order, to continue the order, or to discharge the order and immediately re-impose it, or to make a new order on terms, this jurisdiction should be exercised 'sparingly'.*"

Merits of the Defendants' non-disclosure complaints

21. Three areas of non-disclosure were complained of and set out in the Defendants' Skeleton Argument:

(a) misrepresentation of Mr Hope's motives (paragraphs 19-22);

(b) The law relating to directors and insolvent companies (paragraphs 23-28);

(c) adequacy of damages and the balance of convenience;

(d) the legal test as to the merits of the Plaintiff's claims.

22. It is true that Mr Nicandros in paragraph 24 of his First Affidavit made the legally flawed assertion that the Defendants would profit from enforcing their security. I consider that to be a peripheral complaint which is on the outskirts of materiality. The central and more serious complaint was that funding was being refused because of a desire to take control of a restructuring of the Group, and profit in that way. It is also right that the efforts made to assist FRC by deferring interest were incompletely referred to in evidence and at the ex parte hearing. This was marginally more material, but not significantly so. What happened before the critical period from late March onwards in

terms of forbearances has limited obvious significance. These complaints did not amount to sufficient grounds, standing by themselves, for discharging the Interim Injunction.

23. Mr Hughes forcefully complained in oral argument about the failure not just to address the legal duties of directors of an insolvent company but also the failure to exhibit FRC's Financial Statements. There was no arguable answer to the general proposition that when a company is insolvent or of doubtful solvency, they owe their primary duties to their creditors, not their shareholders. There was no completely satisfactory answer to the complaint that the Financial Statements ought to have been disclosed. In my judgment the Plaintiffs admitted that FIC was insolvent on a cash-flow basis. A solvent company does not need to borrow money to pay its current debts. However, a cursory review of the FRC Condensed Consolidated Balance Sheets (unaudited) for the year ending June 30, 2018 paints a pretty clear picture of balance sheet insolvency, including total current assets $7,411, 275 and total current liabilities of $24,614,796. Mr Goldring QC pointed out that the market view of the value of FRC is far more optimistic. That may well be a basis for believing that a successful restructuring can be achieved and/or that short-term debt financing can be obtained. It does not refute the central proposition that interests of the creditors are what should hold sway at FRC Board level.

24. In the context of an application which centred on a claim which implied that the Defendants were wrongfully blocking the Board from obtaining financing which would have solved FRC's liquidity, material non-disclosure clearly occurred in the following respect. The First Nicandros Affidavit did not disclose that on May 8, 2018 Andy Szescilla resigned as a director of FRC and had expressed concerns about the management of the Company. On July 17, 2017 he emailed fellow directors in relation to a summary of the position and commented: "*This isn't tight, it's unsustainable.*" He also expressed concerns that the Company's approach to disclosure was putting the underlying licenses at risk. On April 30, 2018 he advised that he was resigning from the Board and requested "*a simple statement that I disagree with the direction of the company*". At the ex parte hearing counsel

submitted that it was not necessary to look at the exhibited emails in detail because they painted an inconclusive picture: there was no "smoking gun". The July 17 2017 and April 30, 2018 Szescilla emails linked with the fact of his resignation in early May 2018 at the very least could be likened to a 'warm' if not 'smoking' gun. After all, this 'dissident' director's views potentially chimed with Mr Hope's observations six days earlier in another email which Mr Nicandros did not mention, although emails supportive of the Plaintiffs' case were expressly cited. Mr Hope in a April 24, 2018 email stated:

> "*But overall I think there's a real need for the board members of the company to more fully engage with the fact that the company is on the brink of bankruptcy and we need to take appropriate action to forestall that, if possible. ...we need to take action quickly, and decisively...*"

25. FRC's presumed substantial solvency lies at the heart of the Plaintiffs' case that Mr Hope's objection to debt financing and pleas for a restructuring are improperly

motivated by self-interest. The acuteness of its relevance is heightened by the fact that the Plaintiffs' majority directors appear to be naturally (and commercially) aligned with shareholder interests while Mr Hope is naturally (and commercially) aligned with creditor interests. This is, properly understood, another ground on which the Defendants complain that the case as to Mr Hope's motives was not fairly put. These complaints are sufficiently cogent to justify setting aside the Interim Injunction.

