IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 133 OF 2024 (DDJ)

BETWEEN:

(1) CANTERBURY SECURITIES, LTD. (IN OFFICIAL LIQUIDATION)
(2) KAREN SCOTT AS JOINT OFFICIAL LIQUIDATOR OF CANTERBURY SECURITIES, LTD.
(3) RUSSELL HOMER AS JOINT OFFICIAL LIQUIDATOR OF CANTERBURY SECURITIES

Plaintiffs

AND:

(1) ERIN WINCZURA
(2) PFS LTD.
(3) CANTERBURY GROUP

Defendants

Before: The Hon. Justice David Doyle

Appearances: Alice Carver and John Harris of Nelsons Attorneys at Law Ltd for the Plaintiffs
First Defendant in person remotely
No appearances on behalf of the Second Defendant or Third Defendant

Heard: 2 October 2024

Orders made: 2 October 2024

Draft Judgment circulated: 14 October 2024

Judgment delivered: 17 October 2024

Determination of an application for a debarring order against the Defendants on the ground of their non-compliance with a disclosure order made to assist in the enforcement of an asset freezing injunction and proprietary claims – consideration of the laws of the Cayman Islands in respect of debarring orders, unless orders, freezing and disclosure orders and the importance of complying with court orders and fair trials and access to justice

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JUDGMENT

Introduction

1. On 2 October 2024 I made the following orders:

> "1. Unless the Defendants do by 3.00pm on 16 October 2024 comply with paragraph 1 of the Order dated 26 April 2024, whereby the Defendants were required to provide to the Plaintiffs the information and documents specified therein, then the Defendants be debarred from further defending the action in FSD 133 of 2024 (DDJ) or from filing any application or evidence therein or progressing the Second and Third Defendants' summons dated 29 July 2024 or the First Defendant's summons dated 19 August 2024 without leave of the Court.
>
> 2. The Defendants do pay the Plaintiffs' costs of and occasioned by the Summons to be taxed on the indemnity basis and paid on a joint and several basis forthwith.
>
> 3. The Defendants do by 3.00pm on 16 October 2024 make an interim payment in the amount of US$ 35,000 on account of such costs."

2. I indicated I would deliver a judgment containing the reasons for making such orders in due course and I now do so.

3. It is a serious step to make an unless order debarring a litigant from taking any further part in the proceedings. No Cayman case in which the relevant law was covered in detail was brought to my attention. I therefore make no apology for the length of this judgment that sets out, amongst other things, the relevant law and my reasons for making such an order on 2 October 2024.

4. The numerous judgments which should be publicly and freely available at www.judicial.ky and www.bailii.org reveal a long and sad history of the Canterbury Group ("D3"), Canterbury Securities Ltd ("CSL") (before it went into liquidiation), PFS Ltd ("D2") and their beneficial owner Erin Winzcura ("D1") abusing and disrespecting the legal process and deliberately, without reasonable excuse, failing to comply with court orders. I refer to D1, D2 and D3 collectively as the "Defendants". Not only have the Defendants failed to positively engage in the legal process they have deliberately flouted court orders over a considerable period of time. It is the most shocking non-compliance I have witnessed during my time as a Grand Court Judge. In proceedings before the Financial Services Division orders are normally complied with to the letter and on time. The Defendants provide an unfortunate exception to that rule.

5. If the reader wishes to delve into just three judgments to see examples of this misconduct they are as follows:

   (1) Judgment of Kawaley J in *Fortunate Drift Limited v Canterbury Securities Ltd* FSD 227 of 2018 (IKJ) delivered on 14 September 2023:

> "The Defendant's case has taken a series of unfortunate steps over the last few months which have resulted in the Court: (a) being unable to place any reliance on certain aspects of its evidence relating to the proceeds of sale of the YRIV shares it formerly held (subject to certain contingent security obligations) on behalf of the Plaintiffs; and (b) being satisfied that the Defendant is the sort of litigant which is not embarrassed to engage in

blatant acts of asset dissipation in circumstances which constitute a serious abuse of the processes of the Court." (paragraph 1)

"The suspicious bystander might at this early juncture have raised any eyebrow quizzically and wondered whether or not the supposed Canadian Escrow funds were actually there." (paragraph 6)

"The Defendant continues to be, inexplicably, in flagrant breach of the various iterations of the June 2023 Information Order." (paragraph 8(f))

"At first blush, it appeared to be a remarkable display of audacity for the Defendant to have the temerity to seek to stay the Information Order which it has so significantly failed to comply with." (paragraph 13)

"… the Defendant has substantially failed to comply with paragraph 1.2 of the Information Order since 16 June 2023 …" (paragraph 17)

"I concluded that I could not fairly and confidently find that the Defendant had given misleading evidence about the existence and/or location of the YRIV Share sales proceedings … I was entitled to proceed on the assumption that the funds were no longer (if they ever were) in an account held by Canadian Escrow Ltd for the Defendant's sole benefit. This flowed from the indisputable fact that the Defendant was ordered to verify the existence and location of funds and has (for whatever reason) failed to do so in circumstances where the Court was unwilling to accept the Defendant's bare assertions in the relevant respect." (paragraph 24, internal underlining)

"… it seems obvious that the Defendant's conduct disentitles it from recovering its costs of its Stay Summons and *prima facie* should be subject to an adverse costs order. If the Defendant has wilfully failed to comply with an Order it is able to comply with, it is guilty of contempt of Court.

If the Defendant is unable to comply with the Order, it has filed a series of false Affidavits deliberately misleading the Court." (paragraph 25)

"… although the Defendant eventually demonstrated adequate compliance with paragraph 1.1 of the Information Order, its non-compliance with paragraph 1.2 made that partial compliance academic … A litigant does not establish compliance with a Court order by failing to comply with its actual terms and proposing alternative forms of compliance of its own choosing". (paragraph 31(b))

"… the Defendant failed over a period of nearly three months to provide a screenshot confirming the existence of funds over which a proprietary claim is asserted and which it has sworn are safely held for its own account. The reasons for its non-compliance are entirely unsatisfactory. The court was now required to assume (for the purposes of the present Injunction Summons) that the funds do not exist." (paragraph 31(c)(1)).

"… the Defendant had disposed of the primary asset the Plaintiff was seeking to freeze while contesting the application for the Further Freezing Order. That was both a blatant act of dissipation and a gross abuse of the processes of the Court." (paragraph 31(c)(2))

"Giving deference to the Defendant's fair hearing rights, and assuming it was not a rogue litigant operating outside the parameters of the normal and litigation rules, I deferred granting the Further Freezing Order." (paragraph 36).

"Having granted the Further Freezing Order on 17 August 2023 and discovered that the Defendant had already defeated the principal limb of the Order by disposing of the Treasury Bill before the order was sealed, the Plaintiff's initial suspicions about a risk of dissipation were entirely vindicated." (paragraph 37)

> "… the Defendant elected to add to this sorry picture of dishonourable litigation conduct a blatant act of asset dissipation (effectively in the face of the Court)…" (paragraph 40)

(2) Judgment of Kawaley J also in FSD 227 of 2018 (IKJ) delivered on 13 December 2023:

> "It is common ground that the Defendant has not complied with the Restraining Order which required the Defendant to deposit with its Cayman Islands attorneys' (sic) funds representing the value of a Treasury Bill which the Defendant dissipated while the Court was hearing an application to freeze it."

(3) Judgment of Parker J in FSD 163 of 2022 (RPJ) *Blackgold Investment Holdings Inc v Erin Winczura, Canterbury Securities, Ltd (in official liquidation), Canterbury Group and Leeward Investments SPC* delivered on 18 September 2024:

> "There has been a lack of engagement by D1 and D3 … they have failed to comply with a number of directions …" (paragraph 4)
>
> "D1, Ms Winczura, could and should have taken steps to continue with discovery obligations so as to comply with the Unless Order with or without the assistance of Cayman attorneys." (paragraph 12)
>
> "D1 is evidently an experienced litigant, having been engaged in FSD litigation before the Grand Court for many years. It is not necessary to rehearse the adverse findings made against D1 and the companies she was involved (sic) which have been recorded in a number of reported cases [footnotes refer to FSD 227 of 2018 (IKJ); FSD 364 of 2023 (IKJ) and FSD 133 of 2024 (IKJ)]. Suffice to say the Court has taken due note of the previous findings of Kawaley J who was unimpressed by her lack of

> veracity, conduct and reliability with regard to the Court's processes." (paragraph 13)

At paragraph 14 Parker J referred to my judgment in FSD 133 of 2024 and quoted an extract which included the following:

> "She [D1] had plenty of time to engage attorneys to appear on her behalf but has failed to do so. Moreover, she has failed to appear today. Frankly, I am not impressed with her lack of timely and positive engagement."

The following are further extracts from Parker J's judgment:

> "D1 is a sophisticated enough litigant to have provided discovery of relevant documents. Some 357 documents were provided on 4 April 2023 … The Plaintiff made out a case that the Defendants' compliance with discovery was insufficient … and the Defendants then did not comply with the terms of the Unless Order." (paragraph 15)

> "There has been no convincing explanation or proper excuse from the Defendants for failing to comply with a pre-emptory order of the court. Unless orders are not made lightly and must be complied with. They are an order of last resort." (paragraph 25)

> "The overall justice of this case is clearly that the Defendants should not be granted any further indulgence." (paragraph 28)

6. I focus, of course, on FSD 133 of 2024 (DDJ) as it is in these proceedings that the Plaintiffs sought the debarring order but the non-compliance of the Defendants and those connected with them in other proceedings provides some relevant background. In the proceedings before me the Plaintiffs sought a debarring order following non-compliance by the Defendants with a disclosure order made by Kawaley J on 26 April 2024 requiring compliance within 7 days. As at the hearing on 2 October it had still not been complied with.

7. Insofar as is humanly possible, I guarded against the risk of allowing this court's indignation at the Defendants' conduct to cloud fair judgment. When the evidence is stacked heavily against defendants the court must be especially astute to ensure fairness. To do otherwise would simply be to heap injustice upon injustice, when the role of the court is to provide justice to all parties.

The background and history

8. It appears that from 2018 to January 2024 CSL was the defendant in an action brought by Fortunate Drift Ltd ("FDL") in the Grand Court under cause number FSD 277 of 2018 (IKJ) (the "FDL Proceedings"). In that action FDL sought the recovery of certain shares (the "YRIV Shares"), an account of the proceeds of the YRIV Shares, and an equitable tracing of the proceeds of the YRIV Shares. A proprietary claim was asserted.

9. On 17 August 2023 Kawaley J (after presiding over a hearing from 5-14 June 2023) delivered judgment on liability in the FDL Proceedings substantially in favour of FDL (the "FDL Liability Judgment"). Kawaley J at paragraph 11 described D1 as the CEO, owner and founder of CSL. Kawaley J described her as "the face of CSL in the present proceedings but also owns PFS [D2]".

10. On 13 December 2023 Kawaley J delivered an *ex tempore* judgment on quantum. It was held, amongst other matters, that CSL held the sum of US$1,764,520.62 plus interest making a total sum of US$1,974,057.44 on trust for the Plaintiff and that as at 7 December 2018 CSL held on trust for FDL the proceeds of sale of the YRIV Shares (the "Proceeds"). Judgment was reserved in respect of the measure of damages which CSL was to pay to FDL in respect of its breach of contract claim. CSL was ordered to pay FDL forthwith US$1,974,057.44.

11. On 31 January 2024 Kawaley J delivered a ruling on the measure of damages. For the breach of contract FDL's damages were assessed at US$14,375,336.58 together with interest in the amount of US$1,707,071.22.

12. During the course of the FDL Proceedings the court made a number of orders against CSL which contained penal notices.

13. On 22 May 2023 an order was made restraining, at paragraph 1, CSL from dealing with the proceeds of sale of 1,886,261 shares in Yangtze River Port. Paragraph 2 stated that paragraph 1 applied in particular to cash equivalent of US$15,500,000 apparently held at Canadian Escrow Company Ltd.

14. On 16 June 2023 an order was made requiring CSL to provide by 4pm on 20 June 2024 bank account statements showing the location of the Proceeds, a screen shot showing the current location, precise value and registered custodian of the Proceeds insofar as the Proceeds remain in CSL's control and a verifying affidavit sworn by a director of CSL.

