IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 205 of 2017 (NSJ)

BETWEEN:

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs

and

(1) LOPAG TRUST REG
(2) PRIVATE EQUITY SERVICES (CURACAO) NV
(3) FIDUCIANA VERWALTUNGSANSTALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON
(7) RON GREENSPOON
(8) MIA GREENSPOON
(9) ADMINTRUST VERWALTUNGSANSTALT

Defendants

Before: **The Hon. Mr Justice Segal**

Appearances: **Tracey Angus KC instructed by Guy Dilliway-Parry of Priestleys for the Fifth Defendant**

Graeme McPherson KC instructed by Shaun Tracey of Campbells LLP for the Trustees

Nick Dunne of Walkers (Cayman) LLP for the Plaintiffs [observing]

Heard:	**14 April 2024**
Confirmations provided:	**17 April 2024**
Draft judgment circulated:	**30 April 2023**
Judgment handed down:	**8 May 2024**

JUDGMENT FOLLOWING CMC RELATING TO THE SANCTION HEARING

Introduction

1. This judgment deals with applications made, at a case management conference on 15 April 2024 (the ***CMC***), by the Fifth Defendant for orders for the cross-examination of a number of affiants who have sworn affidavits on behalf of the First and Ninth Defendants (the ***ANOM Defendants***) in connection with the Amended Notice of Motion (***ANOM***) filed by the Fifth Defendant (and with the list of issues to be considered at the forthcoming hearing to deal with the remainder of the ANOM (the ***Sanction Hearing***).

2. In the ANOM the Fifth Defendant sought (in [6]) a declaration that the ANOM Defendants (in their capacity as trustees of the Ypresto Trust) had breached the terms of a proprietary injunction previously (the ***Injunction***) made by me.

3. The ANOM set out the particulars of the alleged breach (the ***Particulars***). The ANOM averred that dividends subject to the Injunction had been paid to the trustees of the Ypresto Trust who had subsequently advanced those funds by way of loan to (themselves acting as) the trustees of the Citizen Trust (the ***Citizen Loans*** which loans were secured by various pledges) and also to (themselves acting as) trustees of the Lake Cauma Trust (the ***LCT Loan***), so that the rights of the trustees of the Ypresto Trust under and in respect

of the Citizen Loans (including the pledges) and the LCT Loan were also subject to the Injunction. The ANOM further averred that by agreeing to clause 27.3, the ANOM Defendants (as trustees of the Ypresto Trust, the Citizen Trust and the Lake Cauma Trust) intended and agreed that the obligations to the Funder of the trustees of the Citizen Trust and the trustees of the Lake Cauma trust should take priority over their obligations as debtors to the trustees of the Ypresto Trust under the Citizen Loans and the LCT Loan and thereby the trustees of the Ypresto Trust agreed to the detrimental alteration and subordination of their rights to the prejudice of those with an interest in the Ypresto Trust, which constituted a dealing with those rights in breach of the Injunction.

4. In [7] of the ANOM, the Fifth Defendant sought an order pursuant to GCR O.52 that the ANOM Defendants be fined for contempt of court.

5. On 29 June 2023 I handed down my judgment (the ***Judgment***) granting the Fifth Defendant's application under [6]. The Judgment sets out the background to the ANOM. I use in this judgment the definitions set out in the Judgment unless otherwise stated.

6. On 4 August 2023, I made an order giving effect to the Judgment (the ***August Order***). [1] of that order contained a declaration confirming that the ANOM Defendants had breached the Injunction and the action which had given rise to the breach:

> *"By agreeing to the inclusion of clause 27.3 in [the LFA] (as subsequently varied by [the DOV] [the ANOM Defendants] breached the terms of the [Injunction]."*

7. That declaration of a breach of the Injunction was made based on the breach asserted by and as set out in the ANOM and the action taken by the ANOM Defendants as set out therein (in the Particulars).

8. Following a hearing on 27 September 2023 (the ***September Hearing***) I made various directions in the ANOM (the ***Directions Order***). These included a direction for the listing of the Sanction Hearing (which has been listed for 27 and 28 June 2024) and for the parties to exchange and seek to agree a list of the issues to be considered and addressed at the Sanction Hearing.

The Sanction Hearing – the procedure to be adopted and the list of issues for decision at the Sanction Hearing

9. The ANOM Defendants and the Fifth Defendant have exchanged drafts of their proposed list of issues and many but not all of the issues have been agreed, subject to the Court's approval. At the CMC the parties made submissions with respect to the points in dispute, which related both to whether certain issues should be included in the list and also to the drafting and formulation of other issues. I was asked to resolve the disputes and settle the list of issues in a manner I considered to be appropriate, which I have now done. I set out below some general comments regarding the procedure for dealing with factual disputes at a hearing to determine the sanction to be imposed on the contemnor for an established contempt, and then set out the list of issues which it seems to me (having reviewed and considered the parties' lists of issues) arise for submissions and decision at the Sanction Hearing.

10. The Court has broad, flexible powers to deal with contempt and the question of punishment for contempt is within the discretion of the Court. The Court is entitled to take into account any matter which has been put to the defendant/respondent and which he/she has had an opportunity to answer. Conversely, the Court may not take into account any matter which has not been put to the defendant/respondent and which he/she has not had an opportunity to answer. If such matters are disputed by the defendant/respondent the Court must either accept the denial or alternatively give the applicant an opportunity of proving it and the defendant/respondent the opportunity of probing the evidence adduced (see *Arlidge, Eady & Smith on Contempt*, 5th edition, 2017 (***Arlidge***) at 15-54 citing *Smith v Smith* [1988] FLR 179 at 181G-H per Sir John Donaldson). The Court needs to establish a fair procedure to give effect to these principles and objectives, taking into account the need to ensure that there are sufficient procedural safeguards to protect a person facing a charge of contempt, and being sentenced for having committed a contempt.

11. At the Sanction Hearing the Court is required to decide whether to impose a fine on the ANOM Defendants by way of sanction for the breach which the Court has declared that they have committed, and if so the amount of the fine. This is the question to be decided at the Sanction Hearing (the ***Core Question***).

