**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**IN THE MATTER OF THE ESTATE OF ISRAEL IGO PERRY DECEASED**

**CAUSE NO. FSD 205 of 2017**

**BETWEEN:**

**(1) LEA LILLY PERRY**
**(2) TAMAR PERRY**

**Plaintiffs**

**and**

**(1) LOPAG TRUST REG.**
**(2) PRIVATE EQUITY SERVICES (CURACAO) NV**
**(3) FIDUCIANA VERW ALTUNGSANST ALT**
**(4) GAL GREENSPOON**
**(5) YAEL PERRY**
**(6) DAN GREENSPOON (7) RON GREENSPOON (8) MIA GREENSPOON**
**(CHILDREN, by Hagai Greenspoon, THEIR GUARDIAN AD LITUM)**
**(9) ADMINTRUST VERWALTUNGSANST ALT**

**and**

**(1) ANDREW CHILDE**
**(2) CHRISTOPHER ROWLAND**

**Third Parties**

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| **Before:** | The Hon. Mr Justice Segal |
| **Appearances:** | Ms Tracey Angus KC instructed by Guy Dilliway-Parry of Priestleys appeared on behalf of the Fifth Defendant<br><br>Mr Graeme McPherson KC instructed by Campbells LLP appeared on behalf of the Trustees |
| **Heard:** | 23 May 2023 |
| **Draft judgment circulated:** | 23 June 2023 |
| **Judgment delivered:** | 29 June 2023 |

**JUDGMENT**

**Introduction**

1. This is my judgment on the Fifth Defendant's Amended Notice of Motion (the ***ANOM***) in which she seeks (in paragraph 6 of the ANOM) a declaration that the First and Ninth Defendants (the ***Trustees***) breached the terms of a proprietary injunction made by this Court on 17 October 2017 (as subsequently amended) (the ***Injunction)*** by entering into a financing (litigation funding) agreement (the ***LFA***) with a litigation funder (the ***Funder***) on 22 June 2018 and/or by entering into any variation thereof (the Trustees entered into a deed of variation of the LFA dated 26 March 2021(the ***DOV***)). The Fifth Defendant also seeks (in paragraph 7 of the ANOM) an order pursuant to GCR O. 52 that the Trustees be fined for contempt of Court.

2. I have previously heard the Fifth Defendant's application for such a declaration made pursuant to her original Notice of Motion (the ***NOM***) dated 23 March 2022. On 23 February 2023, I handed down a judgment (the ***February Judgment***) dismissing the Fifth Defendant's application for such a declaration insofar as it was based on the ground (the ***Indemnity Ground***) that by entering the LFA the Trustees had breached the Injunction because subjecting the assets covered by the Injunction to the Trustees' right of indemnity or lien constituted encumbering or dealing with those assets in a manner prohibited by the Injunction (see [10] of the NOM). The background to the NOM and the ANOM, and the terms of the Injunction and the LFA and the DOV, can be found in the February Judgment (and the other judgments referred to therein).

3. However, in the February Judgment I noted that the Fifth Defendant had also relied, albeit somewhat belatedly, on an alternative ground (the ***Alternative Ground***) relating to the impact of clause 27.3 and schedules 3 and 4 of the LFA on certain loans made by the Trustees as trustees of the Ypresto Trust (the ***Ypresto Trustees***) to themselves in the capacity as trustees of the Citizen Trust (the ***Citizen Trustees***) and on the security granted therefor. Clause 27.3 of the LFA stipulates that the Trustees' obligations under the LFA take priority over their rights as creditors under any loans made by them as trustees of one trust to themselves as trustees of another trust so that, it was said, clause 27.3 had the effect of subordinating and thereby prejudicing the rights of the Ypresto Trustees in respect of the loans made to and the debt owed by the Citizen Trustees in breach of the Injunction. Schedules 3 and 4 of the LFA related to agreements to be entered into by the Trustees with the Funder under

which proceeds received by the Trustees from litigation or retained by the Trustees after the conclusion of litigation were first to be applied in paying sums due under the LFA and making payments to the Funder.

4. I held that the dismissal of the paragraph 6 claim based on the Indemnity Ground was without prejudice to the Fifth Defendant's right to proceed with her application for a declaration based on the Alternative Ground, subject to her amending the NOM to plead it. The order made following the delivery of the February Judgment gave the Fifth Defendant permission to amend the NOM to plead her case based on the Alternative Ground. That order also gave directions for the filing of further evidence in support by the Fifth Defendant and evidence in reply by the Trustees and for a further hearing.

5. The ANOM was filed on 1 March 2023. In support of the ANOM, the Fifth Defendant relied on her Third, Eleventh, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth and Twentieth (***D5 20***) affidavits. In opposition to the ANOM, the Trustees relied on various affidavits sworn by Mr Dominik Naeff ***(Mr Naeff)***, a board member of the First Defendant, being his Seventh (***Naeff 7***), Eighth (***Naeff 8***), Ninth, Tenth and Twelfth (***Naeff 12***) affidavits (and his Thirteenth Affidavit filed with my permission after the hearing (***Naeff 13***)) as well as affidavits sworn by Mr Klaus Boehler (***Mr Boehler***), a board member of the Ninth Defendant. Mr Naeff is a director of the First Defendant and was authorised to give evidence on behalf of the First Defendant, the Ninth Defendant and Cato Trust Reg (the other trustee of the Lake Cauma Trust). Naeff 7 and Naeff 12, and D5 20 had been filed without permission and not in accordance with the directions I had given but ultimately no objection was made to permission being given provided that all three affidavits were admitted into evidence.

6. The further hearing took place on 23 May 2023. Once again, Ms Angus KC appeared for the Fifth Defendant and Mr McPherson KC appeared for the Trustees.

**Summary of conclusions**

7. In relation to the Fifth Defendant's claim that the Trustees acted in breach of the Injunction by agreeing to the contractual subordination contained in clause 27.3 of the LFA, I have concluded (after carefully considering the parties' submissions which I have summarised below) that:

(a). that by entering into clause 27.3 of the LFA the Ypresto Trustees agreed that the debts payable to them in respect of the Loans owed by the Citizen Trustees and the Lake Cauma Trustees would only be payable after sums due to the Funder by all of them had been paid in full and amended their rights as creditors of the Citizen Trustees (secured creditors) and of the Lake Cauma Trustees.

(b). that this amendment of rights was intended to and did take effect immediately.

(c). that the Ypresto Trustees' rights under and in respect of the Loans were subject to the Injunction.

(d). that an amendment to those rights which qualified and limited the Ypresto Trustees' right to repayment of the Loans constituted a dealing with the Loans which was prohibited by the Injunction.

(e). that the terms of the Injunction prohibiting dealings with assets subject to the Injunction were clear and unambiguous and that the breach of the Injunction by amending rights under Loans subject to the Injunction was clear and obvious (where the Trustees' legal advisers could reasonably be expected to have confirmed and noticed such an amendment of substantive rights in respect of property subject to the Injunction would be or was very likely to be treated as a dealing requiring an application to Court).

(f). that the common law rule that prohibits the enforcement of contracts whose performance involves conduct that is illegal or contrary to public policy does not prevent the Trustees' conduct from constituting a breach of the Injunction.

(g). it would not be appropriate at this stage to decline to declare that the Trustees had breached the Injunction on the ground that any adverse financial impact on the Plaintiffs or the Ypresto Trustees of (or risk of financial prejudice to them resulting from) the contractual subordination and amendment of rights was likely to be *de minimis* or capable of being avoided by the Trustees. This is inappropriate where the Trustees have not filed an application to strike-out the ANOM on the ground that the alleged breach was insignificant and insubstantial and therefore should not form the basis of a claim of contempt; and where directions have been given for a two-stage process for hearing the ANOM in which there is to be a second hearing

in the event of a finding of a clear breach of the Injunction to consider the consequences of the breach and what if any fine should be imposed as a result of the breach and where at least some relevant facts have yet to be established and remain or are likely to remain in dispute.

(h). it would also be inappropriate at this stage to decline to declare that the Trustees had breached the Injunction on the ground that the Fifth Defendant is pursuing the ANOM for an improper or collateral purpose where (i) the Fifth Defendant has confirmed that at least one of the purposes of the ANOM is to draw to the Court's attention to what she considers to be serious and material breaches of the Injunction and (ii) the Trustees have not filed a strike-out application on the ground of abuse of process. But I do have a concern that the ANOM is being used to open another front in the global battle between the Trustees and the Fifth Defendant (and the Plaintiffs with whom the Fifth Defendant now appears to be reconciled or at least cooperating) at a time when the main proceedings have been concluded. I can see that the Fifth Defendant can legitimately say that it is proper for her to police the Injunction and bring what she genuinely believes to be serious breaches of this Court's orders to the Court's attention and to the attention of the Liechtenstein court. But she must be careful not to use the ANOM simply to put pressure on the Trustees and to weaponise the application to enforce this Court's orders so as to achieve a tactical advantage in the wider hostilities.

(i). it does appear to be likely that the Trustees will be able to show that there was no substantial risk of prejudice to the Plaintiffs or the Ypresto Trustees flowing from the amendment to the Ypresto Trustees' rights in respect of the Loans because it remained the case that the Loans remained capable of being and would be repaid in full. But I am not satisfied that all the facts have yet been sufficiently established in order to be able to reach a concluded view on this. The rights and position of the Plaintiffs in the event that they had been successful in the main proceedings have yet to be clearly established. One real world concern to which clause 27.3 gives rise is that circumstances may have arisen in which the Plaintiffs were successful, a Resolution Amount nonetheless became payable by the Trustees to the Funder as a result of Success in other Proceedings, the Funder sought and the Trustees were required or decided to make payment from the assets of the Citizen Trust pledged to the Ypresto Trustees and the Plaintiffs' recovery in respect of the Loans was then reduced as compared with what they would have recovered had they been able to rely on and enforce their pledges. I can see from what the Trustees have said to date that this may well not be a real concern but I do not feel comfortable on the current state of the evidence in concluding that this is so. Another real

world concern arising from clause 27.3 is that since the Trustees are trustees of different Trusts and because the discretionary beneficiaries and trustees are not identical across all the Trusts, and because the Trustees are jointly and severally liable to the Funder but have used the litigation funding to benefit different Trusts, there may be rights of indemnity and contribution under applicable law which the Trustees have to consider and which might affect the assets which they selected to use when discharging sums owed to the Funder. Once again, this may not be a material issue but in a case of multiple (foreign) trusts where the Trustees have incurred joint and several liabilities but used litigation funding for the benefit of different trusts, it at least needs to be explained.

(j). the burden of proof is, of course, on the Fifth Defendant but she has discharged that by establishing the reduction in and qualification of the rights of the Ypresto Trustees in respect of the Loans.

8. In relation to the Fifth Defendant's claim that the Trustees acted in breach of the Injunction by agreeing to procure that their external counsel (and by agreeing that they) would enter into a priorities agreement in the form set out in schedule 3 of the LFA and give irrevocable instructions to those attorneys in the form set out in schedule 4 of the LFA (once again after carefully considering the parties submissions which I have summarised below) I have concluded that:

(a). the rights acquired by the Funder under the priorities agreement that was to be entered into pursuant to the LFA are those set out in the form of agreement actually entered into by the Funder and the Trustees.

(b). the Funder and the Trustees (and the Trustees' external counsel) were not bound by the terms of the draft priorities agreement set out in schedule 3 of the LFA. Although the Funder had the right to require the Trustees to give the instructions to external counsel set out in schedule 4 of the LFA and to seek to have their external counsel give the undertakings set out in schedule 3 the Funder never exercised that right and agreed to a different form of priorities agreement being entered into. It is that agreement which should be treated as governing the rights and obligations of the Funder and the Trustees and the form of irrevocable instructions given to and accepted by external counsel as governing external counsel's obligations with respect to Proceeds.

(c). it would be wrong in these circumstances to assess the conduct of the Trustees for the purposes of a claim that they breached the Injunction by reference to the draft terms set out in schedule 3 (and the draft irrevocable instructions set out in schedule 4) of the LFA.

**The Ypresto Trust, Citizen Loan and the Citizen Pledges**

9. Evidence was given by Mr Naeff (in particular in Naeff 7, sworn on 8 August 2022) regarding the funds subject to the Injunction received by the Ypresto Trustees and as to the loans made by them to the Citizen Trustees and the security held therefor.

10. In 2015, the Ypresto Trustees (the Fifth Defendant is a discretionary beneficiary of the Ypresto Trust) had received US$40m which was derived from dividend payments made by BH06 (the ***Ypresto Dividends***). It was common ground that the Ypresto Dividends and assets and property representing the Ypresto Dividends were caught by and subject to the Injunction.

11. On 20 September 2017 the Ypresto Trustees had made payments of US$2m to the Lake Cauma Trust and US$2m to the Citizen Trust and in January 2018 the Ypresto Trustees had resolved to convert the US$2m payment to the Lake Cauma Trust into a loan (the ***LCT Loan***) and to convert the US$2m payment to the Citizen Trust into a loan, and to loan a further US$6m to the Citizen Trust (together the ***Citizen Loan***). I refer to the LCT Loan and the Citizen Loan as the ***Loans***.

12. The Ypresto Trustees borrowed US$6,028,466 from Neue Bank (the ***Neue Loan***) to fund the additional loan to the Citizen Trustees and granted security to Neue Bank in respect thereof. Mr Naeff said (see [22(e)] of Naeff 7) that the collateral charged and given to Neue Bank was "*securities held by the Ypresto Trust*" (although the Neue Bank credit agreement dated 25 January 2018 exhibited by Mr Naeff stated that the collateral was a "*Signed General Deed of Pledge and Declaration of Assignment*" dated 15 January 2018).

13. The Citizen Loan was secured by pledges dated 1 March 2018 over certain assets held by the Citizen Trust, namely shares in Solid Virgin Islands Ltd (***Solid VI***') (the ***Solid VI Pledge***) and a share (the ***EHI Share***) in European Holding Investments Inc. (***EHI***) (the ***EHI Pledge***). The Citizen Trustees granted the Solid VI Pledge and the EHI Pledge to the Ypresto Trustees. The Solid VI Pledge and the EHI Pledge were each governed by Liechtenstein law. I refer to them together as the ***Citizen Pledges***.

14. In Naeff 7 at [23] Mr Naeff said that at the time the transactions referred to in paragraphs 11-13 above were entered into the Trustees had not appreciated that the Ypresto Dividends were subject to the Injunction.

15. In September 2018 the Citizen Trust transferred its shareholding in Solid VI to the Ypresto Trust (in accordance with Mr Perry's letter of wishes and as requested by the Fifth Defendant) in consideration for a payment of US$1,635,764.90 and the Citizen Trust pledged (the ***Receivables Pledge***) certain receivables owed by Solid Real Estate and Greetnwin to the Ypresto Trust in place of the Solid VI Pledge (these receivables had previously been owed to Solid VI and had been distributed by it up to the Citizen Trust before the shares in Solid VI had been transferred to the Ypresto Trust).

16. In January 2019, the Citizen Trust repaid a significant part (totaling US$5.1m) of the Citizen Loan.

17. In Naeff 8 (sworn on 6 February 2023) Mr Naeff reviewed his evidence relating to the Loans and said as follows:

> "***Citizen Loan***
>
> *7. I set out details of the loan between the Citizen Trust and the Ypresto Trust in my second **("DN2")** and seventh affidavits **("DN7").** For the purposes of this affidavit, the following matters are relevant:*
>
> *(a) On 16 January 2018, the Citizen Trust entered into a loan agreement with the Ypresto Trust whereby the sum of $8 million (some of which had previously been advanced) was loaned by the Ypresto Trust to the Citizen Trust. This was done to assist the Trusts to meet their liabilities at a time when it was thought (wrongly) that the assets of Ypresto were not subject to the Proprietary Injunction.*
>
> *(b) The loan was secured against two assets of the Citizen Trust, namely all outstanding shares of Solid Virgin Islands Limited ("Solid VI"}; and (ii} all outstanding shares of European Holding Investment Inc ("EHI").*
>
> *(c) The loan was restructured in July 2018 for the reasons set out in DN7. The shares in Solid VI ceased to be security for the Citizen Loan which was replaced by receivables owed to the Citizen Trust from Solid Real Estate and Greetnwin (which totalled US$ 3,244,987 and €2,358,551, approximately US$ 5.8 million at current exchange rates} - see paragraphs 26 and 30 of DN7.*
>
> *(d) A substantial repayment of the loan was made on 28 and 29 January 2019, totaling US$ 5,100,000.*

*(e) The balance outstanding as at 31 December 2020 was US$ 1,393,906.38. Interest accrues on this sum at 4% per annum - see DN7 paragraphs 31 and 33.*

*8. Of the $8 million funds that were advanced under the Citizen Loan, approximately $5,057,415 remained unspent as at 5 March 2018, which is when Segal J confirmed that the Proprietary Injunction did include the historical dividends paid to the Ypresto Trust. This amount increased to approximately $5,527,911 in April 2018 following a repayment by Lopag of $470,496, which it made after the court's confirmation of 5 March 2018. The $470,496 sum had been paid towards Lopag's historic unpaid fees.*

*9. The loan amount of $5,100,000 repaid on 28 and 29 January 2019 was paid from the balance of the loan that remained unspent in the Citizen accounts."*

**Schedule 3 of the LFA and the Priorities Agreement**

18. In Naeff 8, Mr Naeff provided details of the priorities agreement entered into by the Trustees on 14 February 2019 (the ***2019 Priorities Agreement***) pursuant to the LFA. He said this:

*"The LFA and Priorities Agreement*

*13. The Trustees also entered into a Priorities Agreement on 14 February 2019 which is in the terms of Schedule 3 of the LFA (which was previously redacted). Schedule 3 has been unredacted save that the names of the counterparties remain redacted and I exhibit an unredacted copy of the Priorities Agreement at [DNA8/049], with the names of the counterparties and the policy number still redacted.*

*14. I understand that it is said by Yael Perry that this gives the Funder priority over the EHI Shares if the claim in Panama is successful and this amounts to a breach of the injunction. Again, if this is correct, I was not aware that this may amount to a breach of the terms of the Proprietary Injunction and, without waiving privilege, we were not advised that the Priorities Agreement would have this effect.*

*15. I also copy below clause 29 of the LFA (which was redacted in the copy of the LFA provided to Yael Perry and the Plaintiffs) as I am advised that this may be relevant:*

*SEVERABILITY*

*If any term or provision in this Agreement shall in whole or in part be held to any extent to be illegal or unenforceable under any enactment or rule of law, that term or provision or part shall to that extent be deemed not to form part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected.*

*16. In addition, the definitions of irrevocable instructions, Priorities Agreement and Transaction Document have been unredacted so that the Priorities Agreement can be*

*properly understood. I also confirm that Schedule 9 of the LFA includes proceedings in Panama and the Ypresto supervisory proceedings in Liechtenstein."*

**The relevant terms of the LFA**

19. Clause 27.3 of the LFA provides as follows:

> *"For the avoidance of doubt, the Claimants [and] acknowledge and agree that their obligations under this Agreement shall take priority over any loan agreements or debt instruments between a Trust and any other Trusts or any of its or their respective Affiliates."*

20. The "*Claimants*" includes the Trustees in their capacity as trustees of the "*Trusts*" which include the Citizen Trust and the Ypresto Trust.