26. The failure to make fuller disclosure of the financial position of FRC as regards its ability to give a satisfactory cross-undertaking in damages is fairly the subject of criticism. However, standing by itself, it is of marginal relevance and would not to my mind constitute sufficient grounds for discharging the Interim Injunction.

27. The complaint that the Plaintiffs' counsel misled the Court as to the legal test is rejected for one simple reason. I implicitly rejected the test contended for in the course of the ex parte hearing, as demonstrated by the transcript as being inappropriate having regard to the nature of the claims asserted in the present case.

28. In summary, I find that the Interim Injunction is for the above reasons liable to be set aside on the grounds of the cumulative weight of the above material non-disclosures. Because of the conclusions I reach on the serious question to tried issue below, the need to consider sparingly using the jurisdiction to forgive such breaches does not arise.

Findings: is there a serious question to be tried on the merits?

Approach to the evidence

29. The marginal strength of the Plaintiffs' evidential case on the merits was indirectly revealed by the fact that their counsel appeared to me to be compelled to focus more on dissuading the Court from scrutinising the evidence than on seeking to persuade the Court how cogent the evidence before the Court actually was. It is necessary to clarify what the relevant legal test is and the extent to which affidavit evidence may properly be assessed for interlocutory injunctive relief purposes, before carrying out the relevant assessment.

30. As already recorded above, it was essentially common ground at the *inter partes* hearing that the Plaintiffs had to demonstrate that there was a "*serious question to be tried*": *American Cyanamid*. Mr Hughes aptly relied on this Court's more recent description of the relevant law in *Kelly-v-Fugjimo Limited* [2012] 2 CILR 222, where Smellie CJ (at 227) opined as follows:

> "*10 The primary question which I am required to address at this stage is (as Lord Diplock also explained, ibid., at 407–408) whether I am satisfied that the plaintiffs' claims 'show any real prospect of succeeding' or are 'not frivolous or vexatious, in other words, that there is a serious question to be tried.' As later explained in the cases subsequent to Lord Diplock's pronouncement of the principles, the test of real prospect of*

success is preferred and the use of the expression 'frivolous or vexatious' has been discountenanced in this context: see Mothercare Ltd. v. Robson Books Ltd. (5) ([1979] F.S.R. at 474, per Megarry, V.-C.).

11 But this—notwithstanding the narrow scope of the factual enquiry to be undertaken—will inevitably involve some degree of assessment of the evidence, as invited by the qualitative evaluation of whether the claim satisfies the test of a real prospect of success. Accordingly, the case law admits of the following further approach as explained also in American Cyanamid ([1975] A.C. at 408):

> *'. . . [U]nless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.'"*

31. While accepting Mr Goldring QC's admonition that the stage of the analysis should not turn on technicalities or semantics, in my judgment the standard which the Plaintiffs must meet is marginally higher than merely arguable or "*not frivolous or vexatious*". This is demonstrated by the cited judicial preference for the term "*real prospect of success*". I also accept that Lord Diplock warned in *American Cyanamid* (at 407G) that:

> "*It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may depend nor to decide difficult questions of law which call for detailed argument and mature consideration.*"

32. However as Smellie CJ noted in *Kelly-v-Fugjimo Limited*, the judicial task of determining whether or not the interim injunction applicant's claims have a real prospect of success "*will inevitably involve some degree of assessment of the evidence*". In my judgment it is self-evident, that the extent and quality of the evidential assessment will vary, albeit within a narrow compass, depending on the circumstances of the particular case. Experience suggests that certain indicators generally provide judicial comfort that an interim injunction applicant's evidence can be accepted at face value with only superficial analysis. For instance:

- where the claim depends on the construction of documents but the primary facts are essentially agreed;
- where the parties have no 'history' so there is no basis for concerns that the applicant's case might be affected by personal animus;

- where the applicant's main witness or witnesses have no significant personal stake in the dispute;

- where the nature of the claims asserted are such that the cogency of the central allegations can easily be assessed and/or easily be proved (e.g. a debt recovery action based on a promissory note);

- although the claims involve the proof of bad faith or other misconduct, it is clear that something wrong has occurred (e.g. money is clearly missing or an investment has been lost);

- where there is clear-cut direct or circumstantial evidence supporting the applicant's case.