12. This is the breach referred to at [1] of the August Order. But it is important to bear in mind that, as I have said, the breach which the ANOM Defendants have been found to have committed arises (a) by reason of their having agreed to the inclusion of clause 27.3 in the LFA (b) because of the effects, as averred in the Particulars in the ANOM, of so doing on the rights of the trustees of the Ypresto Trust in relation to the Citizen Trust Loans and the LCT Loans. I shall use the term the ***Breach*** to refer to the breach of the Injunction arising as a result of the inclusion of clause 27.3 in the LFA and its effects on those rights of the trustees of the Ypresto Trust.

13. In order to answer the Core Question and reach its decision, the Court must consider the following four main issues:

(a). whether the Breach was deliberate, negligent or unintentional (***issue 1***):

(i). what was the reason why the ANOM Defendants agreed to the inclusion of clause 27.3 into the LFA?

(ii). were the ANOM Defendants aware (when they entered into the LFA or subsequently up to the service of the NOM) that the inclusion of clause 27.3 in the LFA would (or could) result in the Breach?

(iii). if they were not so aware, should they have been? In particular:

(A). what steps did the ANOM Defendants take to ensure that clause 27.3 of the LFA (and to the extent relevant and related to the steps taken in respect of clause 27.3, to ensure that entry into the LFA) did not result in (or risk) a breach of the Injunction?

(B). what instructions were given by the ANOM Defendants to their legal advisers as to this? Did the ANOM Defendants instruct their legal advisers to check that clause 27.3 did not result in the Breach (or risk of a breach) of the Injunction (or that any term of the LFA did not result in or risk a breach of the Injunction) and to advise and alert them if they

(the legal advisers) considered that clause 27.3 would (or could) result in the Breach (or that any term in the LFA would or could result in a breach of the Injunction)?

(b). whether the Fifth Defendant was prejudiced by the Breach (***issue 2***):

(i). what impact (actual rather than hypothetical) did clause 27.3 of the LFA have on the rights (and the financial value of the rights) of the trustees of the Ypresto Trust under and in relation to the Citizen Loans and the LCT Loan including the security therefor, and on the ability of the trustees of the Ypresto Trust to recover and be paid the Citizen Loans and the LCT Loan in full?

(ii). were the ANOM Defendants permitted (under the LFA and under the various trusts in respect of which they acted as trustees) and in fact able to pay all and any Resolution Amounts in full (if and when they fell due) out of trust assets which were not subject to the Injunction without prejudicing (materially or at all) the ability of the trustees of the Ypresto Trust to recover and be paid the Citizen Loans and the LCT Loan in full?

(iii). was it likely from the time that the LFA became binding and effective that (A) all and any Resolution Amounts (if and when they fell due) would be paid in full out of trust assets which were not subject to the Injunction without prejudicing (materially or at all) the ability of the trustees of the Ypresto Trust to recover and be paid the Citizen Loans and the LCT Loan in full or (B) that no Resolution Amounts would fall due for payment prior to the time at which the Plaintiffs' proprietary claims in FSD 205 of 2017 had been finally determined and the Injunction discharged?

(iv). if a Resolution Amount fell due for payment but was not paid was the Funder entitled to (A) enforce clause 27.3 against the ANOM Defendants; or (B) obtain a judgment or court order in respect of unpaid amounts which could have been enforced or executed against assets subject to the Injunction and

(C) was it likely, based on the ANOM Defendants' knowledge and understanding of the Funder's position, that it would have sought to do (A) or (B)?

(v). whether the ANOM Defendants were aware that the Fifth Defendant would be prejudiced by the Breach and whether they considered and turned their minds to any of (i)-(iv) above?

(c). what impact does the ANOM Defendants' prior and admitted breaches of the Injunction have on whether the Court should impose a fine on the ANOM Defendants and if so the amount of such a fine (***issue 3***)? These admitted breaches are evidence of conduct directly related to the ANOM Defendants' compliance with the Injunction and relates to respect for the administration of justice and the authority of the Court and is therefore conduct relevant to the sanction for a contempt for the Breach. The Sanction Hearing is however not the forum for a debate and fact finding about other possible breaches of the Injunction or as to the impact of the inclusion of clause 27.3 beyond the particulars relied on by the Fifth Defendant in the ANOM, which the Court has found to give rise to the Breach. The Sanction Hearing is not an occasion for embarking on a review of new and further alleged contempts which have not been particularised and relied on in the ANOM and which are not part of the Breach.

(d). what steps have the ANOM Defendants taken or attempted to take to remedy the Breach and to apologise for and purge their contempt (***issue 4***)?

14. I do not consider that other action taken by the ANOM Defendants in the conduct of the NOM/ANOM proceedings, in particular conduct which the Court has found to be worthy of challenge and criticism (namely the Trustee Conduct Issues) is relevant to the sanction to be imposed for the Breach. I have previously indicated (see [7] of my Personal Assistant's email to the attorneys dated 13 October 2023) that I wished to defer issuing a final ruling on the Trustee Conduct Issues (in particular whether in light of the Fifth Defendant's evidence I was satisfied with the explanations given by the ANOM Defendants and their legal advisers and whether any further action or sanctions were

appropriate) until after the Sanction Hearing. This was because I considered that the Sanction Hearing might have an impact on the Trustee Conduct Issues and not the other way round. I considered that the relevant conduct covered by the Trustee Conduct Issues was connected with the impact of including, the ANOM Defendants' understanding of the effect of, and advice to the ANOM Defendants concerning clause 27.3 so that the further evidence to be adduced for the purpose of (and any cross-examination at) the Sanction Hearing might throw further light on the Trustee Conduct Issues. I remain of the view that it is preferable, in order to ensure that a decision is made on the basis of the full picture, that such a ruling on the Trustee Conduct Issues only be delivered after the Sanction Hearing (I plan to hand down a short ruling separate from a ruling on whether to impose a fine and the amount of any fine to be imposed).