21. Clause 1.4 of the LFA provides:

> "*The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement shall be deemed to include the Schedules*."

22. Schedule 3 to the LFA set out the terms of a "*Priorities Agreement*" that the parties to the LFA agreed should "*be entered into with External Counsel and ATE Insurer as appropriate in substantially the same form.*" I refer to the schedule 3 draft priorities agreement as the ***LFA Priorities Agreement***. The identity of "*External Counsel*" has been redacted from the copy of the LFA adduced in evidence but it appears from recital (B) to schedule 3 that it means the lawyers retained by the "*Claimants"* to act for them in the "*Proceedings.*" The names of all external counsel were listed in schedule 1 to the LFA.

23. The Trustees, the BGO Foundation, the Funder, External Counsel and the ATE Insurer were to be parties to the priority agreement which was to be entered into in the form of the LFA Priorities Agreement. Recital D stated that the parties wish to set out the "*priority order for paying the sums due to each of them from any recoveries made in prosecuting*" a claim. By [2] of schedule 3, the parties agreed that the "*Proceeds"* would be distributed in the following order of priority: first, the Funder was to be reimbursed for the sums paid out by the Funder the LFA; second, the ATE insurer was to be reimbursed for payments made pursuant to the ATE policy; thirdly, any further sums due to the Funder and the ATE Insurer were to be paid *pari passu* and fourthly the balance was to be paid to the Trustees (and the other Claimants). In the LFA, "*Proceeds"* are defined as including *"... any*

*…recoveries, judgments or other property or value awarded to, recovered by or on behalf of … the Claimants…as a result or by virtue (directly or indirectly) of the Proceedings, whether by … lawsuit… or otherwise, and includes all of the Claimants' legal and/or equitable rights, title and interest in and/or to any of the foregoing, whether in the nature of ownership, lien, security interest or otherwise…"*

24. [5] of schedule 3 contained an acknowledgement given by external counsel that they acknowledged "*that [they]will hold the Proceeds as trust property for the [parties to the priority agreement] and undertake to distribute the Proceeds as trust property strictly in accordance with [the terms of the priority agreement]*." It was therefore assumed that external counsel would be parties to such an agreement, as was contemplated in the rubric in the heading to schedule 3 which stated that the schedule 3 priorities agreement was to "*be entered into with External Counsel .. as appropriate in the same form*."

25. In [6] of schedule 3, the Parties agreed to "*do all such acts and things and execute all agreements, instruments and other documents as may reasonably be required to carry out the intent and purposes of [the LFA Priorities Agreement]*".

26. Schedule 4 to the LFA sets out the "*Irrevocable Instructions*" to be given to external counsel by the Trustees and the other Claimants. These are "*promptly to pay the [Funder] any amounts owed to the [Funder] under the [LFA]*" with "*Such payment [to] be in accordance with the [LFA] and the Priorities Agreement*." The instructions were expressed to be for the benefit of those giving them and the Funder.

**The treatment of the claim based on the Alternative Ground in the February Judgment**

27. The February Judgment dealt with the Fifth Defendant's paragraph 6 claim based on the Alternative Ground.

28. I discussed and expressed a preliminary view in the February Judgment as to the merits of the Fifth Defendant's claim based on the Alternative Ground as follows (underlining added):

*"123. <u>The Fifth Defendant</u>, as I understand it, <u>claimed that</u>, based on Global's statements, which the Trustees had not sought to rebut or deny, <u>it appeared that the effect of clause 27.3 and schedule 3 of the LFA was to affect and diminish the value to the Ypresto Trust</u>*

*of its rights (technically the rights are those of the Trustees as trustees of the Ypresto Trust) against the Citizen Trust (technically the obligations are those owed by the Trustees as trustees of the Citizen Trust) under and in respect of the Loans and the Citizen Pledges because the sums owed by the Trustees as trustees of the Citizen Trust to the Funder were to be paid before the sums owed to themselves as trustees of the Ypresto Trust under the Loans (which are secured by the Citizen Pledges). The Fifth Defendant submitted that therefore the Trustees dealt with the Loans and the Citizen Pledges in breach of the Injunction.*

*…*

*128. At the hearing, as I have explained, Mr McPherson KC only made brief submissions on the Fifth Defendant's allegation. He dealt only with the EHI Shares. I found these submissions cryptic and hard to follow (as I indicated at the hearing). He appeared to focus exclusively on the impact of the LFA on the Plaintiffs' claims, being litigated in Panama, to ownership of the EHI Shares. He said, as I understood it, that there could be no breach of the Injunction since the LFA did not affect or prejudice the Plaintiffs' rights with respect to the EHI Shares. If they succeeded in establishing in the Panama proceedings that they owned the EHI Shares, then they would obtain the shares free of any claims by the Funder (the shares not, on the evidence, having been charged to the Funder) and their position would not be affected by the fact that the Loans would only be paid to the Trustees as trustees of the Ypresto Trustees after the Trustees as Trustees of the Citizen Trust had paid sums owed by them to the Funder. If, however, the Plaintiffs failed to establish that they owned the EHI Shares then those shares were not assets which the Injunction was intended to protect and preserve and so it did not matter if their value was adversely affected by a liability to the Funder.*

*129. At no point did the Trustees deny that Global's account was accurate or that (indeed they accepted that) the Ypresto Trust's rights in respect of the Loans (and the Citizen Pledges) were subject to the Injunction.*

*130. The Trustees' response appears to miss the point being made by the Fifth Defendant. As I understood her submission, the Fifth Defendant claimed that the effect of the LFA was that the Trustees as trustees of the Citizen Trust had agreed to pay (and that the Trustees as trustees of the Ypresto Trust had agreed that the trustees of the Citizen Trust should pay) the Funder what they owed before paying what they owed to the trustees of the Ypresto Trust in respect of the Loans. The Funder would therefore be paid first by the Citizen Trust trustees (and paid first out of the proceeds of the EHI Shares) before the Ypresto Trust was paid. The Fifth Defendant says that even if the terms of the LFA did not create or give to the Funder any proprietary rights over the assets of the Citizen Trust (including the EHI Shares) or of the Ypresto Trust, they changed the rights of the Ypresto Trust trustees and the terms of the Loans (and the pledge over the EHI Shares). As I understand the argument, the Fifth Defendant says that these changes must be treated as amendments to the Loans (and the pledge of the EHI Shares) which were agreed by the Trustees both qua trustees of the Citizen Trust and trustees of the Ypresto Trust, and an amendment to the rights of the Ypresto Trust trustees which were subject to the Injunction. As such, by entering into the LFA and agreeing to these amendments, the Trustees dealt with assets subject to and in breach of the Injunction.*

131. *This seems to me to be a reasonably arguable position to take. Furthermore, it is a different point to the one raised by the Fifth Defendant when challenging the Trustees' redactions and dealt with in the August Judgment. However, in order to be able to determine the legal effect of clause 27.3 of the LFA, and whether there has been an amendment to the Loans (and the pledge over the EHI Shares) or otherwise a dealing with the Loans (and that pledge) in breach of the Injunction, the Court needs to see and be sure that it has seen the (full) wording of the clause. It is not clear to me that the Fifth Defendant is saying in D5-14 at [21] that Global has given her the precise wording of and quoted from clause 27.3 of the LFA. The Fifth Defendant referred in that paragraph to having been told that the clause stated that "payment to the [Funder] under the LFA will take priority over all existing loan agreements or debt instruments between the trusts in the trust structure" and "trust structure" is not obviously wording that would be used in the LFA (it is not a defined term and I cannot see it used elsewhere in the redacted version of the LFA that is in evidence). It is also unclear as to how schedule 3 of the LFA gives the Funder priority over Proceeds recovered in the Proceedings and what the wording of the schedule is. In these circumstances, I am not in a position to rule on the effect of either clause 27.3 or the relevant part of schedule 3. I certainly cannot conclude that there has been a clear breach to the criminal standard. I also cannot conclude that there has been a breach on the balance of probabilities.*

132. *The Fifth Defendant could, upon having been given the new information by Global, have applied for disclosure of clause 27.3 and the relevant parts of schedule 3. As I have said, the information given by Global and the argument that this disclosed a breach of the Injunction, raised a new point different from the issue on which I had ruled in the August Judgment. Prima facie, the new information and argument would have given at least arguable grounds justifying additional disclosure by the Trustees. But the Fifth Defendant did not make such an application and therefore it would be wrong for me to consider ordering further disclosure at this stage. It is a matter for the Fifth Defendant as to whether she wishes at this late stage to make such an application and whether such an application would be too late or stand any chance of success.*

133. *I would note that the Trustees have argued, and I have accepted, that there must by definition always be free non-injuncted Assets out of which (and which will be sufficient) to pay the Resolution Amount when the liability arises and payment is due. Accordingly, by assuming (upon the LFA becoming effective) an obligation (and even a contingent liability) to pay the Resolution Amount, the Trustees did not become obligated to pay (and remained prohibited from paying) the Resolution Amount out of injuncted assets; nor did they give the Funder a right to have recourse to the injuncted assets. The injuncted assets were therefore protected at least until the Trustees failed to pay the Resolution Amount to the Funder and allowed the Funder to obtain a judgment against them. Following this line of reasoning, the Trustees could no doubt say that, on the basis that the Loans (and the pledge of the EHI Shares) are subject to the Injunction and therefore not in their Control, in order for the Resolution Amount to be payable there must be other free Assets with a market value sufficient to pay the Resolution Amount so that the Trustees are not bound or required to have recourse to the Loans (and the pledge of the EHI Shares) in order to pay the Resolution Amount, so that they will be preserved for the benefit of the Plaintiffs. But, at least on the basis of the arguments made to date, it seems to me that there is a difference when considering whether there has been a breach of the Injunction between saying that (a) incurring a liability which cannot be paid by the Trustees out of injuncted assets (and which under the terms of the*

*applicable agreements the Trustees are not obligated to pay out of injuncted assets and which the applicable agreements envisage will be paid out of other assets) and which gives a Funder rights against the injuncted assets as a judgment creditor of the Trustees in the event of non-payment by the Trustees and (b) an amendment with immediate effect to a chose in action subject to the Injunction (the rights against the trustees of the Citizen Trust or under a pledge they have granted) which qualifies and subordinates the rights granted thereby. If (b) accurately reflects the effect of clause 27.3 (and/or the relevant parts of schedule 3) of the LFA, it seems to me that there has been a breach of the Injunction (at least in the absence of evidence demonstrating that the amendment and subordination can never reduce or adversely affect the value of the Loans and the pledge).”*

**The ANOM**

29. The ANOM, after having set out the relief sought including the declaration at [6] that by entering the LFA the Trustees in their capacity as the Ypresto Trustees breached the Injunction and in [7] an order pursuant to GCR O52 that the Trustees be fined for contempt, sets out the Fifth Defendant's claim based on the Alternative Ground as follows (underlining added):

> *“1. The First and Ninth Defendants have received $47,567,872 c. $50.7 million between May 2015 and May 2016 by way of dividends declared by BHO6 (“the Dividends”)*
>
> *1A. At all material times the First Defendant has been a trustee of the Trusts. The Ninth Defendant was appointed as a trustee of all the Trusts other than the Ypresto Trust on 16 February 2018. The Ninth Defendant was appointed as a trustee of the Ypresto Trust on around 20 June 2018, shortly before the date of the Financing Agreement.*
>
> *1B. In this Amended Notice of Motion, references to “the Ypresto Trustees”, “the LCT Trustees” and “the Citizen Trustees” means the persons who were trustees of the Ypresto Trust, the Lake Cauma Trust and the Citizen Trust respectively at the relevant time.*
>
> *2. Of the Dividends, it is understood that (1) c. $40 million was paid to the Ypresto Trustees held by the First Defendant and is now held by the First and Ninth Defendants as purported trustees of the Ypresto Trust to hold as part of the assets of the Ypresto Trust (“the Ypresto Dividends”). The Ypresto Dividends were paid into an investment account or accounts held by the Ypresto Trustees (“the Investment Account”).*
>
> *3. By paragraph 1(1)(ii) of the Injunction made on 17 October 2017 it was ordered that the Defendants must not in any way “dispose of, encumber or deal with any dividend or distributions in respect of such Shares [in BHO6] or any asset or property representing such dividend or distribution or the proceeds of sale of such asset or property.”*
>
> *4. The Injunction was endorsed with a penal notice.*

5. *Further, by paragraph 4(1) of the Injunction, it was ordered that "it is a contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined, or have his assets seized."*

6. *The Injunction was served upon the First and Third Defendants on 21 November 2017 and the Ninth Defendant became aware of the terms of the Injunction after its appointment as a trustee.*

7. *The Ypresto Dividends are "any dividend or distribution in respect of such Shares [in BHO6]", and as such fall within the terms of paragraph 1(1)(ii) of the Injunction; and any asset or property representing the Ypresto Dividends, or distribution or the proceeds of sale of such asset or property, likewise fall(s) within the terms of such provision.*

7A. *At all material times the assets held in the Investment Account have been assets or property representing the Ypresto Dividends and, as such, have been protected by the Injunction. The First and Ninth Defendants have known this to be the case since March 2018 (as was acknowledged in the Second Affidavit of Mr Dominik Naeff made on their behalf on 23 May 2018 ("Naeff 2")).*

7B. *On 16 January 2018 the Ypresto Trustees resolved to (i) treat $2 million previously paid from the Investment Account to the LCT Trustees as a loan ("the LCT Loan") and (ii) to treat $2 million previously paid to the Citizen Trustees from the Investment Account as a loan and to lend the Citizen Trustees a further $6 million from the Investment Account (together "the Citizen Loans").*

7C. *As at the date of the Financing Agreement, the Citizen Loan was secured by pledges granted on 1 March 2018 by the Citizen Trustees to the Ypresto Trustees over assets which formed part of the trust fund of the Citizen Trust at that time namely the Citizen Trustees' (i) shares in Solid Virgin Islands Limited ("the Solid VI Shares") and (ii) share in European Holdings Investment Inc ("the EHI Share"). The pledge granted to the Ypresto Trustees in respect of the EHI Share is referred to below as "the EHI Pledge".*

7D. *On 11 September 2018, the Citizen Trustees transferred the Solid VI Shares to the Ypresto Trustees. On 12 September 2018 the Citizen Trustees granted the Ypresto Trustees a further pledge over certain receivables payable to the Citizen Trust to secure the Citizen Loans.*

7E. *At all material times the rights of the Ypresto Trustees under the LCT Loan and the Citizen Loans (together "the Loans") and the aforementioned pledges given by the Citizen Trustees to secure the Citizen Loans (together "the Pledges") have been assets or property representing the Ypresto Dividends and, accordingly, protected by the Injunction. The First and Ninth Defendants have known this to be the case since March 2018 (as was acknowledged in Naeff 2).*

8. *Since being served with the Injunction, on 22 June 2018, the First and Ninth Defendants have purported to enter into the Financing Agreement including in their capacity as trustees of the Ypresto Trust, and have borrowed funds from Gillham LLC.*

*9. As trustees, the First and Ninth Defendants have, as a matter of law and/or pursuant to clause 14 of the Deed of Settlement of the Ypresto Trust, in respect of any properly incurred liability or expense, a right to an indemnity against or a lien over the trust assets.*

*10. So, by entering into the Financing Agreement including in their capacity as trustees of the Ypresto Trust and borrowing funds from Gillham LLC the First and Ninth Defendants are (if they assert a right to an indemnity or lien) in breach of the Injunction, and accordingly are in contempt of Court, because subjecting the assets to their right of indemnity or lien constitutes encumbering or dealing with them.*

*11. As at the date of the Financing Agreement the amount owed to the Ypresto Trustees under the LCT Loan was $2 million plus interest at 4% per annum and the amount owed to the Ypresto Trustees under the Citizen Loans was $8,000,000 plus interest at 4% per annum.*

*12. (1) Clause 27.3 of the Financing Agreement ("Clause 27") provides as follows: "For the avoidance of doubt, the Claimants and (sic) acknowledge and agree that their obligations under this Agreement shall take priority over any loan agreements or debt instruments between a Trust and any other Trusts or any of its or their respective Affiliates."*

*(2) The First and Ninth Defendants in their capacity as Ypresto Trustees, Citizen Trustees and LCT Trustees are (along with others) "the Claimants" for the purposes of the Financing Agreement.*