33. On the other hand, there are familiar indicators which set off alarm bells. For instance:

- the applicant's claims depend substantially on proving bad faith in circumstances where it is unclear that any wrong has occurred;

- the parties have 'history' and it is not implausible that the applicant's case has been affected by personal animus;

- the applicant's main deponent clearly has a considerable personal stake in the dispute, and is not a professional employed director;

- the allegations are easy to formulate but difficult to prove;

- key elements of the applicant's case are inherently improbable;

- there is no clear-cut direct or circumstantial evidence supporting the applicant's case at the interlocutory stage.

Assessment of the merits of the Plaintiffs' case

34. The parties' history, current commercial relationship and the nature of the Plaintiff's case, call for the evidence to be carefully scrutinised, for the reasons set out above (paragraphs 6-14). It is entirely unclear that any wrongdoing has occurred at all. FRC has in the past made and abandoned serious allegations of misconduct against Outrider. The Plaintiffs' deponent is a founder of the Frontera Group and clearly has a significant personal equity interest in the dispute. The allegations are easy to formulate but difficult to prove. The suggestion that the Defendants are seeking to commercially benefit from destroying FRC's value is inherently improbable and borders on the fantastical. Subject to one exception, there is no clear-cut direct or circumstantial evidence supportive of the Plaintiff's claims.

35. The only coherent allegation advanced by the Plaintiffs is the broad complaint that Mr Hope has blocked the Company's legitimate attempts to raise debt financing with a view to he and Outrider benefitting from a default by FIC and taking control of its assets. This requires the Plaintiffs to establish that the proposed debt financing ought to have been approved instead of some form of restructuring. The Plaintiffs also have to prove that Mr Hope in contending that a restructuring was a better option having regard to the interests of creditors was motivated not by the interests of the Group's creditors, with which interests Outrider's were arguably aligned. The Plaintiffs have to prove that, instead, Mr Hope and Outrider were to a material extent motivated by the desire to earn restructuring fees.

36. At this stage, based in part on FRC's own accounts and its admitted liquidity problems, it appears strongly arguable that FRC is insolvent and that the directors' primary regard ought to have been to the best interests of creditors. As I put to Mr Goldring QC in the course of argument with his apparent assent, it is a notorious fact that many companies in the oil and gas industry have in recent years faced liquidity crises due to the volatility of oil and gas prices. This lends more credence to the propriety of Mr Hope's general stance in opposing more debt financing and calling for decisive action than it does to the majority directors' position that debt financing was the obviously appropriate business judgment to make. Indeed, the evidence suggests that the Board divisions centred on an all too familiar conflict between persons with equity interests convinced that ordinary business strategies will turn the company around and more detached outsiders capable of forming cold and calculating judgments about the need for a restructuring. The shareholder director psychology (no matter how honest and honourable the director may be) very often resembles that of a gambler, convinced that one more throw of the debt-financing dice will enable management to snatch victory from the jaws of defeat. This view of the commercial landscape justifies a denial that structural insolvency problems exist and results in deference being given to equity interests which are (in legal terms at least) past their 'sell-by date'.

37. Without, of course, deciding anything at this stage, in my judgment the evidence suggests that the Defendants have a more realistic prospect of proving that the best interests of creditors are what the Board should be giving priority to and that some form of restructuring is objectively required. The relevant question, strictly, is more likely to be whether a reasonable director untainted by conflicts of interest and/or improper motives could properly decide that assuming further credit was not in the best interests of FRC's creditors. In these circumstances, where the majority directors have obvious conflicts of interest of their own and appear not to have recognised that creditor interests trump equity interests at this stage, the Plaintiffs' allegations of breach of fiduciary duty may turn out to be a case of 'the pot calling the kettle black'. The most significant evidential nuggets are the pre-resignation emails from former director Andy Szescilla to Mr Nicandros, which evidence concerns about the management's approach to the liquidity crisis on the part of a director who was apparently part of the majority directors' camp. I rely not on the truths of these assertions (which are incapable of assessment at this stage) but the mere fact that they were made:

(a) "*This isn't tight, it's unsustainable. It is sobering but an absolutely necessary discussion. And you have my full support to get the cost structure in line with reality. I would ask a question. As President of the company, did you not see this?*" (July 17, 2017);

(b) "*I am ready to resign the Board. The note I sent last week was met with a worrisome response. I had delayed my notice to Zaza by sending the message to his wrong email address... True. An accident on my part, but my questions about the Company operations were obvious...The world is crashing down and he worries about a 5 minute delay? As if that somehow makes any difference...Lets close this out ASAP...A simple statement that I disagree with the direction of the Company will suffice*" (April 30, 2018).