15. Nor do I consider that the ANOM Defendants' conduct in other proceedings, in particular an alleged breach (resulting from the inclusion of clause 27.3 in the LFA) of an injunction in similar terms to the Injunction issued by the BVI court, is relevant to the Core Question and the sanction to be imposed by this Court for the Breach. The question of whether there has been a breach of the BVI injunction and the consequences flowing from such a breach are matters exclusively for the BVI court. I also do not consider that the level of fees charged by the ANOM Defendants as trustees under the Liechtenstein law governed trusts is relevant to the Core Question. Any complaint regarding such fees which the Fifth Defendant wishes to make should be addressed to and dealt with by the Liechtenstein court.

The directions made in the Directions Order relating to the filing of further evidence and to evidence filed before the September Hearing

16. By [5] of the Directions Order, the ANOM Defendants were required to serve by 24 November 2023 "*any additional evidence and documents and give written notice to the Fifth Defendant of the evidence already filed on their behalf or on behalf of the Fifth Defendant in relation to the NOM or the ANOM upon which they seek to rely in relation to the remainder of the ANOM*."

17. By [6] of the Directions Order, the Fifth Defendant was required to serve by 19 January 2024 "*any additional evidence and documents in response to the evidence and documents*

served by the [ANOM Defendants] pursuant to paragraph 1 and 3 [of the Directions Order] and give written notice to the Trustees of the evidence already filed on their [the Trustees'] behalf or on behalf of the Fifth Defendant in relation to the NOM or the ANOM upon which they [this should have read she] seek[s] to rely in relation to the remainder of the ANOM."

18. As I noted in an email dated 13 October 2023 sent by my Assistant to Campbells and Priestleys, the primary purpose of [6] of the Directions Order (in so far as it dealt with evidence filed in the NOM and the ANOM before the September Hearing) was to require the Fifth Defendant to identify which parts of the ANOM Defendants' earlier evidence filed before the September Hearing she considered to be relevant the issues to be considered at the Sanction Hearing and which she wished to rely on.

19. The primary purpose of [5] of the Directions Order (in so far as it dealt with evidence filed in the NOM and the ANOM before the September Hearing) was to require the ANOM Defendants to identify which parts of the earlier evidence they wished and intended to rely on (this was of course likely only to be the evidence adduced on their behalf by their witnesses but for completeness [5] also referred to evidence filed on behalf of the Fifth Defendant in case the ANOM Defendants intended to refer to and rely on that at the Sanction Hearing).

20. These unusual provisions were included primarily to protect the ANOM Defendants. In view of the ANOM Defendants' concerns that they had not always been given clear advance notice of the basis and particulars of the Fifth Defendant's challenge to their conduct (which the Fifth Defendant strongly denied), and because of the disputes between the parties as to whether it would be permissible for the Fifth Defendant to refer to and rely on evidence filed by the ANOM Defendants at earlier stages of the contempt proceedings (in relation to the NOM and the ANOM), I considered it to be important that, to the extent that this could properly be done consistently with the need to provide the ANOM Defendants with proper procedural protections as parties charged with contempt, the parties be directed to set out their positions clearly in advance of Sanction Hearing. This involved directing:

(a). the Fifth Defendant, as the party seeking sanctions, to identify the parts of her own evidence that she relied on and the parts of the ANOM Defendants' evidence which she disputed, and to the extent that she wished to refer to and rely on (as evidence of the ANOM Defendants' actions and state of mind) affidavits filed on their behalf before the September Hearing, to identify these (so that if the ANOM Defendants wished to challenge the Fifth Defendant's right to do this, the issue was identified in advance of the Sanction Hearing and could be suitably dealt with).

(b). the ANOM Defendants to identify the parts of their evidence on which they relied, covering both the evidence filed after the September Hearing and if relevant evidence filed before that hearing. It was clearly important that the directions did not prejudice, compromise or improperly restrict the ANOM Defendants' rights (as defendants to contempt proceedings) to defend themselves at the Sanction Hearing in the manner they wished but [5] and [6] of the Directions Order were subject to subsequent review at the further case management conference (and the ANOM Defendants have assented to their terms).

21. Pursuant to [3] and [4] of the Directions Order the NOM Defendants filed the Fourteenth Affidavit of Mr Naeff (***Naeff 14***) and the Fifth Defendant filed her Twenty-Third Affidavit (***D5-23***). These affidavits set out the evidence upon which they respectively intended to rely at the Sanction Hearing.

The notices given by the parties pursuant to these directions as to the evidence on which they intend to rely

22. The Fifth Defendant gave notice that, as regards evidence filed by her before the September Hearing, she intended to rely on her Eleventh, Fourteenth, Fifteenth (***D5-15***), Sixteenth, Seventeenth, Eighteenth (***D5-18***), Nineteenth (***D5-19***) and Twentieth Affidavits (in addition to D5 23) and that she would refer to and rely on, as being relevant to the issues to be dealt with at the Sanction Hearing, the ANOM Defendants' evidence referred to in D5 23 (together with [13] of Naeff 14, [8] of Mr Boehler's Seventh Affidavit (***Boehler 7***), [6] of Mr Naeff's Eighth Affidavit (***Naeff 8***) and [5] of Mr Naeff's Ninth Affidavit (***Naeff 9***)).

23. The ANOM Defendants have confirmed that the only witness evidence that they rely on is in Naeff 14 and the evidence referenced therein. As is set out in Naeff 14, the other evidence is Naeff 7; [7]-[9] and [12] of Naeff 8; [6] and [8] of Mr Naeff's Tenth Affidavit (***Naeff 10***); Ms Boulton's Tenth Affidavit ***(Boulton 10)*** and Mr Boehler's Eighth Affidavit (***Boehler 8***).

24. Mr Boehler is a member of the board of the Ninth Defendant. Mr Naeff is a member of the board of the First Defendant. Ms Boulton is a partner in the ANOM Defendants' London solicitors PCB Byrne LLP (***Byrne***).