*(3) The Loans and the Pledges are "loan agreements or debt instruments between a Trust and any other Trusts…" for the purposes of Clause 27.3.*

*(4) Accordingly, when agreeing to Clause 27.3 the First and Ninth Defendants, as Ypresto Trustees, Citizen Trustees and LCT Trustees, intended to and did agree that their obligations to Gillham LLC under the Financing Agreement should take priority over, inter alia, their obligations to each other under the Loans and the Pledges in existence at the time of the Financing Agreement.*

*(5) In the premises, by agreeing to Clause 27.3 the First and Ninth Defendants intended to and did immediately alter the rights of the Ypresto Trustees under the Loans and the said Pledges in a manner which reduced their value.*

*(6) Accordingly, by agreeing to Clause 27.3 the First and Ninth Defendants: (a) dealt with those assets in breach of the Injunction and (b) did so with knowledge of all the facts which made their said act a breach of the Injunction.*

*13. (1) The EHI Share is the subject matter of proceedings brought by the Citizen Trustees in Panama ("the EHI Proceedings"). The EHI Proceedings are "Proceedings" and the EHI Share is "Proceeds" for the purposes of the Financing Agreement.*

*(2) By clause 1.1 of the Financing Agreement the parties to the Financing Agreement agreed that the Schedules to the Financing Agreement formed part of the Financing Agreement and should take effect as if set out in full in the body of the Financing Agreement.*

*(3) By Schedule 3 of the Financing Agreement ("the Priorities Agreement") the parties to the Financing Agreement, which included the Citizen Trustees and the Ypresto Trustees, intended to and did agree that Gillham LLC would have rights in respect of "Proceeds", including the EHI Share, in priority to, inter alia, the Ypresto Trustees as pledgees of the EHI Pledge.*

*(4) The priority rights over the EHI Share granted to Gillham LLC by the Priorities Agreement were intended to be proprietary in nature. By virtue of paragraph 5 of Schedule 3, and pursuant to irrevocable instructions which the parties to the Financing Agreement agreed should be given by, inter alia, the Citizen Trustees to the lawyers they retained in respect of the EHI Proceedings in terms of Schedule 4 of the Financing Agreement, the EHI Share was made subject to a trust to distribute the EHI Share to the Fund in priority to the Ypresto Trustees in accordance with paragraphs 2 to 4 of Schedule 3 of the Financing Agreement.*

*(5) In the premises by entering into the Priorities Agreement, the First and Ninth Defendants, intended to and did immediately alter the rights of the Ypresto Trustees as pledgees of the EHI Pledge so as to make them subordinate to the rights of the Fund under the Priorities Agreement.*

*(6) Accordingly, by agreeing to the Priorities Agreement, the First and Ninth Defendants (a) dealt with the said rights in breach of the Injunction and (b) did so with knowledge of all the relevant facts that made entering into the Priorities Agreement a breach of the Injunction."*

**The Fifth Defendant's submissions – the clause 27.3 point**

30. The Fifth Defendant argued that by entering into the LFA on terms that included clause 27.3 the Trustees had done an act prohibited by the Injunction and that such act was clearly prohibited by the Injunction so that the Trustees should be held, according to both the civil and criminal standard, to have breached the Injunction (or in the alternative that the Trustees' breach was established on the civil standard of the balance of probabilities so that the Court should make a declaration in the terms of [6] of the ANOM even though such a finding would be insufficient for the purposes of and not support an order being made under [7] of the ANOM).

31. The Fifth Defendant submitted that now that the full wording of clause 27.3 of the LFA had been disclosed it was clear that by agreeing to clause 27.3 the Trustees had agreed to subordinate the rights that the Ypresto Trustees had against the Citizen Trustees and the LCT Trustees under the Loans (and consequently also the Ypresto Trustees' rights under the Citizen Pledges) to the rights of the Funder against the Citizen Trustees and the LCT Trustees under the LFA. It was equally plain that by agreeing to clause 27.3 the Trustees had dealt with assets subject to the Injunction in breach of

the Injunction. The question of whether there had been a breach was to be determined at the date when the Trustees entered the LFA, and subsequent events were irrelevant for that purpose (although they may be relevant to sanction in the event that a breach is held to have occurred).

32. The Fifth Defendant noted that the Trustees had accepted (in their written submissions) that clause 27.3 recorded an obligation assumed by them as the Citizen Trustees and the Lake Cauma Trustees to meet their liabilities to the Funder under the LFA (in particular to pay a Resolution Amount) before they made payments under a loan agreement with trustees of another Trust so that (subject to the impact of the Injunction) if a Resolution Amount became payable to the Funder the Citizen Trustees would be under an obligation to pay that Resolution Amount to the Funder before they repaid the Citizen Loan to the Ypresto Trustees (and the Lake Cauma Trustees would be under an obligation to pay the Resolution Amount before repaying the LCT Loan to the Ypresto Trust). It followed, the Fifth Defendant submitted, that the terms of the Citizen Loan (and the LCT Loan) were to be treated as amended to the prejudice of the Ypresto Trustees and therefore that since the Loans (more precisely the Ypresto Trustee's rights under the Loans) were assets subject to the Injunction there had been a dealing with those assets and a breach of the Injunction.

33. The Fifth Defendant said that it was the amendment to the Citizen Loan (and the LCT Loan) which had adversely affected and reduced the Ypresto Trustees' rights, and which gave rise to the breach of the Injunction. The Fifth Defendant accepted that, as I had held in the February Judgment, properly interpreted the Injunction was only intended to prohibit action which would (or could) be prejudicial or damaging to the Plaintiff's proprietary rights if the Plaintiffs were successful in the proceedings. But it was sufficient, where those rights were rights against a debtor and related to the benefit of loans, that the terms of the loans were amended in a manner that qualified or reduced the creditor's rights so as to condition the creditor's right, and adversely affect the creditor's ability, to recover the loan. Clause 27.3 did this by preventing the Ypresto Trustees from enforcing their rights (and the Citizen Trustees from paying sums owing) under the Citizen Loan where sums were owing by the Citizen Trustees to the Funder under the LFA. It did not matter that the Citizen Trustees or the Ypresto Trustees would on the facts be able to pay sums owing to the Funder without interfering with or prejudicing the Citizen Trustees ability to repay the Citizen Loan (and the LCT Loan) in full. The Injunction should be understood as prohibiting action that worsened the position of the Plaintiffs and put their rights in jeopardy. The fact that at the end of the day the Loans could and would be repaid was beside the point. In any event, in this case there is no clear evidence before the Court from which the Court can infer that the giving of priority to the Funder was not and could never be

damaging to the Ypresto Trustees and through them to the Plaintiffs. At the time the LFA was entered into, the Trustees did not know the quantum of the Resolution Amount or which assets would need to be used to pay it.

34. Ms Angus KC during her oral argument said that the position was analogous to the situation where A had granted a charge to B (charge 1) and the rights of B were protected by an injunction, but A then granted another charge (charge 2) over the same property to C with priority over charge 1. She submitted that it would be no answer to a claim that charge 2 constituted a dealing with the property subject to the injunction and had devalued charge 1 for A and C to say that the charged property was sufficiently valuable to meet the secured liabilities owed to both B and C. The fact that the rights granted to the chargee might never come to be exercised was irrelevant. There was a disposition of property subject to the injunction and the rights of the party for whose benefit the injunction was granted, B, were clearly affected, subordinated to the rights of C, and put in jeopardy.

35. The position was wholly different from that arising when the Trustees had merely incurred a liability under the LFA, even where they could use assets subject to the injunction to reimburse themselves after they had paid the liability or just to pay the liability. Clause 27.3 involved a direct dealing with assets subject to the Injunction by varying the terms of the Loans.

36. The Fifth Defendant submitted that this was sufficient to establish that the Trustees were in breach of the Injunction (by reference to the civil standard of proof relevant to the declaration sought in [6] of the ANOM) and in contempt (by reference to the criminal standard of proof relevant to the order sought in [7] of the ANOM).

37. For the purpose of establishing that the Trustees were in contempt, the authorities made it clear that it must be clearly shown that the defendant's conduct was intentional and that he or she knew of all the facts which made that conduct a breach of the order. It was unnecessary to show that the defendant appreciated that his conduct did breach the order. In *Absolute Living Developments Ltd (In Liquidation) v DS7 Ltd* [2018] EWHC 1717 (Ch), Marcus Smith J had said this:

> *"**PROCEDURAL PRE-CONDITIONS IN RELATION TO THE BREACHED ORDER***
>
> *28. It is not every breach of a judgment, order or undertaking that is capable of founding an application made pursuant to CPR 81.10. There are three requirements that must be satisfied for a breached order to found the basis for an application under CPR 81.10:*

*(1) Subject to limited exceptions, the order that is said to have been breached must have been endorsed with a penal notice in the requisite form.*

*(2). The order that is said to have been breached must have been served personally on the defendant.*

*(3). The relevant order must have been served before the end of the time fixed for the doing of the relevant acts.*

*29. These requirements are all met in the present case.*

***ESTABLISHING THE CONTEMPT***

*30. Assuming these "gateway" requirements are met, the principles in establishing whether there has been a contempt and the importance of punishing that contempt are as follows:*

*(1) Of critical importance is the order that is said to have been breached. As has been seen, the order generally must bear a penal notice, must have been personally served on the defendant and must be capable of being complied with (in the sense that the time for compliance is in the future). Additionally, the order must be clear and unambiguous.*

*(2) The breach of the order must have been deliberate. This includes acting in a manner calculated to frustrate the purpose of the order. A difficult question relates to what "deliberate" means. It is not necessary that the defendant intended to breach the order, in the sense that he or she knew its terms and knew that his or her conduct was in breach of the order. It is sufficient that the defendant knew of the order and that his or her conduct in response was deliberate as opposed to inadvertent. The point was put extremely clearly by Millett J. in Spectravest Inc v. Aperknit [1988] FSR 161 at 173:*

> *"To establish contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order."*

*(3) Deliberate breach of an order, in the sense described, is very significant. It is clearly in the public interest that court orders be obeyed.*

*(4) The standard of proof, in relation to the allegation, is to the criminal standard, that is beyond all reasonable doubt."*

38. The Fifth Defendant referred to [12(5)] and [12(6)] of the ANOM and submitted that in the present case, the relevant parts of the Injunction were clear and unambiguous and that the Trustees clearly intended to enter into the LFA and give the Funder priority over the intra-Trust debt. Furthermore, the Trustees were fully aware of the facts that made their action a breach of the Injunction. Indeed,

the Fifth Defendant argued, the evidence showed that at the time the Trustees entered into the LFA, they were fully aware of and alive to the need carefully to consider the proper scope and impact of the Injunction and of the risk of being in breach if they dealt with assets derived from the Ypresto Dividends (unless they applied for and obtained a variation of the Injunction). The Fifth Defendant referred to Naeff 2, sworn in May 2018 shortly before the LFA was entered into, which dealt with and responded to allegations made by the Plaintiffs at that time that the Trustees had breached the Injunction as a result of dealings with the Ypresto Dividends. Mr Naeff had noted that the Plaintiffs had accused the Trustees of having acted in breach of the Injunction and confirmed that the Trustees had not appreciated, until March 2018 when I had indicated that the Ypresto Dividend was subject to the Injunction, that this was the case and further noted that they had complied with the Injunction thereafter. Mr Naeff explained the circumstances surrounding and the terms of the Loans and then went on to discuss the impact of the Injunction on the Trustees' access to cash and ability to pay legal and other expenses. He said as follows (underlining added):

> *"3. I note that the Plaintiffs have made a number of serious allegations of misconduct against the Trustees in which they allege both that the Trustees have misused trust funds and also that they have breached the terms of the Proprietary Injunction made by Segal J. I do not accept that there has been any misappropriation of funds by the Trustees nor have the Trustees intentionally breached any order of this (or any other) Court.*
>
> *4 At no stage did the Trustees believe that the historical dividends declared (which, as the Plaintiffs know well, have been the primary source of cash within the structure for the last several years) were subject to the terms of the injunction. It simply did not occur to us that this was intended, especially as the Plaintiffs themselves confirmed in their evidence when obtaining the injunction that they did not wish to interfere with the distribution of assets to the Ypresto Trust. Once the Court has clarified (in March) that the Proprietary Injunction did include the historical dividends paid to the Ypresto Trust, the Trustees have complied with the terms of the Injunction. If what the Trustees did in the period before the clarification by the Court is in breach of the Order, then I offer the Trustees' apologies. Steps have already been taken to reverse the position where possible. In any event, as I explain below, at no time there has been any reduction in the value of the assets held by the Ypresto Trust, which was provided with cash-equivalents in excess of any cash withdrawn.*
>
> …..
>
> *36 The Trustees have an obligation under Liechtenstein Law to defend the Trusts and the acts of the Plaintiffs in a number of jurisdictions have forced the Trustees to incur significant legal expenses. These are expenses that the Trustees must fund from the assets of the Trust in order to comply with the obligations imposed on the Trustees under Liechtenstein law.*

> 37 *The Trustees also need to meet the ongoing proper expenses of the Trusts. These include an insurance premium of approximately $58,000 for the policy insuring the London art collection, which is due for renewal on 17 May 2018, and the payment of an Annual Tax on Enveloped Dwellings of £226,950, due on the property at 39-41 South Street (the tax return was due on 30 April 2018 and the balance must be paid within 30 days to avoid penalties).*
>
> 38 *As the Plaintiffs know, the Trustees have no other source of cash available to pay the expenses over the period since the notification of the Proprietary Injunction. The transactions involving the Ypresto Trust were effected on the basis that (i) there was cash readily available in this trust; (ii) the security given would mean that there was no diminution of the value of the Ypresto Trust assets; and (iii) on the understanding and belief that these monies were not caught by the Proprietary Injunction. Had we known that this was not permissible, we would have either not entered into the loan at all or would have sought permission of the Cayman Islands Court (had we been able to fund such an application).*
>
> 39 *However, there is a fundamental problem caused by the Proprietary Injunction; which is that currently all of the cash in the various Trusts originate from (historical) dividends paid by BH06 (as the Plaintiffs well know). The Trustees need to be able to pay the expenses incurred . . defending the Trusts but would be unable to do so if the Proprietary Injunction is as farreaching as the Plaintiffs suggest (and no external financing is available for the Trustees).*
>
> 40 *The Trustees are currently exploring alternative sources of litigation funding from outside of the Trust structure, but if this is not available or permissible for whatever reason; the Trustees will be placed in serious difficulty as they are obliged to defend the Trusts but would be prevented by the Proprietary Injunction from doing so.*
>
> 41 *It is likely in any event to be necessary to seek a variation to the injunction to allow such payments to be made with appropriate safeguards. If, in the light of the clarification given by the Court on 15 March 2018 and contrary to the Trustees' previously held belief, the monies lent from the Ypresto Trust cannot be used for these purposes or to meet the costs of defending the Trusts in litigation, the Trustees would have no alternative but to seek a variation to the terms of the injunction. I should stress however, that the Trustees are actively seeking other ways of meeting their necessary litigation costs of defending the attacks on the Trusts."*

39. The Fifth Defendant argued that the Trustees' evidence (see for example Mr Boehler's Sixth Affidavit at [33(c)] and Naeff 8 at [12] where Mr Naeff had said "*without waiving privilege*" that the Trustees had not been advised that the LFA would result in a breach of the Injunction) that they did not appreciate that it would be a breach of the Injunction to give the Funder priority rights over the rights of the Ypresto Trustees was inherently incredible in the circumstances. The Fifth Defendant submitted again that Mr Naeff's credibility was put in doubt in light of the findings of the court in Delaware and that, in any event, there was an evidential dispute as to Mr Naeff's knowledge and state of mind which needed to be tested by cross-examination at the appropriate time. Furthermore,

the Fifth Defendant did not accept that simply by stating that privilege had not been waived, Mr Naeff had avoided doing so and noted that, in any event, it was no defence for a party in breach of an order to show that it acted on the basis of legal advice (citing *Pan Petroleum AJE Limited v Yinka Folawiyo Petroleum Co Ltd and others* [2017] EWCA Civ 1525).

**The Fifth Defendant – illegality not a defence**

40. As I explain below, the Trustees argued that if clause 27.3 (and schedules 3 and 4) of the LFA would require the Trustees to act in breach of the Injunction, those terms would be unenforceable by the Funder because they would be tainted by illegality (and would be severed from the rest of the LFA) so that there could be no breach of the Injunction by the Trustees.

41. The Fifth Defendant denied that illegality was a defence available to the Trustees on the ANOM. She made two arguments.

42. First, before the issue of illegality could arise, the Court needed to make a finding that the Trustees were in breach of the Injunction. A claim to set aside the relevant terms of the LFA on grounds of illegality, which would be a matter between the Funder and the Trustees and be governed by English law and subject to the arbitration clause in the LFA, would only follow (and was dependent on) a finding of breach. Illegality did not render the affected provisions void. It merely gave the affected parties the right to seek to avoid the relevant provisions. Until avoidance, the contractual term was binding. Clause 27.3 and schedules 3 and 4 were binding at the time of entry into the LFA, which was when the question of breach of the Injunction fell to be tested. Accordingly, even if there was an illegality defence available to the Trustees to a claim by the Funder made in other proceedings, that would not prevent the Trustees being in breach of the Injunction when the LFA was entered into. Were this not to be the case, Ms Angus KC said during her oral submissions, it would be impossible for entry into a contract ever to constitute a breach of an injunction.