38. The highpoint of the Plaintiffs' evidential case is the "aggressive" proposal made by Mr Hope, whether as a director or on behalf of Outrider, that he be appointed Chief Restructuring Officer and charged with running the entire restructuring. If that proposal was made by Mr Hope as a director and accompanied by threats that Outrider would enforce its security, as is alleged, that arguably would have constituted a breach of fiduciary duty. But assuming that these allegations can be proved, they support a different legal case entirely to that advanced in support of the present application for interim injunctive relief. The suggestion that there is an inconsistency between opposing debt financing and proposing restructuring financing is on its face unsustainable. It is ordinary market practice for insolvent restructurings to be funded by super-priority lending, whether the restructuring team are insiders or outsiders, because the global returns from the restructuring exercise will generally outweigh the short term effects of taking on further debt.

39. Proof that the Defendants conspired to pressurize the Company into engaging Mr Hope and/or Outrider as restructuring consultants in circumstances where a restructuring was the appropriate macro-strategy is one thing. Proving that that the Defendants have improperly attempted to extract a collateral benefit from a restructuring which was not in fact necessary is an entirely different matter. In the latter case, the facts proved would support the theory that the Defendants had wrongfully created a default in order to enforce their security by preventing FRC from raising the necessary financing to cure the default. In the former case, proof that the Defendants sought to benefit from a restructuring which was actually necessary would not justify preventing Outrider from enforcing its security. FIC would still be in default and the Defendants would not have improperly prevented FRC from curing the default at all. The Plaintiffs claims as presently formulated would fail.

Findings

40. For the above reasons, I accept the Defendants' submissions that the present claims, attractively as they may be pleaded in the Plaintiff's Statement of Claim, do not (based on the evidence presently before the Court) have real prospects of success. It remains to summarise how the broad-brush assessment of the evidence set out above relates to the main limbs of the Plaintiffs' claims.

41. Paragraphs 20-31 of the Statement of Claim set out pleas in support of an unlawful conspiracy claim. The unlawful means alleged are breaches of fiduciary duty by Mr Hope. The conspiracy alleged is an agreement to "*prevent FRC from raising sufficient funds to enable it to continue to fund its operations in the field and to enable FIC to pay OMC the deferred interest under the 2020 Notes*" (paragraph 20). That claim, based on the presently available evidence, has no real prospect of success. The breaches of fiduciary alleged are not particularised, but the duties pleaded as applying to Mr Hope as a director are the following:

> "*19.1 A duty to act in good faith in the best interests of FRC;*
>
> *19.2 A duty to exercise his powers for the purpose for which they were conferred and not for any improper purpose;*
>
> *19.3 A duty not to misappropriate the Company's assets;*
>
> *19.4 A duty not to put himself in a position where there was an actual or potential conflict between his duties as a director and his personal interests or a duty owed to a third party.*"

42. There is no real prospect of successfully proving that Mr Hope breached his fiduciary duties by attempting to misappropriate the Company's assets. The first two duties can be collapsed into one. The allegation that Mr Hope placed himself in a conflict of interest position by proposing himself as Chief Restructuring Officer is plainly sustainable, but it does not support the Plaintiffs' case that the objective of the Defendants was to restructure a company which did not require restructuring. The essence of the Plaintiffs' case, in so far as it is deployed in support of continuing the Interim Injunction at least, is that Mr Hope ought to have approved the debt financing instead of contending that a restructuring was required on the grounds of insolvency and used his fiduciary powers for an improper purpose. The suggestion that the improper purpose was to "*enable OMF to exercise its rights pursuant to the equitable mortgage*" (paragraph 21) is unsustainable because, as Mr Hughes submitted, any surplus from the realisation of the security would fall to be repaid by the Collateral Agent to the Company.