The directions given in the Directions Order and the Fifth Defendant's application with respect to cross-examination

25. In addition, by [6] of the Directions Order the parties were required to indicate by 4pm on 1 March (subsequently extended to 6 March) which witnesses they sought to cross-examine at the Sanction Hearing. In a letter dated 6 March 2024 from her Cayman attorneys (Priestleys) the Fifth Defendant said that she intended to seek orders to cross-examine four of the ANOM Defendants' witnesses, namely Mr Boehler, Mr Naeff, Ms Partos (a senior associate at Campbells, the ANOM Defendants' Cayman attorneys) and Ms Boulton.

26. In their letter Priestleys said that in relation to the cross-examination of Ms Boulton " *this will be required unless the [ANOM Defendants] agree that issue 5 [in the draft list of issues – whether the Funder would have or in fact sought to rely on clause 27.3] is irrelevant to sanction or indicate that they no longer wish to rely on [Boulton 10] in relation to that issue."* The Fifth Defendant argued that issue 5 in these terms should not be included since, she says, the Funder's subjective intentions as to enforcement of Clause 27.3 are irrelevant to the issues arising at the Sanction Hearing and in any event could only be fairly determined with more extensive disclosure of communications between the contracting parties and evidence from representatives of the Funder.

The issues on which the Fifth Defendant wishes to cross-examine the ANOM Defendants' witnesses

27. The Fifth Defendant has confirmed (in D5 23 and in the email to the Court from Priestleys dated 17 April 2024 sent at the Court's request) that she challenges parts of the evidence given by Mr Naeff, Mr Boehler, Ms Partos and Ms Boulton. She has identified the paragraphs in the affidavits made by them which contain evidence which is disputed and in respect of which she seeks to cross-examine each affiant (and the issues arising at the Sanction Hearing to which she says the relevant evidence relates).

28. As regards Mr Naeff's evidence:

(a). relating to the ANOM Defendants actual or constructive knowledge of the Breach: ***Naeff 14***: [6(a)], [6(b)], [7], [10], [11], [13], [14(b)], [15(c)], [16], [17],[18] and [19] (and the relevant parts of Naeff 2 and 7 referred to therein), [20] and [33] (insofar as they refer to the ANOM Defendants' thought processes when they entered into the LFA); ***Naeff 8***: [8] and [10] (referred to in [13] of Naeff 14) and ***Naeff 10***: [6] and [8] (referred to in [13] of Naeff 14).

(b). relating to the harm caused by the Breach: ***Naeff 14***: [6(c)] (the evidence why the breach had no commercial significance and created no risk to Ypresto Trust assets or any asset subject to the Injunction); [20] (the evidence as to why the Funder would have agreed to remove clause 27.3; as to the practical effect of clause 27.3; as to the accuracy of a table setting out the details of the inter-trust loans and that the inter-trust borrowing was limited); [21] & [22] (the evidence that clause 27.3 did not alter the Funder's position due to the size of loans captured by it); [27] (the evidence that the Breach had no impact on security provided by the trustees of the Citizen Trust for the Citizen Loans and no meaningful impact on assets of the Ypresto Trust); [30] (the evidence that the value of pledged receivables always exceeded the level of such borrowing); [32] (the evidence that the ANOM Defendants always believed on "*a practical level*" that no Resolution Amount would be payable without Success in the Cayman proceedings); [33] (the evidence that if a Resolution Amount became payable the ANOM Defendants would always have had $10 million available to them which was sufficient to administer the trusts

and repay the Citizen Loans and the LCT Loan); [35] (the evidence that the ANOM Defendants would always have had sufficient assets to pay any Resolution Amount from non-injuncted assets and could have sold the Heritage Trust's art collection to pay the Funder).

(c). relating to the attitude of the Funder and what the Funder would have done (if included as an issue in the list of issues): ***Naeff 14***: [6(d)] and [20(a)].

(d). relating to the steps taken by the ANOM Defendants to remedy the Breach: ***Naeff 14***: [39] – [43] (the evidence as to steps said to have been taken the ANOM Defendants to remedy the Breach and that the Plaintiffs and the Fifth Defendant have attempted to thwart those attempts); [48] (the evidence that the ANOM Defendants' intention was to repay the Citizen Loans and the LCT Loan Ypresto loans when they had funds available to them to do so).

29. As regards Mr Boehler's evidence:

(a). relating to the ANOM Defendants actual or constructive knowledge of the Breach ***Naeff 10*** at [6] which the Fifth Defendant says gives evidence as to Mr Boehler's state of mind (and is referred to in Naeff 14 at [13]).

(b). relating to the steps taken by the ANOM Defendants to remedy the Breach: ***Boehler 8*** (the evidence relating to the background to the summons relied on by the ANOM Defendants at the Sanction Hearing and contested by the Fifth Defendant in D5-18).

30. As regards Ms Partos' evidence relating to the Trustee Conduct Issues, to the extent that the ANOM Defendants dispute the Fifth Defendant's evidence in D5-15 or Ms Partos' evidence is disputed as set out in D5-19.

31. As regards Ms Boulton's evidence relating to the attitude of the Funder and what the Funder would have done, ***Boulton 10***: [10] to [11] covering her evidence as to

circumstances in which the letter at page 6-7 of NJB 10 (relied upon by the ANOM Defendants – see Naeff 14 at [19(c)] and [20(a)]) came to be obtained.

The ANOM Defendants' submissions in relation to cross-examination

32. At the CMC, the ANOM Defendants' primary position was that an order for cross-examination was at odds with the purpose of a sanction hearing and the summary nature of a contempt application so that no cross-examination should be permitted.

33. In the alternative, they argued that cross-examination was not required. It was neither necessary nor proportionate to order cross-examination of any of the witnesses.

34. The ANOM Defendants submitted that:

(a). compelling individuals to give evidence on contempt applications is inappropriate. There was a right to remain silent (citing *Arlidge,* 1st supplement) at [15-55A] and the authorities referenced in footnote 113C).

(b). GCR Order 52 r 6(4) provides that a person sought to be committed is entitled to give oral evidence. The GCR gives anyone accused of contempt the option to give oral evidence but they do not impose an obligation that he/she must do so.

(c). even if affidavit evidence was relied upon by a party in a contempt application, there was no automatic right for the other party to cross-examine the maker of the affidavit. The Court has a discretion whether or not to permit cross-examination and will only allow this "*when justice requires it*" (*Attorney-General v Pelling* [2005] EWHC 414 (Admin) at [14] and [15]).