43. Secondly, this Court is not in a position (because the Funder is not a party to the ANOM and the requisite evidence is not before the Court) to make a finding that the relevant provisions of the LFA were contrary to public policy and unenforceable and severable from the rest of the LFA. Such a finding was for a different tribunal. In order to decide whether the relevant terms of the LFA were unenforceable as being contrary to public policy and tainted by illegality required a careful assessment of the facts and the application of the factor-based approach in *Patel v Mirza* [2016]

UKSC 42. Whether the relevant provisions, if unenforceable, could be severed required a careful application by reference to proper evidence of the three criteria set out by the Supreme Court in *Egon Zehnder Ltd v Tillman* [2019] UKSC 32 (***Tillman***) (particularly the third criteria of whether the removal of the unenforceable provision would not generate a change in the overall effect of the LFA). These assessments and decisions are not straightforward and could not be made in the current proceedings and in the absence of the Funder (and the BGO Foundation) and full and relevant evidence.

**The Fifth Defendant – no abuse of process in relation to the NOM**

44. This was not a case, the Fifth Defendant submitted, where the breach could be treated as trivial and of no consequence. The Trustees had dealt with the Loans and the Citizen Pledges in a way that made them less valuable. The Trustees did not know at the time of entry into the LFA what the Resolution Amount would be or that there would be no need to have recourse to the assets of the Citizen Trust to pay the Funder. The Trustees could and should have made an application to Court before entering into the LFA for clarification as to the scope and for a variation of the Injunction. The fact that the Plaintiffs' claim had now been finally dismissed was irrelevant. The Trustees acted to prejudice the position and the rights of the Plaintiffs when they entered into the LFA and the Fifth Defendant wanted to bring the significant breach to the Court's attention and for the Trustees to be sanctioned for their misconduct. This was an entirely proper course for the Fifth Defendant to adopt. As Lady Justice Carr said in *Navigator Equities Limited and another v Deripaska* [2021] EWCA Civ 1799 at [82i)]:

> *"The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court's attention a serious (rather than purely technical) contempt. Thus a committal application can properly be brought in respect of past (and irremediable) breaches."*

45. Objection could also not be made on the ground that the Fifth Defendant not only wished to draw the Trustees' misconduct to the attention of this Court as the Court, with conduct of the proceedings commenced by the Plaintiffs, but also to the attention of the Liechtenstein court, as the court administering the Trusts. The Fifth Defendant submitted that it was legitimate (a legitimate purpose) for her to seek to establish that the Trustees had acted in breach of the Injunction for both purposes. Bringing breaches of court orders to the attention of relevant courts was entirely proper and in the interests of justice.

46. Accordingly, this was not a case in which it could be said that the claim for breach of the Injunction and contempt was being pursued for an improper or collateral purpose. In any event, the Fifth Defendant argued, it would be wrong for the Court to give any weight to the Trustees' allegations of abuse of process in circumstances where they had not applied to strike-out the ANOM and before she had been given a proper opportunity to file evidence in response to the allegations.

**The Fifth Defendant's submissions – the Citizen Pledges**

47. The Fifth Defendant submitted that by agreeing to enter the LFA Priorities Agreement the Trustees, as trustees of the Ypresto Trust and trustees of the Citizen Trust, had agreed that the Funder would have proprietary rights over the EHI Share ranking ahead of the proprietary rights of the Ypresto Trustees as pledgees. The proprietary rights arose, the Fifth Defendant said, because the EHI Share was the subject of Proceedings (in Panama) involving the Citizen Trustees and the Second Plaintiff and therefore would be treated as Proceeds under the LFA upon the conclusion of those proceedings. Proceeds were to be held on and subject to a trust for the Funder pursuant to [5] of schedule 3, and the irrevocable instructions to be granted pursuant to schedule 4, of the LFA. The EHI Share was an asset held by the Citizen Trustees who were parties to the LFA and subject to Proceedings so that once the Panama proceedings were resolved in favour of the Citizen Trustees it would be held on trust for (presumably by way of security to pay the sums owing to) the Funder and the Funder's interest was to have priority to the EHI Pledge held by the Ypresto Trustees.

48. The Fifth Defendant argued that the effect of [5] of schedule 3 and the effect of schedule 4 of the LFA was to create a specifically enforceable agreement to create a trust of the "*Proceeds*." A specifically enforceable contract to create a trust of any form of property which was capable of being the subject of a trust (which would include the Proceeds) conferred an immediate proprietary interest on the intended beneficiary of the trust. Accordingly, these provisions in the LFA conferred an immediate proprietary interest on the Funder in the "*Proceeds*" which included the Ypresto Trustees' right, title and interest in EHI as pledgees (contrary to the evidence given in Boehler 7 at [9]). It did not matter that the Trustees had subsequently varied the arrangement. The question of whether the Trustees had acted in breach of the Injunction by entering the LFA had to be judged by reference to the position at the date on which the LFA was entered into and became effective.

49. The Fifth Defendant noted that the Trustees had argued that the dispute in the Panama proceedings concerning ownership of the EHI Share (in which the Second Plaintiff claimed that she owned the

EHI Share) were unresolved. The Trustees had said that the Citizen Trustees' ownership remained in doubt and could not be established or treated as settled for the purpose of the ANOM proceedings since the Panama court had not finally determined the dispute and no final judgment had yet been delivered declaring the Citizen Trustees to be the owners. The Trustees had argued that the Court could not find them in contempt when there remained a serious doubt over whether the EHI Share was and had ever been subject to a pledge in favour of the Ypresto Trustees. The Fifth Defendant argued that this was both inconsistent with the Trustees previous position and factually incorrect.

50. At all times until Naeff 12, the Fifth Defendant said, the Trustees' evidence had been that the Citizen Trustees do own EHI, and the Second Plaintiff's claim to the contrary is not only incorrect but based on forged share certificates. When the EHI Pledge was granted in March 2018 the Citizen Trustees were aware of the Second Plaintiff's claim to own EHI. Despite this, in Naeff 2, made shortly before the LFA, Mr Naeff felt able to rely on the fact the Loans were fully secured to seek the Court's indulgence for the Trustees' previous breach of the Injunction and in Naeff 7 (made in August 2022 in order to draw what the Trustees regarded as another potential breach to the Court's attention) Mr Naeff felt able to assure the Court that the EHI Loan was "*fully secured*." As recently as February this year, Mr Naeff had reiterated to the Court that the Loans were secured by the EHI Pledge.

51. The Fifth Defendant also claimed that the proceedings in Panama had already been resolved in favour of the Citizen Trustees. All that remained were criminal complaints made in Panama. So, the Trustees were wrong to assert that there remained a dispute or doubt as to the Citizen Trustees ownership of the EHI Share.

**The Trustees' submissions – an overview**

52. The Trustees' case can be summarised as follows:

(a). the purpose of the Injunction was to preserve the assets subject to the Plaintiffs' proprietary claim so that they would be available to the Plaintiffs if they succeeded and the key question on the ANOM was whether clause 27.3 and the provisions in schedule 3 and schedule 4 of the LFA (in the case of schedule 3 and schedule 4 as given effect by the agreement subsequently entered into by and the irrevocable undertakings subsequently given to the Trustees) offended against that purpose. The Trustees submitted that they did not.

(b). the Injunction, properly construed, did not prohibit action which only *might* in the future prejudicially affect the value of rights subject to the Injunction (such as the Ypresto Trustees' rights as a secured creditor in respect of the Loans) in circumstances where the Trustees were able to avoid any such prejudice (by ensuring that sums owing to the Funder were paid without affecting the Ypresto Trustees prospects of being repaid).

(c). the Court had found in the February Judgment that under the LFA the Trustees were subject to a contingent liability which gave rise to nothing more than a purely theoretical risk to the assets of the Ypresto Trust. The rights given to the Funder under clause 27.3 and schedules 3 and 4 of the LFA were also contingent and dependent on the Trustees' contingent liability to the Funder crystallising. At the date on which the LFA was entered into the assets of the Ypresto Trust (and the Citizen Trust) remained subject only to the same theoretical risk.

(d). the Injunction, properly construed, also did not prohibit action which caused no prejudice to the Ypresto Trustees (and through them to the Plaintiffs) and which did not reduce or prejudicially affect the value of the rights subject to the Injunction. Clause 27.3 of the LFA had no adverse financial consequences for or practical effect on the position of the Ypresto Trustees. It did not in a practice worsen the position of the Ypresto Trustees or improve the position of the Funder. The Ypresto Trustees, the Citizen Trustees and the Lake Cauma Trustees were all jointly and severally liable to the Funder and the Funder could look to the assets of any of the Trusts. To that extent, the rights of the Ypresto Trustees against the Citizen Trustees were always subject to the right of the Funder to go against the assets of the Citizen Trust. But, as already noted, the Trustees retained the power to decide where payments of sums owed to the Funder came from and always had it in their power to ensure that the ability of the Citizen Trustees and the Lake Cauma Trustees to repay the Loans was not impacted.

(e). during the subsistence of the Injunction, and therefore at the time the LFA was entered into, the Ypresto Trustees' rights under and sums owing in respect of the Loans and the assets of the Citizen Trust were subject to the Injunction and protected (the Trustees argued that since the evidence indicated that the Citizen Trust's assets were subject to the Injunction and had no free assets it was arguable that the Citizen Trustees were unable to repay any sums owing in respect of the Citizen Loan without a variation of the Injunction permitting them to do so although it was clear that some repayments had been made in 2019 without objection – see Naeff 7). Clause 27.3 did not change the position.

(f). once the Injunction was discharged the position would be different. The Citizen Trustees would, if a Resolution Amount became payable, be required to pay the Funder out of Citizen Trust assets before repaying the Loans. But at that point, there could be no breach of an injunction which had gone.

(g). furthermore, the inclusion of clause 27.3 did not adversely affect the position of the Plaintiffs. While the Injunction was in place and had they been successful even after its discharge, the Plaintiffs would have had the benefit of the Loans and rights over the Citizen Trust assets (which were, as already noted, to be assumed to be subject to the Plaintiffs' proprietary claims and therefore the Injunction and therefore, if the Plaintiffs had been successful, to their proprietary rights).

(h). but if these points were not accepted and clause 27.3 would otherwise result in a breach of the Injunction, there could in fact be no such breach because the sub-clause was unenforceable by the Funder against the Trustees for reasons of public policy and would be severed from the LFA.

(i). as regards the EHI Share and the Citizen Pledges point, the Fifth Defendant was unable to prove that the EHI Share was owned by the Citizen Trust and so was unable to prove that the LFA in fact adversely affected a valuable right of the Ypresto Trust, namely its rights in respect of the EHI Pledge. Furthermore, the priority agreement actually entered into by, and the irrevocable undertakings given to, the Trustees (as contemplated by schedules 3 and 4 of the LFA) did not grant proprietary rights to the Funder and did not give rise to a breach of the Injunction. If that was wrong, these provisions would also be unenforceable by the Funder against the Trustees for reasons of public policy and would be severed from the LFA.

(j). furthermore, the Fifth Defendant's pursuit of the ANOM was an abuse of process. The ANOM was being pursued for an improper purpose. While this fact alone did not, in the absence of a motion by the Trustees to strike-out (which the Trustees reserved the right to file in due course), justify dismissal of the ANOM, it was a relevant and important factor for the Court to take into account when deciding whether to grant the Fifth Defendant's application. The pursuit of contempt proceedings when what was alleged could at most constitute a purely technical contempt, rather than something of sufficient gravity to justify the imposition of a

serious penalty, may lead not only to the applicant having to pay the respondent's costs but to the dismissal of the proceedings as an abuse of process (see *Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 (Ch) (***Sectorguard***) at [44] – [58] per Briggs J). In this case (a) the Fifth Defendant was only pursuing the NOM for the (collateral) purpose of obtaining ammunition to use in the proceedings in Liechtenstein and to persuade the Liechtenstein court to make an order removing the Trustees as trustees of the Ypresto Trust and (b) there was no risk to the Ypresto Trustees or of loss to the beneficiaries of the Ypresto Trust because it is clear that the Citizen Loan (and the LCT Loan) will very shortly (in a matter of days in all likelihood following the discharge of the Injunction) be repaid in full so that the subordination of the rights of the Ypresto Trustees against the Citizen Trustees will have had and was always contemplated to have no adverse financial impact. Indeed, the Trustees had sought to agree an early variation of the Injunction to permit the repayment of the Citizen Loan (and the LCT Loan) but the Fifth Defendant (and the Plaintiffs) refused to give their consent. There was evidence that the Fifth Defendant was not in reality, concerned about these loans not being repaid and the assets of the Ypresto Trust being diminished but wanted to rely on what was at most a technical breach by the Trustees to promote her claims in Liechtenstein.

**The Trustees' submissions – abuse of process**

53. On the issue of abuse of process the Trustees relied on the following passages in the judgment of Marcus Smith J in *Absolute Living Developments Limited v DS7 Limited and others* [2018] EWHC 1717 (Ch) (***Absolute Living***) (underlining added).

> *"35. In the present case, it is not suggested that the breach of the Inter Partes Freezing Order cannot be made out: it is not, as I have noted, contended that the breaches fall within CPR PD 16.1(1) (no reasonable ground for alleging contempt). Rather, it is said that the nature of the breaches is such that the use of the contempt jurisdiction is abusive.*
>
> *36. <u>When considering whether an allegation of contempt, which is accepted as factually well-founded, should nevertheless be struck out as an abuse of process, it is necessary to bear in mind the following</u>:*
> *(1) The contempt jurisdiction exists generally only in relation to orders that have a penal notice and that have been personally served on the defendant. The public interest in seeing such orders obeyed is, inevitably, a strong one. Since a court can be presumed not to make unnecessary orders, where an order of the court <u>remains</u> uncomplied with, it seems to me extremely difficult to say that contempt proceedings in relation to such a contempt can <u>ever</u> be said to be an abuse of process.*
>
> *(2) Where the defendant – albeit in <u>past</u> breach of the order – has now <u>complied</u> with the order or has taken steps to regularise his breach (for instance, by seeking an extension of*

*time for compliance, and apologising for the past non-compliance), that is a factor suggesting that contempt proceedings may not be necessary.*

*(3) Whether that factor is determinative depends upon the seriousness of the breach. Seriousness has two aspects to it:*

*(a) Deliberation. In [47] of Sectorguard, Briggs J. classified breaches of order into (i) serious, (ii) technical, or (iii) involuntary. "Technical" breaches are breaches where the defendant's conduct was intentional and where he knew of all the facts which made that conduct a breach of the order, but where the defendant did not appreciate that his conduct did breach the order. "Involuntary" breaches are those cases where even this element of deliberation is absent. "Serious" or "contumelious" breaches are those going beyond the technical, generally because the defendant has deliberately breached the order.*

*(b) The importance of the order in question. Some orders are more important than others. Although, of course, all orders of the court must and should be obeyed, breach of some orders can have more serious consequences than breaches of other orders. In JSC BTA Bank v. Solodchenko (No. 2) [2011] EWCA Civ 1241 at [55], Jackson L.J. emphasised the fact that any substantial breach of a freezing order was a serious matter.*

*(4) The number of breaches of an order are a relevant factor. As I have noted, CPR 81.10(3)(a) requires each act of contempt to be separately enumerated. That, however, does not mean that where there are a series of breaches, the court should not take this fact into account when considering whether the contempt application is an abuse of process.*

54. The Trustees submitted that this was at most a technical breach case. The Trustees accepted that reliance on legal advice was not a defence to a claim of contempt but where such advice has been taken and relied on in good faith, as in this case, any breach could only be technical.

55. It was clear, the Trustees submitted, that now that the Judicial Committee of the Privy Council had dismissed the Plaintiffs' appeal, the Injunction would be discharged very shortly and the Citizen Loans repaid in full. The Trustees had, in fact, previously sought the agreement of the Fifth Defendant to a variation of the Injunction to permit such repayment to be made now but the Fifth Defendant had declined to give her consent. The Liechtenstein court was currently considering complaints made by the Fifth Defendant regarding their conduct as Ypresto Trustees and in particular regarding entry into the LFA and it was clear that the Fifth Defendant wished to rely on what was at most a technical breach of the Injunction for the purpose of her "*Liechtenstein chess game*" (to use Mr McPherson KC's phrase). The Court should give considerable weight to this and decline to permit the Fifth Defendant to use this Court's contempt jurisdiction for such a collateral purpose.

**The Trustees' submissions – the standard of proof**

56. The Trustees argued that in this case the criminal standard should be applied when the Court decides whether the Trustees have acted in breach of the Injunction. The Fifth Defendant was really only seeking a determination of breach for the purpose of her application for an order that the Trustees were in contempt and should be fined. The [6] declaration served no real or independent purpose *in this jurisdiction* and the Fifth Defendant had not identified any relief that would flow from a declaration made only on the basis of a finding on the civil standard.

**The Trustees' submissions – the clause 27.3 point**

57. The Trustees accepted that clause 27.3 imposed an obligation on them to meet any liabilities owing to the Funder before they made payments under the Loans so that if and when a Resolution Amount became payable to the Funder the Citizen Trustees and the Lake Cauma Trustees would be obliged to pay the Funder before repaying the Ypresto Trustees. But they argued this obligation (a) was, as at the date of the LFA and like the obligation to pay a Resolution Amount, only contingent and therefore did not give rise to a breach of the Injunction; and (b) did not prejudice or adversely affect the position of the Ypresto Trustees (or through them the Plaintiffs).

58. The Trustees argued that clause 27.3 did not grant unconditional rights to the Funder in or over the Loans or the Pledges from the date of execution of the LFA. It simply provided that *if* the Funder obtained rights under the LFA against the Trustees (because a Resolution Amount became payable), then such rights would take priority over the rights of the Ypresto Trustees. In other words, whatever rights were in fact created by clause 27.3 they only crystallised after the Funder had become entitled to be paid (and the Trustees had become obliged to pay) a Resolution Amount under the LFA. That meant that any such rights were only contingent and that any adverse interference with the rights of the Ypresto Trustees was similarly only contingent (it was an interference that only might occur before the Injunction had been discharged).