15. On 17 August 2023 a restraining order was made against CSL restraining it from dealing with the treasury bill stated to be purchased by CSL through Canaccord Genuity Corp on 25 July 2023 for the total cost of US$15,801,626.72 (the "Treasury Bill") and required CSL to provide within 24 hours a screenshot revealing the current location of the Treasury Bill or any proceeds of sale of any asset replacing it.

16. On 7 September 2023 an order was made which recorded that FDL had informed the court that the Treasury Bill was sold or transferred before the 17 August 2023 Order was sealed. The order of 7 September 2023 required CSL to pay within 3 days the sum of US$15,801,626.72 (being the value of the Treasury Bill) into an interest-bearing bank account in the name of McGrath Tonner (CSL's then attorneys) and within 24 hours of such payment to provide a screenshot or bank statement revealing where the sum was held.

17. In his reasons for decisions delivered on 14 September 2023 Kawaley J referred at paragraph 6 to D1's evidence as "decidedly odd". Further relevant extracts from this judgment appear above.

18. On 25 September 2023 Kawaley J also made an order giving CSL a further 14 days to comply with the previous order and at paragraph 3 made the following order:

> "Unless the Defendant [CSL] has complied with the Restraining Order [7 September 2023] to the Court's satisfaction, the Defendant shall be debarred from filing any further summonses, applications or evidence in these proceedings [FSD 227 of 2018 (IKJ)] until further order".

19. On 16 January 2024 Kawaley J granted an order with notice to CSL and D1 in her capacity as director or officer of CLS and clearly stated:

> "If [CSL] neglects to obey this order within the time specified you are liable to a process of execution to compel [CSL] to obey it. You may be sent to prison or have your assets seized."

The Order required CSL to provide FDL by 4pm on 19 January 2024 (1) bank statements showing the location of the Proceeds (2) a screenshot showing the current location, precise value and registered custodian of the Proceeds and (3) an affidavit shown by a director at CSL within the jurisdiction of the court. Orders were also made requiring the payment of US$15,801,626.72 into a bank account and the provision of a screenshot or bank statement in respect of the Frozen Sum as defined.

20. CSL, at the time wholly controlled by D1, has never fully complied with these orders.

21. For the sake of completeness I should add that on 13 December 2023 on the petition of FDL, CSL was put into provisional liquidation and on 16 January 2024 into official liquidation with Karen Scott and Russell Homer as joint official liquidators ("JOLs").

22. Furthermore to complete the relevant background and history in respect of the proceedings presently before the court, on 29 July 2024 D2 and D3 in effect applied for an extension of time to set aside the default judgment entered against them on 3 June 2024. On 19 August 2024 D1 applied for an order that the freezing and disclosure order made on 26 April 2024 be varied so as to permit the payment of reasonable living expenses and legal fees by D1 and also be varied to permit the payment of legal fees by D2 and D3. The Plaintiff had filed a Summons seeking a debarring order on 23 July 2024.

23. I should add that on 8 July 2024 the FSD 133 of 2024 (IKJ) proceedings were assigned to me (see my judgment delivered on 12 July 2024 at paragraph 3).

The Disclosure Order and the failure to comply

24. On 26 April 2024 Kawaley J, on the application of Canterbury Securities, Ltd (in official liquidation) ("P1") and its joint official liquidators (the "Applicants") in FSD 133 of 2024 (IKJ), made an order against the Defendants by way of an asset freezing injunction coupled with a requirement for disclosure (the "Disclosure Order"). It was in very simple and straightforward terms. The Disclosure Order contained a penal notice warning of contempt, fines, assets seizure and imprisonment. In addition to an asset freezing injunction being imposed, the Defendants were also required to provide the Applicants' attorneys with the following information within 7 days from the date of service of the Disclosure Order:

a. full details of the location, nature and amount of any assets held either directly or indirectly by them;

b. full details of the location, nature and amount of any assets which are or were at any time the property of P1 or which were at any time held either directly or indirectly by P1;

c. the information specified in Schedule 3 to the Disclosure Order.

25. Schedule 3 (information to be provided by the Defendants) referred to:

"1. Bank account statements showing the location of the proceeds of sale of the YRIV shares (which were the subject of the proceedings in Cause No. FSD 227 of 2018) ("Proceeds") from 6 December 2018 to date or until such time as the Proceeds or part thereof left [CSL's] control. For the avoidance of doubt, such statements shall be statements of the bank account(s) in which the Proceeds have stood and/or are presently standing as a credit balance with the financial institution(s) at which the bank account(s) is (are) held, and shall not include merely the statements of any custodian used by [CSL] as a custodian of the Proceeds;

2. A screen shot showing the current location, precise value and registered custodian of the Proceeds insofar as those Proceeds remain in the [CSL's] control; and

3. Full details of any transactions related to the acquisition and disposal by Canterbury Securities, Ltd of: (i) shares in Thinkbox; and (ii) a treasury bill as detailed in the Eighth Affidavit of Erin Winczura sworn in Cause No. FSD 227 of 2018 including in each case bank statements showing the source and transmission of funds used or realized and the present whereabouts of any proceeds."

26. The Disclosure Order was notified to D1 on 29 April 2024 and served on D2 and D3 on 30 April 2024.

27. On 31 July 2024, by consent, paragraph 1a. of the Disclosure Order was varied in relation to D2 and D3 such that they were only required to "provide the location, nature and amount of any assets valued in excess of US$5,000, excluding bank accounts, all of which shall be disclosed irrespective of the present account balance."

28. The Defendants have failed to comply with the Disclosure Order. There has not even been partial compliance. The Defendants do not suggest that they have sought to comply with the Disclosure Order. They deliberately refuse to comply until they have funds to engage legal advice and representation. D1 also, for the first time, by an unsigned and undated 9 page attachment to an email dated 10 October 2024 3:59pm raised serious belated allegations, with no evidence in support, to the effect that FDL had obtained the FDL Liability Judgment by fraud. That document was referred to in the email as "attached Skelton (sic)" and headed "Defendants' Submission" and was filed late. Order 12 rule 1 (2) of the Grand Court Rules (the substance of which was expressly brought to D1's attention by Mr Harris by email dated 18 September 2024 11:18am) provides that a body corporate may acknowledge service of the writ and give notice of intention to defend but "such a defendant may not take steps in the action otherwise than by an attorney". I therefore treated it as D1's belated skeleton argument but insofar as it contained submissions that were also relevant to D2 and D3, in fairness, I also took those into account. The July 2024 Order required the Defendants to file and serve their skeleton arguments no later than 12pm on 24 September 2024. D1 did not apologise for its late filing on the eve of the hearing or even offer up an explanation for its delayed filing.

The Debarring Summons

29. By Summons dated 22 July 2024 (the "Debarring Summons") the Applicants sought an order that unless the Defendants by 4pm on 14 August 2024 fully comply with the Disclosure Order they be "debarred from further defending this action, or from filing any application herein without leave of the Court"; and "any application by [D2 and D3] to set aside the default interlocutory judgment dated 3 June 2024 be struck out". The Applicants also sought an order that the Defendants do pay the Applicants' costs of and occasioned by the Debarring Summons to be taxed on the indemnity basis and paid forthwith and within 7 days make an interim payment in an amount to be fixed by the court on account of such costs.

30. On 31 July 2024 having heard counsel for the Applicants and counsel for D2 and D3 I made an order (the "July 2024 Order") setting down the Debarring Summons for a one day hearing commencing at 10am on 2 October 2024. There was no appearance on behalf of D1 but she had been served by email pursuant to paragraph 4 of an order I had made on 12 July 2024. On 12 July 2024 I had also ordered in effect that any application to set aside a default interlocutory judgment dated 3 June 2024 should be filed and served by no later than 4pm on 25 July 2024. Under the July 2024 Order the Defendants were required by 3pm on 19 August 2024 to file and serve their evidence in response to the Debarring Summons and the Applicants' evidence in reply (if any) was required to be served by 3pm on 23 August 2024. The parties were also required by no later than 12pm on 24 September 2024 to file and serve their respective skeleton arguments. Furthermore it was ordered that there were to be no filings outwith the provisions of the July 2024 Order without leave of the court.

The Evidence

31. I now turn to the evidence before the court in respect of the Debarring Summons.

Paula Richmond

32. Paula Richmond ("Ms Richmond"), the principal assistant to the JOLs, in her affidavit sworn on 22 July 2024 provides a detailed history of the FDL Proceedings and the failure of CSL to comply with various orders including the Orders made on 7 September 2023 and 16 January 2024. Ms

Richmond at paragraph 10 says that although D1 "sought to persuade the Court that the proceeds of sale of the YRIV Shares were held variously by a company named Canadian Escrow Ltd. or alternatively in a Treasury Bill held by Canaccord, neither of these statements was true and the documents exhibited in support of them were forged." In her fifth affidavit stated to be sworn on 25 July 2023 in Ontario Canada for the FDL Proceedings D1 at paragraph 9 states:

> "Accordingly at page 1 a screenshot which confirms the precise value [US$15,801,626.72] and location of a treasury bill purchased by Canterbury's trader, Canaccord Genuity Corp, on behalf of Canterbury on 24 July 2023 (the "Screenshot")."

33. At paragraph 10 D1 says that these assets do not form part of the proceeds but will be held pending judgment or further order. At paragraph 11 D1 apologises to the court for not having been in a position to provide the screenshot prior to 25 July 2023.

34. I note paragraphs 19-21 and 32.2 of Karen Scott's first affidavit and an email dated 3 May 2024 2:56pm from Martin Stead Client Compliance Officer Canaccord Genuity Corp stating that it "did not purchase a Treasury Bill for Canterbury Securities in or around 24 July 2023". Ms Richmond had attached a screenshot which D1 exhibited to an affidavit which showed a Treasury Bill held by Canaccord Genuity Corp with a trade of 24 July 2023 for $15,801,626.72. Mr Stead was specifically asked whether "this is a legitimate screenshot". Mr Stead responded:

> "The screenshot that you have attached to your email is not a Canaccord Genuity record. Cannacord Genuity learned of the screenshot through the affidavit referred to in your email."

35. I have not been directed to any response from the Defendants in respect of this email. I referred it to D1 during her oral submissions to ascertain if she wanted to comment on the position. She did not. For example she did not allege that the email from Canaccord Genuity did not record the correct position. See also my judgment delivered on 12 July 2024 where at paragraph 66 I referred to Kawaley J's judgment delivered on 4 June 2024 and his stark reference at paragraph 11 to a "jaw-dropping bit of evidence", namely a Confirmation Letter dated 12 April 2023 that Canadian Escrow was holding "in trust cash equivalent US$15,500,000 value, in the name of Canterbury Securities

Ltd" but the purported signatory of the Confirmation Letter when contacted by the JOLs had denied signing it and asserted that it was not even printed on that company's letterhead and the purported signatory denied having any dealings with D1 or CSL. *Prima facie* it would appear that false evidence has been placed before the court in the form of a forged screenshot and a forged Confirmation Letter. I suggest the JOLs refer this judgment and, if they have not already done so, the concern that false evidence may have been put before the court, to the relevant authorities for further investigation. I am content that the JOLs also forward the relevant evidence to them. It is a very serious matter not only to fail to comply with court orders but also to put false evidence before a court. It is worthy of further investigation and if potential offences have been committed, the relevant authorities will no doubt consider whether a criminal prosecution should ensue. The rule of law requires that any wrongdoers are brought to justice.

36. Ms Richmond at paragraph 10 of her affidavit says that CSL at the time was "wholly controlled" by D1 and never complied with any of the various orders. At paragraph 14 it is stated that the Plaintiffs' ability to plead their claim fully – in particular as to dissipation and misappropriation of the funds – is inhibited by the Defendants' continuing contumelious default in refusing to provide discovery on the movements and current whereabouts of the funds. Ms Richmond at paragraph 16 says that the Disclosure Order at Schedule 3 "was in identical terms to that of the Information Order first made on 16 June 2023 and restated on 16 January 2024."

37. Ms Richmond at paragraph 17 states that the Disclosure Order was duly served on D2 and D3 "by personal service at their registered office on 30 April 2024" and notice of it was given to D1 by email on 29 April 2024 at 4pm. D1 responded to Mr Harris by email on 1 May 2024 asking for a further 2-3 weeks to instruct lawyers and Mr Harris on 2 May 2024 responded stating:

> "The information required pursuant to schedule 3 of the order is the same information which you have previously been ordered to provide in the orders of 16 June and 16 January 2024 and which you have consistently failed to do. You should not require any further time to produce this information, you just have to decide to do so …"

Erin Winczura

38. In an unsworn affidavit dated 19 August 2024 D1 undertakes to swear the affidavit as soon as it is reasonably practicable to do so. A sworn version of the affidavit has not been brought to my attention and was not in the bundle. Although it pales into relative insignificance in view of her other more serious failings, it appears that D1 is also in breach of that undertaking. It reveals the, to put it mildly, overly relaxed attitude she takes to complying with undertakings to the court.