35. The ANOM Defendants argued that the majority of the evidence relied on by them at the Sanction Hearing will be from Mr Naeff. The only issue of fact about which he gives evidence relates to the issue of whether the ANOM Defendants were aware that entering into the LFA containing clause 27.3 would amount to a breach of the Injunction. The other issues which fell to be considered at the Sanction Hearing did not turn on any

factual evidence given by Mr Naeff. In particular there was an issue as to whether the ANOM Defendants should have known that clause 27.3 breached the terms of the Injunction but this only involved an objective test that the Court was able to determine from the documents. There was also an issue as what impact the inclusion of clause 27.3 had on the Citizen Trust Loans and the LCT Loan but this also only involved a consideration of the documents which have been disclosed by the ANOM Defendants. Mr Naeff's state of mind was irrelevant. There were further issues concerning the attitude and intention of the Funder and whether clause 27.3 was enforceable as a matter of English law (and severable from the rest of the LFA). Mr Naeff had not given and could not give relevant evidence on either issue. A further issue related to the impact of the ANOM Defendants' existing admitted breaches of the Injunction on any sanction to be imposed by the Court but, the ANOM Defendants submitted, there were no factual disputes in relation to this which would justify cross-examination. The further issue dealing with the steps that the ANOM Defendants had taken to purge the contempt also gave rise to no dispute of fact as to what had been done.

36. The ANOM Defendants said that they had now disclosed all documents (and, for the limited purpose of the ANOM, waived privilege with respect to such documents) which evidenced the advice that they had received and the discussions they had had regarding clause 27.3. The Court was able to decide the various issues without the need for any cross-examination of Mr Naeff and in the circumstances justice did not require such cross-examination.

37. As regards Mr Boehler, the ANOM Defendants said that the only part of his evidence on which they relied at the Sanction Hearing was Boehler 8, which had been filed in support of their application to vary the terms of the Injunction to allow for various payments to be made from BH06 assets. Boehler 8 was only relevant to the issue of what steps were taken by the ANOM Defendants to purge any contempt and no factual disputes arose in relation to the evidence given in Boehler 8. The Fifth Defendant only relied on one comment made by Mr Boehler in his First Affidavit (***Boehler 1***) (at [15]) regarding BGO being a different legal entity from the various trusts but this was also not in dispute. The ANOM Defendants submitted that in circumstances where they did not rely on the evidence of Mr Boehler regarding the LFA it was inappropriate for the Fifth Defendant

to be permitted to cross-examine him on the issue of whether he knew that clause 27.3 breached the terms of the Injunction (see D5-23 at [15]). Cross-examination was unnecessary (the issue on which the Fifth Defendant wished to cross-examine was not covered by Boehler 8 or even Boehler 1). Furthermore, under the rules regulating the giving of evidence by parties accused of contempt which they relied on (summarised above), since the ANOM Defendants did not rely on the evidence of Mr Boehler for the purpose of the Sanction Hearing (and in relation to issues arising in respect of sanction) one of their officers could not be compelled to give evidence.

38. The ANOM Defendants said that Ms Boulton's evidence dealt with the rectification of the DOV when it was discovered that some of the agreed changes to it had not been incorporated into the final agreed draft. The steps taken to rectify the DOV were of no relevance to the issues before the Court at the Sanction Hearing and cross-examination should not therefore be ordered. The ANOM Defendants noted that it was difficult to see Ms Boulton being cross-examined without impermissibly trespassing into privileged territory (privilege on this issue not having been waived). Cross-examination of Ms Boulton was not necessary to resolve the issue of whether the Funder would have sought to enforce clause 27.3.

39. As regards Ms Partos, there should be no order that Ms Partos be cross-examined. The ANOM Defendants said that the Fifth Defendant wished to cross-examine Ms Partos on the Trustee Conduct Issues but these issues were of no relevance to the issue of sanction for the Breach (and after previously having considered the Trustee Conduct Issues at length in earlier hearings the Court was able to issue its ruling on them without the need for them to be dealt with at the Sanction Hearing). Furthermore, the ANOM Defendants did not rely on Ms Partos' evidence for the Sanction Hearing which was in any event clear on its face so that cross-examination was not required.

The main evidence relied on – an overview

40. Naeff 14 refers to the following facts and matters:

(a). Mr Naeff confirms the ANOM Defendants' apology for the Breach (he says that had they known that clause 27.3 would or might give rise to the Breach they would never have agreed to its inclusion or taken steps to have it deleted from the LFA) and refers to the ANOM Defendants' attempted demonstration of contrition by making an open offer to make amends.

(b). Mr Naeff confirms that (a) neither he nor any of the ANOM Defendants were aware that including clause 27.3 would or might breach the Injunction and (b) the ANOM Defendants were not advised that including clause 27.3 would or might breach the Injunction (the ANOM Defendants never received any advice on the effect of clause 27.3). He refers to [10] and [12] of Naeff 8 and [6] and [8] of Naeff 10 to the same effect. At [6] of Naeff 10, Mr Naeff says that he and Mr Boehler had reviewed the LFA together with their legal advisers before signing it and at [8] of that affidavit he says that Global had not raised any concern that clause 27.3 might result in a breach of the Injunction before 7 November 2022 (the date on which D5-14 was served).

(c). Mr Naeff refers to the extensive discovery process caried out by the ANOM Defendants' legal advisers and the documents disclosed to the Fifth Defendant. He notes that the ANOM Defendants have elected to waive privilege in respect of documents containing (or recording) legal advice concerning clause 27.3 and its inclusion in the LFA and the inter-trust loans. He says that these documents confirm the lack of any advice received on these topics.

(d). Mr Naeff explained, based on these documents, how clause 27.3 came to be included in the LFA. He says that he does not recall there being any internal discussion about clause 27.3 when it was first added to the draft LFA sent to the ANOM Defendants by Byrne on 16 May 2018 and no documents record the ANOM Defendants considering the effect of clause 27.3.