59. Furthermore, there was no breach of the Injunction because clause 27.3 of the LFA had no practical effect on the position of the Ypresto Trustees or the Funder. It did not in a practice worsen the position of the Ypresto Trustees or improve the position of the Funder. It was not the type of conduct prohibited by the Injunction.

60. The Trustees relied on the approach taken and the findings made as to the proper construction of the Injunction in the February Judgment. They said that this approach and these findings applied equally to the ANOM. In deciding whether entry into the LFA on terms including clause 27.3 gave rise to a breach of the Injunction the Court must take into account its earlier finding that it was not enough that the Funder might in future obtain rights against assets subject to the Injunction (in the clause 27.3 context, the Funder is being given privileged access to the assets of the Citizen Trust and the Lake Cauma Trust ahead of the rights of the Ypresto Trustees). The Fifth Defendant needed to demonstrate that the Funder received improved rights by virtue of that clause immediately upon execution of the LFA and thus that the rights of the Ypresto Trustees were correspondingly blighted from the outset. The Trustees said that the Court must stand back and, as it did in the February Judgment, consider how and when the Funder might in fact ever be able under the terms of the LFA to have recourse to the assets of the Citizen Trust (and the Lake Cauma Trust) for payment of sums owed to it and actually need or wish to do so, before asking whether the inclusion of clause 27.3 in the LFA improved the Funder's position at the expense of the Ypresto Trustees. The Trustees submitted that the Funder would not be able or need to do so.

61. The Court had held in the February Judgment that the LFA gave rise to a contingent liability to pay a future debt (the Resolution Amount). It followed that any rights given to the Funder by clause 27.3 were also contingent (that is rights that might or could later crystallise before the Injunction had been discharged but might not do so) and that any adverse interference with the rights of the Ypresto Trustees resulting therefrom was similarly contingent. As the Court had found in the February Judgment (at [112-113]) the Injunction was not intended to provide protection against the Trustees assuming obligations of a type which "*could later crystallise into*" (in that case) a debt which might fall due before the Injunction had been discharged, which debt could have been paid out of free assets but which, if not paid, would give the Funder the ability (as a judgment creditor) to have recourse to assets subject to the Injunction:

> *"The natural and ordinary meaning of the words "not in any way [to] … (ii) Dispose of, encumber, or deal with" the relevant assets connotes a transfer or granting of rights to a third party not bound by the Injunction or change to the condition or terms of assets that has taken effect in such a way that the Plaintiffs' rights have been or will be prejudiced*."

62. The Trustees argued that clause 27.3 had not had the practical effect of granting the Funder greater rights of access to the assets of the Citizen Trust and the Lake Cauma Trust at the expense of the Ypresto Trustees than the Funder would have had if clause 27.3 had been excluded. The Ypresto Trustees were not financially worse off or at greater risk as a result of the inclusion of clause 27.3.

63. The Trustees accepted, as I have noted, that clause 27.3 recorded an obligation on their part to meet (subject to the effect of the Injunction) any accrued obligations they had to the Funder before they made payments under the Loans. But, they argued, save in the most contrived of situations this did not have any adverse practical consequences for the Ypresto Trustees. That was because (again, ignoring the effect of the Injunction) under the terms of the LFA a Resolution Amount was not payable unless, after payment, the Trustees would be left with assets under their Control with a market value of more than US$10m and so it would always be open to the Trustees to pay the Resolution Amount without having recourse to assets of the Citizen Trust (and so without affecting the ability of Citizen Trustees to repay the Citizen Loan or the ability of the LCT Trustees to repay the LCT Loan). If the Trustees did not pay the Resolution Amount, the Funder could then seek to obtain a judgment against them and could decide to enforce any judgment against the assets of the Citizen Trust. But the mere prospective right of the Funder as judgment creditor to access the assets of the Citizen Trust (or of the Lake Cauma Trust) was not sufficient to result in a breach of the Injunction, as the Court had held in the February Judgment. In any event, the Funder's rights against the Citizen Trustees (and the Lake Cauma Trustees) arose from other terms of the LFA and not clause 27.3. Clause 27.3 did not give the Funder rights which, absent the clause, it would not have had or improve such rights as it already had and did not diminish the rights that the Ypresto Trustees would otherwise have had.

64. The Trustees argued that even if they were wrong as to the proper construction and effect of clause 27.3 of the LFA, as just described, there was another reason why the inclusion of that clause in the LFA could and did not result in the Trustees being in breach of the Injunction. This was because the clause would, as a matter of English law as the governing law of the LFA, be unenforceable by the Funder against the Trustees if its effect was to expose the Trustees to a sanction for contempt. As such it would be a contractual term that was contrary to public policy and tainted by illegality since it involved the commission of an unlawful (criminal or quasi-criminal) act.

65. The Trustees relied on Lord Toulson's factor-based approach in *Patel v Mirza* (see above) at [101]:

> *"I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by the denial of the*

*claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality."*

66. The Trustees argued that a term that exposed a party to sanction of a penal character would be treated as being tainted by illegality for these purposes (in reliance on the judgment of Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55 (***Les Laboratoires***) at [25] where one of the examples given there is a contractual provision which infringes a "*... statutory rule enacted for the protection of the public interest and attracting civil sanctions of a penal character ...*"

67. The Trustees submitted that when the *Patel v Mirza* factors were applied in this it was clear that clause 27.3 was to be treated as unenforceable. It was difficult to see that there were competing public policies which might be rendered ineffective or less effective if clause 27.3 was not enforceable and refusing enforcement of clause 27.3 would be wholly proportionate, particularly where the Funder had previously confirmed that it had no intention (and never had any intention) of looking to assets subject to the Injunction to satisfy any liability of the Trustees while the Injunction remained in force. Furthermore, even if clause 27.3 was not a provision tainted by illegality, it was a term which (on the Fifth Defendant's case) that was injurious to the proper working of justice (since it contravened the very purpose for which the Injunction was imposed) and would be unenforceable on that ground (see *Chitty on Contracts, 33rd edition* at [18-079] – [18-113]. Ultimately, the Trustees said, the key consideration was not the degree of illegality with which a contract might be tainted, but whether relief from the consequences of that illegality should be granted in the light of the public interest in preserving the integrity of the justice system (*Mohammad Saeed v Mohammad Ibrahim* [2018] EWHC 1804 (Ch)). Such relief should and would be granted in this case.

68. If clause 27.3 was unenforceable for these reasons, it would be severed from the LFA. The Trustees relied on the decision of the Supreme Court in *Tillman* and clause 29 of the LFA which provides as follows:

*"If any term or provision in this Agreement shall in whole or in part be held to any event to be illegal or unenforceable under any enactment or rule of law, that terms or provision or part shall to that extent be deemed not to form part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected.*"

69. Clause 27.3 could be severed from the LFA without difficulty by being deleted either in its entirety or by deleting the words "*loan agreements or*" (assuming the Citizen Loan is properly characterised as a loan agreement). The blue pencil test was plainly satisfied. There was ample consideration for

the remainder of the LFA, which was an agreement for the advance of funding for permissible purposes and on permissible terms in return for repayment of the funding with a premium if certain criteria were satisfied. Deletion of Clause 27.3 did not affect the core of the bargain between the Trustees and the Funder and the character of the contract between the Trustees and the Funder was unaffected. The priorities provision in Clause 27.3 was one (very minor) peripheral provision of the LFA. It did not vary the obligation to fund, the obligation to repay, the amount repayable or the circumstances in which repayment becomes due.

**The Trustees' submissions – the Citizen Loans and the Citizen Pledges**

70. As I have already noted, the Trustees' first argument was that the Fifth Defendant was unable to prove that the EHI Share was owned by the Citizen Trust and so was unable to prove that the LFA had prejudiced or affected valuable rights of the Ypresto Trust in the EHI Share or the EHI Pledge. The Trustees relied on the state of play in, and the Second Plaintiff's position in relation to, the proceedings in Panama between the Citizen Trustees and the Second Plaintiff regarding a dispute as to the ownership of the EHI Share. In Naeff 10 (at [7]) Mr Naeff said that he had been told by the Trustees' Panamanian lawyer that "*the question of ownership of the EHI Shares is very unlikely to be finally determined by the Panamanian courts for at least 5 more years*." In Naeff 12 (at [8]-[9]), Mr Naeff said that there were five sets of proceedings before the Panama court. One of these was a civil claim and four were criminal claims. In the civil proceedings, the Second Plaintiff had obtained an injunction preventing the Trustees from exercising their rights as shareholder (in domiciling EHI to Liechtenstein) but that injunction had been discharged and the Supreme Court had recently dismissed the Second Plaintiff's appeal. In one criminal complaint, the prosecutor was considering allegations that the Second Plaintiff had used forged instruments. He reiterated that he did not expect there to be a resolution of the dispute over ownership "*for the foreseeable future*" given the slow pace of proceedings in Panama. He said that "i*t was likely to be years not months before resolution is achieved*." The Trustees noted that the Fifth Defendant in D5 20 had challenged Mr Naeff's evidence. She said had said that the civil proceedings in Panama concerning EHI were now at an end and that (at [15]):

> *"Mr Naeff says .... that there have been four criminal complaints made in Panama and that in one of these the prosecutor is considering allegations about my sister. There does not seem to be any basis for Mr Naeff's assertion (in paragraph 10 of Naeff 12) that proceedings following this complaint (or the other three complaints) will decide whether or not the EHI shares are in the Perry trust structure or whether the EHI Pledge is valuable security."*

71. The Trustees submitted that the Fifth Defendant's statement was carefully phrased to avoid addressing the question of whether the Second Plaintiff now accepted that the Citizen Trustees were the owners of the EHI Share for all purposes, and that it was important to note that the Second Plaintiff had refused to do so, despite having been asked. This refusal to accept that the Citizen Trustees were the owners of the EHI Share, rather than accept that they had won in the Panama proceedings to date, was confirmed by the statement of the Second Plaintiff's position given to the Court by Mr Dunne of Walkers, the Cayman attorneys acting for the Second Plaintiff. During the hearing Mr McPherson KC had invited Mr Dunne, who was in Court, to confirm the Second Plaintiff's position and after taking instructions Mr Dunne said as follows (underlining added):

> *"My Lord, it's slightly a more complicated answer than the yes or no I was requested by my learned friend. The question that we were asked was phrased astonishingly widely, and effectively asked us to concede for all purposes and in all jurisdictions, that the shares probably belong to the Trustees. I'm unable to give that assurance, I think I can go so far as to say that proceedings in Panama were resolved in favour of the Trustees, but we cannot give a positive answer to the question we were asked by the Trustees."*

72. The Trustees second argument was that (a) the effect of the LFA on the rights of the Ypresto Trustees in relation to the Citizen Pledges had to be judged by reference to the form of priorities agreement (the ***Final Priorities Agreement***) and irrevocable instructions (the ***Final Irrevocable Instructions***) that the Trustees had actually entered into and given rather than the LFA Priorities Agreement set out in draft in schedule 3 and the form of irrevocable undertaking set out in draft in schedule 4 of the LFA and (b) that the Final Priorities Agreement and the Final Undertaking did not grant proprietary rights to the Funder over the EHI Share or the Ypresto Trustees' rights in the EHI Pledge and only contained and confirmed the Trustees' obligation to pay sums out of Proceeds in accordance with the order of priorities set out in the Final Priorities Agreement.

73. The Trustees said that they had entered into only one Final Priorities Agreement, as was confirmed after the hearing in Naeff 13, to which the Funder and the ATE Insurer were parties with the Trustees and the BGO Foundation. The Final Priorities Agreement was in a form that was materially different from the LFA Priorities Agreement. The form of the Final Priorities Agreement was exhibited to Naeff 8. It was dated 14 February 2019.

74. In the Final Priorities Agreement, the parties agreed that all sums due to the Funder under the LFA (the DOV and other related documents) would be paid out of any Proceeds in accordance with the LFA. The Final Priorities Agreement contained the same order of priority for the distribution of

Proceeds as the LFA Priorities Agreement. But the Final Priorities Agreement did not include [5] of the LFA Priorities Agreement. As I have noted, [5] contained an acknowledgement by external counsel that they would hold the Proceeds as trust property for the parties to be distributed in accordance with the agreed order of priority. External counsel were not parties to the Final Priorities Agreement and therefore such a confirmation was inappropriate and was excluded.

75. Furthermore, while the Final Irrevocable Instructions from the Trustees to their external counsel (in respect of which the Funder was a third-party beneficiary) required counsel *inter alia* to *"… pay to the [Funder] any amounts owed to the [Funder] under the [LFA]"* in accordance with the LFA and the Final Priorities Agreement, they did not require the Proceeds to be held as trust property or refer to the creation of any trust.

76. In these circumstances, the Trustees argued, the Funder was not granted and did not obtain a proprietary right or interest in the EHI Share (or the EHI Pledge). The Fifth Defendant had claimed in reliance on the LFA Priorities Agreement, that the EHI Share was made subject to a trust to distribute it to the Fund in priority to the Ypresto Trustees and that as a result the Trustees had intended to and immediately altered the rights of the Ypresto Trustees as pledgees of the EHI Pledge so as to make them subordinate to the rights of the Funder. However, the Trustees said, the Final Priorities Agreement did not and could not have had that effect since no proprietary rights were granted to or acquired by the Funder. All that the Funder had was the rights of an unsecured creditor against the Trustees (and the BGO Foundation).

77. In addition, the Trustees submitted, while external counsel would hold funds recovered in Proceedings, they would not hold the EHI Share which was not intended to be covered by the provisions for the distribution of Proceeds by such counsel. External Counsel would never receive the EHI Share or hold the EHI Share for anyone. The LFA only obliged the Trustees to make payments in respect of Resolution Amounts and not transfer shares and the references to holding (in the LFA Priorities Agreement) and to distributing (in the LFA Priorities Agreement and the Final Priorities Agreement) Proceeds should and could only sensibly be interpreted as meaning and referring to funds and money held by the external counsel.

78. The Trustees also submitted that once again entry into the Final Priorities Agreement (or even entry into the LFA on terms including schedule 3 and schedule 4) could not constitute a dealing with the Ypresto Trustees' rights in respect of the Loans or the Citizen Pledges (or the EHI Share) since, save

in the most contrived of situations, the position of the Ypresto Trustees was not prejudiced (and the position of the Funder was not improved). Under the terms of the LFA a Resolution Amount was not payable unless, after payment, the Trustees were left with resources under their Control with a market value of more than US$10 million so that it would always be open to the Trustees to pay the Resolution Amount without having to have recourse to the assets of the Citizen Trust and so without affecting the ability of the Citizen Trustees to repay the Citizen Loan (and without the need for the Ypresto Trustees to rely on the EHI Pledge or the other Citizen Pledges and without affecting the ability of the LCT Trust to repay the LCT Loan).

**Discussion and decision**

*Did clause 27.3 constitute a breach of the Injunction? – did clause 27.3 result in an amendment to the terms of the Loans?*

79. The first issue is whether, having regard to the meaning and proper interpretation of the Injunction, the Trustees were by entering into clause 27.3 in breach of the requirement in the Injunction that they "*must not in any way ... (ii) dispose of, encumber, or deal with any dividend or distributions in respect of [the BH06 Share] or any asset or property representing such dividend or distribution or the proceeds of sale of such asset or property ...* "

80. Clause 27.3, as I have noted, was in the following terms:

> *"For the avoidance of doubt, the Claimants [and] acknowledge and agree that their obligations under this Agreement shall take priority over any loan agreements or debt instruments between a Trust and any other Trusts or any of its or their respective Affiliates."*

81. As I noted in the February Judgment (at [133]), there is in my view a difference, at least for the purpose of identifying the starting point in the legal analysis, between a claim (a) that there was a breach by reason of the Trustees incurring a liability under the LFA which might in certain circumstances result in assets subject to the Injunction being used for payment and (b) a claim that there was a breach by reason of the Trustees having amended and conditioned their rights as creditors under a loan which is itself an asset subject to the Injunction. In the latter case, an asset subject to the Injunction is directly affected and altered and there is a *prima facie* dealing with such an asset. The Court then has to consider whether the dealing is of a kind covered and prohibited by the Injunction, properly interpreted and understood and, for the purpose of exercising the contempt jurisdiction,

whether the prohibitions in the Injunction were clear and unambiguous and whether it is satisfied beyond a reasonable doubt that the breach was clear and obvious.

82. The first issue therefore is whether clause 27.3 operated as an amendment of the rights of the Ypresto Trustees as creditors of, and as against, the Citizen Trustees (and the LCT Trustees). In my view it did.

83. As I understood their case, the Trustees did not resist the proposition that clause 27.3 must be treated as having had that effect. They accepted, as I have noted, that it recorded and imposed an obligation on them (as the Citizen Trust Trustees and the Lake Cauma Trustees) to meet any obligations that they had to the Funder (that were due and payable) before they made payments under the Loans to the Ypresto Trustees. It must follow in my view that the Ypresto Trustees were no longer able to demand payment from the Citizen Trustees (and the Lake Cauma Trustees) under the Loans and that the Citizen Trustees (and Lake Cauma) Trustees were no longer under an obligation to make payment to the Ypresto Trustees (or their obligation to pay was suspended) once and while a Resolution Amount was payable and unpaid. The Trustees were parties to the LFA in their various capacities and it seems to me that they must be taken to have agreed to this as between themselves and not just with the Funder. Clause 2.1 of the LFA states that nothing in the LFA shall be construed as conflicting, fettering, or otherwise impinging on the Trustees' (and BGO's) duties under Liechtenstein law in their capacities as trustees of the Trustees but the Trustees did not argue that this or any other provision of the LFA (or DVA) prevented clause 27.3 operating as an agreement *inter se* as well as with the Funder. In my view, clause 27.3 operated immediately to amend the rights of the Ypresto Trustees and the obligation of the Citizen Trustees and Lake Cauma Trustees.