39. In fairness, I should add that in her oral submissions D1 said her unsworn affidavit dated 19 August 2024 was sworn on 25 August 2024 and she thought it had been filed by her attorneys. On checking the court's online portal (where attorneys upload relevant filings) there is no sworn version.

40. In her unsworn affidavit D1 says at paragraph 1 that she is the sole shareholder of D2 and the sole director of D3. She says at paragraph 3 that the Defendants have been put in an "impossible position" because of the Disclosure Order as they cannot spend any money on legal fees.

41. At paragraph 7 she says that "at the moment the JOLs are on an unconstrained fishing expedition."

42. She says in effect that they need help from counsel to "gather and sift through information as well as … review information for any privileged material or material protected from disclosure for some other reason" (paragraph 8 of the unsworn affidavit). At paragraph 9 she says that she "must be assisted by counsel in order to continue to engage in the process." She adds at paragraph 12 that she has "made enormous efforts to try to raise funding for legal fees and expenses whilst, at the same time, ensuring compliance with the" Disclosure Order.

43. She says at paragraph 15 that D2's asset position is "relatively straight-forward and as such it has been possible for [D2] to substantively prepare an Affidavit addressing its assets but not possible (without Counsel and in the present circumstances) to address the Information Requests in Schedule 3 of the Freezing Order [defined in this judgment as the Disclosure Order]. My understanding is that Affidavit should be sworn and served in the near future."

44. She says at paragraph 16 that she has reached out to friends and family to request financing but adds at paragraph 17 that this has not resulted in any "potential funding". At paragraph 18 she says that she paid US$50,000 from third parties to Stuarts but apparently that has not been enough to

enable the Defendants to comply with the Disclosure Order. At paragraph 21 D1 requests the court in "these circumstances" in "its discretion, not to grant the debarring application and permit the Defendants to continue their defence."

Karen Scott

45. Karen Scott, one of the JOLs of CSL, swore an affidavit in reply on 22 August 2023. She says at paragraph 9 that none of the Defendants have complied with the provision of information required by the Disclosure Order despite a letter from Stuart Humphries dated 25 July 2024 stating that they were instructed that D2 and D3 were in the process of collating the information required by the Disclosure Order. She adds that D2 and D3 have not applied to set aside the default interlocutory judgment.

46. Ms Scott at paragraph 11 refers to the information orders made against CSL on 16 June 2023 and restated on 16 January 2024 in the FDL Proceedings when CSL was represented by McGrath Tonner who remained on record in the FDL Proceedings until 25 April 2024. She says that the orders were never appealed. She adds at paragraph 12 that despite being represented by counsel CSL "of which [D1] was a director and ultimate beneficial owner" still failed properly to comply with orders made by Kawaley J. Indeed the position was worse as Ms Scott says D1 "filed evidence, purportedly in compliance with those orders, which was subsequently shown to have been perjured and included forged documents … and which gave a deliberately false account of the whereabouts of the Proceeds of Sale".

47. Ms Scott at paragraph 13, with some considerable justification, says that it is "extremely disingenuous" of D1 to say, as she does at paragraph 9 of her unsworn affidavit dated 19 August 2024, that she must be assisted by counsel in order to engage in the process of complying with the Disclosure Order.

48. Ms Scott at paragraph 14 states:

> "It is apparent from [D1's] conduct that she has no intention of complying with any order of the Court to provide information about her own, or CSL's, assets and is looking for any excuse not to do so".

49. Ms Scott at paragraph 17 responds to D1's allegations that they are on "a fishing expedition" by justifiably commenting that this "wholly overlooks that these are orders of the court which the Defendants are in breach of."

The Law

50. I now deal with the relevant law.

Jurisdiction

51. Under section 11(1) of the Grand Court Act (2015 Revision) (the "Act") it is provided in effect that the Grant Court, in addition to any jurisdiction previously exercised by the court or conferred by any Act, shall possess and exercise, subject to any Act, the like jurisdiction within the Island which is vested in or capable of being exercised in England by His Majesty's High Court of Justice.

52. Section 18 (1) of the Act provides that subject to the Act or any other law the jurisdiction of the Grand Court shall be exercised in accordance with any Rules made under the Act.

53. No rule in the Grand Court Rules and no Act dealing with debarring orders has been brought to my attention.

54. Section 18(2) of the Act provides that:

> "In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."

Zuckerman on Civil Procedure

55. *Zuckerman on Civil Procedure* (Fourth Edition) at paragraph 3.200 on page 178 states:

> "Denying a party an opportunity to participate may be justified where the party has refused to comply with court orders [footnote 602 refers to *Hadkinson v Hadkinson* [1952] P 288 and *United States v Montgomery (No2)* [2003] EWCA Civ 392; [2003] 1 WLR 1916]. The court would be justified in denying a party the opportunity to participate, or indeed in striking out the party's statement of case, if by disobeying a court order that party has made it impossible for the court to deal fairly with a dispute, as where a party has refused to obey a disclosure order [footnote 603 refers again to *United States v Montgomery (No2)*]".

56. I will deal with *Hadkinson* in detail below. Lord Woolf CJ in *United States v Montgomery (No 2)* [2003] 1 WLR 1916 at paragraph 34 referred to Laddie J's comment that "it is all too easy for a court to be impressed by its own status … where an action or inaction by a party seriously interferes with the fair conduct of a trial as well as being in contempt of an order of the court, it is the former consideration, not the latter, which justifies the court in taking the steps either of staying the proceedings or, where appropriate, striking out the party's claim or defence." Lord Woolf CJ at paragraph 35 recognised the force of Laddie J's comments but added that care has to be exercised in seeking to apply them. Lord Woolf CJ at paragraph 36 stated:

> "In our courts, if a party flagrantly disobeys an order of the court, the court can dismiss his claim or give judgment for the other party or stay the proceedings."

57. I am also conscious that the court should not allow the indignation it may feel about deliberate, inexcusable non-compliance with an order to taint its objective assessment of what a fair, just and proportionate response should be to the non-compliance and how compliance may be secured in the interests of justice.

Civil Fraud Law, Practice & Procedure

58. In *Civil Fraud Law, Practice & Proecedure* by Thomas Grant KC and David Mumford KC the point is made at paragraph 36-016 that:

> "… a finding of contempt is not a necessary precondition of the making of a debarring order … for … alleged fraudsters with no connection to the jurisdiction or who may be

> prepared to turn fugitive rather than face imprisonment, the ultimate threat may not be the risk of incarceration but the prospect of forfeiting the defence to the claim against them."

59. The authors at paragraph 36-017 state that in the context of a debarring order the applicant must prove non-compliance, (outside the committal context) on the civil standard of proof, namely the balance of probabilities.

60. At paragraph 36-020 it is stated that although necessary, proving a breach of an order is not of itself sufficient to allow the court to make an order debarring a defendant from defending the claim against him.

61. The authors add that the defaulting party's breach must give rise to a continuing risk of injustice. In some cases this will consist of a risk to the fairness of the trial process itself, particularly where the defendant's default consists of breaches of the defendant's standard disclosure obligations (paragraph 36-023). In *Arrow Nominees Inc v Blackledge* [2001] BCC 591 letters disclosed on standard disclosure had been forged. The authors refer to the comments of Chadwick LJ at [55]:

> "Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was 'hijacked' by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court."

The authors at 36-023 add:

> "This language, although coming from a case decided at the dawn of the CPR era, resonates with even greater force almost two decades later, in a climate in which concern for the impact of the conduct of litigants upon the court's own resources is even more acute. It is no surprise that the *Arrow Nominees* decision is regularly relied upon in fraud cases as justifying a strong response to the defaults of litigants."

62. At paragraph 36-026 the authors make the point that the circumstances in which justice will be impeded by a party's default can extend however beyond cases in which the fairness of the trial process itself is affected. Injustice can arise even if the fairness of the trial process itself is unaffected. The impact on the court's ability to ascertain the truth is just one factor, another is the impact on the court's ability to enforce the orders it may make. A party's default may render further proceedings unsatisfactory. The authors add:

> "It is now well recognised that such a consequence may arise where the default consists in failure to disclose assets under a freezing order, making it more difficult for the claimant to enforce any judgment in its favour against the defendant[40]. Similarly, it may arise from a failure to comply with orders to provide information and deliver up documents, made in order to safeguard a proprietary claim[41].
>
> [40] *Lexi Holdings v Luqman* [2007] EWCA Civ 1501, at [28]-[29], per Mummery LJ (a case in which the Court of Appeal made an unless order requiring the respondent to disclose in full his assets in circumstances where his earlier assertions about this asset position, made in response to disclosure provisions in a freezing order, were held to be incredible); *Blue Sky One Ltd v Mahan Air* [2010] EWHC 128 (Comm), at [37], per Beatson J; *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411; [2013] 1 W.L.R. 1331, at [183], per Rix LJ.
>
> [41] *Tarn Insurance Services Ltd v Kirby* [2009] EWCA Civ 19; [2009] CP Rep. 22 (CA), at [82], per Sir John Chadwick."

63. The authors at paragraph 36-027 refer to other cases which have gone further and taken into account other considerations as justifying the making of a debarring order even when there is no risk of injustice as between the parties. Maintaining public confidence in the court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself. Popplewell J in *ORB a.r.l. v Ruhan* [2016] EWHC 850 (Com) at [178] stated:

"178. Mr Drake also submitted that an unless order should not be made in the absence of a breach so serious that it would give rise to a risk of injustice in the adjudication of the trial of the issues in the action, such as would make a fair trial impossible, citing as authority *Raja v Hoogstraten* [2004] EWCA Civ 968, per Chadwick LJ (paragraphs 112-113). This proposition is unsound in principle and unsupported by the authority cited. It was the argument rejected by the Court of Appeal in *Marcan Shipping v Kefalas*. The Court's orders are made with a view to promoting a fair and effective trial. In the context of freezing orders, the emphasis is on an effective trial, so as to enable the applicant's rights to be vindicated by enforcement, not merely judgment. The interest of a party in seeking an effective and realistic outcome to his litigation, if he succeeds, may be as important in the balance of things as the interest of the other party in preserving his right of access to trial despite his refusal to abide by orders of the court: see *JSC BTA Bank v Ablyazov (No 8)* [2013] 1 WLR 1331 per Rix LJ at paragraphs [182]-[185]. Moreover, the Court's orders are to be obeyed. The administration of justice depends on it. Maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself: *ibid* at paragraph [188]. The Court regularly makes debarring orders where the failure does not directly impact on the substantive issues which fall to be decided at trial. It does so, for example when it stays proceedings for failure to provide security for costs. It is well established that such an unless or debarring order may be justified by failure to comply with a freezing order and ancillary disclosure order: see for example *Lexi Holdings Plc v Luqman* [2007] EWCA Civ 1501; *JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (Comm); *JSC BTA Bank v Shalabayev* [2011] EWHC 2903 (Ch); and *JSC BTA Bank v Ablyazov (No 8)* (supra).

179. There are a number of factors which have persuaded me that only by imposing an unless order can the Court render the March Order effective.

180. The Orb Parties have already failed twice to comply with the Disclosure Orders, in each case without any adequate apology or excuse:

(1) In respect of the February Disclosure Order, they failed to comply in the respects identified in Cooke J's March judgement.

(2) As I have held, in August 2015 and thereafter the Orb Parties simply ignored the Court's March Disclosure Order, despite the fact that it bore a penal notice, and advanced what they appreciated was a spurious argument as a fig leaf for doing so.

181. This high handed behaviour, and refusal to recognise the authority of the Court's orders, is of a piece with their abusive behaviour in other respects. There is a long history of behaviour by the Orb Parties in these and other proceedings which shows that they are prepared to mislead the Court and abuse the Court's processes for the improper collateral purpose of putting pressure on Mr Ruhan..."

64. The authors at paragraph 36-029 state in effect that if it is obvious that an unless order would serve no useful purpose an immediate order may be made but "given the seriousness of a … debarring order, in most cases the court is likely to give a defaulting party some further time to comply in the form of an unless order before imposing that ultimate sanction."