43. To the extent that the improper purpose was to make a profit through providing restructuring services when no restructuring was actually required, this allegation is sustainable. But on the presently available evidence the Plaintiffs' case is a tenuous one, because it appears more likely that the Defendants will be able to establish that a restructuring was at least a reasonable option to prefer in the circumstances. An important question for the Court to try, on this basis, would be not simply whether Mr Hope was motivated by a personal interest in running the restructuring to <u>any</u> extent, but whether this motivation actuated his decision making in blocking the debt-financing proposals to the <u>legally requisite</u> extent in circumstances where the best interests of creditors did require a restructuring.

44. I am unable to conclude based on the presently available evidence that the Plaintiffs have a real prospect of meeting this test, it being for the Plaintiffs to satisfy me that their claims rise to the necessary merits threshold. Although the point was not canvassed in argument, I consider I am entitled to assume (as a matter of trite law) that it will be insufficient for the Plaintiffs to merely establish (which they probably could) that Mr Hope was partially motivated by a desire to take an active role in the restructuring he contended was necessary. Without seeking to decide what the relevant test is for establishing breaches of fiduciary duty in mixed purpose cases, a useful starting point in terms of highly persuasive authority is *Eclairs Group Ltd-v-JKX Oil and Gas plc* [2015] UKSC 71[2] Lord Sumption opined as follows:

> "*22. Dixon J's formulation has proved influential in the courts of Australia. As the majority (Mason, Deane and Dawson JJ) pointed out in the High Court of Australia in Whitehouse v Carlton House Pty (1987) 162 CLR 285 , 294:*
>
> *'As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, 'the power would not have been exercised'. '*
>
> *I think that this is right. It is consistent with the rationale of the proper purpose rule. It also corresponds to the view which courts of equity have always taken about the exercise of powers of appointment by trustees: see Birley v Birley (1858) 25 Beav 299 , 307 (Sir John Romilly MR), Pryor v Pryor (1864) 2 De G J & S 205 , 210 (Knight Bruce LJ), Re Turner's Settled Estates (1884) 28 Ch D 205, 217, 219, Roadchef (Employee Benefits Trustees) Ltd v Hill [2014] EWHC 109 (Ch), para 130, and generally Thomas on Powers, 2nd ed (2012), paras 9.85-9.89.*"[3] [Emphasis added]

45. The unlawful interference with business and procuring a breach of contract claims are pleaded summarily (and at first blush inadequately) and can accordingly be only generously viewed as dependent upon the same facts as the unlawful means conspiracy claim. For the same reasons, the Plaintiffs have failed to satisfy me that these claims have a real prospect of success.

The balance of convenience

46. In light of my above findings, no need to consider the balance of convenience arise

[2] Reported at, *inter alia*, [2016] BCC 79; [2016] 1 BCLC 1; and [2016] 2 All ER (Comm)

[3] Reference was also made to the somewhat different "*substantial or primary purpose*" test applied by the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 82 at 834.

Summary

47. The Interim Injunction is discharged on the grounds that:

(a) it was obtained at an ex parte hearing on the basis of affidavit evidence which failed to disclose material facts and/or fairly present the merits of the case; and

(b) the Plaintiffs' case based on the evidence available at this stage has no real prospects of success and/or fails to raise a serious question to be tried.

48. I shall hear counsel as to costs.

Postscript on irreparable harm and the desirability of a commercial compromise

49. I should add that although the Defendants did not evidentially challenge the Plaintiffs' case on the risk of irreparable damage flowing from Outrider enforcing its security, I consider there was considerable force in two submissions made by Mr Hughes. Firstly I accept that this Court ought to be slow for legal policy reasons to cast doubt on the right of secured creditors to enforce their security under Cayman Islands law. Secondly, I accept that it is inherently unbelievable that Outrider would take steps which would be calamitous to its own commercial interests. After all, the Plaintiffs themselves assert that Outrider is overly enthusiastic about maximizing its commercial returns from distressed companies. As Mr Hughes hinted in reply, businessmen in situations such as this always tend to talk.

50. The Frontera Group appears to have considerable market value despite the present dispute about how best to preserve that value. The best outcome may well require a pooling of the founding directors' specialist industry and historical corporate knowledge and the hard-edged financial logic of a restructuring specialist, rather than an application of one skill-set alone. The present dispute cries out for a commercial compromise rather than a final judicial resolution.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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