84. There was some discussion during the hearing (see the transcript at pages 123-124) as to the proper construction of the conditions imposed by clause 27.3 on the Ypresto Trustees' right to demand payment under and enforce the Loans while the LFA remained in force. I pointed out to Mr McPherson KC that it might be said that clause 27.3 was intended to prevent the Citizen Trustees (and the Lake Cauma Trustees) from repaying any Loans while the LFA remained in force and the Trustees were subject to a contingent obligation to the Funder (so that it was understood as preventing any funds moving between the Trusts and any Associate until it was clear that the Trustees ultimate liability to the Funder had crystallised and been paid). Mr McPherson KC said that he did not accept that this was the correct construction and in any event even if it was the proper meaning of the clause it could not be said to be a clear and obvious meaning. He submitted that clause 27.3 was to be

understood as only preventing the Ypresto Trustees from claiming repayment of the Loans when sums were due and owing to the Funder (for example because a Resolution Amount had fallen due).

*Even if clause 27.3 did result in an amendment to the terms of the Loans, was such an amendment sufficient to constitute a dealing under and for the purpose of the Injunction?*

85. The Trustees said that even if clause 27.3 was to be treated as technically having amended the rights of the Ypresto Trustees under the Loans (and therefore to enforce the Citizen Pledges), it did not follow that the Trustees had acted in breach of the Injunction. First, the Funder only obtained conditional or contingent rights to be paid before the Ypresto Trustees. Clause 27.3 only provided that if the Funder became entitled to be paid under the LFA then such entitlement and right would take priority over the rights of the Ypresto Trustees. The Funders' right to priority might or might not crystallise before the discharge of the Injunction. It had not crystallised on the date the LFA. The Injunction was not intended and should not be interpreted as covering such a conditional subordination of rights. Secondly, and most importantly, the subordination agreed in clause 27.3 did not in fact prejudice and could not prejudice the position and rights of the Ypresto Trustees (or through them the Plaintiffs) because it did not expand the Funder's rights or improve its ability to be paid. Clause 27.3 was therefore not the type of amendment to the Ypresto Trustees' rights that was covered or contemplated by the Injunction.

86. As regards the first argument, it seems to me that the mere fact that the Funder's priority and the subordination of the Ypresto Trustee's rights to prior payment of sums owing to the Funder was dependent on sums becoming and being due and owing to the Funder did not prevent the amendment of those rights constituting a dealing with the Loans in a manner that adversely affected the Plaintiffs' rights and was therefore a breach of the Injunction. The key issue is whether the Ypresto Trustee's rights were reduced in a manner that was material because the amendment to their rights adversely affected their ability to recover and created real risk of a reduced recovery from the Citizen (and Lake Cauma) Trustees. It is necessary to consider, in light of the amendment to the Ypresto Trustee's rights, whether, on the basis that the Trustees were going to receive funds from the Funder under the LFA, if and when a Resolution Amount (or other sums) became payable to the Funder the change to the Ypresto Trustees' rights brought about by clause 27.3 had adversely affected their ability to recover the Loans and created real risk of a reduced recovery from the Citizen (and Lake Cauma) Trustees.

87. As regards the second and main argument, I found it difficult to pin down the analysis supporting the Trustees' case, as is evident from my lengthy exchanges with Mr McPherson KC during the hearing. But I think that the Trustees' position was most clearly expressed by Mr McPherson KC during the following exchange (see the hearing transcript at pages 135-137) when I pressed him to explain why there was, in fact, no risk to the Ypresto Trustees despite there being at least an apparent risk that the Citizen Trustees might be unable to pay both the Resolution Amount and the Citizen Loan when the Resolution Amount became payable and the Funder was pressing for payment (depending on the quantum of the Resolution Amount and the location of Assets under the Trustees' Control at the relevant time and the value of the assets in the Citizen Trust) (underlining added):

| | |
|---|---|
| *Justice Segal* | *… but if there was a shortfall in the Citizen Trust, then the Ypresto Trustees [would] have to subordinate their rights to the rights of the Funder, there would be [shortfall], assuming … that the Citizen Trust didn't have sufficient assets to pay both the Funder and the Ypresto Trustees.* |
| *Mr McPherson:* | *But My Lord, the Funder can get its money from anywhere. You're hypothesising this, I'm going to suggest, slightly absurd scenario, that the Funder is going to choose the Citizen Trust and all of this is going to happen, the Citizen Trust is suddenly going to be penniless and the rest of the trust structure is not going to step in and it's going to keep its $10 million, it's going to keep it all separate and let the Citizen Trust fall away. It's the same Trustee.* |
| *Justice Segal:* | *The struggle is because we're doing this with at least one eye closed and one arm behind our backs because we don't know where the assets are. We don't have the relevant facts.* |
| *Mr McPherson:* | *Well, Yael's position is you don't need any of that, you do it from day one of the LFA.* |
| *Justice Segal:* | *All I'm saying is, if our hypothesis that there could be, and this is my real question to you, if it is possible on the evidence before the Court that the Citizen Trust may become subject to [an accrued] liability to pay … the Resolution [Amount]. And [there are] sums [payable] in respect of the Citizen Loan, if that is [a] conceivable set of facts, and the effect of 27.3 in that situation is to require the Citizen Trustees to pay the Funder, and it's conceivable that the result of that is that the Ypresto Trustees will not be able to recover the full amount of their Citizen Loan, if that is a conceivable outcome on the evidence before the Court, … how does the court then analyse the effects of the Injunction.* |
| *Mr McPherson:* | *My Lord, you don't get to you that- You are assuming-* |
| *Justice Segal:* | *your submission is -* |
| *Mr McPherson:* | *Because all of that, that long sentence of hypotheticals had at its heart,* |

> *assuming that paragraph 27.3 creates the prejudice. But you can't say that because prejudice connotes a difference of position. What was a good position has become a worse position. And it just doesn't work because the hypotheticals that you put in place exist whether or not 27.3 is in there. And the reason [for] that .. is because the scenario of a shortfall in Citizen Trust assumes an obligation to pay a Resolution Amount. And if there's an obligation to pay a Resolution Amount one of two things happens, either the Trustees choose to pay it or if they refuse to pay it, the Funder goes after the Trustees as a whole. If the Trustees pay it, then they have to pay whatever is due and there has to be at least $10 million left and they choose where to get it from…. if they choose not to pay it and the Funder goes after [them], the Funder then chooses where to get the money from. So priorities don't come into it. [The] obligations created by 27.3 don't come into it because it's always a matter of choice. And that's why there's no prejudice. What could have been a possibility does not become a greater possibility by 27.3. What was an impossibility does not become a possibility by 27.3. And that is why, even if one is right that on a strict construction of 27.3 it is a dealing with, in that it creates a form of words that on the face of it, appears to say, well, is an unconditional obligation has something put in front of it, it doesn't matter. And that's why it's not a breach of the injunction. And that's why we're having a fascinating debate about the construction of 27.3 and what it means. But actually, we need to get back and ask even if it means what it said it means, does that breach the injunction, does breach the purpose of the injunction? And that that is where I come back to. And so I'm not going to accept that even if my learned friend's position of, well, that's all that matters is right. So that's a breach of the injunction because it's not.*

88. As I understand it, Mr McPherson KC's core analysis and argument was as follows: all the Trustees were, at the date on which they entered into the LFA, jointly and severally liable under the LFA for sums contingently payable to the Funder; if and when a Resolution Amount became due and payable, all of the Trustees would have a liability to pay the full sum due; the Funder would have a claim against both the Ypresto Trustees and the Citizen Trustees (and the Lake Cauma Trustees) for the full amount owing; the Funder could therefore if not paid have recourse to the Citizen Trust's assets or the assets of the Ypresto Trust; this joint and several liability was not the result of clause 27.3; clause 27.3 did not impact in any real or material way on the position of the Ypresto Trustees because the Funder, even without that clause, already had full rights of recourse against the assets of the Citizen Trust and therefore the Ypresto Trustees' claims were in effect subject to the Citizen Trustees' liability to the Funder; critically and in any event, the Trustees at all times could control whether the Funder was paid and would always have sufficient to pay the Resolution Amount in full taking into account all assets under the Trustees' Control in the various Trusts; and in the event that the assets in the Citizen Trust were insufficient to pay both the Funder and the Ypresto Trustees, there would, by definition, be sufficient funds under the Control of and in the other Trusts which

could and would (because of the Trustees' joint and several liability) be used to pay the Funder, thereby leaving the Citizen Trustees able to repay the Citizen Loan (without the need for the Ypresto Trustees to rely on the Citizen Pledges). The Trustees say that this was the position even to the extent that clause 27.3 (and schedule 3) had the effect of subordinating the Ypresto Trustees' security interests. The Trustees were bound to have sufficient funds (taking into account the funds and assets in all of the Trusts in aggregate) to discharge the Resolution Amount and funds from other Trust assets under the Control of the Trustees could and would be used to pay the Resolution Amount and avoid any deficiency in the assets of the Citizen Trust (and the Lake Cauma Trust). The Ypresto Trustees would not need to rely on the Citizen Pledges.

89. Accordingly, the Trustees say that clause 27.3 would and could only be relevant and prejudicial to the Ypresto Trustees in a wholly unreal set of circumstances. That would be if a Resolution Amount became payable to the Funder, the assets of the Citizen Trust were insufficient to repay both the Funder and the Ypresto Trustees in full, the Trustees refused to pay the Funder (in circumstances where they were, by definition, able and liable to pay the Funder in full) from other Trust assets in their Control and the Funder chose to obtain and execute a judgment against the Citizen Trustees and the assets of the Citizen Trust. This the Trustees said was a purely theoretical risk. Since a Resolution Amount would only ever be payable in circumstances where the Trustees (following the occurrence of Success) would retain Control, after payment of the Resolution Amount, of Trust assets with a market value of at least US$10 million, by definition there had to be more assets under the Trustees' Control than their liability to pay the Funder and it followed that the Trustees collectively would be able to use assets under their Control to discharge the liability to the Funder in full. If there were insufficient assets in the Citizen Trust other assets under the Trustees' Control could and would be used.

90. The Trustees submitted that when the effect of the Injunction was taken into account, it became quite clear that the position of the Ypresto Trustees was not and could not be prejudiced by the contractual subordination in clause 27.3. While the Injunction remained in force, as I noted at [61(h)] of the February Judgment, a Resolution Amount would never be payable unless the pool of non-injuncted Assets under the Trustees Control was at least $10 million more than the Resolution Amount. The Ypresto Trustees' rights under the Loans were assets subject to the Injunction and it was likely (at least this was Mr McPherson KC's submission and apparently the Trustees' assumption) that all the assets held by the Citizen Trust (having been derived from the sums paid by the Ypresto Trustees to the Citizen Trustees out of the Ypresto Dividends) were assets subject to the Injunction. Therefore,

the amounts owing in respect of the Loans and the assets of the Citizen Trust (and the value of the BH06 share) would never be treated as being under the Control of the Trustees while the Injunction remained in force. For a Resolution Amount to be payable, there would have to be other assets which the Trustees had recovered or retained which the Trustees Controlled and therefore these assets could be used to pay the Funder without a breach of the Injunction and would be sufficient to pay the Resolution Amount and leave a surplus of such assets with a market value of at least US$10 million. The rights of the Ypresto Trustees could therefore not be prejudiced while the Injunction remained in force and clause 27.3 did not change that analysis.

91. If the Injunction was discharged because the Plaintiffs had lost, it would not matter (for determining whether the Injunction had been breached) that the Ypresto Trustees had subordinated their rights in respect of the Loans to payment of a Resolution Amount. Even if the Injunction was discharged after the Plaintiffs had been successful, the Plaintiffs would not have been adversely affected as a result of the inclusion of clause 27.3. The assets held to be owned by the Plaintiffs would not have been recovered by or under the Control of the Trustees and therefore would not trigger an obligation to pay, or be treated as assets under the Trustees' Control for the purpose of calculating, a Resolution Amount. The Plaintiffs would have been entitled to the rights of the Ypresto Trustees as secured creditors under the Loans and the Citizen Pledges, and, as I have noted, were also, the Trustees said, likely to have had proprietary claims against or proprietary rights over all the assets of the Citizen Trust (which, consistently with the Trustees' position, were likely to be binding on the Funder). Clause 27.3 could and would not have interfered with such rights. The Funder would not have been able to access or be paid out of the assets of the Citizen Trust and so the Plaintiffs, standing in the shoes of the Citizen Trustees, could not be prejudiced.

92. At [133] of the February Judgment I said this:

> *"But, at least on the basis of the arguments made to date, it seems to me that there is a difference when considering whether there has been a breach of the Injunction between saying that (a) incurring a liability which cannot be paid by the Trustees out of injuncted assets (and which under the terms of the applicable agreements the Trustees are not obligated to pay out of injuncted assets and which the applicable agreements envisage will be paid out of other assets) and which gives a Funder rights against the injuncted assets as a judgment creditor of the Trustees in the event of non-payment by the Trustees and (b) an amendment with immediate effect to a chose in action subject to the Injunction (the rights against the trustees of the Citizen Trust or under a pledge they have granted) which qualifies and subordinates the rights granted thereby. If (b) accurately reflects the effect of clause 27.3 (and/or the relevant parts of schedule 3) of the LFA, it seems to me that there has been a breach of the Injunction (at least in the*

*absence of evidence demonstrating that the amendment and subordination can never reduce or adversely affect the value of the Loans and the pledge).*"

93. As I have held, even though clause 27.3 does not say so explicitly, it must follow from the agreement by each of the Citizen Trustees, the Lake Cauma Trustees and the Ypresto Trustees with the Funder and *inter se* that the Citizen Trustees and the Lake Cauma Trustees would discharge any liabilities to the Funder (that were due and payable) before they made payments under the Loans to the Ypresto Trustees, that the Ypresto Trustees' rights and the Citizen Trustees' and the Lake Cauma Trustees' obligations were varied. This is in my view a *prima facie* dealing with the Ypresto Trustees' rights under the Loans (an asset subject to the Injunction) and a breach of the Injunction.

94. The Trustees say that despite this the effect of the variation was *de minimis* and had no financial impact so that as a matter of construction clause 27.3 was not the type of dealing intended to be prohibited by the Injunction.

95. On the construction point, while I see the force of the Trustees' case that clause 27.3 is to be treated in fact as having had no adverse financial impact on the Ypresto Trustees, it seems to me that the Injunction properly interpreted is to be understood as prohibiting amendments to a creditor's substantive rights under a loan (a chose in action) which rights are caught by the Injunction, where the amendments reduce or qualify those rights and that it is only amendments which have no effect on the substantive rights of the creditor (for example an amendment to a notice clause or a provision dealing with repayment mechanics) which are to be treated as outside the scope of the Injunction.

96. Where the benefit of a loan is subject to an injunction (on the basis that the claimant may have a right to the benefit of the loan and stand in the shoes of the relevant creditor) an amendment which reduces or qualifies the substantive rights of the creditor in respect of the loan (in particular the creditors right to and relating to repayment) results in material prejudice to the rights and position of the claimant. It seems to me that this is precisely the kind of act which constitutes a dealing with the rights under the loan and which the Injunction was intended to prevent in order to preserve the status quo and to protect the claimant. The Injunction was designed to prevent direct dealings with assets within its scope so as to preserve them as is for the benefit of the Plaintiffs. It constructed a ring fence around the assets for that purpose. Where the Trustees wished to amend rights caught by the Injunction but considered that such an amendment would be unobjectionable because the position of the Plaintiffs would and could not be prejudiced in practice, they needed to apply to the Court for a variation of

the Injunction on notice to the Plaintiffs and the other parties and adduce the relevant evidence to support their case.