65. The authors at paragraph 36-030 consider the impact of a debarring order on the defendant's right of access to the court. Arden LJ in *Stolzenberg v CIBC Mellon Trust Co Ltd* [2004] EWCA Civ 827 stated at [161]:

> "161. Article 6 of the Convention requires attention to be addressed to a matter which has always been implicit in cases of this kind, namely that the effect of the court's refusal to grant relief is that the losing party will be deprived of a trial of his defence on the merits. Clearly, as the judge recognized, that is an important factor. But three points must be borne in mind. First, it is open to a party to consent to judgment being given against him without a trial on the merits. In the absence of some special feature (not present here) there is no public policy consideration which forces an unwilling party to undergo a trial if he, being competent to do so, decides against this course. Second, this is not an appeal against the judgments entered against the appellants. The appellants cannot say that those orders were wrongly made. Third, the state can impose restrictions on the right of access to court provided that the restrictions serve a legitimate aim, are proportionate and do not destroy the very essence of the right. Here, the legitimate aim in imposing a sanction is to secure

> compliance with court orders, which in the instant case were made to ensure the effectiveness of freezing orders. The imposition of a sanction is proportionate if it is reasonably necessary for achieving that aim. The essence of the right of access to court is not destroyed because the litigant has the opportunity to seek relief against the sanctions. The refusal of that relief is Convention-compliant if the same tests are satisfied. The legitimate aim remains the same. Proportionality will be satisfied if the overriding objective is met. The essence of the right will not be destroyed even if refused, since the appellants always had the chance to comply with the court orders and to help progress the case to trial."

66. It appears well established that the High Court of Justice of England has jurisdiction to make debarring orders and the "practice and procedure" in the High Court of England permits debarring orders to be made. Consequently the Grand Court also has jurisdiction to make debarring orders on an "immediate" basis or on an "unless" basis. Moreover, such may be made without a contempt hearing and formal findings of contempt being recorded.

67. I now dig into more detail in respect of the relevant authorities.

Hadkinson

68. Ms Carver refers to one of the earlier English cases, the oft-cited *Hadkinson v Hadkinson* [1952] P 285; [1952] 2 ALL ER 567. In that case an order was made that a child should not be removed out of the jurisdiction without sanction of the court. The mother removed the child to Australia without sanction of the court. An order was made that she return the child. On appeal by the mother, the father objected that, as she was in contempt, she was not entitled to be heard. Romer LJ at page 569 stated that the mother's action was in direct violation of a court order and constituted, *prima facie*, a gross contempt of court. Romer LJ added:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged …".

This passage was endorsed by the Privy Council in *Isaacs v Robinson* [1985] AC 97 at 101.

69. Romer LJ referred to the consequences of being in breach of a court order. The first relates to contempt and punishment:

> "The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt."

70. Romer LJ referred to exceptions to the rule including applications to purge the contempt and an appeal with a view to setting aside the order on which the alleged contempt is founded. Romer LJ added in passing, at page 571, "an apology is no acceptable substitute for compliance with an order and will not in any circumstances be regarded in itself as a purging of contempt."

71. At page 571 Romer LJ stated:

> "Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be …".

72. At page 572 Romer LJ stated:

> "… the mother was not entitled, in view of her continuing contempt of court, to prosecute the present appeal and that she will not be entitled to be heard in support of it until she has taken the first and essential step towards purging her contempt of returning the child within the jurisdiction."

73. Denning LJ at page 573 stated that he believed this was "the first occasion on which this court, since it was set up eighty years ago, has refused to hear an appellant who has been heard by the court below."

74. Denning LJ referred to the history of the rule in chancery matters which "was never applied unless and until the contempt had been established … As soon as that was done, the party became a party in contempt and the court would not hear him …". In ecclesiastical matters if a party was in contempt for disobeying an order, and his disobedience impeded the course of justice in the suit, the court might in its discretion refuse to allow him to take active proceedings in the suit until the impediment was removed.

75. Denning LJ, having given us all a valuable history lesson, at pages 574-575 referred to the "modern rule":

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance … . I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

Arnage v Walkers

76. In *Arnage v Walkers* 2022 (1) CILR N3 (FSD judgment 25 January 2022) Romer LJ in *Hadkinson* was cited at paragraph 84. At paragraphs 78-103 of my judgment, I stressed the importance of strict compliance with court orders.

77. At paragraph 85 the obvious but important point is made:

> "It is not for any party to decide unilaterally whether he will comply with a court order and if so when and to what extent."

78. At paragraph 88 it is stated:

> "There is a very substantial public interest in seeing that court orders are obeyed. The whole foundation of the rule of law would collapse if court orders ceased to be obeyed."

79. At paragraph 95 I referred to the comments of Lord Phillips sitting in the Judicial Committee of the Privy Council in *Mossell (Jamaica) (t/a Digicel) v Office of Utilities Regulations* [2010] UKPC 1. At paragraph 43 of his judgment Lord Phillips referred to *Isaacs v Robertson* [1985] AC 97 and stated that it was established that orders of the court "must always be obeyed, whatever their defects, until set aside." Orders must be complied with even if a party thinks they have been

wrongly or irregularly obtained. Whatever their apparent defects orders must be complied with until set aside. Lord Diplock in *Isaacs* was at pains to stress that an order made by a court of unlimited jurisdiction (in that case the High Court of Saint Vincent) must be obeyed unless and until it has been set aside by a court (at page 101). At page 103 Lord Diplock added that "Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies." Irregular orders must be complied with until set aside.

80. I also briefly refer to *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35 where the Judicial Committee of the Privy Council in effect held that even where a winding up order has been made without jurisdiction it must be complied with until it is set aside or in some way stayed. At paragraph 25 the Privy Council made it clear that even though a court of unlimited jurisdiction did not in fact have jurisdiction to make a winding up order and appoint joint official liquidators the order "must, at least until it is set aside by a subsequent order be treated as effective in law. This is because of "the short and well established ground that an order made by a court of unlimited jurisdiction … must be obeyed unless and until it has been set aside by the court" – per Lord Diplock giving the advice of the Board in *Isaacs v Robertson* [1985] 1 AC 97, 101F. Consistently with this, there is a number of cases in which judges have held that they cannot "go behind" a winding up order, ie that it must be treated as valid and effective, albeit until it is set aside or in some way stayed …".

81. At paragraph 102 of my judgment in *Arnage v Walkers* reference was made to Grand Court Practice Circular No 1 of 2014 at paragraph 1:

> "… orders, including interlocutory orders, must be complied with to the letter and on time."

82. At paragraphs 118-132 I covered the position under the laws of the Cayman Islands in respect of unless orders in the context of failing to comply with discovery obligations. Unless orders are orders of last resort usually only made if there is a history of failure to comply with previous orders. It is the party's last chance to put his case in order. In that case I was persuaded to give the Fifth Plaintiff a further chance to put his house in order in respect of discovery and inspection and I gave him further time to do that and did not make an unless order (paragraph 155 of the judgment).

83. In *New Frontier Health Corporation* (FSD unreported judgment delivered 24 April 2024) I referred to *Arnage v Walkers* and also stressed the importance of complying with court orders at paragraph 23. In *New Frontier Health* at paragraph 22 I referred to section 7 of the Bill of Rights scheduled to the Cayman Islands Constitution ("Section 7") which provides that everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time. It is in similar terms to Article 6 of the European Convention of Human Rights and Fundamental Freedom ("Article 6").

JSC BTA Bank v Ablyazov

84. Ms Carver also helpfully referred to *JSC BTA Bank v Ablyazov (No 8)* [2012] EWCA Civ 1411, [2013] 1 WLR 1331, [2013] 2 ALL ER 515. In that case proceedings had been brought by a bank against A in which the bank claimed that A had defrauded the bank of a considerable amount of money. The bank obtained a freezing injunction against A and he was required to disclose details of his assets and in particular details of companies in which he was involved. The bank made an application for a committal order on the grounds of non-disclosure of assets, lying during cross-examination and dealing with assets. The judge found A guilty of contempt of court and imposed a sentence of twenty two months' imprisonment. A went into hiding. On a further application by the bank the judge ordered that unless within a stated period A surrendered himself to custody and made proper disclosure of all his assets and his dealings with them, he would be debarred from defending the claims. A appealed raising numerous grounds including a lack of jurisdiction. The headnote reflects that it was held that the court did not lack jurisdiction, whether under section 37 of the Senior Courts Act 1981 (power to grant an injunction or appoint a receiver in all cases which it appears to the court to be just and convenient to do so) or under its own inherent jurisdiction, to do what was just and convenient, and necessary, to protect its own orders and to give effect to the interests of justice. Accordingly (Toulson LJ disagreeing as to the element of the order debarring A from defending the claims unless he surrendered himself to custody), it had been fair, necessary and proportionate for the judge to have made the unless order.

85. At paragraph [147] Rix LJ (a former Justice of Appeal of the Cayman Islands Court of Appeal) referred to English case law indicating that "Freezing orders are critical weapons in the courts' armoury against fraud, securing the preservation of assets … the preservation of evidence, including documentation, and the provision of information to trace the proceeds of fraud."

86. At paragraph [148] Rix LJ referred, where an unless debarring order had been made, to the comments of Sir John Chadwick (another former Justice of Appeal of the Cayman Islands Court of Appeal) with whom Waller LJ and Thomas LJ agreed in *Tarn Insurance Services (in administration) v Kirby* [2009] EWCA Civ 19, which are very pertinent in the case presently before the court and upon which Ms Carver is right to place emphasis:

> "… In the case of deliberate and persistent non-compliance with orders to provide information and deliver documents made in order to safeguard proprietary claims, a proper administration of justice requires that, save in very exceptional circumstances, sanctions imposed should take effect. There were no exceptional circumstances in the present case."

87. Rix LJ at paragraph [168] stated that it was "impossible to submit that the court lacks jurisdiction, whether under section 37 or under its own inherent jurisdiction to do what is just and convenient, and necessary to protect its own orders and to give effect to the interests of justice … There is no doubt that the bank has a legal or equitable right … to entitle it to seek freezing orders from the courts and there is no doubt that the court thereafter has the power to do what is just and necessary to give effect to such orders". Rix LJ referred at paragraph [171] to jurisprudence being "replete with confirmation of the power possessed by the court to make such orders as are necessary to make its own orders effective."

88. At paragraph [186] as an aside Rix LJ made comments which also have a ring of applicability in the case presently before this court, although the trial stage is yet to be reached:

> "…a trial involving a recalcitrant defendant who has shown himself willing to suborn false testimony and to rely on forged documents, but who remains unrepentant and unwilling to face up to the responsibilities of his litigation, is hardly likely to be a trial which remains unpolluted in itself from the conduct of that defendant."

89. At paragraph [188] Rix LJ, in colourful and persuasive language, stated that "it is vital for the court, in the interests of justice, to have effective powers, and effective sanctions. Without these, it would be possible for a defendant (or, in a different situation, a claimant) to flout the orders of the court, which are the court's considered means by which to keep the scales of justice for the parties even. If once it became known that the court was unable or unwilling to maintain the effectiveness of its

orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice. Those wrongly accused of fraud would be relieved of a certain amount of inconvenience, but fraudsters would rejoice and hitch a free ride to interminable litigation on the back of ill-gotten gains."

90. Toulson LJ at paragraph [195] stated that he agreed with Rix LJ "in every respect except one". Toulson LJ agreed that the appeal against the order debarring Mr Ablyazov from defending claims unless he makes proper disclosure of his assets and his dealings with them, should be dismissed. Toulson LJ, however, expressed concern at paragraph [197] in respect of part of the order debarring Mr Ablyazov from defending the claims if he fails to surrender, but recognised at paragraph [197] and [200] that such concern was likely to be "academic".

91. Maurice Kay LJ (a former Justice of Appeal in Bermuda) at paragraph [201] agreed with Rix LJ and at paragraph [202] added:

> "It is difficult to imagine a party to commercial litigation who has acted with more cynicism, opportunism and deviousness towards court orders than Mr Ablyazov."

92. It is also useful to refer to two of the many first instance judgments in the *JSC BTA* proceedings. Christopher Clarke in [2010] EWHC 2219 (QB), in the context of a case where there was a challenge to jurisdiction pending, referred at paragraph 16 to counsel's submission that "the courts have stressed the importance of compliance with the disclosure provisions of worldwide freezing orders on numerous occasions" and the comments of Etherton J (as he then was):

> "Freezing orders are critical weapons in the court's armoury against fraud, securing the preservation of assets which might otherwise be wrongly dissipated pending judgment and in appropriate cases the preservation of evidence, including documentation, and the provision of information to trace the proceeds of fraud."