(e). Mr Naeff says that he and other ANOM Defendants considered that the LFA was structured so that no Resolution Amount would ever become payable unless after payment the ANOM Defendants (and the other trustees) would retain at least

US$10 million in assets. He says that neither he (nor, so far as he is aware, the other ANOM Defendants) considered that entering into the LFA created any risk to the assets subject to the Injunction (and had been mindful of the need to comply with and take steps to ensure compliance with the Injunction).

(f). Mr Naeff says that he believes that the Funder would have agreed to the removal of clause 27.3 since it had confirmed by countersigning the letter dated 20 October 2022 that it never intended to take any rights over assets subject to the Injunction and because the inter-trust borrowing was limited in amount so that the practical effect of the subordination effected by clause 27.3 (and therefore the benefit to the Funder) was limited. He sets out a table showing all the inter-trust loans which includes the Citizens Loans and the LCT Loan.

(g). Mr Naeff also refers to the loan of Euro 136 million advanced by BGA to the trustees of the Heritage Trust (the ***HT Loan***) and the dispute as to whether the trustees' obligations are affected by clause 27.3. He says that the ANOM Defendants did not consider this issue but in any event clause 27.3 could not have improved the position of the Funder because the BGA had pledged its rights in respect of the HT Loan to the Funder, which could be done because those rights were not subject to the Injunction.

(h). Mr Naeff also says that he believes that the Funder would not have attempted to enforce any rights over assets subject to the Injunction and notes that the ANOM Defendants have argued that the Funder had no right to enforce.

(i). Mr Naeff says that there has in fact been no prejudice to the Fifth Defendant (or the Plaintiffs) because a Resolution Amount did not become payable before the Injunction was discharged. "*The presence of clause 27.3 ..had no impact on the security provided by Citizen Trust for the [Citizen Loans] or on [the Citizen Loans].*" Nor were the assets of the Ypresto Trust put at risk in any meaningful way while the Injunction was in force. The Citizen Loans had been partly repaid in September 2018 and January 2019 reducing the balance to US$1.1 million. The

security given by the trustees of the Citizen Trust had been amended with receivables with a value of approximately US$5.8 million.

(j). Mr Naeff says that even though there was a theoretical possibility that a Resolution Amount could have become payable before the Injunction was discharged the assets subject to the Injunction were never at risk. This was because there would always have been sufficient assets within the trust structure to meet not only the ANOM Defendants' liabilities to the Funder but also all other trust liabilities. There would always be a surplus of trust assets of at least US$10 million after payment of Resolution Sums and since the liability in respect of the Citizen Loans and the LCT Loan were always less than US$10 million there would always have been funds in the trusts to repay them. Mr Naeff exhibits a unredacted set of the trust accounts (save for the Lake Cauma Trust which are exhibited in redacted form for the period 2018-2022) and of the BGO Foundation accounts to show sums drawn down from the Funder and LFA expenses.

(k). Mr Naeff says that no consideration was given at the time of the LFA or subsequently to the question of whether the Citizen Loans and the LCT Loan would be repaid only after the payment by the trustees of the Citizen Trust of their obligations to the Funder.

(l). Mr Naeff refers to the steps taken by the ANOM Defendants after they were informed of the allegation that the inclusion of clause 27.3 had resulted in a breach of the Injunction because of the impact of the Citizen Loans. He says that steps were taken (and identifies the steps taken) to (obtain permission to) repay the Citizen Loans but that these efforts were thwarted by the Fifth Defendant and the Plaintiffs (and sets out how this was done).

41. D5-23 refers to the following facts and matters:

(a). the Fifth Defendant says that she disputes Mr Naeff's evidence that it did not occur to the ANOM Defendants that including clause 27.3 would or might breach the Injunction. She notes that Mr Naeff's evidence is that he and Mr Boehler saw clause

27.3 in draft (and asserts that this evidence does not indicate that the ANOM Defendants were under time pressure requiring a rapid decision on whether to accept clause 27.3) and knew, by the time that clause 27.3 was added to the draft LFA, that the inter-trust loans (including the Citizen Loans and the LCT Loan) were subject to the Injunction. The Fifth Defendant asserts that it is inconceivable that parties in the position of Mr Naeff and Mr Boehler, with the knowledge they admit they had (and being, as Mr Naeff says they were, mindful of the need to avoid a breach of the Injunction) would not have appreciated that clause 27.3 would grant rights to the Funder over assets subject to the Injunction. The Fifth Defendant asserts that the ANOM Defendants at least should have known that including clause 27.3 would or might breach the Injunction.

(b). the Fifth Defendant says that even if Mr Naeff's evidence is believed it indicates that in fact the ANOM Defendants did not bother to consider or discuss why clause 27.3 had been added to the LFA or the effect of so doing. This, she says, was incompetent (and a breach of the ANOM Defendants' duties as trustees) and evidences a cavalier approach to the Injunction and the ANOM Defendants' obligations thereunder.

(c). the Fifth Defendant notes that both the Liechtenstein court and the Delaware court had previously rejected evidence given by Mr Naeff as untrue.

(d). the Fifth Defendant challenges Mr Naeff's evidence as to the attitude and likely action of the Funder (noting that the communications between Byrne and the Funder or its legal advisers leading up to the 20 October 2022 letter had never been disclosed, which should be disclosed in advance of the Sanction Hearing).

(e). the Fifth Defendant also challenges Mr Naeff's evidence as to the legal advice given in relation to clause 27.3, at least to the extent that Mr Naeff's evidence was incomplete (an email of 15 May indicated that Byrne would be going through the LFA with the ANOM Defendants and no explanation or record of what had been discussed had been provided) and gave an account that was either incredible or indicated an astonishing failure by the ANOM Defendants' legal advisers. The Fifth

Defendant asserts that the ANOM Defendants had the opportunity to ask and should have asked for advice as to the impact of clause 27.3 on the Injunction.