97. As I have said, this is a different situation from that arising on the NOM where the alleged breach involved no direct dealing with an asset (including rights) subject to the Injunction. The alleged breach involved only an indirect dealing by the assumption of contingent liabilities that might in certain circumstances result in a payment out of those assets (either pursuant to the Trustees' right of indemnity or lien or the execution of a judgment obtained by the Trustees against the Trustees). I explained the position as follows in the February Judgment (underlining added):

> "*83. ……. The Trustees cannot enforce their right of indemnity or lien since that would clearly be prohibited by the Injunction (as doing so would involve disposing of and dealing with the injuncted assets) and in my view additional wording would need to be included in the Injunction in order to capture action taken by the Trustees which might permit a third party to obtain and enforce a judgment against the Trustees and thereby as a judgment creditor of the Trustees have access to the injuncted assets in circumstances where the Trustees are able (having regard to the terms of the LFA) to prevent the third party from acquiring such a right and thereby prevent any dissipation of or the creation of rights against the injuncted assets.*
>
> *84. It is important to ask whether the protection which the Injunction was intended to provide (having regard to the terms used and the relevant context) required that the Trustees be prevented from entering into a litigation funding agreement (on the terms of the LFA):*
>
> *(a). the purpose of the Injunction was to preserve the assets subject to the Plaintiffs' proprietary claims so that they would be available to the Plaintiffs in the event that they were successful.*
>
> *(b). the language used in the Injunction (disposal, encumbrance or dealing) refers (in the case of a disposition or encumbrance) to an act which involves (gives rise to) a transfer of the injuncted assets or a transfer (or the granting or creation including by way of charge) of rights in, over or to those assets (whether absolutely or by way of security) or (in the case of a dealing) some use of or change to the assets (or the rights attaching to them) in a manner that would prejudicially affect the Plaintiffs' rights to them (I would note that I the parties chose to cite only one authority on the meaning of "dealing" and save for Ablyzaov I was not directed to any case law on the interpretation of freezing injunctions and no cases on the interpretation of proprietary inunctions were relied on).*
>
> *(c). the transfer of the assets (or of rights in, over or to them), the granting or creation of rights in, over or to the assets, or the prejudicial use of or change to the assets must have occurred and taken effect. It can have taken effect where a third party (not bound by the Injunction) has become entitled to the assets (or rights in, over or to them) in the sense that the third party has taken a transfer of, been granted*

*rights over or been party to a use or change of the assets, or where the third party has been granted an enforceable right (i) to have the assets transferred to it subsequently, or (ii) to rights in, over or to the assets in the future or (iii) to them or to use or change them.*

*(d). in the present case the Trustees' prospective right to enforce its indemnity and lien in respect of trust assets and the Funder's potential future rights as a judgment creditor of the Trustees are insufficient to give rise to a breach of the Injunction. The enforcement of the right of indemnity and lien would of itself clearly be a breach of the Injunction. The injuncted assets can be and will be preserved without the need to interpret the Injunction as prohibiting and applying to the earlier act of incurring a liability (or entering into an agreement which may result in a liability being incurred which is) covered by the indemnity and lien. Furthermore, the Funder's rights against the injuncted assets has not arisen and the Funder has not become entitled to rights against the injuncted assets at the time of and by reason of the Trustees' entry into (or even the performance of) the LFA. The Funder does not, on the LFA coming into force or it being performed, have any right to go against injuncted assets (even a contingent right). There is also an issue, not explored by the parties, as to whether the Funder could be liable for aiding and abetting a breach of the Injunction.*

*(e). in my view, the Injunction did not and was not intended to prevent the Trustees incurring a liability (or entering into a contractual obligation that was capable of and would in the event that certain conditions were satisfied become a liability) which, even though it may arise and become payable before the Injunction was discharged (i) they were not permitted to pay out of the injuncted assets (because the Injunction prohibited that) and (b) which could only be enforced by the Funder against, and would only result in the Funder having rights against, the injuncted assets upon the occurrence of subsequent events which were not required by the terms of the LFA and may never happen, namely if the Trustees subsequently failed to pay the liability (out of assets not subject to the Injunction) and the Funder acquired the rights of a judgment creditor of the Trustee.*

*(f). the Fifth Defendant goes too far when she asserts that the Injunction prohibited any action by the Trustees which resulted in there being a risk of dissipation of the injuncted assets, in particular a risk that those assets could subsequently be subject to a process of execution of a judgment by a third party. A mere risk of dissipation is different from an act which takes effect so as to result in a disposition of or the granting of rights over or to (or changes to) the assets (even rights exercisable in the future) and, in order to be covered, would need additional wording in the Injunction. I note that the Injunction did not include the words used in the standard freezing injunction (see Ablyazov) prohibiting the injuncted party from "diminishing the value" of his/her assets but even that language requires an act which can be said to have effect so as immediately and irrevocably to diminish the value of the assets concerned, rather than to give rise to a risk of diminishment in the future."*

98. Clause 27.3 by contrast resulted in a "*change to the assets [caught by the Injunction] (or the rights attaching to them) in a manner that would prejudicially affect the Plaintiffs' rights to them."* The

alteration and reduction of substantive rights constituted and resulted in such a change. To my mind, the fact that it remained within the Trustees' power to pay the Resolution Amount in full and avoid the Funder being paid out of the assets of the Citizen Trust and the Lake Cauma Trust in a manner that was prejudicial to the Ypresto Trustees goes to the question of the seriousness and significance of the breach and not whether there was a breach in the first place. This, as I have said, is a result of considering the purpose of the Injunction which was establish a Court controlled ring-fence around the assets within its scope. For this regime to work, it is important that the Injunction be interpreted as prohibiting direct access and changes to assets caught by the Injunction even where such access and changes may be benign and justifiable since it for the Court to decide, following an application for relief on notice to the other parties, whether the access and changes are in fact appropriate and do not put the Plaintiffs at risk (or properly balance the parties' rights and risks). The Injunction needs to be construed so as trigger the need for such an application where there is a direct access to and alteration of assets and rights caught by the Injunction. Merely incurring a contingent liability, however, which does not immediately create rights over assets or change the rights subject to the Injunction is different since the Injunction continues to operate to prevent any subsequent access to or amendment of rights (as I explained in the February Judgment).

99. This is not, it must be conceded, a case of a transfer of property or funds subject to an injunction, which can be said to be the more normal context for a claim for a breach of a proprietary or freezing injunction. This case involves an amendment to rights under a loan (a chose in action). It must also be conceded that no authority dealing with such an amendment as a breach of an injunction has been cited to me. But as matter of principle and of the proper construction of the Injunction (having regard to its purpose as a proprietary injunction) it seems to me clear that the rights under the Loans are property subject to the Injunction and that the prohibition on a dealing was not confined to transfers (whether absolutely or by security) of those rights. The value of a chose in action can be seriously affected in other ways and an injunction whose purpose is protect the potential rights of parties in the chose of action must be taken, as I held in the February Judgment, when imposing a prohibition on dealings (in addition to dispositions and encumbrances) to prohibit more than such transfers. I note that there are cases confirming (unsurprisingly) that assets in injunctions similar to the Injunction include choses in action so that if a defendant is himself proceeding against a third party then he cannot settle that claim without the permission of the court because a settlement would involve a disposition of an asset (see *Normid Housing Association Ltd v Ralphs and Mansell (No.2)* [1989] 1 Lloyd's Rep. 274 – but this was not a case cited to me by the parties). I also note that the Trustees

have not challenged my findings regarding the scope of the Injunction and the meaning of "*deal*" in the Injunction.

100. While the rights and obligations that are affected are rights and obligations between the Trustees, (being the reduction and qualification of the Ypresto Trustees' rights) that reduction and qualification is for the benefit of and may be enforced by a third party, namely the Funder. Furthermore, the Ypresto Trustees, the Citizen Trustees and the Lake Cauma Trustees cannot be treated as in effect one person and in the same position for all purposes since they have different constituencies and potential beneficiaries (so that it may be necessary to consider the separate position of the different Trustees and claims for contribution or indemnity as between them, although this is an issue which has not be canvassed to date and on which there is no Liechtenstein law evidence).

*Was the breach clear and obvious?*

101. The Fifth Defendant has the burden of showing (in order to establish that the Trustees were in contempt and to obtain the relief sought in [7] of the ANOM) that the conduct complained of was clearly an act of the type which was prohibited by the Injunction. At [17] of the February Judgment I said this (underlining added):

> *"There was no substantial dispute between the parties as to what was meant by proving a breach to the criminal standard. The breach must be clear (see the judgment of Proudman J in FW Farnsworth v Lacy [2013] EWHC 3487 (Ch) at [17]). In my view, this means that the conduct complained of must clearly be an act of the type which is prohibited by the Injunction. If there is an ambiguity or uncertainty as to the meaning of the terms used in the Injunction, the Court must determine the correct interpretation of those terms and whether the act complained of was clearly within the scope of the prohibition as so interpreted."*

102. In *Cuadrilla Bowland v Persons Unknown [2020] EWCA Civ 9; [2020] 4 W.L.R. 29* Lord Justice Leggatt (as he then was) in the English Court of Appeal said as follows (underlining added):

> *23. It was common ground at that hearing that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see FW Farnsworth Ltd v Lacy [2013] EWHC 3487 (Ch), para 20. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach*

…

54. *There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".*

55. *A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown",, it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.*

56. *All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.*

57. *It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another….*

103. The Trustees did not argue in their written submissions that it was not clear and obvious that the Injunction prohibited them from entering into a contractual subordination provision such as clause 27.3. They did however, as I have already noted, emphasise that the Court had to be satisfied to the criminal standard that they had acted in breach of the Injunction (for the purpose of making an order

in the form sought in [7] of the ANOM which they said was the only form of relief that the Fifth Defendant really sought). As I have also noted, Mr McPherson KC did argue during his oral submissions that the interpretation of clause 27.3 that I had suggested was one plausible construction, namely that intra-Trust loans could not be repaid until it was clear that no further sums would become payable to the Funder, was not a clear and obvious meaning to be given to the clause.

104. As the extracts from the February Judgment and the judgment of Lord Justice Leggatt in *Cuadrilla* make clear, in order to hold the Trustees in contempt by reason of agreeing to the contractual subordination in clause 27.3 of the LFA the Court must be satisfied that the Fifth Defendant has established beyond reasonable doubt that (a) someone acting and taking the relevant decisions on behalf of the Trustees had notice of the Injunction and did an act prohibited by it, that is dealt with the Ypresto Trustees' substantive rights under Loans in a prejudicial manner (the Trustees did not dispute that they were liable as a result of the decision to enter into the LFA taken on their behalf by one or more of their officers or that the Loans were property representing the Ypresto Dividends, which is not in dispute); (b) the Trustees had intended to do enter into the LFA on terms including clause 27.3 and to agree to the contractual subordination contained therein (the Trustees did not dispute that this was the case) and (c) the Trustees had knowledge of all the facts which would make agreeing to the contractual subordination a breach of the Injunction (once again the Trustees did not dispute that they had the requisite knowledge even though Mr Naeff and Mr Boehler say that they did not appreciate and were not advised by the Trustees' legal advisers that agreeing to the contractual subordination in clause 27.3 was prohibited by the Injunction).

105. Since I have decided that on the proper construction of the LFA clause 27.3 resulted in an amendment of the rights of the Ypresto Trustees under the Loans and that on the proper construction of the Injunction such an amendment constituted a dealing with those rights and since it is accepted that these rights were subject to the Injunction, it follows that the Trustees breached the Injunction by agreeing to clause 27.3.

106. It seems to me that the relevant terms of the Injunction are clear. The prohibition of a dealing with the assets subject to the Injunction is a standard term used in proprietary and freezing injunctions which is well understood by legal advisers. It is a deliberately and appropriately broad term designed to capture a wide range of actions that will prejudice the claimant. It is, I accept, a term which will give rise to some borderline cases but as Lord Justice Leggatt said in *Cuadrilla* some degree of

imprecision is inevitable. This is a case in which the Trustees could be expected to, and the evidence shows they did, obtain legal advice on the meaning of the Injunction.

107. It also seems to me that the Injunction clearly prohibited amendments to rights subject to the Injunction. In my view, it should have been clear to the Trustees' legal advisers that a contractual subordination provision in the form of clause 27.3 in an agreement to which all the Trustees of the various Trusts were parties would have the effect of amending the rights of the Ypresto Trustees under the Loans and that an amendment of rights which were subject to the Injunction would constitute a dealing with those rights.

108. I can see that it could be argued that it was not clear and obvious that conduct by the Trustees short of transfers or payments away or the granting of proprietary rights over assets subject to the Injunction would breach the Injunction. But such a view would be wholly unreasonable in light of the drafting of the Injunction and the reference to dealing in addition to disposition and incumbrance. It could also be argued that because clause 27.3 does not explicitly refer to an amendment of the Ypresto Trustees' rights under the Loans it was not clear and obvious that it resulted in such an amendment and in consequence a dealing with those rights. I carefully considered this point. But in my view the process of legal reasoning involved in reaching the conclusion that there was an amendment and therefore a dealing (which I have just summarised) was straightforward and one which the Trustees' legal advisers can reasonably be expected to have reached without difficulty. I can also see that the Trustees' legal advisers might (reflecting the submissions made by the Trustees as to how they viewed and view clause 27.3) have regarded clause 27.3 as a relatively unimportant (and standard) provision which was ancillary to the incurrence by the Trustees of the liabilities to the Funder and which did not have a material adverse impact on the financial position of the Ypresto Trustees. But even if this was the case, it does not obviate the need for a proper legal analysis of the effect of clause 27.3 or show that the conclusion that the clause resulted (or at least was very likely to constitute) a dealing with the Loans was not obvious and clear. Furthermore, and importantly, the Trustees have not relied on arguments to this effect.

109. The evidence shows, as the Fifth Defendant submitted, that the Trustees were fully aware of the potential impact of the Injunction on the litigation funding they were considering. Naeff 2 shows that immediately before the LFA was entered into the Trustees had been forced to acknowledge (what they said and I accepted was) an inadvertent breach of the Injunction resulting from the making of the Loans by the Ypresto Trustees out of the Ypresto Dividends in the first place. They had, Mr Naeff

said, taken steps to ensure that the Ypresto Trustees had received back "*cash equivalents*" with a value above the amounts paid away. This situation certainly highlighted the importance of preserving and protecting the value of the assets of the Ypresto Trust. Naeff 2 also shows that the Trustees were considering, with legal advice, whether obtaining litigation funding was permissible and whether an application to Court for a variation of the Injunction was needed.

*Have the Trustees established that clause 27.3 had no or only a limited financial effect on the position of the Ypresto Trustees (and the Plaintiffs) so that the breach of the Injunction must be treated as purely technical and not sufficiently significant to justify the imposition of a serious penalty or a further hearing?*

110. The Trustees argued that clause 27.3 did not have, and could never have had, a material or real adverse effect on the position of the Ypresto Trustees or the Plaintiffs. They submitted, as I have noted, that as a result the amendments to the Loans flowing from that clause could not be the kind of amendments which the Injunction was intended to cover. I have rejected that submission. But the Trustees also say, as I understand their case, that even if they are wrong on this construction point, nonetheless the Court can and should at this stage decide that the breach was so inconsequential that it would be wrong to proceed further with the ANOM. I do not accept that this is the right approach.

111. I can see that it can be said that the financial effect on and risk to the Ypresto Trustees of including clause 27.3 in the LFA was very limited. First, the Trustees collectively retained and were likely (and perhaps even required) to exercise the power to ensure that the Citizen Trustees and the Lake Cauma Trustees remained able to (and did) pay the Loans (because they could ensure that the Funder was paid in such a way that left the Citizen Trustees and the Lake Cauma Trustees with sufficient assets to repay the Loans and because the Citizen Trustees, the Lake Cauma Trustees and the Ypresto Trustees would wish and were bound to ensure that intra-trust debts were properly paid in full). Secondly, since all the Trustees of the various Trusts were equally liable to pay sums due to the Funder payment of the Funder by the Citizen Trustees and the Lake Cauma Trustees would benefit the Ypresto Trustees.

112. I can see that the following propositions and points are at this stage at least arguable:

(a). as a result of clause 27.3 the Ypresto Trustees only lost the right to compete with the Funder as creditors of the Citizen Trust and of the Lake Cauma Trust. Without the subordination contained in clause 27.3, the Ypresto Trustees would have been first ranking secured creditors of the Citizen Trustees with security interests in the EHI Share (if it proved to be owned by

the Citizen Trust) and in certain receivables, and would rank equally with the Funder as creditors of the Lake Cauma Trustees and for their unsecured claims against the Citizen Trustees. By reason of clause 27.3 (and of schedule 3 and 4 of the LFA and the Final Priorities Agreement and Final Irrevocable Undertaking), the Ypresto Trustees in effect ranked after the Funder and could only obtain repayment of the Loans once the Funder had been paid all that was owed to it. But since the Ypresto Trustees, the Citizen Trustees and the Lake Cauma Trustees were jointly and severally liable for sums due to the Funder, the Ypresto Trustees would also benefit from any recovery made by the Funder from the Citizen Trustees and the Lake Cauma Trustees. Any recovery made by the Funder would reduce *pro tanto* the liabilities of the Ypresto Trustees to the Funder. If clause 27.3 had not been included in the LFA, the Ypresto Trustees would have been able to enforce and recover under the Citizen Pledges and claim as unsecured creditors against the Citizen Trustees and the Lake Cauma Trustees in competition with the Funder. But any repayments received, or recoveries made by the Ypresto Trustees out of the assets of the Citizen Trust and the Lake Cauma Trust at the expense of the Funder would result in the Funder being owed a higher amount than it would otherwise have been in the absence of such competition and in the Ypresto Trustees having a correspondingly higher residual liability to the Funder.

(b). the subordination effected by clause 27.3 was ancillary to the assumption by the Trustees on behalf of all the Trusts of a joint and several liability to the Funder. If incurring the liabilities to the Funder under the LFA did not constitute a breach of the Injunction, it would be odd if a term agreed as an incident of the incurrence of such collective obligations (and designed to reflect the fact that the Funder as the external creditor of all the jointly liable Trustees was entitled to be paid those liabilities without being in competition with claims owed to insiders, namely the Trustees) was treated as giving rise to serious sanctions for a breach.

(c). the Trustees, being trustees of all the Trusts, retained the ability to determine from which Trust assets a Resolution Amount should be paid and the drafting of the LFA ensured that the Trustees collectively will always have sufficient assets under their Control from which to pay a Resolution Amount in full with a surplus of at least US10 million. The have the right under the LFA to pay the Resolution Amount (out of Proceeds) from such sources and Trust assets as they select and have the power as Trustees of all the Trusts to manage the Trust assets in such manner they consider to be appropriate in accordance with their duties as trustees of each separate trust (subject to taking into account any rights of contribution or indemnity that may

arise as between the trusts). Clause 2.1.2 of the LFA states that nothing in the LFA is to be construed as conflicting with or impinging on the Trustees' duties under Liechtenstein law.

(d). the Plaintiffs also would and could not have been adversely affected if they had won their case by the inclusion of clause 27.3. They would have had proprietary rights in respect of the Ypresto Trustees' rights under the Loans (and the Citizen Pledges). They were likely also to have had proprietary rights in respect of the assets of the Citizen Trust and of the Lake Cauma Trust derived from the funds advanced out of the Ypresto Dividends. Even though a win by the Plaintiffs in the main proceedings would not have prevented some sums (and a Resolution Amount) becoming payable to the Funder (as a result of Success in other Proceedings, for example as a result of the Citizen Trustees establishing that they own the EHI Share) the sums involved would have been much smaller (because the assets successfully claimed by the Plaintiffs in the main proceedings would not have been under the Trustees' Control and therefore would have been excluded from the calculation of the Resolution Amount) and the Plaintiffs could still have asserted their proprietary rights to the assets of the Citizen Trust (because of their right to trace into those assets to the extent of the funds advanced out of the Ypresto Dividends) ahead of the unsecured claims of the Funder (assuming that the Fifth Defendant was wrong that schedule 3 and schedule 4 of the LFA gave the Funder proprietary rights over the EHI Share or the EHI Pledge). In addition, the Trustees would still have had sufficient assets to pay the Resolution Amount and retain a surplus of US$10 million, which on the face of it would be sufficient to repay the Loans.