93. At paragraph 17 there is reference to the words of Sir Swinton Thomas:

> "This court cannot stress too strongly the importance of strict compliance with court orders, especially unless orders. If relief is granted lightly an entirely wrong message goes out to litigants and their advisers … judges of first instance are entitled to complain if, having

made orders envisaged by the rules and which they are encouraged to make by this court, this court then lightly sets them aside."

94. Reference at paragraph 22 is made to comments of Steyn LJ to the effect that without disclosure orders "the worldwide Mareva injunction will be a relatively toothless procedure in the fight against rampant transnational fraud." The need for disclosure orders to "police" the injunction is also referred to as an important policy factor. At paragraph 25 there is reference to a disclosure order being a very important part of the jurisdiction to make worldwide freezing orders. Although a disclosure order was an invasion of a defendant's privacy, a freezing order could not in all circumstances be effected without such an order. At paragraph 27 the comment is made that a "freezing order in normal circumstances cannot be effective without disclosure". At paragraph 35 there is reference to "a more robust approach to litigants whose conduct is liable to subvert the overall fairness of the proceedings."

95. Christopher Clarke J at paragraph 38 stated:

> "… if the court makes an order for disclosure for information on documents it is entitled, in the event of non-compliance, to order that if such non-compliance is persisted in the claimant will be at liberty to enter judgment. Were it otherwise, in many cases the order would be without effect …. There are many cases in which it is only an "unless" order that will ensure compliance."

96. At paragraph 39 Christopher Clarke J emphasises that "the court expects its orders to be obeyed by those who are subject to them."

97. At paragraph 41 Christopher Clarke J did not accept that the question is solely whether non-compliance will render further conduct of the proceedings unsatisfactory. He stated that "the court is entitled to take into account the effect of making, or not making, the order sought on the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective."

98. Henderson J in a judgment delivered on 10 November 2011 [2011] EWHC 2915 (Ch) at paragraph 13 referred to the fact that if an unless order is not complied with its consequences automatically

take effect in accordance with the principles explained by the Court of Appeal in *Marcan Shipping (London) Limited v Kefalas* [2007] EWCA Civ 463, [2007] 1 WLR 1864.

Lexi Holdings v Luqman

99. In *Lexi Holdings v Luqman* [2007] EWCA Civ 888 the Court of Appeal of England and Wales made an order that unless Mr Luqman complied in full with all the obligations contained in certain paragraphs in an order made by David Richards J within 14 days the defence "be struck out and he be debarred from defending these proceedings further."

100. Mummery LJ gave reasons the next day [2007] EWCA Civ 1501. The orders of David Richards J included world-wide freezing orders and orders for the disclosure of assets, the disclosure of information relating to the location of alleged misappropriated assets and property of the company for the purpose of tracing the property and assets and for the disclosure and preservation of documents. Briggs J had refused to make unless orders. At paragraph 29 Mummery LJ stated that "the judge was wrong not to make an unless order in relation to the respondent's disclosure of assets. I agree with Lindsay J that, on the material before the court, his evidence is incredible and that it is now necessary to make an unless order, which, if not complied with, will result automatically in the respondent being debarred from defending the claim against him."

101. In the same proceedings but on 29 August 2007 [2007] EWCA Civ 1070 Lawrence Collins LJ commented (at paragraph 4) that Mr McGarry had failed to comply with freezing and disclosure orders. An unless order was made and not complied with and judgment was granted. Mr McGarry applied for the judgment to be set aside and relief from sanctions. At paragraph 7 there is reference to the judge noting that "Mr McGarry had never had any intention to comply with the orders … and that the failure to comply was deliberate … The application … was unaccompanied by any recognition that there had been a failure to comply with the Unless Order". At paragraph 8 it was noted that the judge had said he had had to "consider Mr McGarry's complete reluctance to put all the cards on the table and be frank about the transactions into which he had entered. He was satisfied that the order was a proportionate and reasonable response to the repeated failures to comply with orders of the court". The judge declined to accede to Mr McGarry's application. Before the appeal court Mr McGarry admitted that "at the outset his default in complying with the orders was, at least

in part, deliberate" (paragraph 9). Mr McGarry accepted that there was "a public interest in the court ensuring that its orders are complied with." (paragraph 9). Collins LJ at paragraph 13 stated:

> "It seems to me that there is no possible ground for interfering with the exercise of discretion. Mr McGarry has been in deliberate breach of the court's orders. He was personally served with both freezing orders and made no attempt to comply with his obligations. He refused to provide the information on the basis of a plea of self-incrimination, which he now accepts was misconceived. He produced only redacted bank statements … This court has emphasised on a number of occasions the importance of strict compliance with Unless Orders, and the gravity of non-compliance greatly increases where it results from a conscious decision. This was a case of a deliberate breach of an Unless Order designed to enforce compliance with orders which were intended to ensure not only effective operation of the freezing injunction but also the preservation of evidence for trial."

Blue Sky One

102. In *Blue Sky One Limited v Balli Group plc* [2010] EWHC 128 (Comm) Beatson J (now Beatson JA in the Cayman Islands Court of Appeal) made reference to his prior finding of contempt against certain parties for their failure to comply with a court order requiring the delivery up of aircraft. He had also ordered the strike out of statements of case and debarred certain parties from taking part in a trial. At paragraph 37 Beatson J rejected a submission that because the non-compliance with the order would not impact on whether the court could ascertain the truth in the trial that necessarily makes barring the defendants from participating in it disproportionate. Beatson J concluded that, in the circumstances of the case before him, the breach of the order fell within the second limb of the analysis of Denning LJ in *Hadkinson's case.* Beatson J concluded, on the material before him, that Mahan's conduct in relation to the order appeared to be a calculated and systemic attempt to ensure that the aircraft were not grounded but without offering or providing adequate security to meet the risks that had been identified when the order was made.

ORB a.r.l. v Ruhan

103. Popplewell J in *ORB a.r.l. v Ruhan* [2016] EWHC 850 (Comm) dealt with, amongst others, an application by Mr Ruhan for an order that unless the ORB Parties complied with a disclosure order made on the back of a freezing order their claim and defence to counterclaim should be struck out. At paragraph 47 there was reference to a judgment of Cooke J where he had held that the court had been misled by the ORB Parties and that they were in breach of the disclosure order and there was no adequate excuse or apology offered for their failure to comply with the disclosure order. At paragraph 54 there is reference to the disclosure order not primarily being that of a standard disclosure order which is made ancillary to a freezing order and requiring disclosure of all the defendants' assets up to the maximum amount of the order as it was also addressed to the traceable proceeds of certain sums and was designed to police the efficacy of certain undertakings to preserve assets and enable Mr Ruhan to effectively pursue his proprietary claim in respect of such assets. It was in those respects a hybrid order (paragraph 55).

104. From paragraph 175 onwards Popplewell J deals with the position of unless orders. The judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. They should not be deployed unless their consequences are justified (paragraph 176). Court orders are made with a view to promoting a fair and effective trial. In the context of freezing orders, the emphasis is on an effective trial, so as to enable the applicant's rights to be vindicated by enforcement, not merely judgment. Moreover, orders of the court are to be obeyed. The administration of justice depends on it. Maintaining public confidence in the court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself. The court regularly makes debarring orders where the failure does not directly impact on the substantive issues which fall to be decided at trial. It does so, for example when it stays proceedings for failure to provide security for costs. It is well established that such an unless or debarring order may be justified by failure to comply with a freezing order and ancillary disclosure order (paragraph 178).

105. At paragraph 191 Popplewell J concluded, without any real hesitation, that:

> "… an unless order is necessary to bring home to the Orb Parties the importance of complying with the Court's order. It is a necessary and proportionate sanction without

which the Orb Parties would likely continue the pattern of behaviour in failing to comply if it did not suit them. The Orb Parties will be given a further period within which to comply with the March Disclosure Order, failing which their claim and defence to counterclaim will be struck out …".

Byers v Samba Financial Group

106. Ms Carver also referred the court to *Byers v Samba Financial Group* [2020] EWHC 853 (Ch). In that case a Saudi Arabian bank declined to provide standard disclosure on the basis that its regulator would not permit it. At paragraph 120 Fancourt J stated:

> "An order striking out a defence or debarring a defendant from defending (or striking out a claim) is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate in the circumstances. Lord Clarke said "… the test in every case must be what is just and proportionate", and he emphasised the draconian nature of the strike out sanction and the flexibility of remedies available to the court to fashion a proportionate remedy. Rix LJ similarly emphasised "… the flexible remedies that the court had at its disposal to make the sanction fit the breach. If a breach, though serious, is excusable, an order striking out a party's case and debarring it from proceeding further may well be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach."

107. At paragraph 122 Fancourt J referred to "an interesting argument at the Bar as to whether a full debarring order is a "normal" or "usual" response of the court to serious non-compliance with its orders." At paragraph 123 Fancourt J adopted the approach of Lord Clarke and Rix LJ and stated:

> "The court must have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective. The seriousness of the breach, the extent if at all which it is excusable and the consequences of the breach will

be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just."

108. In that case Fancourt J struck out and barred only those issues that could not be tried fairly without disclosure by the bank.

109. I referred to *Byers* in *New Frontier Health*.

Michael Wilson & Partners v Sinclair

110. There are important policy reasons why courts make interlocutory disclosure orders in support of asset freezing orders. Without information as to assets it would be difficult if not impossible to properly enforce the asset freezing order. There are also important policy reasons why courts make interlocutory costs orders.

111. In *Michael Wilson & Partners v Sinclair* [2017] EWHC 2424 (Comm) Sir Richard Field (then sitting as a deputy judge of the English High Court now a Justice of Appeal in the Cayman Islands) reviewed the authorities on the making of debarring orders for failure to comply with an interlocutory costs order and at paragraph 29, in an oft quoted paragraph, set out six principles:

(1) The imposition of a sanction for non-payment of a costs order would require the court to exercise its discretion pursuant to the court's inherent jurisdiction.

(2) The court should keep in mind the important policy reasons behind interlocutory costs orders.

(3) The court must give consideration to "all the relevant circumstances". These include the potential applicability of Article 6.

(4) Where the defaulting party submits that he or she lacks the financial resources to pay the costs order (such that a debarring order would be a denial of justice or a breach of Article 6), those submissions must be supported by "detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her

prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability."

(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper evidence of impecuniosity the court ought generally to require the defaulting party to pay the costs order as the price of being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

(6) If the court decides that a debarring order should be made the order ought to be an unless order, except where there are strong reasons for imposing an immediate order.

112. In *Hangar 8 Management Limited v Taleveras Group* [2019] EWHC (Comm) His Honour Judge Pelling QC sitting as a judge of the High Court dealt with an application to set aside a debarring unless order and at paragraph 11 referred to the helpful guidance given by Sir Richard Field in *Michael Wilson and Partners*. Paragraphs 19 and 29 of Judge Pelling's judgment sets out the position where a litigant says that impecuniosity is causing the problem and make it abundantly clear that such litigant is required to provide detailed evidence as to the relevant finance position. A bare asserted plea of impecuniosity will not suffice.

113. In *Tonstate Group Limited v Wojakovski* [2020] EWHC 1004 (Ch) Zacaroli J dealt with an application for a debarring order. In that case various costs orders had not been paid. Again the law as stated by Sir Michael Field in *Michael Wilson & Partners* was applied (paragraph 12 of the judgment). Mr Wojakovski's breaches (including deliberate breaches) of the court's orders were a relevant consideration in determining whether to make a debarring order. A further relevant consideration was whether the claimants had an alternative means of enforcing the order (paragraph 33). The judge concluded (at paragraph 35) that Mr Wojakovski had failed to discharge the burden of establishing that the effect of a debarring order would be to deny him access to justice and/or a breach of Article 6 and as such the default position is that he should be allowed to continue to contest the relevant proceedings only on the condition that he pays the costs order. It was an appropriate case to make a debarring order against Mr Wojakovski. At paragraph 48 the judge was not persuaded to make an immediate debarring order (even where there had been past and continuing breaches of court orders) but gave Mr Wojakovski "a final chance" to pay the costs order within 14 days, failing which "he shall be debarred from defending."

114. The principles outlined in the English authorities in respect of debarring orders and the importance of disclosure orders in the context of freezing orders and proprietary claims appear to have been applied in the Cayman Islands.