(f). the Fifth Defendant challenges Mr Naeff's evidence that clause 27.3 never created any actual or material risk to any assets subject to the Injunction. She asserts that the table provided by Mr Naeff is incomplete and that the amount of the inter-trust loans affected by clause 27.3 were substantial so that the subordination effected by that clause was material and that this should have been appreciated by the ANOM Defendants. She also challenges Mr Naeff's evidence as to the value of the security for the Citizen Loans. Furthermore, the Fifth Defendant challenges Mr Naeff's evidence that the ANOM Defendants would always have access to sufficient trust assets and funds to meet their liability to the Funder and other trust creditors. She asserts that the movement of funds between trusts was not just a matter of convenience but required the relevant trustees to be satisfied that it was in the interests of their trust to make the advance and notes that the trust accounts filed by Mr Naeff showed that many of the trusts held no assets of any substantial value at the time of the LFA (and claims that the valuable art collection owned by the trustees of the Heritage Trust had been pledged to the Funder in breach of an agreement between those trustees and her).

(g). the Fifth Defendant challenges Mr Naeff's evidence that all the terms of the LFA which are relevant to whether the ANOM Defendants have breached the Injunction have been disclosed and says that without further disclosure it is impossible to tell whether there have been other breaches. She refers to her claims that the ANOM Defendants have failed to comply with their disclosure obligations (which arise in relation to the Trustee Conduct Issues) and case management directions. She also alleges a breach of the BVI Injunction.

(h). the Fifth Defendant challenges Mr Naeff's evidence that it would have been possible for the ANOM Defendants to obtain the deletion of clause 27.3 and why the ANOM Defendants' offer of an apology and to purge their contempt was unacceptable and why it was reasonable for her to reject it. She also challenges Mr

Naeff's evidence that the ANOM Defendants had made a genuine attempt to repay the Citizen Loans and the LCT Loan.

Ordering cross-examination in contempt applications – the law

42. While the parties only made limited submissions at the CMC as to the nature and procedural regime that governs a hearing solely concerned with the penalty to be imposed for an established contempt, it is necessary to say a few words on this topic by way of context for the decision on whether cross-examination should be ordered.

43. At the sanction stage, the Court is concerned with the exercise of its discretion as to the sanction to be imposed on the contemnor for the contempt which the contemnor has already been found to have committed. The Court needs to establish the facts concerning matters relevant to the exercise of that discretion pursuant to a procedure that accords with the contempt jurisdiction.

44. It is true that contempt proceedings are summary in nature (they are *sui generis* civil proceedings to which certain procedural safeguards are applied derived from or which would be appropriate to criminal proceedings) and that the remedy for contempt is generally obtained on affidavit evidence (see Lord Diplock in *Attorney General v Times Newspapers* [1974] AC 273 at 311-312). However, it is clear that cross-examination can and will be ordered when appropriate. As the ANOM Defendants accepted, while the Court cannot compel individuals to give evidence on contempt applications (there is a right to remain silent), where the contemnor relies on affidavit evidence in a contempt application, the Court has a discretion whether or not to permit cross-examination and will only allow this "*when justice requires it*" (*Attorney-General v Pelling* [2005] EWHC 414 (Admin) at [14] and [15]).

45. I have already referred to the passage in Arlidge (at [15-54]) which sets out the approach in a contempt case where there are factual disputes. The Court should give the applicant an opportunity of proving the relevant facts and the defendant/respondent the opportunity of probing the evidence adduced. Facts going to penalty rather than liability must still be

established to the criminal standard of proof (as is the case with liability) so that, for example, facts tending to show that a breach was deliberate and contumacious must be proved according to the criminal standard (see Arlidge, [12-51] citing *Z Bank v D1* [1994] Lloyd's Rep 656 at 667).

46. In *Great Future International Limited v Sealand Housing Corporation and others* [2004] EWHC 124 (Ch) Lewison J said that the court will normally exercise its discretion in favour of cross-examination provided that the cross-examination can be limited to the alleged contempt. At [26] he said this:

> *"As I have quoted, Lord Denning, MR, held that a person could not be compelled to answer interrogatories, it relating to an application for contempt. In Memory Corporation v Sidhu [2002] Ch 645 it was held that a respondent to an application for committal for contempt was entitled to rely on the privilege against self-incrimination as a ground for refusing to answer questions which might expose him to such an application. What is important is that that species of privilege is not a separate privilege, but is an aspect of privilege against self-incrimination. Based on these two cases five points can be made:*
>
> *1) the defendant is not a compellable witness;*
>
> *2) if the defendant chooses to give evidence, the court may, as a matter of jurisdiction permit him to be cross-examined;*
>
> *3) the court will normally exercise its discretion in favour of cross-examination, if the cross-examination can be limited to the alleged contempt;*
>
> *4) if the defendant adduces evidence and declines to submit to cross-examination, the court may give his evidence very little weight;*
>
> *5) the defendant cannot be made to answer questions at an interim stage, the answers to which may expose him to an application to commit for contempt."*

47. *Gee on Commercial Injunctions* (7th ed, 2021 at [20-20]) makes the same point in reliance on *Great Future International*. At 20-21, Gee points out that:

> *"Since contempt proceedings, although not in fact criminal proceedings, partake of a criminal nature, the alleged contemnor is permitted to make a submission of no case to answer, without being put to his election whether or not he chooses to call evidence: Attorney-General for Tuvalu v Philatelic Distribution Corp Ltd. This is in contrast with the usual position in civil proceedings: Alexander v Rayson. Where as a matter of case management directions are given for service of evidence in advance of the hearing the wording of the directions should normally not compromise the right of the respondent to remain silent, require the applicant to prove its case, make a submission of no case to answer, and then decide if that*

submission should fail what evidence to adduce to meet the case of the applicant. When the good faith of the alleged contemnor is in issue in the contempt proceedings fairness will normally require that the alleged contemnor is given the opportunity to adduce his own oral evidence in his defence even in a case in which he has made an affidavit and served it in advance of the hearing."

Discussion and decision

48. The ANOM Defendants have confirmed the affidavit evidence they rely on for the purpose of the Sanction Hearing. This evidence sets out the facts and matters which the ANOM Defendants say are relevant to the Core Question and the exercise by the Court of its discretion as to sanction. The Fifth Defendant disputes many of those facts and challenges the ANOM Defendants' account of their conduct. It is clear that a number of the factual disputes are relevant and highly material to the issues which fall to be decided at the Sanction Hearing and the Core Question which the Court has to decide.

49. It seems to me that the Fifth Defendant should be given permission to cross-examine Mr Naeff in relation to the issues I have listed above (and in that way the cross-examination will be limited to the contempt which the Court has found to have occurred). I reject the ANOM Defendants' submission that there is no need to cross-examine Mr Naeff because the Court could decide the issues that arise by reference to the documents, because he had not given evidence on many of the issues or because the Court would need to make an assessment of the ANOM Defendants' conduct based on objective standards which were not affected by Mr Naeff's evidence. It is clear from my summary of Mr Naeff's and the Fifth Defendant's evidence that it will be necessary to test and review Mr Naeff's evidence by cross-examination in relation to three of the issues that fall to be considered at the Sanction Hearing (I have identified issues and questions which appear to me to arise but have given examples only as I am not seeking to formulate the questions which the Fifth Defendant should or is entitled to ask in cross-examination):

(a). issue 1 (for example, why did he agree to the inclusion of clause 27.3 and what did he consider its purpose and effect to be; the nature and extent of his review of clause 27.3; what he discussed with Mr Boehler in relation to clause 27.3; his understanding at the time of the LFA of the effect of the Injunction; what instructions he or others had given to the ANOM Defendants' legal advisers

requesting that they provide advice on the impact of the Injunction on the LFA; what discussions he had with Global in relation to clause 27.3; what steps had been taken to monitor and check compliance with the Injunction?).

(b). issue 2 (for example, on what basis did Mr Naeff consider that there would always have been sufficient assets within the trust structure to meet, and that the various trustees would always have access to trust assets to enable them to pay, not only the ANOM Defendants' liabilities to the Funder but also all other trust liabilities including the Citizen Loans and the LCT Loan? When did he form that view – was it before the LFA was signed? What was the basis for his view that the Funder would have agreed to the removal of or not enforced clause 27.3? Will the Citizen Loans and the LCT Loan be repaid in full and if so when?).

(c). issue 4 (for example, what steps did the ANOM Defendants take to obtain the requisite approvals for the repayment of and otherwise to pay or procure the repayment of the Citizen Loans and the LCT Loan and why did this fail?).

50. I note the Fifth Defendant's evidence concerning the rejection of Mr Naeff's evidence in other proceedings. It will be for submissions at the Sanction Hearing to address whether any weight should be given to this evidence for the purpose of assessing Mr Naeff's credibility.

51. I do not consider that the Fifth Defendant's complaints regarding the allegedly incomplete disclosure by the ANOM Defendants justify any orders requiring further disclosure. If the Fifth Defendant wished to seek orders for further discovery she should have made a specific application for the purpose.

52. I have accepted that the question of whether the ANOM Defendants were entitled to move assets between the various Liechtenstein law trusts so as to facilitate the discharge of the liabilities of other trusts is an issue that arises at the Sanction Hearing and may be the subject of Mr Naeff's cross-examination. The real issue though for the purpose of the Sanction Hearing is what Mr Naeff (and the ANOM Defendants) understood their powers to be to make such transfers and payments and what steps they had taken to confirm that

they had such powers (subject to Mr Naeff and the ANOM Defendants to assert and rely on any privilege on this issue). The Court will not be making findings of Liechtenstein law as to the true nature and extent the ANOM Defendants' powers as Liechtenstein law trustees. It would be wholly disproportionate and inappropriate for the Sanction Hearing to be extended by granting permission for expert evidence and to be burdened with the additional costs and complexities to which such a procedure would give rise.

53. The same point is to be made in relation to the adjudication on the ANOM Defendants' submission that clause 27.3 would have been, had the Funder sought to enforce it before the discharge of the Injunction, and remains, unenforceable. The Sanction Hearing is not the forum for a full forensic investigation into that issue. The Court will need to review, based on the relevant facts presented and found, the likelihood that in the event of a claim to enforce clause 27.3, an order would be made that the LFA was tainted by illegality but should remain in force subject to the deletion and severance of clause 27.3. The Court will need to assess the impact of that likelihood on the effect of the Breach and what weight it should be given in determining whether a fine should be imposed (and in what amount).

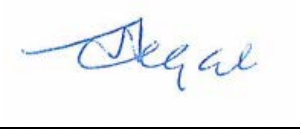
54. I do not consider that it is necessary or appropriate that the Fifth Defendant be given permission to cross-examine Mr Boehler. I generally agree with the ANOM Defendants' submissions on this. It seems to me that Mr Naeff has himself now given evidence as to the matters covered by Mr Boehler in Boehler 8 (namely the steps taken by the ANOM Defendants in relation to their March 2023 application for a variation of the Injunction to permit, *inter alia*, a distribution to be made by the trustees of the Ypresto Trust to the Fifth Defendant) which refers to and covers the same territory as is traversed in Boehler 8, so that he can properly answer questions on these matters without there being any need for Mr Boehler to be cross-examined as well. No basis has been proposed as to why Mr Boehler in particular must deal with these issues.

55. Nor do I consider that it is necessary or appropriate that the Fifth Defendant be given permission to cross-examine Ms Bouton or Ms Partos. I also agree with the ANOM Defendants' submissions as to unsuitability of these affiants for cross-examination. The Fifth Defendant accepts that Ms Partos' evidence only relates to the Trustee Conduct

Issues, which I have held not to be relevant for the Sanction Hearing. Ms Boulton's evidence covers a narrow compass regarding the process by which the amendments to the DOV were proposed and agreed. Mr Naeff has given evidence on the ANOM Defendants' approach to negotiating the DOV and can answer the relevant questions which arise as to this. I do not consider that cross-examination on her evidence on this issue is needed or justified.

56. It seems to me that a two-day listing for the Sanction Hearing remains appropriate.

57. Finally, I would note that I was told at the CMC that an application would made by consent before the Sanction Hearing for the joinder of the other trustee. This should now be done without delay.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
8 May 2024