113. But in my view, it would be wrong to conclude at this stage that it has been established that the Trustees' conduct could not and does not merit more than a nominal sanction or no penalty at all:

(a). first, that is because the procedural directions given for dealing with the ANOM have established that all issues and the filing of evidence relevant to the consequences of a breach of the Injunction are to be dealt with in a second and subsequent hearing. It seems to me that much of what the Trustees have said in their defence of the ANOM to date has dealt with the consequences of the breach alleged by the Fifth Defendant. They have in claimed that they have only inadvertently breached the Injunction and that the breach has not caused and could never have caused any prejudice. These are matters for consideration and the filing of further evidence at the second stage.

(b). second, the Trustees have suggested that the nature of the breach is such that there is no need and it was unreasonable of the Fifth Defendant to invoke the contempt jurisdiction. But as the Fifth Defendant submitted and I think the Trustees accepted, what is in substance a claim that the ANOM is an abuse of process requires an application to strike-out on that ground which the Trustees have not (yet) made.

(c). thirdly, in order to be sure that the Court is making proper findings and proper decisions as to the real world impact of the contractual subordination effected by clause 27.3 the Court needs to have and to be able to assess all the relevant facts. The Court needs to see whether the Trustees can rebut the presumption of prejudice flowing from a reduction and qualification of the rights of the Ypresto Trustees by demonstrating that there really are no circumstances in which the Plaintiffs or the Ypresto Trustees might have been prejudiced or any real risk of prejudice. Various issues of fact may impact on this. The Trustees say that the Plaintiffs must be treated as having proprietary rights over the sums advanced by way of loan by the Ypresto Trustees to the Citizen Trustees and the Lake Cauma which would rank ahead of the rights of the Funder and on the face of it this appears to be persuasive. But it is not self-evident and while the Funder has indicated in correspondence that it had and has no intention to seek repayment out of assets subject to the Injunction it has not expressed any view on this issue. The Trustees have also majored on their power (and complete discretion) to apply any assets of any Trust in paying a Resolution Amount but it has not been shown that this really is an unfettered power where the funds advanced by the Funder will have been used in different proceedings for the benefit of different Trusts and where recoveries are made in respect of assets of different Trusts so that, at least in principle, the interests of different Trusts may conflict or there may be rights of contribution or indemnity that might have an impact in how the Trustees can and should deal with the Trust assets. I am not at this point saying that this is a real issue but it seems to me that it is one that needs to be shown to be of no relevance. This impacts on the Trustees' repeated point that the definition of the Resolution Amount in the LFA means that they collectively will always have surplus assets of at least US$10 million so that their collective liability to the Funder can never result in the Trusts collectively having insufficient assets to pay the Funder (or the Trusts being made insolvent by reason of the liability to the Funder). I have accepted that this is the correct interpretation of the LFA but its impact and implications for the various Trusts and the Plaintiffs need to be demonstrated by evidence as to the location of relevant assets (recovered or preserved) to show how the Resolution Amount can and will in fact be paid. I appreciate that the Trustees (or more

precisely Mr McPherson KC) have found it frustrating that the Court has on occasions been unable to see immediately or accept without more that the Trustees' control of all the relevant Trust assets automatically results in no risk to the Ypresto Trustees or the Plaintiffs but without more evidence (in a case where there have been redactions in documents and as yet limited information regarding the assets out of which the Resolution Amount will be paid) or the familiarity with the background and operation of the LFA which the Trustees have, the Court simply cannot be sure that it has the full or at least an adequate picture.

114. Having said that, I would say that the Trustees have made out a strong *prima facie* case that the financial impact of clause 27.3 on and the real world risk created by the contractual subordination effected by that clause to both the Ypresto Trustees and the Plaintiffs was small and I also acknowledge that the Trustees consider that they are now able, and wish and intend as soon as possible, to arrange for the Citizen Trustees and the Lake Cauma Trustees to repay the Loans in full. But a proper and final determination of the effect of clause 27.3 needs to be addressed based on such further evidence as may be relevant at the next hearing.

*The relevance and weight to be given to the Trustees' claim that the Fifth Defendant is pursuing the ANOM for an improper or collateral purpose*

115. The Trustees, as I have noted, invited the Court to give weight to their allegation that the Fifth Defendant's purpose in filing the ANOM was only or primarily to assist her (and the Plaintiffs') submissions in the continuing proceedings in Liechtenstein in which the Princely Court is considering whether to remove the Trustees and as part of their continuing attack on the Trustees.

116. As I have already noted, I do not consider that these allegations require or justify a refusal to declare that the Trustees have acted in breach of the Injunction and to refuse to permit the ANOM to proceed to a further hearing although I have expressed some concerns as to the Fifth Defendant's conduct.

117. I am satisfied that the Fifth Defendant has established that she has a legitimate purpose in pursuing the ANOM. She has given evidence that she wishes to draw to the Court's attention to what she considers to be serious and material breaches of the Injunction and misconduct by the Trustees and the authorities on which she relied make it clear that this is a proper purpose. The fact that there are proceedings in Liechtenstein in which the Trustees' conduct is relevant and in issue such that a finding of a breach of the Injunction by the Trustees will also assist the Fifth Defendant in those

proceedings does not, in my view, of itself, prevent the Fifth Defendant from prosecuting the ANOM for a proper purpose.

118. Furthermore, if the Trustees wish to rely on a claim of abuse or process and seek to resist the ANOM on that ground they need to file a strike-out application and adduce adequate evidence in support to make out their case. I also agree with the Fifth Defendant that she should be given a proper opportunity to answer the allegations of acting for an improper or collateral purpose and it seems to me that a strike-out application would be the appropriate forum in which any dispute as to the Fifth Defendant's purpose in proceeding with the ANOM should be adjudicated.

*Does illegality provide a defence?*

119. The Trustees, as I have noted, submitted that they cannot be held to be in breach of an injunction and in contempt when the basis for the breach is a contractual term that would or is likely to be held to be unenforceable against them. They argue that clause 27.3 is and will be unenforceable by the Funder against them if and to the extent that its effect is to expose the Trustees to a sanction for contempt. It must then be treated as a contractual term that was contrary to public policy and tainted by illegality since it involved the commission of an unlawful (criminal or quasi-criminal) act.

120. It is, of course, clear that if the formation, purpose or performance of a contract involves conduct that is illegal or contrary to public policy the contract is unenforceable by one or either party if enforcement would be harmful to the integrity of the legal system taking into account the purpose of the rule which the conduct has infringed , any policies that may be rendered ineffective or less effective by denying enforcement and the need to ensure that a denial of enforcement is not a disproportionate sanction for the conduct. In applying the last factor, further matters may be taken into account including the seriousness of the conduct, the centrality of the conduct to the contract, whether the conduct was intentional and whether there was a marked disparity in the parties' culpability (see Lord Burrows and others, *A Restatement of the English Law of Contract*, second edition, 2020, OUP (***Burrows***) at [44(1)] and [44(2)] and the commentary thereon, particularly the second paragraph on page 231 which states that these paragraphs "*seek to capture accurately the central elements of Lord Toulson's judgment*" in *Patel v Mirza*.

121. The full quotation from the judgment of Lord Sumption's judgment in *Les Laboratoires* at [25], to which the Trustees referred, is as follows:

> *"The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J in Safeway Stores Ltd v Twigger [2010] EWHC 11 (Comm), [2010] 3 All ER 577, [2010] Bus LR 974."*

122. The Trustees did not cite (and I assume were unable to find) any authority to the effect that a contractual term that imposed an obligation on a party to do an act which was prohibited by an injunction binding on them was unenforceable as tainted by illegality or contrary to public policy. However, it seems to me that it is right to say that acts which breach court orders in general and injunctions in particular are properly categorised as contrary to the public law of the state and engage the public interest in the enforcement of court orders. The Court's contempt jurisdiction is often characterised as quasi-criminal and acts which are subject to that jurisdiction can also be so characterised for these purposes. It also seems to me right to say that an executory contract requiring a party to perform such an act is unlikely to be enforced by the Court, However, a decision as to the effect of the illegality or breach of public policy will (as the Fifth Defendant pointed out) require an application by reference to proper evidence of the factor-based approach in *Patel v Mirza* and unenforceability is not automatic and inevitable and I note that some effects of a contract tainted by illegality or contrary to public policy may be unaffected by such a finding – it is well accepted, for example, that title to property can pass under an illegal contract: see *Bowmakers Ltd v Barnet Instruments* [1945] KB 65).

123. So I accept that it is strongly arguable that since clause 27.3 resulted in an amendment to the Ypresto Trustees' rights under the Loans in breach of the Injunction the term required the Trustees to engage in conduct that was of a kind which engages the illegality/public policy doctrine. However, it does not follow that the clause is of no effect or will not be enforced. As Burrows says at page 233, the better view is that the effect of illegality or public policy is to render the relevant contract unenforceable rather than void.

124. In this case the Funder (and the BGO Foundation) are not parties to the proceedings. The LFA is governed by English law and subject to an arbitration clause. The Trustees have not challenged or disputed the enforceability of clause 27.3 in an arbitration commenced pursuant to the LFA. There is no live dispute with the Funder. Clause 27.3 has not been found to be unenforceable. Of course, the Trustees say that this does not matter since the unenforceability of clause 27.3 would follow from a decision by this Court that entry into the clause resulted in a breach of the Injunction and the effect of such unenforceability on the question of whether the Trustees can be held to have acted in breach of the Injunction or as to the consequences of their having done can be decided in these proceedings without the need for the Funder to be joined. If the Trustees submit, the result of a decision that entry into clause 27.3 resulted in a breach of the Injunction was that the clause would be treated as unenforceable the Court cannot regard the Trustees as having breached the Injunction or at least it would be unjust and wrong to treat the Trustees as being in contempt (or the sanctions for breach would have to take this into account).

125 It seems to me that the Trustees are right to say that the fact that the illegality or public policy issues do not arise in this Court in proceedings between the parties to the LFA or by reason of a defence raised by the Trustees against enforcement of clause 27.3 is not determinative. This does not preclude the Court from considering whether the LFA is unenforceable. Indeed, the Court is required to do so in any case where the enforceability of the relevant agreement is in issue. As Burrows states at [44(7)] (underlining added):

> *"Where there are proceedings before a court relating to a contract involving conduct that that appears to be illegal or contrary to public policy, the court must consider whether the contract or term is unenforceable or void even if not raised by the parties unless the court considers that it has insufficient legal and factual material to do so" (the rule is based on Chitty on Contracts (33rd edition, 2018 at [16-247]).*

126. The Fifth Defendant submitted that the Court did not have sufficient evidence before it from which to reach a conclusion at least as to how the *Patel v Mirza* factors should be applied and, in relation to the question of whether clause 27.3 should be severed from the rest of the LFA, as to how the test in *Tillman* should be applied. I agree. What is important is that the Court does not have before it sufficient evidence from which to decide the effects on the Trustees' obligations under clause 27.3 and on the amendment to the Ypresto Trustees' rights under the Loans which has already been made and taken effect of a finding that clause 27.3 is a contractual term that involves conduct that is illegal or contrary to public policy. Furthermore, in my view, it would be wrong for this Court even to make a determination on whether the breach of the Injunction resulting from entry into clause 27.3 makes

that term tainted by illegality or contrary to public policy (and as to the effects of such a determination) without the Funder being given an opportunity to make submissions and to seek to be joined. It may decide not to do so and the Court may then need to make a determination of the issue for the purpose of the ANOM as between the Trustees and the Fifth Defendant. It also seems to me that it may well be open to the Trustees (and possibly the Funder if it sought to be joined) to apply for a stay of the relevant part of these proceedings that related to and depended on whether clause 27.3 was to be treated as unenforceable to allow that issue to be determined as between itself and the Funder (and others) by a proper tribunal.

127. In these circumstances, it seems to me that the position is as follows. Clause 27.3 was effective at the date on which the LFA was entered into, it resulted, as I have held, in the Trustees being in breach of the Injunction and is not rendered void and of no effect even if it is treated as being tainted by illegality or being contrary to public policy. Such likely illegality or inconsistency with public policy, therefore, does not result in there having been no breach of the Injunction by the Trustees. However, the fact that the term may cease to be enforceable (and that the Trustees might be able to invalidate and set aside the amendment to the Loans resulting from clause 27.3) is highly material to the issue of sanction and should be considered at the next hearing of the ANOM. Directions can be given for the filing of further evidence relevant to the application of the *Patel v Mirza* factors and the Funder can be given an opportunity to decide whether it wishes to make any submissions for the purpose of or participate in the further hearing. At the next hearing, the Court can determine with the benefit of relevant evidence and further submissions the effect on the Trustees' obligations and on the amendment made to the Loans of the finding that the Trustees were in breach of the Injunction and the impact of such a determination on the question of the appropriate penalty for the breach (indeed whether any penalty should be imposed if the Trustees' obligations under and the amendments to the Loans effected by clause 27.3 are to be treated as unenforceable). This seems to me to be the fair and proper way to proceed.

**Schedules 3 and 4 of the LFA, the Final Priorities Agreement and the Final Irrevocable Undertaking**

128. The Fifth Defendant claims in the ANOM that the effect of schedule 3 and schedule 4 of the LFA was to give the Funder proprietary rights in respect of the EHI Share in priority to the Ypresto Trustees as pledgees of the EHI Pledge. The Trustees argue that schedule 3 and schedule 4 of the LFA are irrelevant where those schedules only set out draft terms for a priorities agreement and irrevocable undertakings and the parties to the LFA agreed not to enter into agreements on those but different terms.

129. In my view, it would be wholly artificial to determine the rights of the Funder and the obligations of the Trustees by reference to draft terms in the schedules which they agreed after the entry into force of the LFA not to implement unless it can be shown that the Funder and the Trustees intended that the terms in the schedules should have immediate effect and that they did take effect so that the Funder was given substantive rights that it should then be treated as having released when the Final Priorities Agreement and the Final Irrevocable Undertakings were entered into.

130. The LFA was signed on 22 June 2018. The Final Priorities Agreement was signed on 14 February 2019. The Trustees had taken out a legal expenses policy on the same date (which suggests that certain arrangements relating to the litigation funding were still in the process of being finalised even after the LFA had been signed). The fact that no priorities agreement was entered into and signed (with external counsel as parties) on the terms of the LFA Priorities Agreement in the period before the Final Priorities Agreement was signed and that the Funder and the Trustees agreed a different form of priorities agreement strongly suggests that there was no intention that the terms of the schedules be treated as having immediate effect. In particular, the Funder and the Trustees decided and agreed to enter into a form of priorities agreement that did not include any provision imposing or referring to a trust over Proceeds.

131. I accept that it is strongly arguable that the Funder could have required the Trustees to take steps to require their external counsel to enter into the LFA Priorities Agreement and to confirm that the external counsel held the Proceeds on trust for the Funder. But the LFA Priorities Agreement did not state that the Trustees held the Proceeds on trust for the Funder or that they agreed to do so. Nor did the LFA or the LFA Priorities Agreement, so far as I can see, explicitly impose an obligation on the Trustees to pay (or transfer) Proceeds to their external counsel although that must have been the intention, in order to allow the arrangements to work properly and the Funder to obtain the protection it needed. The idea, which is common in these types of arrangement, is that all the funds (or possibly property) recovered in the litigation to which the litigation financing relates are to be received and held by the attorneys or solicitors for the borrower and they then control disbursements and payments out of those funds to the Funder and others.

132. While it is arguable that the placing of funds with legal advisers for the sole purpose of discharging certain liabilities can constitute an appropriation of the funds to and therefore the creation of a trust or charge over the funds to secure the payment of the relevant liabilities, that need not and is not

always the result. The Fifth Defendant did not argue that this was the effect of the arrangements put in place by the Final Priorities Agreement and the Irrevocable Instructions.

133. It follows therefore that schedule 3 and schedule 4 are not to be treated as having resulted in a trust being created by the Trustees over the EHI Share or the rights of the Ypresto Trustees as pledgees of the EHI Share, nor is the Funder to be treated as having been granted a proprietary interest in the EHI Share or the EHI Pledge by reason of schedule 3 or schedule 4 of the LFA.

134. It also follows that the question of whether the term Proceeds is to be interpreted as including assets such as shares recovered in, or only funds paid to the Trustees' external counsel by parties to, Proceedings does not arise. But I would note that the definition of Proceeds includes "*any other property or value recovered by or on behalf of (or reduced to a debt owed to) the Claimants on account or as a result or by virtue (directly or indirectly) of the Proceedings* .." It is not entirely clear whether if the Citizen Trustees succeed in the proceedings in Panama (or elsewhere) in establishing that they own the EHI Share, the EHI Share will be treated as having been recovered but presumably, that is the intention. It is then unclear, in the absence of an express obligation on the Trustees to transfer all Proceeds to their external counsel, whether it was intended that they should then do so (or to have the EHI Share registered in the name of external counsel). I would assume that this would be undesirable (for reasons of tax and transaction cost) and therefore unlikely to be the intention of the parties but this issue has not been adequately dealt with by submissions or in the evidence and is not a matter on which I can form a view on this application.

135. In these circumstances, the question of whether the Fifth Defendant has established or needs to establish for the purpose of the ANOM that the EHI Share is owned by the Citizen Trust does not need to be decided.

**The Hon. Mr Justice Segal**

**Judge of the Grand Court, Cayman Islands**

**29 June 2023**