Meridian Trust Company

115. Ms Carver helpfully directed my attention to the judgment of Mangatal J in *Meridian Trust Company Limited v Batista da Silva* 2017 (1) CILR 370. In that case the applicants in October 2016 acquired an asset freezing order and an order that the respondents disclose information regarding the first respondent's assets including banking documentation since 2010. The respondents made various disclosures. In January 2017 the first respondent was arrested in Brazil and was detained in a high security prison. He sought an order that he should not be required to disclose historic banking documentation. The applicants applied for an unless order providing that unless the respondents complied with the disclosure obligation within 48 hours they would be barred from opposing the continuation of the asset freezing order until 14 days after the grant of any final judgment in proceedings in Florida which had been commenced in February 2017. The applicants submitted that the respondents were in deliberate and continuing breach of their disclosure obligations. They added that there was no evidence that it was impossible for the first respondent to comply with his disclosure obligations by reason of his imprisonment, and an unless order was appropriate in the circumstances. The headnote in the Cayman Islands Law Reports indicates amongst other matters, it was held that although the circumstances were finely balanced, the court would not make an unless order debarring the respondents from contesting the asset freezing order if they failed to comply with their disclosure obligations. The unless order sought by the applicants would likely have very serious consequences for the respondents. Before imposing this kind of sanction, the court had to consider carefully whether it was appropriate in all the circumstances. The applicants' interests in ensuring compliance and preventing injustice to themselves had to be weighed against the risk of prejudice to the respondents. The fact that the first respondent was in prison took the present case out of the norm. There had been partial compliance by the respondents with their disclosure obligations; there had not been a total failure to comply with what were heavy and wide-ranging obligations. The court was satisfied that the fact that the first respondent was in prison produced an added difficulty that had to be taken into account. The court was unable to say, on the evidence before it, that the first respondent was

deliberately flouting the court's orders. The court gave the respondents additional time to comply with the order (14 days to the second to fourth respondents and 28 days to the first respondent with a provision that if the first respondent was unable to comply he should file an affidavit explaining the basis for his failure and he should have 35 days to issue a summons).

116. In a well considered judgment Mangatal J at paragraph 157 recognised that in her case the court was confronted with "a difficult, delicately poised set of circumstances". At paragraph 159 Mangatal J commented that "the fact Mr Batista is in prison has caused a shift in the scales and is such as to take the case out of the norm." Mangatal J added that "this court's firm expectation and stance is that court orders are to be complied with, unless or until varied, suspended or revoked" but she noted that the respondents "continued to provide a certain amount of disclosure (indeed they did so, even up to the evening before this hearing)". Mangatal J noted that the respondents had "made some attempt to pull themselves up by their bootstraps out of the murky waters of deliberate non-compliance on the flawed ground of their own unilateral views."

117. At paragraph 161 Mangatal J found that there had been "partial compliance with the disclosure obligations" and "There has not been an outright failure to comply with what are heavy and wide-ranging obligations". Mangatal J at paragraph 161 seemed to accept that "the second to fourth respondents have been "coming into compliance"" and she did "not think that the draconian remedy of an unless order is, overall, appropriate at this time".

118. At paragraph 162 Mangatal J stated:

> "I am unable to say, on the present state of the evidence, that I am satisfied that Mr Batista is deliberately flouting the court's orders."

119. Mangatal J felt that "if appropriate time is given some attempt must be made to comply with the disclosure obligations". She did not accept that it was not possible for Mr Batista to sign documents whilst in prison, although she did accept it was not a straightforward or simple process. Mangatal J gave further time for compliance, without imposing an unless order.

The Armand Hammer Foundation

120. In *The Armand Hammer Foundation Inc v Hammer International Foundation* (FSD unreported judgment 14 August 2024) Asif J referred at paragraphs 54-55 to a debarring order he had made. Asif J made a debarring order and was in no doubt satisfied that he had power to do so. In that case it appears from paragraph 64 of the judgment that the Defendants had failed to make the payment on account of costs and they had therefore been debarred from defending the claim against them and from advancing the counterclaim. At paragraph 66 Asif J stated he was unaware of any Cayman Islands authority on the effect of a debarring order on the ability of a party to participate in a trial but felt that the English cases including *Time Travel (UK) Limited v Pakistan International Airline Corp* [2019] EWHC 3732 (Ch) stated to be approved in *Hirachand v Hirachand* [2021] EWCA Civ 1498 provided useful guidance. Asif J then helpfully set out his own formulation of the approach that should be taken based upon the English authorities which he considered provided "useful guidance as to the approach to be taken in the Cayman Islands".

Perry v Lopag Trust

121. Segal J in *Perry v Lopag Trust Reg.* (FSD unreported judgment 12 August 2024) referred at paragraph 15 to the power to make an asset freezing order which carries with it the power to make disclosure orders to make the freezing order effective:

> "They facilitate the policing of the order by identifying the nature and extent of the respondent's interest in assets subject to the order and allow the claimant to decide whether to take further steps (and if so what steps) to protect such assets and avoid asset dissipation."

122. Segal J at paragraph 10 referred to the Trustee's submissions, which relied on *Classroom Investments v China Hospitals* 2015 (1) CILR 451 and *PJSC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 482 (Ch), to the effect that the purpose of an asset disclosure order is to police or put another way make the freezing order effective and the fact that the information is sought is confidential does not of its own entitle the respondent to withhold disclosure. Reference was also made to *Gerald Metals SA v Timis* [2017] EWHC 3381 (Comm) where it was held that sufficient information must be disclosed to allow the claimant and the court to know the nature and

extent of the respondent's interest in the relevant assets and "the Court could require disclosure of a document where that was required for this purpose."

123. At paragraph 18 Segal J referred to English law to the effect that "a party who is subject to a disclosure order is required to take reasonable steps to investigate the truth or otherwise of any answer which he gives as regards assets in which he has or had an interest."

Summary of the relevant law

124. These authorities appear to establish the following:

Debarring orders

(1) The Grand Court has jurisdiction to make debarring orders (section 11(1) and section 18(2) of the Act and the English and Cayman authorities on debarring orders referred to above).

(2) A formal finding of contempt is not a necessary pre-condition to the making of a debarring order (*Hadkinson, Byers*, *Zuckerman on Civil Procedure, Grant and Mumford on Civil Fraud Law, Practice & Procedure*).

(3) The applicant must prove non-compliance (outside the contempt context) on the civil standard of proof namely the balance of probabilities (*Zuckerman on Civil Procedure)*.

(4) The applicant in addition to proving non-compliance may also have to persuade the court that the defaulting party's breach gives rise to a continuing risk of injustice. This may involve the risk of fairness to the legal proceedings either the trial itself or the enforcement of an order such as an asset freezing and disclosure order. Injustice can arise even if the fairness of the trial process itself is unaffected. It may arise where the default consists in failure to disclose assets under a freezing order making it more difficult to enforce any judgment and it may arise from a failure to comply with an order to provide information and deliver up documents, made in order to safeguard a proprietary claim (*Zuckerman on Civil Procedure*, *Lexi Holdings*, *Blue Sky*, *JSC BTA Tarn*, *ORB a.r.l.*).

(5) Maintaining public confidence in the court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless debarring order itself (*Grant and Mumford on Civil Fraud Law, Practice & Procedure*, *ORB a.r.l.*).

(6) The court should keep in mind the important policy reasons behind interlocutory orders. The court should consider all the relevant circumstances including Article 6 and Section 7. If a defaulting party uses lack of financial resources as an excuse it should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the financial position including any prospect of raising the necessary funds. If the court decides that a debarring order should be made the order ought to be an unless order, except where there are strong reasons for imposing an immediate order (*Michael Wilson & Partners, Hangar 8, Tonstate Group*).

(7) The court should take a fair, just, necessary and proportionate approach and the court should consider if another less draconian sanction is sufficient to achieve the ends of justice notwithstanding the breach. The seriousness of the breach, the extent if at all which it is excusable and the consequences of the breach are all very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just (*JSC BTA, Byers, Meridian Trust Company*).

(8) In the case of deliberate and persistent non-compliance with orders to provide information and deliver documents made in order to safeguard proprietary claims, the proper administration of justice requires that, save in every exceptional circumstances, sanctions should be imposed and should take effect (*JSC BTA, Tarn*).

(9) The court is entitled to take into account the effect of making, or not making the order sought on the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective (Christopher Clarke J in *JSC BTA* quoted above).

(10) It is well established that an unless debarring order may be justified by failure to comply with a freezing order and ancillary disclosure order (*ORB a.r.l.*).

Unless orders

(11) Unless orders are orders of last resort usually only made if there is a history of failure to comply with previous orders (*Arnage v Walkers).*

(12) An unless order is sometimes necessary to bring home to defaulting parties the importance of complying with orders of the court.

Freezing and disclosure orders

(13) Freezing and disclosure orders are critical weapons in the courts' armoury against fraud, securing the preservation of assets and evidence including documentation and the provision of information to trace the proceeds of fraud (*JSC BTA, Michael Wilson & Partners, Perry v Lopag Trust)*.

(14) A disclosure order included in an asset freezing order facilitates the policing of the order and the fact that the information is confidential does not of its own entitle the respondent to withhold disclosure (*Perry v Lopag Trust*).

(15) The court has the power to do what is just and necessary to give effect to freezing orders. It may make such orders as are necessary to make its own orders effective (*JSC BTA, Perry v Lopag Trust*).

Importance of compliance with orders

(16) Compliance with court orders is important. There is a very substantial public interest in seeing that court orders are obeyed. The whole foundation of the rule of law would collapse if court orders ceased to be obeyed. Orders, whatever their defects and even if made without jurisdiction, should be complied with until set aside (*Isaacs v Robertson, Mossell (Jamaica) (t/a Digicel), Saad Investments, Arnage v Walkers, New Frontier Health*).

(17) The court's firm expectation and stance is that court orders are to be complied with, unless or until varied, suspended or revoked (*Meridian Trust Company*). The court expects its orders to be obeyed (Christopher Clarke J in *JSC BTA* quoted above).

(18) If once it became known that the court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation with terrible consequences for the administration of justice (*JSC BTA*).

Fair trial and access to justice

(19) The court, in exercising its discretion when considering to make an unless debarring order, should also take into account the provisions of Section 7 and Article 6 (*Stolzenberg, New Frontier Health*).

Determination

125. I now turn to the determination section of this judgment.

General

126. On 15 July 2024 Nelsons acting for the Applicants wrote in perfectly reasonable terms to D1 enclosing an order made on 12 July 2024. Nelsons drew to her attention that she had failed to comply with the Disclosure Order and advised her to seek independent legal advice as a matter of urgency. D1 responded by email (from the email address at which the order for substituted service was directed):

> "Go fuck yourselves – disgusting [with a vomiting emoji]
> Erin Winczura"

127. D1 was not displaying the "charisma" referred to at paragraph 27 of Kawaley J's judgment delivered on 17 August 2023. D1 was in effect, on behalf of herself and her two companies, D2 and D3, also putting two abusive fingers up at the Disclosure Order.

What was the explanation for the deliberate non-compliance?

128. How do the Defendants try to explain away their deliberate non-compliance with the Disclosure Order?

129. In her unsworn affidavit dated 19 August 2024 D1 says at paragraph 4 that it has been "impossible to hire counsel". D1 at paragraph 9 says that several orders have been issued against her "subject to penal consequences" and she "must be assisted by counsel in order to continue to engage in this process." She says (at paragraph 18) that she was able to obtain just under US$50,000 and forwarded such funds directly to Stuarts but she has been unable to obtain further funds (paragraphs 16 and 17). She adds at paragraph 19 that the "absence of funding" has "disabled" the Defendants from substantively instructing Stuarts "to address the disclosures required by" the Disclosure Order.

130. In her 9 page undated and unsigned document (attached to her email dated 1 October 2024 3:59pm) D1 says that the "JOLs have in their possession all necessary information that shows that the judgment for FDL was obtained by fraud" and says that what "follows is a partial recitation of the fraud perpetrated by FDL on this court…". D1 refers to some evidence given by Mr Coleman in the Nevada trial. D1 at page 8 makes further serious allegations:

> "… this was indeed a China hustle. Ms Winczura has been very concerned – indeed afraid – of dealing with and being at the mercy of people who are this ruthless and convincing. They will stop at nothing, as no dirty trick is beneath them, and they will use any means, no matter how despicable, to harm her, her business relationships, and her financial stability. It is fair to say, they are out for her blood. And the JOL's (sic) are right there with them."

131. D1 at page 8 says that "this entire proceeding is tainted by false testimony and false documents" and "All other things must be stayed because right now there is a serious risk that any further orders are a product of the fraud on the court perpetrated by FDL" and adds the following at page 9:

> "JOLs should be denied their effort to debar PFS, Canterbury Group, and Erin Winczura or to get any other and further relief against any of the defendants."

132. D1 in her oral submissions said that she and her companies could not comply with the Disclosure Order as they needed legal advice and representation and did not have the necessary funding. D1 added that the companies could not act without legal representation. In response to a question from the bench as to whether CSL had applied and obtained leave to appeal the FDL Liability Judgment she stated "I don't know that is a technical point, I have no idea, but absolutely everyone knew that we were filing an appeal … I have no idea if the attorney filed the proper document … What I do know for sure was done was everybody was notified we were appealing." She says she got the Coleman deposition, on which her allegations of fraud are based, in November 2023 and wanted to appeal immediately. The JPLs were not appointed until 13 December 2023.

133. Ms Carver referred the court to Kawaley J's judgment in *Canterbury Securities Ltd* (FSD unreported judgment 24 April 2024) where it is recorded that Ben Tonner KC of McGrath Tonner appeared at a hearing on 12 April 2024 for "Ms Erin Winczura (a former director of the Company)" with a footnote that indicated "On 23 April 2024, the Court was notified that McGrath Tonner had ceased to act". The judgment is in respect of an application by the JOLs for sanction not to appeal the FDL Liability Judgment. It is interesting to note that nowhere in Kawaley J's judgment of 24 April 2024 is there any reference to a submission by the experienced Ben Tonner KC on behalf of D1 that the FDL Liability Judgment had been obtained by fraud. At paragraph 22(a) there is reference to evidence adduced by the JOLs that "Ms Winczura alone had urged the JOLs to appeal the Liability Judgment" and at 22(b) there was reference to grounds of appeal but "None of those grounds were considered to be arguable". It was recorded that the JOLs' evidence "was not challenged by counsel for Ms Winczura". Kawaley J made reference to the fact that no immediate steps were taken to appeal and at paragraph 24 Kawaley J noted "The Company under the control of its former management never displayed any conviction on the merits of what was little more than the notion of an appeal against this Court's Judgment which was delivered nearly five months before the Winding Up Order was made". At paragraph 25 Kawaley J referred to "the JOLs' attempts to avoid being distracted by the Company's former management, and not wish them to focus on seeking to recover assets to meet their claims". D1 seeks to distract from her failings by making belated, ill-informed and misconceived attacks against FDL to the effect it obtained the FDL Liability Judgment by fraud. D1 should have focused on the need to comply with the Disclosure Order or at least explaining her deliberate decision not to comply. D1 seems to think that the best form of defence is attack but the attack she attempted was launched far too late and with no evidence to support it.

134. In *Consolidated Contractors International Company SAL v Masri* [2011] UKPC 29 the Judicial Committee of the Privy Council referred at paragraph 3 to Kawaley J's "full and careful judgment". In that case CCIC applied to set aside English judgments registered in Bermuda on the ground that they were obtained by fraud. Kawaley J, the Court of Appeal of Bermuda and the Privy Council were having none of it. There was reference (at paragraph 21) to CCIC not making a case of fraud in the English jurisdiction or attempting to set aside any of the English judgments. The Privy Council felt that if CCIC had a *prima facie* case that the judgments had been obtained by fraud "one can be confident, in view of the history of this litigation, that CCIC would not have been shy in pursuing that case or at least raising the allegation in the context of the English proceedings at any early stage". At paragraph 21 it was stated that "the Committee does regard CCIC's failure even to allege fraud in the years from 2006 to late 2008 as affording factual confirmation of the unreality of the allegation now made, a factor to which Kawaley J also referred (paragraph 66)."

135. In the circumstances of the case presently before me I attach very little weight to D1's belated fresh allegations of fraud which even if true would provide no excuse whatsoever for the Defendants' failure to comply with the Disclosure Order within the 7 days specified.

136. D1 refers to material which she said in her oral submissions she had in November 2023 and, which she says indicated the FDL Liability Judgment had been obtained by fraud and she "gave it to everybody". If it was genuinely felt that the FDL Liability Judgment was obtained by fraud CSL should have sought to appeal it on that basis. It did not. Kawaley J at paragraph 27 of his judgment of 24 April 2024 recorded his decision to sanction "the decision of the JOLs not to pursue an appeal against the Liability Judgment". It was in these circumstances that I was somewhat sceptical in respect of D1's belated fresh claims of fraud, unsupported by evidence.

137. D1's attack on FDL was no defence to non-compliance at all. As Ms Carver rightly stressed, even if D1 genuinely thought that the Disclosure Order was irregularly granted or was in some way tainted by the conduct of FDL, that was no excuse for non-compliance with the Disclosure Order which remains valid until set aside.

138. The 9 page undated and unsigned document filed on the eve of the hearing, perhaps filed with an increasing realisation that the lame excuse "we could not comply because we did not have funds to engage attorneys" would not hold muster, appeared a somewhat desperate and clumsy attempt to

try and distract focus on the Defendants' wrongdoing in failing to comply with the Disclosure Order and to try and focus on allegations against FDL who were not before the court to answer such allegations. It was a very unimpressive tactic.

139. D1 stressed that the FDL Proceedings were "100% fraudulent" and all of the relevant orders (presumably on her case including the Disclosure Order) came from the court being misled with no "full and frank disclosure" and FDL's documents submitted to the court through its attorneys were "100% false". D1 submitted that D2 and D3 needed an attorney to enable them to respond to the Disclosure Order and there should be no debarring order. D1 says that she has "been unrepresented."

140. There are a number of problems with the unconvincing position adopted by D1, including the following:

(1) CSL did not appeal the FDL Liability Judgment.

(2) The JOLs received sanction from Kawaley J not to appeal the Liability Judgment (FSD unreported judgment reasons delivered 24 April 2024).

(3) D1 has produced not one shred of evidence to support her belated fresh serious allegations of fraud made on the eve of the hearing in an undated and unsigned document. Under the order made on 31 July 2024 the Defendants had until 3pm on 19 August 2024 to file and serve their evidence in response to the Summons. The unsworn affidavit of D1 dated 19 August 2024 made no references whatsoever to a fraud by FDL in obtaining the FDL Liability Judgment. The whole thrust of D1's unsworn evidence was that the Disclosure Order had not been complied with as the Defendants were without funds to engage legal advice and representation and they needed advice before they provided the disclosure. This is not the first belated attempt at introducing a new allegation of fraud in the proceedings involving CSL. CSL in the FDL Proceedings sought to adduce expert evidence "in support of an essentially un-pleaded new case on fraud" (paragraph 106 of the FDL Liability Judgment). CSL's pleaded case was that YRIV had been engaged since about December 2015 in a fraudulent scheme to inflate the price of its publicly traded shares artificially (the "Scheme"). Kawaley J refused leave by a ruling delivered on 30 June 2023. Kawaley J in the FDL Liability Judgment was critical of CSL referring to CSL's pleaded case "over three

years ago" and its attempts to "adduce an entirely new expert report from an unidentified new expert witness in support of an entirely new and un-pleaded case on market manipulation" (paragraph 110 of the FDL Liability Judgment). At paragraph 116 Kawaley J felt it important "to dispel any impression that the Court has rejected this defence based purely on technical pleading rules and turned a blind eye to clear evidence of fraud." At paragraph 117 Kawaley J referred to there being "no clear evidential base for the proposition, which was not even formally advanced, that the alleged Scheme participants always knew that they would not obtain the port project." At paragraph 129 Kawaley J found that "the pivotal allegation that FDL was engaged in The Fraudulent Scheme has not been proven". At paragraph 145 Kawaley J also found that "FDL did not induce CSL to enter into the Brokerage Contract by making fraudulent misrepresentations about its beneficial ownership" as alleged by CSL.

(4) If D1's case was that she was not complying with the Disclosure Order because it is an irregular order (in that it is tainted by the belated allegations of fraud against FDL) such is no excuse for non-compliance, as well established by the authorities reviewed above. Orders, even irregular orders, must be complied with unless and until set aside. Moreover there has been no application to discharge the Disclosure Order and no appeal against it or against the appointment of the JOLs. Furthermore, there is no evidence that the FDL Liability Judgment was obtained by fraud or that the Disclosure Order was an irregular order.

(5) The Defendants' suggestion that they have no money for legal advice and representation also rings hollow. D2 and D3 had retained Stuarts. Stuarts also acted for D1 but were careful not to appear on her behalf. By email dated 9 July 2024, Richard Annette of Stuarts indicated that Stuarts had been instructed to act for D2 and D3 and that they "act for the First Defendant but have not been instructed in the Proceedings." The Defendants could have engaged Stuarts to assist them in complying with the Disclosure Order. The Defendants plainly had access to funds to engage legal advice and representation and obtained such in respect of these very proceedings and indeed other proceedings. By order made by the Chief Justice on 3 September 2024 Stuarts once they served the Order on every party to the proceedings ceased to be the attorneys on record for D2 and D3. So from at least 9 July 2024 to at least 3 September 2024 the Defendants benefited from Stuarts acting for them and could have taken and acted upon advice in respect of compliance with

the Disclosure Order and yet still deliberately refused to comply with the Disclosure Order. The Disclosure Order should, of course, have been complied with in early May 2024 with or without legal advice. It appears that the priority of the Defendants was not to comply with the Disclosure Order.

(6) Furthermore, previous indications that compliance would be forthcoming have come to nothing. Stuarts by letter dated 25 July 2024 to Nelsons at paragraph 1.1 indicated that they had been expressly instructed that D2 and D3 "are in the process of collating the information responsive to" the Disclosure Order. As at 2 October 2024 that information had not been provided. This was an empty indication suggesting partial compliance by D2 and D3 in due course which unsurprisingly has come to nothing. D1 indicated at paragraph 15 of her unsworn affidavit dated 19 August 2024 that D2 would be swearing and serving an affidavit in compliance with the Disclosure Order "in the near future". Again more empty indications of partial compliance by D2 which have come to nothing. I was not made aware of any such affidavit and no such affidavit appeared in the bundle. Moreover there was no explanation as to why such affidavit could not have been provided in early May 2024 in accordance with the Disclosure Order.

141. As Rix LJ stated in *JSC BTA* freezing orders are critical weapons in the courts' armoury against fraud and as Segal J stated in *Perry v Lopag Trust* disclosure orders facilitate the policing of the freezing order and protection of assets. I would respectfully add that disclosure orders in support of freezing orders are orders of great importance in the fight against fraud and to facilitate bringing wrongdoers to justice and their ill-gotten gains being effectively recovered.

142. The Defendants should have given full details of their assets, the bank account statements and the simple screenshot required in early May 2024. D1's unsworn affidavit does not provide any reasonable explanation or justification for the serious failure to comply with the Disclosure Order. She has found money to fund various attorneys, including McGrath Tonner and Stuarts Humphries, to progress and seek to defend her position but it appears she was unwilling to spend money on complying with the Disclosure Order which should have been her priority. In any event I do not accept her claim that in effect she and her companies, D2 and D3, could not comply without the advice of Cayman counsel.

143. Furthermore nowhere in her unsworn affidavit is there reference to any acknowledgement that the Disclosure Order should have been fully and promptly complied with. There is no apology or reasonable explanation for the clear failure to comply. It is in fact quite a shocking response which reveals a blatant disrespect to court orders, the legal process and the rule of law. It is as if D1 thinks that the rule of law and orders of the court requiring disclosure do not apply to her or her companies D2 and D3.

144. The Defendants have provided no reasonable explanation for their deliberate failure to comply with the Disclosure Order. The Defendants have provided no apology for their deliberate non-compliance. It was a very serious situation which required a fair, just and proportionate response from the court.

D1's failure to appear in person at the hearing

145. I should add that D1 failed to appear in person at the hearing. No leave to attend remotely had been properly applied for or given. By email dated 30 September 2024 10:33am, D1 wrote to my PA in the following terms:

> "I apologize for the late notice as it (sic) was intending on appearing in person on Oct 2, unfortunately I am not able to appear in person (sic) can you please send me the zoom link …"

146. D1 gave no reason as to why she was apparently unable to appear in person. No mention of the weather or lack of funds. On 2 October 2024 I permitted D1's appearance remotely but did ask her for her reasons for non-attendance in person. She then expressed concerns about the weather. It is interesting that she did not say she could not afford to travel to the Cayman Islands. For the record, the courts of the Cayman Islands were open, as was the airport. Weather was not preventing travel. No evidence was put before me to indicate that D1's attendance was not possible because of the weather. In her interview with the JOLs on 24 January 2024 (at pages 22-23 and 25) D1 said that she was in Mexico for work at a remote mine site in the jungle and they "helicopter in and out". On 31 January 2024 D1 said she was in New York. If she is to be believed she obviously had access to funds to spend on travel when it suited her. In her email of 1 May 2024 1:56pm to Mr Harris, D1 describes her Shamrock Road property in Cayman as "our primary residence" and adds "not

sure how things got off the rails". She apparently no longer seems to reside at her "primary residence" any more. D1 seems reluctant to attend the Cayman Islands in person, and her US$2 million plus home in the Cayman Islands, presently frozen, presumably lies empty.

147. Karen Scott, one of the JOLs, at paragraph 34 of an affidavit sworn on 23 April 2024 states that D1 "has repeatedly promised to attend an in-person interview with the JOLs but, to date, has never done so." More broken promises, this time to officers of the court.

148. This is further evidence of D1's lack of positive engagement with the legal process. The reasonable inference is that she is staying away from the Cayman Islands because she wishes to try and avoid being brought to justice.

An immediate debarring order or an unless debarring order or no debarring order?

149. The Plaintiffs in effect sought a debarring order with immediate effect. D1 in effect submitted that a debarring order should not be made.

150. In their Debarring Summons the Plaintiffs sought an order that unless the Defendants complied with the Disclosure Order by 4pm on 14 August 2024 they should be debarred from further defending the action. At paragraph 11 of the Plaintiffs' skeleton argument dated 24 September 2024 it was specified that:

> "The Court is asked to exercise its inherent jurisdiction to debar all three defendants from further defending this action, or from filing any application or evidence without leave of the Court unless, by a specified date, they fully comply with the Disclosure Order …"

151. At paragraph 65 the Plaintiffs asked the court to make an order in the form of a draft included in the hearing bundle. The draft order in the bundle sought an immediate debarring order. The Plaintiffs submitted that as the 14 August 2024 had "now passed, the Plaintiffs' application is that no further time should be permitted and the debarring order should take immediate effect and that the two summonses filed by the Defendants after the filing of the Debarring Summons should be dismissed".

152. On balance I did not think it just and proportionate to make an immediate debarring order or to immediately dismiss the summonses. Instead I felt the more just and proportionate approach would be to give the Defendants one last chance to comply with the Disclosure Order. If they took that chance this may also produce a more just solution for the Plaintiffs. Furthermore, rather than immediately dismissing the two summonses I felt it more appropriate to specify a time period for compliance and if that was not met to debar the Defendants from progressing the summonses without leave of the court. An unless debarring order was in my judgment a necessary and proportionate sanction in the particular circumstances of this case. No other lesser sanction would have been sufficient to achieve the ends of justice. I took into account the seriousness of the non-compliance, the fact that no reasonable explanation for non-compliance had been forthcoming and whether the sanction was proportionate and just. In making the unless debarring order, I took into account the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective.

153. The failure to comply with the Disclosure Order does "impede the course of justice". The disclosure is required, amongst other reasons, to enable the asset freezing order to be effectively policed and to ascertain the truth in respect of the asset position of the Defendants. No good reason has been shown as to why the Disclosure Order should not be complied with. There has been no application to discharge it and no appeal has been lodged against it. It remains in force and should have been complied with in early May 2024. This case involves deliberate decisions not to comply with a disclosure order which was designed to assist in the enforcement of an asset freezing order and also the preservation of evidence for a fair trial.

154. There is a continuing risk of injustice. It is clear from the Defendants' non-compliance with the Disclosure Order that there would be very little chance of them complying with their standard discovery obligations. There could be no fair trial of the main action. Further proceedings would be unsatisfactory in view of the Defendants' contempt for court orders and non-compliance with their obligations in the legal process.

155. I appreciate that the non-compliance relates to the Disclosure Order rather than standard discovery obligations prior to trial. The failure is so fundamental however that in my judgment it would also taint the fairness of a trial. In any event I do not need to go that far. The deliberate and continuing breach of itself warranted an unless debarring order. The fair and efficient administration of justice

would quickly grind to a halt if those on the receiving end of disclosure orders in support of asset freezing orders and proprietary claims failed to comply with them on the grounds that they did not have the money to spend on lawyers to enable them to consider such orders, and did not face the consequences of their non-compliance.

156. Compliance with court orders strikes at the very heart of the rule of law and the effective, just, and fair administration of justice. Individuals or other legal entities cannot reasonably say that they will only comply with court orders if they have funds to instruct lawyers any more than those seeking election can reasonably say I will only accept the election result if I am successful. To allow that would lead to anarchy and that is no place that any reasonable and civilised individual would wish to go to. Most reasonable and civilised people would much prefer an existence conducted in accordance with the rule of law and in a place where the truth matters.

157. Litigants must conduct themselves in litigation in accordance with the rules and court orders and, like in football, if they do not they may receive a yellow card caution or a red card and be dismissed from the field of play. Litigation is not a game but in this case the Defendants deliberately flouted the rules and the Disclosure Order. I, in effect, gave them first a yellow card caution to comply within 14 days, failing that a debarring order (the judicial equivalent of a red card removing a player from the field of play) would come into effect and they would be removed from participation in the proceedings. I would respectfully and humbly suggest that even if such decision was reviewed by the CICA (the judicial equivalent of football's VAR), there is plain justification for it at first instance, but that may be for others to determine.

Article 6 and Section 7 considerations

158. Although not raised by the Defendants, in fairness I considered whether an unless debarring order would be contrary to Article 6 and Section 7 and concluded that it would not be. I was greatly assisted by Arden LJ's comments, albeit in a different context, at paragraph 161 of her judgment in *Stolzenberg*. Applying the relevant law to the particular circumstances of this case there were three specific reasons which supported my conclusion that an unless debarring order would not breach Article 6 or Section 7. First, if the Defendants complied with the unless debarring order they would have access to a trial on the merits, subject to any other judgments and orders against them. Secondly, the legitimate aim of the unless debarring order was to secure compliance with court orders which, in *Stolzenberg* and this case, were made to ensure the effectiveness of a freezing

order and in support of proprietary claims. The imposition of the sanction was proportionate as it was reasonably necessary for achieving that aim. Thirdly, I expressly included a "without leave of the court" provision in the order.

Fact sensitive cases

159. Each case depends on its own facts and circumstances and applications for debarring orders are fact sensitive.

160. In *Asia Renewable Energy (Cayman) Ltd* (FSD unreported judgment 2 May 2024) I declined to make a debarring order in the particular circumstances of that case. There was no history of persistent non-compliance. The delays had been explained (paragraph 25 of the judgment). Sadly, in the present case there has been persistent non-compliance over a prolonged period of time and the delay in complying has not been adequately explained.

161. In *Meridian Trust* an immediate debarring order was not made and neither was an unless debarring order but Mangatal J gave further time for compliance in the circumstances of that case. The facts of *Meridian Trust* can also however easily be distinguished from the facts of the case presently before the court:

(1) Firstly, the case presently before me does not present a "delicately poised set of circumstances". It is not finely balanced.

(2) Secondly, the Disclosure Order is not "heavy and wide-ranging". It simply requires the Defendants to provide information in respect of their assets and to provide bank account statements, a screenshot and details of certain transactions.

(3) Thirdly, D1 is not in prison. She is presently free but appears to be staying away from the Cayman Islands and is on the run apparently in Mexico, if what she says is to be believed. D1 has previously said she was in the jungle in Mexico and now gives the name of a hotel in Mexico as her address. She is apparently unable or unwilling to travel back to the Cayman Islands to face the music. She is presently burying her head in the sand well away from Seven Mile Beach.

(4) Fourthly, there has been no partial compliance with the Disclosure Order by the Defendants. The Defendants appear still very far away from "coming into compliance".

(5) Fifthly, it is impossible to avoid the conclusion that the Defendants are deliberately flouting the Disclosure Order.

(6) Sixthly, the Defendants, in the case before me, have not even attempted to pull themselves "out of the murky waters of deliberate non-compliance on the flawed ground of their own unilateral views" (paragraph 160 of *Meridian*). If the Defendants drown in such murky waters they will have no one but themselves to blame.

(7) Seventhly, the Defendants can avoid any prejudice and serious consequences if they simply do what the law requires them to do and comply with the Disclosure Order.

Costs

162. The position in respect of costs was less finely balanced in contrast to the position of whether to make an immediate or unless debarring order. I had no hesitation in making an order that the Defendants on a joint and several basis pay the Plaintiffs' costs of the Debarring Summons to be taxed on the indemnity basis and paid thereafter forthwith. I also ordered that the Defendants by 3pm on 16 October 2024 make an interim payment in the amount of US$35,000 on account of costs. I give my brief reasons for making such orders as follows:

(1) The conduct of the Defendants, in respect of the Debarring Summons and the hearing, was improper and unreasonable to a high degree.

(2) In breach of the July 2024 Order, D1 failed to file a skeleton argument on time and only filed an unsworn affidavit within the required time.

(3) D2 and D3 failed to properly engage with the legal process.

(4) D1, purportedly on behalf of herself and D2 and D3, made belated new serious allegations of fraud against FDL in respect of the FDL Liability Judgment in an unsigned and undated document with no evidence filed in support.

(5) D1 failed to attend the hearing in person without reasonable excuse.

(6) D2 and D3 also failed to attend the hearing without reasonable excuse. If D1's position in respect of alleged lack of funding for legal representation was to be properly advanced then full details of the financial position of the Defendants should have been put before the court and they were not.

163. In respect of the payment on account of costs I took into account the helpful judgment of Asif J in *The Armand Hammer Foundation, Inc v Hammer International Foundation* (FSD unreported judgment delivered 24 April 2024) and the authorities referred to therein and applied a rough 30% reduction. I also considered it appropriate to give the Defendants 14 days to pay that amount and that the remaining costs once taxed should be paid forthwith. The Plaintiffs provided a helpful costs schedule. The charge out rates appeared reasonable and the total amount claimed of US$48,960.00 modest in the circumstances. The Defendants by their conduct had not made the tasks of the Plaintiffs' attorneys easy and no doubt much time had to be properly and reasonably incurred in advancing and protecting the rights of the Plaintiffs.

Summary of determination

164. I endeavour to summarise the determinations as follows:

(1) D1 was aware of the Disclosure Order from 29 April 2024 and took no point on service. D2 and D3 were served with the Disclosure Order on 30 April 2024.

(2) The Defendants have deliberately chosen not to comply with the Disclosure Order for over 5 months.

(3) The Defendants have provided no apology for their deliberate non-compliance.

(4) The Defendants have provided no reasonable explanation or excuse for their deliberate non-compliance.

(5) Initially D1 suggested that the lack of compliance was due to the lack of funding to engage legal representation. I do not accept that. The Defendants in the past have utilised funds on legal advice and representation when it suited them but compliance with the Disclosure Order does not appear to have been one of their priorities. Furthermore, the Defendants have provided no information in respect of their financial positions. In any event the Disclosure Order could have been complied with, if need be, without legal advice and representation.

(6) D1's belated complaints raised on the eve of the hearing in an unsigned and undated document that FDL had obtained the FDL Liability Judgment by fraud and such tainted the Disclosure Order were unimpressive, to say the least. In any event the Disclosure Order must be complied with unless it is set aside. It has not been set aside and no application has been made for it to be set aside.

(7) An unless debarring order was a fair, just and proportionate judicial response to the Defendants' continuing and deliberate failure to comply with the Disclosure Order. It was made taking into account the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective.

(8) The unreasonable and improper conduct of the Defendants required an indemnity costs forthwith order.

(9) It was also appropriate to make an order for payment of costs on account to be paid within 14 days.

The big question

165. The big question "what has happened to the US$15 million plus?" in effect specified in the Disclosure Order remained unanswered on the day I made the unless debarring order. If there was an honest answer and explanation as to its whereabouts no doubt it could have been provided easily and promptly. The Disclosure Order was made on 26 April 2024 and required compliance within 7 days. An explanation and full details have still not been provided. It is to be hoped that the JOLs will be able to assist, as officers of this court, in obtaining an answer to that question and bringing any wrongdoers to justice.

166. It was for these reasons that I made the orders which I did on 2 October 2024.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT