IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 172 of 2016 (IMJ)

BETWEEN

MERIDIAN TRUST COMPANY LIMITED
AMERICAN ASSOCIATED GROUP, LTD.

Applicants

AND

(1) EIKE FUHRKEN BATISTA DA SILVA
(2) 63X INVESTMENTS LTD
(3) 63X FUND
(4) 63X MASTER FUND
(5) MAPLES CORPORATE SERVICE LIMITED
(6) BANCO BTG PACTUAL S.A.

Respondents

IN CHAMBERS

Appearances: **Mr. G Halkerston of Counsel instructed by Ms. L Hatfield and Mr. J McGee of Solomon Harris**
Mr. E McQuater QC of Counsel instructed by Ms. A Dixon and Mr. T Baildam of Carey Olsen on behalf of the 1st to 4th Respondents

Before: **Hon. Justice Ingrid Mangatal**

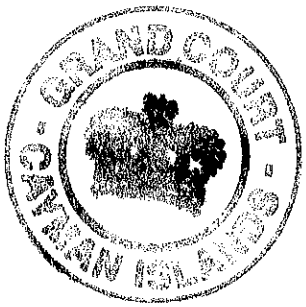
Heard:	**23 and 24 February 2017**
Draft Judgment (No. 3) Circulated:	**10 March 2017**
Judgment (No. 3) Delivered:	**15 March 2017**

HEADNOTE

Civil practice and procedure - world-wide freezing order - ancillary disclosure orders - application to vary, suspend - unless order application - flexibility of freezing order, injunction jurisdiction - whether historic disclosure, and not just current asset disclosure permissible in personal, as opposed to proprietary claim where claim is that respondent has hidden assets over many years using complex offshore structures.

JUDGMENT

1. At a hearing on 8 February 2017, I ordered that the following four summonses be listed for hearing on February 23 and 24:



(a) The Applicants' Summons dated 3 February 2017 seeking an unless order as a sanction for what the Applicants say is the 1st to 4th Respondents' deliberate and persistent refusal to comply with the Cayman Mareva ("**the Unless Order Summons**");

(b) The 1st to 4th Respondents' (the "Respondents") Summons dated 2 February 2017, seeking a suspension of the disclosure obligations under the Cayman Mareva, until further order, on the basis of allegations that the Applicants have leaked the First Respondent's confidential information to the Brazilian press ("**the O Antagonista Summons**");

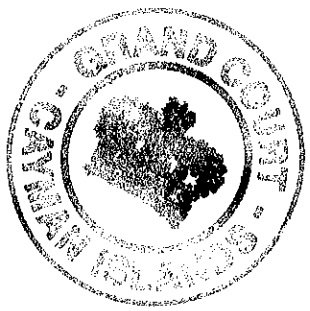
(c) The First Respondent, Mr. Eike Fuhrken Batista's ("**Mr. Batista**"), Summons dated 31 January 2017, seeking a number of aspects of relief, including that Mr. Batista does not have to disclose banking documentation prior to 28 October 2016 ("**the Historic Disclosure Summons**"); and

(d) The Applicants' Summons dated 7 February 2017, seeking a variation of Undertaking 8 of the Cayman Mareva, if, which the Applicants deny, the making of a FUFTA injunction application in Florida was not permitted by reason of the Undertaking ("**the FUFTA Summons**").

2. I wish to express my gratitude to Counsel on both sides for the great level of preparation and invaluable assistance to the Court.

3. To some extent, the exact contents of the Historic Disclosure Summons and the Unless Order Summons are important, and thus I set out their material terms as follows. The Historic Disclosure Summons seeks the following:

> *"1. An order that the worldwide freezing order of Mangatal J dated 28 October 2016 as amended (the "**WFO**") be varied by:*
>
> *(a) Replacing paragraph 10(b) of the WFO with the following "all bank statements in relation to all bank accounts in which the Respondents have an interest (direct or indirect, legal or beneficial, sole or joint) showing the credit balance of the said accounts as at the date of this Order or copies of those documents."*
>
> *(b) Replacing the second paragraph (commencing "I hereby authorise...") of the draft letter contained in Annex A Part 1 to the WFO with the following "I hereby authorise and request you immediately to inform Solomon Harris....of the current credit balance of the Accounts. I authorise you to have contact with Solomon Harris in order to answer their questions about the current status of the Accounts. I further authorise you to send to the said Solomon Harris...copies of all current and future bank statements and other records prepared by you in respect of the Accounts until further instruction from Solomon Harris."*
>
> *(c) Inserting the word "current" before the word "assets" in the fourth line of the draft letter contained in Annex A, part 2 to the WFO.*
>
> *(d) Replacing the second paragraph (commencing "I authorise you...") of the draft letter contained in Annex A Part 2 to the WFO with the following: "I authorise you to have contact with Solomon Harris in order to obtain their instructions and to deliver the copy documents requested (Attn: Laura Hatfield) and to answer any*



questions they may have about my current assets and my current financial affairs.

2. *An order that time for compliance by the First Respondent with paragraphs 10, 11 and 12 of the WFO shall be extended until 7 days after the determination of this Summons.*
3. *The said orders be subject to such exceptions and provisos as the Court shall consider appropriate.*

...."

4. On 24 February 2017, the 2nd to 4th Respondents also filed a Summons seeking the same relief as the First Respondent in his summons dated 31 January 2017, i.e. the Historic Disclosure Summons, but also seeking additional relief, notably that historic disclosure documents previously handed to the Applicants be destroyed. At the hearing, it was agreed, by the parties and the Court that the best use of the Court's resources would be for the portion of this Summons that sought the same relief as that contained in the Historic Disclosure Summons, to also be determined at this hearing.

5. The Unless Summons seeks relief as follows:

"1. That unless the First Respondent by 48 hours after hearing do comply with his disclosure obligations contained in paragraphs 5, 6, 7, 11 and 12 of the Cayman Mareva and 3.1-3.3 of the Order dated 24 January 2017 by:

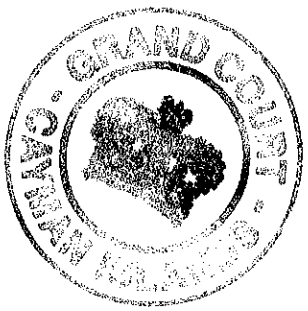
1.1 Providing Asset Documents as defined by Paragraph 11 of the Cayman Mareva;

1.2. Providing Annex A authority letters as set out in Paragraph 12 of the Cayman Mareva;

1.3. Informing Solomon Harris of his assets as set out Paragraph 5 of the Cayman Mareva;

1.4. Providing notice of liabilities or claims as set out in Paragraph 6 of the Cayman Mareva; and

1.5. Providing an affidavit confirming his assets as set out in Paragraph 7 of the Cayman Mareva;



then the First Respondent be debarred from opposing the continuation of Cayman Mareva until 14 days after the grant of any final judgment in the Florida Proceedings and the Cayman Mareva shall be continued against the First Respondent until 14 days after grant of any final judgment in the Florida Proceedings.

2. *That unless each of the 2nd to 4th Respondents by [48 hours after hearing] do comply with their disclosure obligations contained in paragraphs 11 and 12 of the of the worldwide freezing order dated 28 October 2016 as varied (the **WFO**) within 48/72 hours by :*

   2.1. Providing Asset Documents relating to accounts outside the Islands pursuant to paragraph 11 of the Cayman Mareva.

   2.2. Providing Annex A authority letters for banks inside the Islands pursuant to paragraph 12 of the Cayman Mareva;

   then each of the 2nd to 4th Respondents be debarred from opposing the continuation of Cayman Mareva until 14 days after grant of any final judgment in the Florida Proceedings and the Cayman Mareva shall be continued against such Respondents until 14 days after grant of any final judgment in the Florida Proceedings.

.....

4. The Respondents' Summons filed on 2 February 2017 be struck out"

6. During the second day of the hearing, Mr. Halkerston, Counsel for the Applicants, handed up a draft order which modified the position and the orders being sought considerably. By this draft, the Applicants sought a number of orders which are different than those set out in the Unless Order Summons. For example, this includes that the Applicants are prepared, on the basis of practical considerations, to roll back the historical disclosure obligations under paragraph 10(b) to 1 September 2012, rather than 1 January 2010. I note in passing that the original draft order filed in the Bundle for the October hearing had in fact sought the date 1 September 2012, but this was modified during the hearing to seek the 1 January 2010 date, which I ultimately ordered. The Applicants would also be agreeable to further variation so as to not require the 1st to 4th

Respondents to provide bank statements for accounts in Brazil. Additionally, they are prepared to agree that, in respect of the letters at Annex A, the categories of documents be narrowed to bank statements, payment orders and wire transfer advices and amendment to the date 1 September 2012.

7. Also quite fundamentally, there has been a substantial increase in the extended time periods for compliance sought by the Applicants before the Unless Order sanction trips in. As regards the 2nd to 4th Respondents, they ask that the Court require that these Respondents comply with paragraphs 10(b) and 12 of the Cayman Mareva, and provide copies of the written instructions given to third parties in compliance with paragraph 11 of the Cayman Mareva, and that unless they do so within 14 days, (and thus no longer within 48 hours), they be debarred from opposing the continuation of the Cayman Mareva until 14 days after the grant of any final judgment in the Florida Proceedings.

8. In relation to Mr. Batista, they now seek that he comply with the obligations in paragraphs 5, 6, 7, 10, 11 and 12 of the Cayman Mareva within 28 days. Further, that if and to the extent that Mr. Batista considers in the course of his compliance with those obligations that his compliance may be incomplete, he serve an affidavit stating certain details by way of confirmation and explanation as set out in the draft order. They seek at paragraph 7 of the draft order that unless Mr. Batista complies as required, then he be debarred from opposing the continuation of the Cayman Mareva until 14 days after the grant of any final judgment in the Florida Proceedings. Further, that if and to the extent that Mr. Batista is unable to comply with the obligations during the 28 day time period, and confirms this in the affidavit required, he shall be required within 35 days to issue a summons to vary the paragraph with which he is unable to comply, with a supporting affidavit sworn by Mr. Batista himself.

Relevant Background to the Applications

9. The Applicants obtained *ex parte* the WFO/Cayman Mareva by summons dated 19 October 2016. That application was heard by me over a two day period, on 27 and 28

October 2016. The WFO was granted on 28 October 2016, and my written reasons were subsequently delivered to the Applicants on 11 November 2016.

10. The WFO was granted pursuant to s. 11A of the *Grand Court Law* in relation to proceedings which were to be commenced in a court outside of the Cayman Islands, namely Florida, U.S.A. The Applicants issued their complaint before the Florida Courts on 12 January 2017.

11. The 63X Companies were served with the WFO on 9 January 2017. Mr. Batista was served by way of substituted service on 16 January 2017.

12. By letter dated 27 January 2017, the 1st to 4th Respondents' Cayman Islands Attorneys, Carey Olsen, wrote to Solomon Harris:

    (i) enclosing what they said was a list of all of the assets held in Mr. Batista's name, and a list of the cash assets held by Mr. Batista indirectly (the "**Asset Schedule**"); and

    (ii) stating that Mr. Batista was in the process of collating a list of assets held by him indirectly.

13. On 30 January 2017 Mr. Batista was arrested by the Brazilian Federal Police in connection with "*Operation Car Wash*". The evidence from the 1st to 4th Respondents is that Mr. Batista has been held in prison since the time of his arrest.

14. On 31 January 2017, a Brazilian political blog called "*O Antagonista*" published information about Mr. Batista's bank accounts. 13 of the 16 bank accounts referred to on the blog were the same as those contained in the Asset Schedule.

15. Also on 31 January 2017, the Historic Disclosure Summons was issued on Mr. Batista's behalf.

16. On 2 February 2017, the O Antagonista Summons was issued on the 1st to 4th Respondents' behalf.

17. Also on 2 February 2017, the Applicants obtained *ex parte* an interim injunction against all the defendants to the Florida Proceedings, including Mr. Batista and the 63X Companies (**"the FUFTA Injunction"**).

18. On 3 February 2017, the Applicants issued the Unless Order Summons. This application had, however, been previously foreshadowed at a hearing before me on 24 January 2017, as well as in correspondence flowing from the Applicants' Attorneys to the 1st to 4th Respondents' Attorneys.

19. On 7 February 2017, the Applicants issued the FUFTA Summons.

20. On 8 February 2017, a hearing took place before me at which directions were given for the determination of these applications. Originally the 8 February 2017 hearing date was set by me for hearing of the Unless Order Summons in response to the Applicants' request that it be heard during that week. However, upon reflection, I felt that more time should be given to all concerned to deal with that application, as well as to allow the 1st to 4th Respondents to put before me other applications and evidence that they thought relevant to my consideration of the Unless Order Summons.

21. On 17 February 2017, a Summons was filed on behalf of the 63X Companies seeking the same relief as that sought by Mr. Batista in the Historic Disclosure Summons and relying upon the same evidence in support. However, this application also seeks the return/destruction of previously disclosed materials and as indicated earlier in this judgment, that aspect of this application has been adjourned to a date to be fixed. However, depending on my ruling on this application, it seems to me that if I decide that the historic disclosure was not wrong in the circumstances of this case, then that application about destruction should fall away. It is only if I decide that the WFO should be varied as sought by the 1st to 4th Respondents regarding excluding the historic

disclosure aspect of the Order that the 63X Companies further application would arise for consideration. No doubt the 1st to 4th Respondents will indicate their final position in that regard after delivery of this Ruling.

The O Antagonista Summons

22. I think that it is appropriate to deal with the O Antagonista Summons first. In his written Skeleton Argument on behalf of the 1st to 4th Respondents, Mr. McQuater QC invites the Court to order that any further asset disclosure which falls to be given by the 1st to 4th Respondents should be on the basis that proper provision is made to protect the confidentiality of the information disclosed.

23. It is the 1st to 4th Respondents' position that 13 of the 16 bank accounts referred to on the O Antagonista blog were the same as those contained in the Asset Schedule. Further, that the information therein contained was highly confidential and was not previously in the public domain.

24. At paragraph 48 of the 1st to 4th Respondents' Skeleton Argument, it is contended as follows:

> *"48. The publication of that information on the O Antagonista blog gives serious cause for concern. In particular:*
>
> *48.1 The publication occurred a matter of days after the Asset Schedule was provided to the Applicants.*
>
> *48.2 The Applicants suggest (in Trainer-9, para 50) that O Antagonista attributes the article to the "work product of the Lava Jato task force"- that being a task force connected with "Operation Car Wash". This is not, however, what the O Antagonista article states. Rather, that article provides as follows:*
>
> *"The task force of the car wash in Rio de Janeiro are mapping the network of offshore that Eike Batista used to hide your patrimony of the Brazilian authorities. The*

antagonist obtained first-hand, the list of accounts by BTG Pactual Cayman Branch."

48.3 The article does not, therefore, state that the information in question was provided to O Antagonista by the Lava Jato task force, or that it is the "work product" of that task force. Further, the Lava Jato task force's investigation has been ongoing for three years, and it has never before leaked information concerning Mr. Batista's assets to the public.

48.4 The format of publication of the asset information on O Antagonista was substantially the same as the presentation of that information in the Asset Schedule. In particular, save for three additional accounts identified by O Antagonista, (i) the names of the banks, (ii) the account numbers, and (iii) the names of the account holders, are all identical to the information provided in the Asset Schedule.

*48.5 As to the three additional accounts, it is the Respondents' evidence that the existence of these accounts had been disclosed by BTG Pactual SA ("**BTG**") to the Applicants prior to the date of the O Antagonista publication. Accordingly, by the time that this publication occurred, the Applicants were aware of all 16 of the accounts which were subsequently referred to on the blog."*

25. In Thor 3, at paragraph 20c, Thor Batista, Mr. Batista's son ("**Thor**"), and Director of EBX International S.A. ("**EBX**"), which is the sole corporate director of the 63X Companies, stated that on 31 January 2017 BTG provided written confirmation that they were not responsible for passing this information to O Antagonista.

26. The 1st to 4th Respondents say that the Applicants have only belatedly, in evidence served on 17 February 2017, (in Trainer 11), and only after being pressed by the 1st to 4th Respondents, set out the inquiries they have conducted to assure themselves that the Asset Schedule was not intentionally leaked by them or their advisors/agents to O Antagonista. Prior to this, the 1st to 4th Respondents assert, the Applicants' explanation had been nothing more than a single line statement in Trainer 9: "*I understand from inquiries with attorneys and other advisors that this allegation is untrue*".

27. Mr. McQuater QC indicates that, nevertheless, the 1st to 4th Respondents continue to have significant reservations as to the Applicants' use of their confidential information. Firstly they say, despite Mr. Trainer's evidence in paragraph 51 of Trainer 11, that: "*the account information provided to the Applicants by the Respondents was and is treated as highly confidential with restricted access*", it is a fact that the Applicants have proceeded to use such confidential information in the Florida Proceedings, in breach of their undertaking to the Court. Further, the 1st to 4th Respondents say that, "*The asset information in question was disclosed to the Applicants by BTG in both the proceedings before the Grand Court and those taking place in the Bahamas.*" It is the evidence that the Applicants' filings in the Florida Proceedings are available to the public. The 1st to 4th Respondents say that the Applicants are therefore actively introducing the 1st to 4th Respondents' confidential information into the public sphere.

28. Further, the 1st to 4th Respondents assert that, even if the Applicants did not *intentionally* leak the Asset Schedule to O Antagonista, they remain concerned that such information may have found its way to O Antagonista inadvertently.

29. Learned Queen's Counsel has asked that, in any event, for the purposes of the Unless Order application, the Court is invited to take these concerns into account in the exercise of its discretion in two ways. First, that the 1st to 4th Respondents had a genuine concern and this affected their further compliance with the Disclosure Orders. Second, that the conduct of the Applicants and the manner in which they have treated the 1st to 4th Respondents' confidential information, should be placed in the balance for consideration.

The Applicants' position regarding the O Antagonista Summons

30. The Applicants say that the allegations in the Affidavits of Thor mirror the allegations contained in the letter from Carey Olsen dated 1 February 2017. They charge that in essence, the 1st to 4th Respondents seek to rely on an alleged leak of information as to Mr.

Batista's assets in order to justify their unilateral decision to suspend all disclosure obligations. The letter from Carey Olsen concluded as follows:

"Accordingly, we are instructed our clients' position is that the natural inference is that your clients (or their agents or advisors under instruction) improperly disseminated this confidential information to the Brazilian press for a collateral purpose.

In these circumstances, we are instructed that our clients' current position is that they will not disclose any further information to your clients pursuant to the terms of the WFO until our clients are entirely satisfied that your clients did not disclose this information to the press..."

31. At paragraphs 51-55 of Trainer 9 and paragraphs 49-63 of Trainer 11, the Applicants vehemently deny these allegations, and they state the inquiries that have been made of the professionals who received copies of Mr. Batista's Asset Schedule, as a result of these allegations. All of these professionals have confirmed that they have not disclosed the information to the blog or to third parties.

32. Mr. Halkerston, in Skeleton Arguments filed on behalf of the Applicants, makes the additional point that the Applicants have no interest in disclosing information about Mr. Batista's assets to the press, as that would be contrary to their client's interests.

33. The Applicants also make reference to the fact that the blog refers to investigations being undertaken by the Brazilian authorities as part of the Lava Jato task force. They submit that those conducting the investigation would seem a more likely source of the information in the blog.

34. Counsel concluded by submitting that the publication by O Antagonista provides no basis for suspending Mr. Batista's disclosure obligations and indeed, they assert that on the contrary, it provides further evidential support for their necessity. Accordingly, Mr. Halkerston submitted that the O Antagonista Summons should be dismissed.

DISCUSSION AND ANALYSIS OF THE O ANTAGONISTA SUMMONS

35. In my judgment, there is no sufficient basis upon which I can conclude that the Applicants did leak information to O Antagonista. Indeed, as Mr. McQuater QC observed during oral submissions, he is not seeking to have the permission granted to the Applicants to use information revoked. His argument was more aimed at convincing me that the complaint was made in good faith, and not, as the Applicants allege, as a tactic to buy time, and create a bit of prejudice. I do appreciate that the mere fact that confidential information is reaching the media may be of some concern to the 1st to 4th Respondents. Further, having looked at both the Asset Schedule and the O Antagonista article, there is some similarity in the format of the documents setting out the accounts. However, there are important variations also. At the end of the day, as I am unable to conclude that it is the Applicants that provided the information, I cannot say that this factor weighs against the Applicants with regard to the Unless Order. Whilst as I have said I can understand that the 1st to 4th Respondents may be concerned to have their information dealt with sensitively, I cannot say that this concern can or should suspend Mr. Batista's disclosure obligations indefinitely or at all. This Summons is dismissed. However, the Applicants must ensure that they maintain the confidentiality of the 1st to 4th Respondents' private information disclosed to them as a result of this Court's orders.

The FUFTA Summons

The Applicants' Arguments

36. The Applicants in their Skeleton Arguments pose the question: "*Should the Undertaking be Amended?*" On 2 February 2017 the Applicants sought and obtained interim relief in the Florida Proceedings.

37. By letter dated 6 February 2017, the 1st to 4th Respondents' Counsel indicated their understanding that the Applicants should have applied to the Grand Court for permission to apply for the FUFTA Injunction.

38. The Applicants say that they did not agree, but in order to clarify the position they filed the FUFTA Summons.

39. The Applicants maintain that a FUFTA Injunction is not a Mareva or Freezing Order or anything close to it. The submission is that such an injunction simply enjoins the respondent from fraudulently dealing with his assets and thus permitting additional sanctions, via the contempt process.

40. At paragraph 110 of their Skeleton Arguments, the Applicants state as follows:

"110. The nature of the FUFTA Injunction is set out in full in Trainer 10. In summary:

a. *The FUFTA injunction is a prohibition on future fraudulent dealing. The effect is that the Respondents cannot fraudulently move assets outside of Florida if the purpose is to fraudulently avoid a judgment. Moreover, a FUFTA injunction is not a lien or charge on assets.*
b. *The claim for a FUFTA Injunction and interim and permanent relief was pleaded in the proposed complaint and an advertised part of the Applicants intended course of action in the affidavit of the Applicants' Florida law expert, Mr. Kevin Murray.*
c. *The FUFTA Injunction was sought in Florida on the basis that the Applicants could not enforce the Cayman Mareva in respect of the assets in Florida and instead the Applicants sought the assistance of the FUFTA Injunction, which is limited to Florida, in respect of those assets located in Florida."*

41. At paragraph 111 the Applicants make the point that, since the 1st to 4th Respondents have not adduced any evidence to challenge the summary in Trainer 10 referred to above, that position cannot therefore be in dispute.

42. Also in Trainer 10, paragraph 29, the Applicants say that due to the narrow application of the FUFTA Injunction as described above, they wished to make clear that they still required the protection of the Cayman Mareva vis-à-vis Florida.

43. The undertakings given by the Applicants which are relevant to this application, are those set out at paragraphs 7 and 8 of Schedule 1 to the Cayman Mareva, as follows:

> *"(7) The Applicants will not without the leave of the Court use information obtained as a result of an Order of the Court in this jurisdiction for the purpose of civil or criminal proceedings in any other jurisdiction other than the proposed proceedings in the United States and any interim applications for relief in the Bahamas related to the proposed proceedings in the United States.*
>
> *(8) Save for any application for interim relief against the Respondents in the Bahamas, the Applicants will not without the leave of the Court seek to enforce this order in any country outside the Cayman Islands or seek an order of a similar nature including orders conferring a charge or other security against the Respondents or the Respondents' assets."*

44. The Applicants say that by reason of the limited juridical nature of the FUFTA Injunction, Undertaking 8 is not engaged.

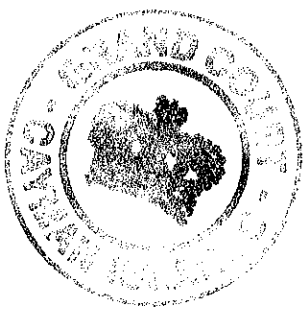
45. The Applicants argue that further and separately, the cross-undertaking at paragraph 8, restricting the bringing of applications for similar relief is intended to prevent the bringing of a multiplicity of such proceedings in third jurisdictions. Mr. Halkerston submitted that it is traditionally considered when the *substantive* proceedings are in the same court as the court which granted the WFO. The Applicants conclude that it is not intended to affect the bringing of interim relief in the jurisdiction in which the substantive claim is being brought. This conclusion, they say is reinforced when paragraph 8 is read in the context of paragraph 7.

46. Counsel states that as expressly foreshadowed in the evidence before the Court in October 2016, in Florida narrow interim injunctive relief can be brought under the Florida Uniform Fraudulent Transfers ("**FUFTA**") to prevent the fraudulent transfer of assets in the state.

47. According to the Applicants, the seeking and obtaining of the FUFTA Injunction on 2 February 2017, followed the 1st to 4th Respondents' deliberate and persistent breaches of their obligations under the WFO, without which the Applicants and this Court would not know what assets the 1st to 4th Respondents have in Florida.

48. The 1st to 4th Respondents have indicated that they consider that the Applicants ought to have obtained leave of the Court to apply for the FUFTA Injunction in the light of Undertaking 8 of the WFO. The Applicants indicated their disagreement for the reasons set out above.

49. However, if necessary, the Applicants seek an amendment to the Undertakings at paragraph (8) to the WFO in the following terms:



> *"(8) Save for any application for interim relief against the Respondents in the Bahamas, the Applicants will not without the leave of the Court seek to enforce this order in any country outside the Cayman Islands or seek an order of a similar nature including orders conferring a charge or other security against the Respondents or the Respondent's assets, save that permission has been granted in respect of the Applicant's application for a Florida Uniform Fraudulent Transfer Act ("**FUFTA**") injunction which was obtained on 2 February 2017 (the "**FUFTA Injunction**"), in respect of the proceedings in the United States."*

50. When a Plaintiff applies for permission to *enforce* a WFO abroad, English Courts will usually apply the principles outlined in ***Dadourian Group International Inc v Simms.*** [2006] EWCA Civ 399, [2006] 1 WLR 2499 esp. [25] - [49]. These principles also apply to an application to enforce a WFO granted in aid of foreign proceedings: see ***JSC VTB Bank v Skurikhin*** [2012] EWHC 3116 (Comm) at [9], [15], and [36 – 43], but that case considered jurisdictions other than the Court where the substantive claim was proceeding.

51. These cases generally involve cases where the substantive claim is pending in England. The Applicants argue that the fact that the Undertaking is never intended to apply to the

jurisdiction in which the substantive proceedings are taking place is clear from the ***Dadourian*** guidelines themselves, and opine that many of these guidelines simply make no sense when applied in that context.

52. It was submitted that the ***Dadourian*** principles do not apply on these facts.

53. However, if Court takes the view that the ***Dadourian*** principles might be considered to be applicable, Counsel posits that they are satisfied in any event.

54. In ***Dadourian,*** the English Court of Appeal outlined the following Guidelines at paragraph [25]:

"Guideline 1. The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2. All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3. The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4. *Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.*

Guideline 5. *The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.*

Guideline 6. *The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.*

Guideline 7. *There must be evidence of a risk of dissipation of the assets in question.*

Guideline 8. *Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice."*

55. Applying these principles in turn, the Applicants submit that they have been satisfied, as set out in their Skeleton Arguments.

The 1st to 4th Respondents' Position in respect of the FUFTA Summons

56. The 1st to 4th Respondents argue that the FUFTA Injunction was obtained in plain breach of the Applicants' Undertaking (8) given to the Court and, therefore, is a contempt of Court. The Applicants' suggestion that the Undertaking applies only to steps taken in jurisdictions other than Florida, they submit, is obviously wrong. That is not what para (8) of schedule 1 says. Mr. McQuater QC asserts that it is also fatally undermined by the express carve-out for use of information in the "*proposed proceedings in the United States*" in para (7) which, on the Applicants' case, would be wholly redundant.

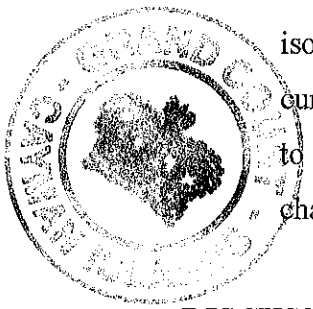
57. As a way of remedying this contempt, the Applicants seek, by the FUFTA Summons, a variation of para (8) so as to record that permission "*has been granted in respect of the Applicants' application for* [the FUFTA Injunction]."

58. As to this application, the 1st to 4th Respondents make the following points:

> First, the form of relief sought by the Applicants is, in the Respondents' submission, inconsequential. Permission is not being sought to apply for the FUFTA Injunction; it is sought, retrospectively, because that injunction has already been obtained, in breach of para (8). The variation now sought will not erase the fact that, on 2 February 2017, the Applicants ignored their undertaking to the Court and applied for the FUFTA Injunction.
>
> Second, it is a matter for the Applicants and the Court whether leave to seek similar orders in different jurisdictions should be granted. In that regard, it is incumbent upon the Applicants to satisfy the Court that the ***Dadourian*** guidelines are satisfied. The Court will be concerned, in that regard, to avoid causing oppression to the Respondents, particularly at a

time when, by reason of his imprisonment, Mr Batista's ability effectively to give instructions to his legal team is very limited.

59. The oppressiveness of the Applicants' conduct in this respect should not be viewed in isolation, the 1st to 4th Respondents submit. It should be considered in the context of their current strategy of pressing for an "unless order" with which Mr Batista would be unable to comply, with the consequence that he is debarred from making any substantive challenge to the way in which the Applicants obtained the WFO.



DISCUSSION AND ANALYSIS OF THE FUFTA SUMMONS

60. In my judgment, the Applicants are correct that the claim for a FUFTA Injunction and interim and permanent relief was pleaded in the proposed complaint and was alluded to as part of the Applicants intended course of action in the affidavit of the Applicants' Florida law expert, Mr. Kevin Murray. Thus, whilst the 1st to 4th Respondents are correct that the wording of Undertaking 8 above does raise concerns if read literally, in my view the question of what it "bites on" has to be considered in the light of the application before the Court at the time that the WFO was granted.

61. These section 11A proceedings are, by definition, ancillary to the Florida proceedings. It was also the case that the application was made to this Court for a WFO in part because this Court had the jurisdiction to grant the WFO, once satisfied that it was appropriate to grant it in respect of the 1st to 4th Respondents, whereas the Florida Court does not have that jurisdiction. The wording of the FUFTA Injunction does not on the face of it spell out what the Applicants and Mr. Trainer have said as to the nature of the FUFTA Injunction, i.e. that a FUFTA Injunction is not a Mareva or Freezing Order or anything close to it, and that it only relates to fraudulent transfers. The submission is that such an injunction simply enjoins the 1st to 4th Respondent from fraudulently dealing with their assets and thus permitting additional sanctions, via the contempt process. However, I accept that there is no evidence forthcoming from the 1st to 4th Respondents to challenge the Applicants' evidence as to the nature of the FUFTA injunction. In the context of this case, and the materials placed before the Court at the *ex parte* application, whilst it could

have been more squarely put before the Court that an application would be made for interim relief in Florida after the claim was filed there, in my judgment paragraph 8 is not intended to affect the bringing of interim relief in the jurisdiction in which the substantive claim is being brought. Thus, in my judgment, there has been no breach of the undertakings by the Applicants.

62. Further, in my view there is no need for the Grand Court to regulate the Florida processes as the substantive claim is pending there and the Florida court can and should regulate its interim processes.

63. However, if I am wrong about the question whether the FUFTA Injunction does amount to similar relief and is caught by Undertaking 8, I am quite satisfied that any such breach on the part of the Applicants was unintentional. In those circumstances, I think that it is quite appropriate to examine the circumstances, albeit retrospectively, to see whether the essence of the ***Dadourian*** principles discussed above have been satisfied. This is all being applied for within the realm of equitable relief. The Court's equitable jurisdiction is flexible and adaptable to suit the infinite circumstances that can occur and is aimed at achieving a just result.

64. In my judgment, the essence of the ***Dadourian*** principles that might be considered to be applicable in this *inter partes* application made after the event, are in any event satisfied.

65. Guideline 1 is satisfied to the extent that the FUFTA injunction application is just and convenient in ensuring that the WFO is effective in achieving its purpose. This is because, although the scope of the FUFTA injunction is narrow, it does protect assets in Florida from fraudulent dissipation. Those assets being in the jurisdiction of the substantive claim will be more readily and easily susceptible to efficient enforcement processes following a Florida judgment, in the event that those assets remain in Florida at that time.

66. Guideline 2 is satisfied, to the extent it is engaged; the regulation of costs associated with the interim applications in Florida are properly a matter for the regulation of the Florida Court, being the jurisdiction where the substantive proceedings are taking place, and the FUFTA injunction is reviewed in *inter partes* proceedings or on appeals.

67. Guidelines 3 and 4 are satisfied, to the extent they are engaged; the 1st to 4th Respondents are parties to the FUFTA Injunction application. So are other defendants to the Florida Proceedings who are not involved with the Cayman litigation to-date. Again the regulation of those proceedings are properly a matter for the Florida Court.

68. As to Guideline 5, the Court has copies of the FUFTA injunction, the evidence in support of it and a summary of the juridical scope of the order.

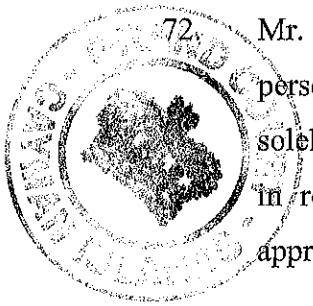
69. Guidelines 6 – 7 are satisfied for the same reasons as the Cayman Mareva was granted, and by reason of the evidence in Trainer 10 and 11 and de Araujo 5, which confirms that the disclosure received so far is consistent with the Applicants' case. There was a considerable movement of assets through Miami and it is not disputed that there are assets within the jurisdiction of the State of Florida.

70. Guideline 8 contemplates a ***Dadourian*** application being made prior to the proceedings abroad. However, the fact is this application is being made after the event, and is *inter partes*.

The Historic Disclosure Summons

71. I now turn to consideration of the Historic Disclosure Summons.

The 1st to 4th Respondents' position



72. Mr. McQuater QC submits that where a freezing injunction is sought in support of a personal claim, the freezing injunction and any ancillary disclosure orders are concerned solely with the respondent's *current* assets. This contrasts, he contends, with the position in relation to proprietary claims, where disclosure of *historic* transactions may be appropriate to enable the applicant to identify traceable proceeds.

73. Even in proprietary cases, however, learned Queen's Counsel points out that the Court is generally very reluctant to order wide-ranging disclosure of historic transactions. In particular, such disclosure will only be ordered where the applicant can demonstrate "*a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim*", and any order granted will be "*directed with specificity to ascertaining the whereabouts of the assets in question.*" Reference was made to ***Arab Monetary Fund v Hashim (No.5)*** [1992] 2 All E.R. 911 at 918 and 919 *per* Hoffmann J.

74. McGrath, *Commercial Fraud* (2nd ed.) at §20.112 describes the position as follows:

> "*The court has an inherent jurisdiction to award disclosure to ensure the effectiveness of its orders. Two obvious restrictions apply in the case of the freezing order. First, this will be limited to information as to the up-to-date position about the respondent's assets. Formally, the freezing order is not concerned with questions of where assets have gone but solely where are the respondent's assets* ..." (emphasis added in the 1st to 4th Respondents' Skeleton Argument).

75. The purpose of granting orders for disclosure ancillary to freezing injunctions, it was submitted, is to give assistance in connection with the underlying purpose of a freezing injunction, namely to prevent the improper dissipation of current assets pending

satisfaction of the applicant's claim. Reference was made to ***A. J. Bekhor & Co Ltd v Bilton*** [1981] 1 Q.B. 923 where at page 848 Griffiths L.J. observed that:

> "*...from time to time cases will arise when, although it seems highly probable that the defendant has assets within the jurisdiction, their precise form and whereabouts are in doubt, or in the case of a number of defendants they may collectively have sufficient assets but there may be doubt about their distribution among themselves. In such cases in order that the Mareva injunction should be effective both the court and the plaintiff require to know the particular assets upon which the order should bite. It must be remembered that the underlying reason for making the order is the fear that the defendant may remove his assets and this is most effectively prevented by the plaintiff serving a copy of the injunction on whoever is holding the defendant's assets for the time being.*" (emphasis added in the 1st to 4th Respondents' Skeleton Argument)

And at 950:

> "*I agree that the power to order discovery in support of a Mareva injunction should be sparingly exercised and if too readily resorted to could easily become a most oppressive procedure.*"

76. In that case, the Court of Appeal criticised the disclosure order which had been granted at first instance (by Parker J) and which sought disclosure of the defendant's assets "*as at past dates as distinct from their present whereabouts*" on the basis that such an order in that case exceeded the legitimate purpose of an order for disclosure ancillary to a freezing injunction. In this respect, Stephenson LJ held as follows (at 955):

> "*Parker J. described the plaintiffs' application and his order for discovery as in aid or support of the Mareva injunction and so in a sense they were. But in so far as they relate to the defendant's assets at past dates as distinct from their present whereabouts their purpose seems to be not so much to help the court or the plaintiffs to locate and freeze particular assets now, as to open the way to incriminating and ultimately punishing*

the defendant for contempt of court in formerly disobeying the Mareva injunction and/or breaking his undertaking. This purpose emerges not only from the wide terms of the order but from the judge's comments at the end of his judgment. To that extent the order goes beyond the legitimate purpose of an order for discovery in aid of a Mareva injunction and Robert Goff J.'s order in A v. C and is not necessary for the proper and effective exercise of the Mareva injunction."

Departures from the standard form of Freezing Order

77. On an application for *ex parte* relief, the 1st to 4th Respondents reminded the Court, the Applicant's counsel has a duty to present the application fairly. This includes drawing the Judge's attention specifically to any parts of the draft order which depart from the standard form of freezing order and ensuring that the Judge is actually aware of all the terms and their implications. Reference was made to ***Memory Corporation plc v Sindhu (No.1)*** [2000] 1 WLR 1443 per Robert Walker LJ at p.1458 per Mummery LJ at pp.1459-1460, ***Greenwich Inc Ltd v Dowling*** [2014] EWHC 2451 (Ch) per Peter Smith J at 79-89, and Gee, Commercial injunctions, 6th Ed., at §9 – 002.

78. The 1st to 4th Respondents submit that this was not done in relation to the historic aspects of the disclosure sought and that the Applicants failed to discharge their duty fairly.

79. The 1st to 4th Respondents also made reference to the scope of the letters required to be signed by the 1st to 4th Respondents; in particular, they referred to paragraphs 11-12 and Annex A Parts 1 and 2 of the Cayman Mareva which require the 1st to 4th Respondents to give instructions to banks and others to disclose information which is not limited to information about current assets but which will enable the Applicants to conduct a wide-ranging, unrestricted historical investigation. The 1st to 4th Respondents referred to my ruling of 24 January 2017, delivered on 16 February 2017 ("**Return Date Order**"), where at paragraph 28 I describe the obligations imposed on Mr. Batista as "*heavy and wide-ranging*".

80. At paragraph 56 of their Skeleton Argument, the 1st to 4th Respondents say that the Historic Disclosure Summons should be granted for a number of reasons, including the following:

> "……
>
> *Second, there is no justification for this unusual and invasive form of disclosure order. It is wrong in principle to require disclosure of historic transactions in support of a personal (as opposed to a proprietary) claim, where the freezing order is concerned solely with the Respondents' current assets. In her Reasons for her Ruling on 24 January 2017 (delivered on 16 February 2017) at paragraph 27 Mangatal J indicated that the Applicants required Mr Batista's "basic asset disclosure" urgently. The same does not apply to the wide-ranging historical disclosure included in the WFO.*
>
> *Third, the requirement that the Respondents provide historic bank statements covering a period of more than seven years engages the confidentiality and privacy rights of not only the Respondents, but also the many payment counterparties recorded in those documents. The Applicants have not explained why, at this early stage, their interests in seeing all of those transactions significantly outweigh the interests of the Respondents and affected third parties."*

81. The 1st to 4th Respondents further argue that the breach by the Applicants of their duty to make a full and fair presentation was further compounded by the fact that the *ex parte* hearing in this case was particularly heavy, requiring two days of Court time and approximately 5,000 pages of application documents.

The Applicants' Position

82. As set out at paragraph 32 of their Skeleton Argument, the Applicants say that as a matter of practicality, they are content to seek disclosure of such documents from 1 September 2012 onwards in respect of bank accounts outside of Brazil.

83. However, the Applicants maintain that, contrary to the impression given by the applications made by Mr. Batista, the Applicants are *not* seeking disclosure of Mr. Batista's historic assets. The Cayman Mareva is quite clear in that regard, see paragraphs 5 and 10(a) of the Cayman Mareva. As is standard, the statement of assets and affidavit verifying that statement is limited to assets as of the date of the Cayman Mareva (i.e. 28 October 2016).

84. What Mr. Batista objects to, Mr. Halkerston says, is the provision of historic documents evidencing the flow of his funds through offshore structures and bank accounts from the start of the collapse of his empire and at the time of the clear and unchallenged evidence that Mr. Batista sought to put his assets beyond the reach of creditors at that time.

85. The Applicants insist that the provision of disclosure is acutely necessary to identify where Mr. Batista has hidden his monies. This principle was recognised, it was submitted, in respect of personal claims, by the Chief Justice in ***China Classrooms*** at [68] - [71] and no substantive distinction was drawn between the disclosure that was appropriate for the personal claims and the earlier disclosure order in respect of proprietary claims discussed at [55].

86. The Applicants say that the disclosure sought by them, relating to the period of time when there is evidence of Mr. Batista's worldwide asset dissipation, is necessary to identify his current assets and to police the Cayman Mareva. It is a fair inference, the argument continues, that in light of the factors above, any disclosure by Mr. Batista of his current directly and indirectly held assets will not be complete. It follows that the entire purpose of ancillary disclosure obligations – to police the effectiveness of the freezing order – cannot be achieved without such disclosure.

87. The Applicants refer to paragraphs 16 - 20 of their Skeleton Argument which deals with the information obtained by the Applicants which they contend has allowed a limited policing of Mr. Batista's compliance, this historic disclosure having come from third parties, including BTG. For example, it would not have been known that Mr. Batista

owned property in Florida or sent $30m to a Miami based "wealth preservation" attorney, but for the historic disclosure (Trainer 3, paragraph 14).

Mr. Batista's filed evidence in support of the Historic Disclosure Summons is in the form of an affidavit from a Cayman attorney ("**Dixon 2**"). Counsel for the Applicants argues that that evidence is telling in what it contains and does not contain. It was submitted that Mr. Batista is relying on legal objections to the disclosure sought which could and should have been raised on the Return Date on 24 January 2017. The Applicants take the position that the Summons is an abusive appeal from the Return Date Order.

89. In a nutshell, the Applicants maintain that the overwhelming evidence is that a documentary disclosure order limited to *current* assets would be a useless order and would be ineffective in allowing the Court and the Applicants to police the Cayman Mareva.

90. The Applicants seek information on assets from 1 September 2012 onwards because this is the time-scale in which the Applicants have evidence of asset dissipation and this is the information that is therefore necessary to identify assets and ensure the effectiveness of the Cayman Mareva. By way of example, reference was made to para 116 of ***Algosaibi v Saad Investments Co Ltd*** (2011 (1) CILR 178).

91. The Applicants say that it was made clear at the *ex parte* application (notably at paragraphs [31], [67], [68], [74], [141.6 – 9] and [207] of the Applicants' Skeleton Argument in support of the original application for the Cayman Mareva), that the purpose of the disclosure orders is to identify where Mr. Batista has hidden his assets; and the time period disclosure is sought in respect of is the period of which the Applicants adduced evidence of Mr. Batista's asset dissipation. That evidence, they submit has since been corroborated by the BTG disclosure (Trainer 3, paragraph 14). There is clear evidence, Mr. Halkerston opines, that Mr. Batista has moved assets dishonestly through offshore structures to put those assets out of the reach of enforcement processes.

92. Mr. Halkerston submits that there is no legal rule barring the disclosure of Mr. Batista's banking documentation. He argues that the evolution of freezing orders against Non Cause of Action Defendants has advanced greatly in recent years. In part that evolution has been driven by cases of large scale international fraud in which fraudsters have hidden their assets in offshore entities. The documentary disclosure sought will allow the Court and the Applicants, they posit, to identify the flow of funds to such entities and to test whether assets held by those entities fall within the scope of Mr. Batista assets. The Court has jurisdiction to order the disclosure in question. The question is whether it should exercise that jurisdiction.

93. The starting point in the authorities, the Applicants submit, is the statement of three guiding principles for the determination of the scope of relief granted in freezing order applications by Beatson LJ in ***JSC BTA Bank v Ablyazov (No 10)*** [2014] 1 WLR 1414, which was approved by the Court of Appeal in ***JSC Bank v Pugachev*** [2015] EWCA Civ 139; [2016] 1 WLR 160.

The Enforcement Principle

94. The first and primary principle is that the purpose of a freezing order is to stop the injuncted defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for his claim.

The Flexibility Principle

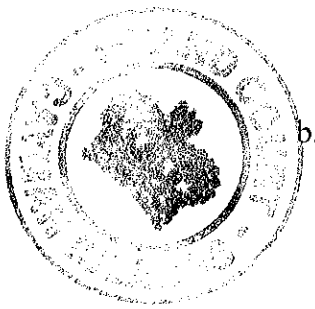
95. The jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders.

The Strict Interpretation Principle

96. Because of the penal consequences of breaching a freezing order and the need of the defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed.

97. The authorities were also comprehensively explained in ***JSC Bank v Pugachev*** [2015] EWCA Civ. 139; [2016] 1 WLR 160, a case upon which the Applicants rely. In that case:

a. A worldwide Mareva, with ancillary disclosure obligations, was granted by the English High Court freezing D's assets in aid of Russian proceedings [5].



b. D served a schedule of assets, indicating that he was one of a class of discretionary beneficiaries of five trusts [6]. At the return date, Henderson J granted an ancillary order requiring D to disclose further information in relation to the trusts [7]; [42]:

> "[the Court has jurisdiction to order] *disclosure relating to the trusts for the purpose of ascertaining the true position, in particular as to the extent, if any, of Mr Pugachev's control of assets held within the trusts structures. Where uncertainty exists as to the true position of the assets owned or controlled by a defendant, the court has power to order the cross-examination of the defendant on his affidavits of disclosure* [...] *Equally, in my view, the court has jurisdiction to order written disclosure."*

c. An application to discharge this part of the order was refused; and that decision was appealed [8].

d. On appeal, Lewison LJ explained the primary purpose of the freezing order jurisdiction as follows:

> *"17* [...] *There is now a considerable body of case law at first instance which holds that the summary of principle by Sir John*

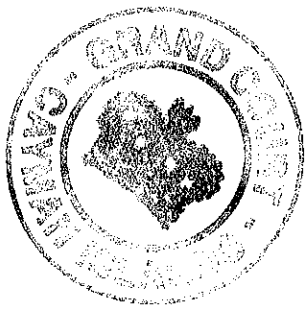
Chadwick P (sitting as a judge of the Court of Appeal of the Cayman Islands) in Algosaibi v Saad Investments Co Ltd 2011 (1) CILR 178 represents the law of England and Wales: Linsen International Ltd v Humpuss Sea Transport Pte Ltd [2012] Bus LR 1649 (Flaux J); Parbulk II AS v PT Humpuss Intermoda Transportasi TBK [2012] 2 All ER (Comm) 513 (Gloster J); JSC BTA Bank v Ablyazov (No 10) [2012] 2 All ER (Comm) 1243 (Christopher Clarke J). It was referred to with approval in this court on appeal from the last-mentioned decision [2014] 1 WLR 1414, para 35. The relevant parts of Sir John's summary are:

"32. It is necessary to keep in mind the basis on which a court exercises the Mareva jurisdiction. ***It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment.*** *[...]*" (emphasis added in the Applicants' Skeleton Argument)

98. The Court of Appeal considered the question whether, having disclosed these interests, Mr. Pugachev was required to go further [26]. The Court referred to the evidence in support of the "*opaque manner in which [Mr Pugachev's] assets are held (often involving the use of off-shore companies and nominees to distance himself from the assets in question*" [29], and including the example of real property (a French chateau) held indirectly in another's name [30].

99. At [47], the Court considered that "[*S]o far as judicial precedent is concerned we can say with some confidence that the jurisdiction to make a freezing order also carries with it the power to make whatever ancillary orders are necessary to make the freezing order effective*"

100. As to the ordering of provision of information, it was observed that a lower threshold ("*some credible evidence*") applies than to the granting of the freezing relief [52], that the present case was one where the freezing order was made before the investigation into the ownership of assets takes place [54], and that disclosure orders are less intrusive than an order freezing assets [55]:



"We must not lose sight of the fact that at this stage the claimants are only asking for information. ***An order for the provision of information is far less intrusive than an order which prevents someone from dealing with assets.*** *Moreover the claimants are asking only for information from Mr. Pugachev who is bound by the terms of the freezing order. ..."* (emphasis added in the Applicants' Skeleton Argument)

101. The Court of Appeal ordered disclosure of documentation to allow the Claimant to assess whether assets ought to fall within a freezing order [58]:

> *"As I have said, I do not consider that the court is in a position to reach even a provisional conclusion on the current state of the evidence.* ***But it is here, in my judgment, that the principle of flexibility comes into play.*** *I do not consider that if the threshold test for including an asset within the scope of a freezing order is not met, the court is powerless. The bank does not ask that the trust assets be brought within the scope of the freezing order immediately. It asks for the opportunity to test its assertion that Mr. Pugachev is the effective owner of those assets against his (and the trustees') assertion that he is not. If its assertion is correct, it may then be in a position to apply for the scope of the freezing order to be widened. If its assertion is incorrect then an application to that effect will fail.* ***But in my judgment the court's concern that sophisticated and wily operators should not be able to make themselves immune to the courts' orders militates against denying the DIA that opportunity.*** *As Robert Walker J put it in International Credit and Investment Co (Overseas) Ltd v Adham [1998] BCC 134, 136:*
>
> ***"the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly***

prized and official regulation is at a low level." (emphasis added in the Applicants' Skeleton Argument)

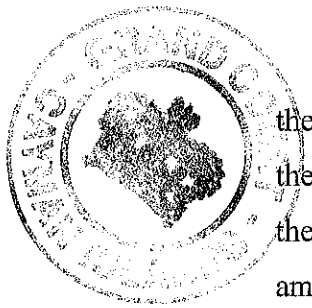
102. ***Pugachev*** is firm authority, the Applicants submit, that, in accordance with the flexibility principle, the disclosure jurisdiction is not limited to information concerning assets which are frozen, or which on the available evidence could be frozen; information can be ordered which permits the applicant to ascertain the status of assets which may be amenable to the freezing order.

103. This principle applies *a fortiori*, it was submitted, to the present case. Here, the Applicants assert, the only effective way in which the they can ascertain the state of Mr. Batista's present assets is to obtain historic disclosure from the period of time when Mr. Batista was dissipating assets:

a. There is evidence of fraud;
b. There is strong evidence of asset dissipation using offshore structures to avoid creditors' claims;
c. Batista is in breach of disclosure orders;
d. The third party disclosure (itself of a historic nature) corroborates the evidence of asset dissipation; and
e. There is no possibility of cross-examination.

104. There are two (Singaporean) cases cited by Gee in which a court considered that a disclosure order was too wide (see 23-003). Both cases, i.e. ***Petromar Energy Resources Pte Ltd v Gelncore AG*** [1999] 2 SLR 609 and ***Wallace Kevin James v Merrill Lynch International Bank Ltd*** [1998] 1 SLR 785, Mr. Halkerston submits, are miles apart from the present and are readily distinguishable for the reasons discussed in argument.

105. It is the Applicants' case that, just as *Mareva* relief can be applied flexibly to ensure that the effectiveness of the order is not undermined (see for example the expansion of ***Chabra*** relief as outlined in ***Algosaibi*** and ***Linsen***), so too ancillary disclosure obligations can be imposed on terms that ensure that the freezing relief is effective. Here,



the most appropriate way to ascertain the whereabouts of Mr. Batista's assets, and allow the Cayman Mareva, is to order disclosure on the terms originally ordered by this Court, they submit. The Applicants are agreeable, in the interests of practicality, to narrow the ambit of disclosure, as set out in paragraph 82, above.

106. The Applicants accordingly submit that the Historic Disclosure Summons should be dismissed.

DISCUSSION AND ANALYSIS OF THE HISTORIC DISCLOSURE SUMMONS

107. I think it is fair to say that at the *ex parte* hearing, where the Court had thousands of pages to consider, and countless legal and evidential points of a most complicated nature to analyse, the point about the historic disclosure and the significant departure from the standard form Order could have been brought into sharper focus. This is especially so because this was a difficult case. Thus, even if the point may have arisen for consideration in the Court's mind at some stage (or was there by implication in Counsel's submissions), there was a need to spell out squarely that the Disclosure being sought was unusual and particularly burdensome.

108. On the other hand, it is true to say that throughout their Skeleton Arguments and in oral submissions, the Applicants did make it clear to me that they were seeking disclosure orders so as to identify where Mr. Batista had hidden his assets over the years. There was clear evidence presented at the *ex parte* application that over a number of years, and during times when he was under criminal charges and investigation in Brazil, Mr. Batista had moved assets utilizing offshore structures from and to different jurisdictions.

109. In my judgment, there is nothing to merit the discharge of the disclosure orders. I am of the view, in keeping with the modern authorities, that the jurisdiction to make a freezing order and the disclosure orders which are ancillary to it, should be exercised in a flexible and adaptable manner. Indeed, in his oral submissions, Mr. McQuater QC very fairly acknowledged that he was not arguing that the Court does not have the jurisdiction to

make historic disclosure orders in personal claims. His argument was that it was not appropriate in this case, in any event not at the *ex parte* stage, and that the case for so ordering was not frankly and properly explained to the Court on the *ex parte* application.

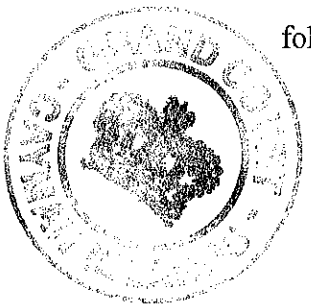
110. In my judgment, in the circumstances of this case, the historic disclosure orders should remain in place, but should be modified as suggested by the Applicants, to 1 September 2012 and in the other manners suggested by them. It seems to me that the Applicants case for the need to have the historic disclosure in order to identify where the 1st to 4th Respondents current assets are, has been strengthened to date, by differences and discrepancies in disclosure made by the 1st to 4th Respondents as opposed to, for example third parties such as BTG, certain incomplete attempts at disclosure by the 1st to 4th Respondents and other sources of information that have emerged, including media reports. Subject to any ruling I make on the Unless Order Summons, the burdensome nature of the disclosure orders, which has now at this *inter partes* stage come home to me with greater force, can be dealt with by granting longer time periods for compliance. Indeed, even the Applicants themselves appear to have belatedly and/or discerningly recognised this in the longer periods of time that they are now proposing in the latest draft order. These are matters well within my discretion, a discretion which includes the power to make appropriate adjustments and variations in orders as and when deemed appropriate.

111. However, as regards the wording of the Annex A letters which instruct the relevant banks "*to answer* [Solomon Harris'] *questions about the Accounts*", I am of the view that at this stage, those words are too wide and intrusive and should be removed, subject to any application that the Applicants may make in the future should appropriate circumstances arise.

The Unless Order Summons

112. In their Skeleton Argument, the Applicants refer to a number of matters which they say have not been challenged by the 1st to 4th Respondents to date, although they have filed

seven affidavits. In particular, at paragraph 6 of the Skeleton Argument, the Applicants say that a whole host of matters upon which the Applicants have produced credible evidence have not been disputed by the 1st to 4th Respondents. These include the following:



a. That Mr. Batista has committed fraud.
b. That Mr. Batista has committed the fraud alleged in the Florida Proceedings.
c. That Mr. Batista has dissipated his assets by transferring them to third parties or through offshore vehicles. In particular, that Mr. Batista dissipated his assets in 2012, 2013 and afterwards.
d. That Mr. Batista was aware of the Cayman Mareva on 6 January 2017.
e. That Mr. Batista participated in a conference with legal advisors in New York between 24 and 30 January 2017 at which he was advised on responses to the Florida Proceedings and the Cayman Mareva.
f. That Mr. Batista and his civil legal advisers have made no effort to meet or take steps towards compliance with the Cayman Mareva in the 25 days since he was imprisoned.

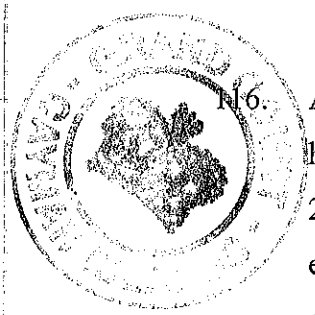
113. The Applicants aver further that on close review, the only denial forthcoming in respect of the issues is that contained in paragraph 14 of Thor 3, i.e. that Mr. Batista *"vehemently denies"* that he would interfere in the future of the Lava Jato investigation.

114. The fundamental point made by the Applicants is that Mr. Batista and the 63X Companies are in deliberate and continuing breach of the Cayman Mareva and the Return Date Order. The Applicants say that the conduct of the 1st to 4th Respondents all points in one direction; that Mr. Batista's strategy is to keep his hidden assets hidden.

115. The Applicants make the point that the information so far disclosed is deliberately incomplete, and that the information capable of allowing the Applicants to police the Cayman Mareva has been derived from:

a. Historic banking disclosure from third parties, such as BTG; and

b. Press reports.



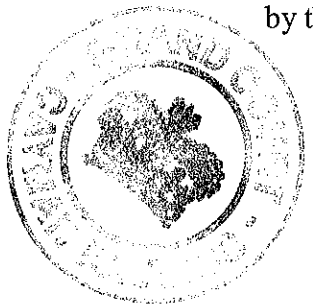
116. As regards third party disclosure, the Applicants refer to the fact that it was the BTG historic disclosure that revealed accounts of extremely large amounts dating from May 2012 and numerous transfers which the Applicants have argued were consistent with evidence of dissipation, including the transfer of US$30 Million to a "*wealth preservation*" lawyer in Miami in December 2013. This sum represents, in terms of quantum, almost half of the amount of the Florida claim. The Applicants are concerned that no attempt whatsoever has been made to explain the transfer of these funds at the time when Mr. Batista's company was collapsing.

117. Reference was also made by the Applicants to the Return Date hearing before me, in relation to differences between what the BTG information revealed, as opposed to what was stated in an article in *O Globo*, a Press Outlet in Brazil, which latter was subsequently confirmed by Mr. Batista's Attorneys in a letter. Reference was made to my Ruling delivered in February 2017, in particular paragraphs 20, 22, 24-27.

118. The Applicants submit that Mr. Batista's disregard of the Orders of the Grand Court is consistent with the Applicants' case that Mr. Batista is at the heart of an international fraud, a central part of which is the dissipation of assets through a global offshore network. They maintain that the Cayman Mareva is incomplete and cannot be policed for so long as the 1st to 4th Respondents refuse to comply with their disclosure obligations. The Applicants say that they wrote to Mr. Batista's Counsel on 16 February 2017, inviting Mr. Batista to provide the minimal disclosure which he was prepared to provide on his own case, namely disclosure of current assets such as could be done at this stage. The Applicants say that this was rejected and no further disclosure has been given by Mr. Batista.

119. The Applicants have in their Skeleton Argument set out in detail the manner in which they say that Mr. Batista and the 63X Companies are in breach of the Orders.

120. The Applicants also claim that the 1st to 4th Respondents have in correspondence made repeated requests trying to identify what information the Applicants know about their financial affairs. Mr. Halkerston submits that this is a common tactic used by fraudsters. Reference was made to ***JSC BTA Bank v Shalabayev*** [2011] EWHC 2903(Ch) at [66]-[67], where Henderson J, in dealing with an application by a WFO respondent that the applicants disclose to the respondent asset disclosure documents or information obtained by the applicant bank in the course of the proceedings said:



> *"66. There is a further reason why it would, in my view, be most undesirable to make an order of that nature. If the Bank were compelled to disclose at this stage the information which it has been able to obtain from other defendants pursuant to disclosure requirements in the freezing order, and matters of that sort, there is in my view a real risk that Mr. Shalabayev, and perhaps other defendants as well, would then seek to tailor their evidence or their own contentions so as to fit with what they would then know that the Bank had available to it.*
>
> *67. It is, in my judgment, a legitimate tactical advantage enjoyed by the Bank in a case of this nature that it should not be compelled at this stage to reveal all the information which it has, when all that is required of the defendant is that he should do his honest best to state what he actually knows, or can with reasonable enquiries find out about the disclosure required of him."*

121. The Applicants submit that an Unless Order would be an appropriate measure. They point out that in the ordinary case, an Unless Order strikes out the substantive defence of the defaulting respondent to a freezing order, allowing a money judgment to be entered. However, in the present case, the substantive claim is in Florida and the 1st to 4th Respondents would, the Applicants submit, remain at liberty to defend themselves in that jurisdiction.

122. The Unless Order sought by the Applicants in this case would operate only in respect of the ancillary interim freezing order, providing that the order continue on an *inter partes* basis until after the end of the Florida Proceedings. The Applicants say that even then, on ordinary principles, the 1st to 4th Respondents would still be able to apply to set aside the

Unless Order if they comply with their obligations and present a compelling reason to explain their breach.

123. The Applicants say that the apparent position of the 1st Respondent, as set out in Thor 3, is that it is impossible for Mr. Batista to comply with his disclosure obligations by reason of his imprisonment on 30 January 2017. They referred to the cases of ***MV Yorke Motors v Edwards*** [1982] 1 WLR 444, HL(E) and ***Blue Sky One Ltd. v Mahan Air*** [2011] as authority for the proposition that it is for the party alleging impossibility to demonstrate the alleged impossibility to the Court. They further submitted that the 1st to 4th Respondents' arguments and evidence to this effect do not bear scrutiny. They say that there is no evidence from the 1st to 4th Respondents that if this Court makes an Unless Order it is not possible for Mr. Batista to comply with it if he and his attorneys work to comply with that order.

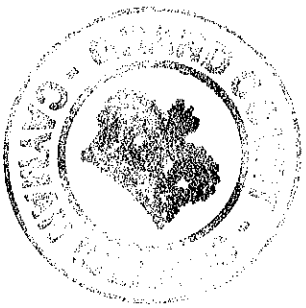
124. The Applicants submit that the narrative in Thor 3 starts with an account from 30 January 2017. They say no explanation whatsoever has been given of events from 6 January 2017, when they say Mr. Batista was put on notice of the Cayman Mareva.

125. Reference was made by the Applicants (in Trainer 11, paragraph 14.7) to an article in the Brazilian press, whereby one of Mr. Batista's Brazilian lawyers Sergio Bermudes was reported as informing journalists as follows: *"Sergio Bermudes, who defends the business man in civil cases, told Folha de S. Paulo that Eike is between New York and Miami and travelled to the United States to handle a lawsuit related to the blocking of $63 million in assets for the Justice of the Cayman Islands".*

126. The Applicants say that on the same day as the Return Date on 24 January 2017, but unbeknownst to the Court or the Applicants at the time, Mr. Batista flew from Brazil to New York to meet with attorneys to discuss the case.

127. In relation to Mr. Batista's arrest, at paragraph 51 of their Skeleton Argument, the Applicants state as follows:

"Batista's arrest follows the issue of a warrant which alleges that Batista paid substantial bribes, including a bribe of $16.5m to Segio Cabral, the Governor of the state of Rio de Janeiro. See generally Trainer 9 paragraphs 25 – 31.



As set out in Trainer 9, paragraph 28, the warrant sets outs allegations that Batista transferred monies from TAG Bank in Panama to accounts in Uruguay of companies owned by third parties. The pretense for the payment was a fraudulent contract between Centennial Asset Mining Fund LLC and another company. The allegations indicate the use of several jurisdictions to further the payment of bribes including Switzerland, Luxembourg, the Bahamas, Uruguay and Andorra.

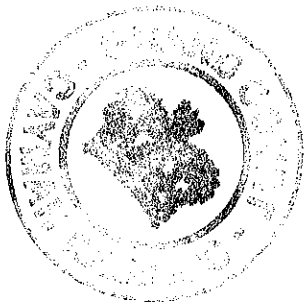
Press reports in Brazil indicate that the authorities investigating Mr. Batista are "mapping an offshore network that Eike Batista used to hide his assets from the Brazilian authorities". The Court will recall that Batista was required to provide details of his assets as part of the Brazilian criminal process. Apparently he lied when purportedly complying with that process.

The allegations in the warrant also allege that Batista sought to interfere with the investigation process by briefing Cabral's stooges after the Lava Jato investigation had begun so as to provide cover and explanations for the sham transactions that papered the bribes paid to Cabra."

128. There has been evidence filed on behalf of the Applicants (by Mr. Trainer and Brazilian lawyer Eduardo Bacal) and evidence given on behalf of the 1st to 4th Respondents (by Thor, and Fernando Martins, Mr. Batista's criminal lawyer) as to access to Mr. Batista in prison and as to what he can and cannot do whilst detained in custody in prison. The Applicants have taken the position that there are not insurmountable problems in Mr. Batista signing documents. They say that even if there were, if Mr. Batista were acting in good faith, there are a number of ways in which he could have offered legal responses, which they set out in paragraph 63 of their Skeleton Argument.

129. As regards the law in relation to the Unless Order application, the Applicants rely upon a number of authorities, including ***JSC BTA Bank v Ablyazov*** [2010] EWHC 2219 (QB).

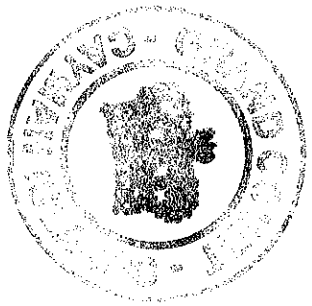
Reference was made to paragraph 38 of that judgment where Christopher Clarke J (as he then was) stated:



"In my judgment if the court makes an order for disclosure for information or 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.*** *The making of such an order is of course a discretionary exercise. It is necessary in a case such as this, where there is a challenge to the jurisdiction and to the making of a freezing order, carefully to consider whether or not it is right to require the immediate production of information given the prospect that the court may later hold that jurisdiction should not have been exercised or that the freezing order should not have been made.* ***It is plain from Grupo Torras that it is open to the court to make an order for the production of information even during the pendency of a challenge to the jurisdiction. If that be so it must, as it seems to me, follow that it is open to the court to impose a sanction for non-compliance as a means of securing compliance.*** *The Court of Appeal in* ***Grupo Torras*** *cannot have contemplated that although an order for disclosure could be made during the currency of the challenged jurisdiction; it could not be enforced or could only be enforced by a sanction which did not involve entitling the claimants to enter judgment.* ***There are many cases in which it is only an "unless" order that will ensure compliance.*** *Thus in* ***Mellon Trust*** *the Court of Appeal (at paras.49 and 177) agreed with the trial judge that on the facts he had no realistic alternative to making an "unless" order in the face of the persistent defiance of two of the defendants in relation to the disclosure of their assets. In the case of one of the defendants, Chacrona, the order was made during the pendency of its application to challenge jurisdiction: see paras 3(19) and (22)."* (emphasis added in the Applicants' Skeleton Argument)

130. Reference was also made to ***Orb arl v Ruhan*** [2016] EWHC 850 (Comm), where Popplewell J held at [178]:

> *" 178 [counsel for the defendant] 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).* (emphasis added in the Applicants' Skeleton Argument)

131. Reference was also made to ***JSC BTA Bank v Ablyazov*** [2011] EWHC 2506, at paragraph 162; ***JSC BTA Bank v Shalabayev*** [2011] EWHC 2903 (Ch) at [57]-[60].

The 1st to 4th Respondents' position regarding the Unless Order Summons

132. For present purposes, and subject to Mr. Batista reserving his position, as he has done throughout these proceedings, as to whether the Cayman Court has any jurisdiction over him and his right to challenge jurisdiction, service and orders made against him in these proceedings, the 1st to 4th Respondents accept that the Court has jurisdiction to make an unless order of the type sought in the Unless Order Summons.

133. The matter, Mr. McQuater QC submits, is one of discretion. The sanction sought in this case, however, namely debarring the 1st to 4th Respondents from opposing the Cayman Mareva, will likely have very serious consequences for the 1st to 4th Respondents and the Court should, before imposing this kind of sanction, carefully consider whether that sanction is appropriate in all the circumstances of the case. Reference was made to ***Marcan Shipping (London) Limited v Kefalas*** [2007] EWCA Civ 463 at [36]; and to ***JSC BTA Bank v Ablyazov*** [2010] EWHC 2219 at [38], a passage also referred to by the Applicants.

134. Those circumstances will include the likely prejudice to the 1st to 4th Respondents if they are forced to comply further with the relevant disclosure provisions but it is later found that the Cayman Mareva should not have been made (or should not have been made in that form): ***Ablyazov*** at [39].

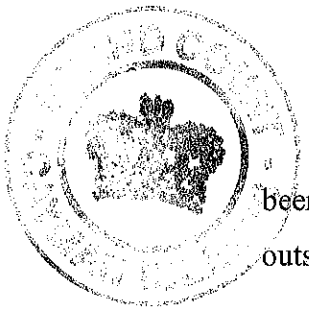
135. For an example of a case where this kind of sanction was considered an inappropriate response to a failure to comply with the disclosure obligations in a freezing order reference was made to ***Raja v Van Hoogstraten*** [2004] EWCA Civ 968 at [112].

136. Moreover, the Court should not make an order that imposes an obligation to do something that is impossible or that requires a party to perform an act which is not within his power: reference was made to ***Pride of Derby and Derbyshire Angling Association Limited v British Celanese Limited*** [1953] 1 All ER 179 *per* Sir Raymond Evershed MR at p.197 (at H) – p.198 (at A) and *per* Romer LJ at p.205 (at H).

137. As to what Mr. McQuater QC described as the Applicants' "*refrain*" that the 1st to 4th Respondents have not denied the fraud and other allegations, it was Learned Queen's Counsel's position that at the hearing on 8 February he had expressly indicated that his clients certainly deny these allegations. Further, that fulsome denials have been made in Thor 5 and other materials which were not before me at this time, but which were filed in relation to the 1st to 4th Respondents' applications to set aside the Cayman Mareva and substituted service orders, which had been filed in compliance with my order that they be filed by 22 February 2017.

138. Mr. McQuater QC bolstered his argument by reference to the fact that even in the FUFTA application before the Florida Court, the papers reviewed by this Court were described as a "*mountain of affidavit evidence*". It was submitted that the fraud alleged here is complex and technical in nature and that it is hardly surprising that it would take the 1st to 4th Respondents some time to set out their specific denials, all of which may in any event simply lead the Court to the view that there may be arguments on either side, and confirm the Court's earlier expressed view that the Applicants' have a good arguable case. The Respondents have therefore concentrated on pointing to the prejudice and difficulties they are suffering. Mr. McQuater QC also reiterated the points made by Mr. Golaszewski on the Return Date, regarding the novel application of the Court's section 11A jurisdiction to the situation of Mr. Batista being a non-resident and in relation to the treble damages claim in Florida.

139. Learned Counsel also referred to my reasons for the Ruling, delivered on 16 February 2017, where at paragraph 24, I said that there was nothing in the evidence then before me to take the case outside of the norm. He submitted that since then, Mr. Batista has now



been arrested and imprisoned and he argued that this manifestly takes the circumstances outside of the norm.

The Unless Order Summons

140. In determining the Unless Order Summons, it was submitted that the Court should carefully consider whether the 'unless' sanction is appropriate in all the circumstances of the case. The relevant factors bearing upon the exercise of the Court's discretion are set out in the paragraphs 141, 142 and 143 below. It was submitted that those factors point firmly against the making of an "unless" order at the present time.

Mr. Batista's imprisonment

141. Mr. Batista was arrested by the Brazilian Federal Police on 30 January 2017 in connection with a long-running investigation known as 'Operation Car Wash'. The reason for his arrest is explained in Thor 3, and is unrelated to the subject-matter of the Applicants' claim in these proceedings.

142. Mr. Batista has been detained in a high security prison in Brazil (known as **'Bangu 9'**) since his arrest on 30 January 2017. His ability to give instructions to third parties is exceptionally limited. This is described in detail in Thor 3 and in the evidence of his criminal attorney, Fernando Martins.

143. The circumstances of Mr. Batista's detention are as follows:

(1) Mr. Batista's application for bail was denied by way of a preliminary judgment of the Federal Regional Court of the 2nd Region given on 1 February 2017. A final decision is yet to be made on this application. If it is unsuccessful, he intends to appeal to the Superior Court of Justice.

(2) Mr. Batista has no right to use a telephone or the internet.

(3) The only persons currently authorised to visit Mr. Batista in prison are Mr. Martins and two other lawyers acting for him in connection with the criminal case

which is being brought against him. Other individuals wanting to visit Mr. Batista have to apply for authorisation, which can take up to 15 days to be granted.

(4) The visitation room at Bangu 9 only permits four visitors to speak with four inmates at any one time (there are over 400 inmates). There are four chairs in the visitation room, opposite four chairs for inmates, separated by a glass panel. Conversations take place by telephone through the glass panel.

(5) Visits are not by appointment; they take place on a "first come, first served" basis. If the four chairs are occupied when Mr. Martins arrives to visit Mr. Batista, he and Mr. Batista have to wait to meet with one another and delays can be substantial.

(6) There are no cubicles or privacy screens between each visitor and inmate and conversations are not in private. Mr. Martins is able to overhear the conversations of the other visitors at the visitation panel when he is speaking with Mr. Batista.

(7) Visitors are not allowed to take electronic devices (such as computers), note pads, pens or paper documents into the visitation room. Instructions may only be relayed to Mr. Martins orally.

(8) By reason of the lack of privacy in the visitation room, Mr. Martins does not discuss confidential matters with Mr. Batista there. The only opportunity he has to speak with Mr. Batista privately, and to take instructions from him, is when he is taken to the Federal Police for the purposes of making a deposition. On those occasions (which, to date, have only occurred twice), Mr. Martins is able to speak with Mr. Batista in private, albeit "*for a very short time before he makes the deposition.*" The sole focus of such meetings is, understandably, the criminal proceedings. Mr. Martins is the only person entitled to meet with Mr Batista under these circumstances.

144. It was opined that Mr. Martins' first-hand evidence as to Mr. Batista's visitation rights is broadly consistent with (albeit considerably more detailed and informative than) the

fourth-hand hearsay evidence put forward in Trainer 11, para 23.3 (i.e., information apparently first passed by the director of the prison to an unnamed associate in Marcello Oliveira's Brazilian law firm, then by that associate to Mr. Oliveira, and then by Mr. Oliveira to Mr. Trainer).

145. The main suggestions advanced on the Applicants' behalf are:

(1) there appears to be no reason in principle why Mr. Martins could not be used as a '*conduit*' for the purposes of giving asset disclosure, and

(2) Mr. Batista has a team of professional advisors who manage his finances, and they are under no disability in terms of preparing and collating compliance on his behalf.

146. These suggestions by the Applicants are, however, Mr. McQuater QC submits, entirely unrealistic and betray a lack of appreciation of the circumstances of Mr. Batista's incarceration. They ignore, in particular, the following facts:

(1) Mr. Martins is only able to receive *oral* instructions from Mr. Batista. He cannot take notes during the meeting or bring notes with him.

(2) Mr. Martins is not able to show *any documents* (whether in hard copy or electronic) to Mr. Batista, or give him any documents, or invite him to sign any documents.

(3) Conversations between Mr. Martins and Mr. Batista at which these highly confidential matters would be discussed would *not be in private*.

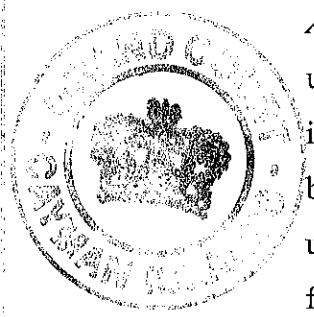
(4) Visits are erratic, they cannot be booked in advance and there can be substantial delays.

(5) Although Mr. Batista does have advisors who are able to assist him in giving asset disclosure, inaccuracies and insufficiencies in such compliance would be visited upon him personally. It is imperative, therefore, that he is able to satisfy himself that any disclosure given on his behalf is correct.

147. Outside the time provided for in my order of 8 February 2017, on 20 February 2017 the Applicants filed and served further evidence on this issue in the form of an affidavit of a Brazilian lawyer, Eduardo Bacal. Mr. Martins has filed evidence in response, and I have allowed both sets of affidavits to stand. The 1st to 4th Respondents say that in any event, Mr. Bacal's evidence does not assist the Court in resolving this issue. He does not suggest that he has ever visited Bangu 9 and is unable, therefore, to offer any evidence as to the actual and current circumstances of Mr. Batista's imprisonment. This is in direct contrast to the current and first-hand evidence of Mr. Batista's criminal attorney, Mr. Martins, the submissions continue.

148. For these reasons, as matters currently stand, taking detailed and accurate instructions from Mr Batista on what is on any view a vast, complex and confidential body of information, in order to comply with the asset disclosure obligations under the Cayman Mareva is in practice impossible, say the 1st to 4th Respondents. It is simply unrealistic to suggest that Mr. Batista is able to give asset disclosure operating under these conditions. To put this into context, Mr. McQuater QC says that when the EBX Group of companies was audited in 2012/2013, each audit (conducted by KPMG) took six months to complete due to the complexity of the Group structure and volume of transactions taking place within it. It was also, suggested with respect, that it is bizarre for Mr. Trainer to suggest (in Trainer 11, paragraph 9) that Mr. Batista is "*playing for time*" or "*frustrating*" the Cayman Mareva disclosure provisions by being arrested and kept in these draconian conditions. No-one would sensibly wish, it was contended, to be held in those conditions and Mr. Martins is actively trying to secure Mr. Batista's release on bail.

149. Accordingly, Learned Counsel argues, were the Court to grant an unless order in the terms sought by the Applicants, it would effectively be making an order with which it is impossible for Mr. Batista to comply with, with the result that the debarring sanction contained in the order would be inevitably triggered. The purpose of an unless order imposing a sanction in default is, however, to secure compliance with the relevant order, by giving the respondent a further opportunity to comply, this time under threat of a sanction: see, for example, the observations of Christopher Clarke J in ***JSC BTA Bank v***



Ablyazov [2010] EWHC 2219 at [33, 38 and 39]. The point of making an unless order is undermined if the respondent (as here) simply cannot comply within the time specified – it amounts to the immediate imposition of the relevant sanction. In effect the Court would be debarring Mr. Batista from defending these proceedings because of his arrest on unrelated charges in Brazil. That contravenes elementary principles of justice and fairness.

The 1st to 4th Respondents' prior attempts to comply with their disclosure obligations

150. It was submitted, that as explained in Thor 3, prior to the occurrence of O Antagonista issues, the 63X Companies had substantially complied with their disclosure obligations under the Cayman Mareva, Mr. Batista had made significant efforts to comply and all of the 1st to 4th Respondents were in the process of collating further asset disclosure.

151. In particular:

(1) As to the 63X Companies, these Respondents say that they have substantially complied with their disclosure obligations under the Cayman Mareva. The limited criticism which had been levelled by the Applicants at such compliance as at 8 February 2017 has been addressed in Thor 3. It was anticipated by Learned Counsel that the 63X Companies will have given full disclosure of their current assets (i.e., they will have complied with their disclosure obligations under the Cayman Mareva save for those obligations which are the subject of the Historic Disclosure Summons) prior to the hearing on 23 February 2017. The Court was updated in this respect as developments occurred.

(2) As to Mr Batista, by letter dated 27 January 2017, Carey Olsen wrote to Solomon Harris:

(i) enclosing a list of all of the assets held in Mr. Batista's name, and a list of the cash assets held by Mr. Batista indirectly (the "**Asset Schedule**"); and

(ii) stating that Mr. Batista was in the process of collating a list of assets held by him indirectly.

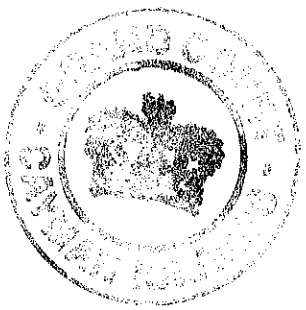
152. The argument continues that collation of Mr. Batista's further asset disclosure was, however, disrupted by two events which occurred shortly after the production of the Asset Schedule, namely Mr. Batista's arrest on 30 January 2017, and the 'O Antagonista' publication on 31 January 2017.

153. Subsequently to the hearing, as is often the case with these types of applications, where the processes of disclosure under contest are ongoing, the Court received further correspondence from the parties. Solomon Harris, by way of email sent 2 March 2017 notified the Court that on 21 February 2017, Carey Olsen had sent to them a purported Annex A Authorisation letter from the 2nd to 4th Respondents to a certain Bank signed by Thor according to the Applicants "*supposedly in compliance with their disclosure obligations contained in the Cayman Mareva*".

154. Solomon Harris advised that the Bank responded on 27 February 2017 to that letter indicating that Thor Batista does not have authority in regard to the accounts of the 2nd to 4th Respondents held by the Bank. They indicated that they wrote to Carey Olsen on 1 March 2017 to raise this point, and asked them to explain and requested that they inform the Court of the correct situation regarding the actual situation in regard to the 2nd to 4th Respondents provision of Annex A Authority Letters.

155. In their response dated 2 March 2017, Carey Olsen noted that the issue raised in Solomon Harris' letter was not before the Court on 23 and 24 February 2017. I should note that I am more inclined to agree with the Applicants that, whilst obviously since the letter from the Bank came after the hearing it was not before me at the hearing, it would equally obviously be relevant and appropriate to clarify the situation, since the extent of the 63X Companies compliance with the Cayman Mareva was the subject of submissions by Mr. McQuater QC and Mr. Halkerston.

156. However, the letter from Carey Olsen did go on to say as follows:



"We are instructed that the First Respondent is the authorised signatory to the bank accounts held by the Second to Fourth Respondents at [the Bank]. *We understand that, in good faith, Mr. Thor Batista expected* [the Bank] *to accept the letter signed by him as a result of the well-known circumstances whereby the First Respondent is in prison. If* [the Bank] *are insisting on signed authorisation letters from the First Respondent (we do not know this as you have not provided us with the...letter), this will not be possible for the reasons set out in the First Affidavit of Mr. Martins."*

DISCUSSION AND ANALYSIS OF THE UNLESS ORDER SUMMONS

157. In my judgment, this is a difficult, delicately poised set of circumstances. The sanction sought by the Applicants in this case, namely debarring the 1st to 4th Respondents from opposing the Cayman Mareva, would likely have very serious consequences for the 1st to 4th Respondents. Before imposing this kind of sanction, the Court has to carefully consider whether that sanction is appropriate in all the circumstances of the case. The interests of the Applicants in ensuring compliance and preventing prejudice to themselves have to be weighed against the risks of prejudice to the 1st to 4th Respondents.

158. The circumstances will include the likely prejudice to the Respondents if they are forced to comply further with the relevant disclosure provisions but it is later found that the Cayman Mareva should not have been made (or should not have been made in that form): ***Ablyazov*** at paragraph [39].

159. In my judgment, the fact that Mr. Batista is in prison has caused a shift in the scales and is such as to take the case out of the norm. I say so although the point made by the Applicants about the time period prior to incarceration, and whether the 1st to 4th Respondents have demonstrated sufficient efforts to comply, is not unmeritorious. However, it falls to be weighed amongst other factors, in the balance.

160. With regard to the O Antagonista Summons and the position taken by the 1st to 4th Respondents as communicated by Carey Olsen in their letter referred to at paragraph 30 above, I do think that this was a rather high-handed approach on the part of the 1st to 4th Respondents. It is for the Court to determine whether circumstances have occurred which justify a suspension or variation of extant Court Orders; not the respondent to a WFO. This Court's firm expectation and stance is that Court Orders are to be complied with, unless or until varied, suspended or revoked. I, therefore, view it as an ameliorating feature on the part of the 1st to 4th Respondents that, notwithstanding this letter and expressing this posture, they continued to provide a certain amount of disclosure (indeed they did so, even up to the evening before this hearing). No doubt upon reflection, and on the advice of eminent Counsel, the 1st to 4th Respondents 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.

161. On balance, however, I find that there has been partial compliance with the disclosure obligations, more so by the 2nd to 4th Respondents. There has not been an outright failure to comply with what are heavy and wide-ranging obligations. Indeed, the Applicants set out certain paragraphs (paragraph 13 in particular) in the second affidavit of Mr. de Araujo, Certified Fraud Examiner retained by the Applicants, which were referred to as accounts in respect of which they had not had disclosure from the 2nd to 4th Respondents. By the time of the hearing, some of this had been rectified and dealt with by these Respondents. As Mr. McQuater QC put it, the 2nd to 4th Respondents have been "coming into compliance", and I do not think that the draconian remedy of an unless order is overall, appropriate at this time.

162. In my judgment, it is not necessary for me to make any detailed findings as to impossibility or otherwise of Mr. Batista complying with the Cayman Mareva and disclosure orders whilst in prison. I am satisfied that it will be difficult and this is a factor that must be taken into account in the exercise of my discretion. In that regard, 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. There does seem to me to be some force in

saying (indeed, Mr. McQuater QC candidly and correctly conceded this), that if appropriate time is given, some attempt must be made to comply with the disclosure obligations. In particular, I do not accept that it is not possible for Mr. Batista to sign documents, since as stated by Mr. Bacal in his affidavit of 20 February 2017, incarcerated persons do have to sign documents from time to time in the ordinary course of criminal proceedings. This was accepted as being the position by Mr. Martins in his affidavit of 22 February 2017, though his point was that it is not a straightforward or simple process. Mr. Martin's evidence was that a specific request would have to be made of the prison's director. Indeed, the Historic Disclosure Summons which was filed on the day after Mr. Batista's arrest, offered to provide disclosure in relation to paragraphs 10, 11 and 12 of the WFO, 7 days after the determination of that Summons.

163. I agree with the Applicants that the 1st to 4th Respondents have not given evidence as to any attempts by Mr. Batista to give instructions to his civil lawyers, nor has there been any evidence forthcoming that Mr. Batista's civil lawyers have attempted to take instructions from him. Mr. Bacal has given evidence that Mr. Batista's partner (variously referred to as Mr. Batista's wife or girlfriend), has been reported by the press as having visited him in prison on 10 February 2017 and having obtained access by reason of her status as an attorney. This suggests that Mr. Batista's civil attorneys can quite reasonably be expected to be able to meet with him while in prison and to sign documents, albeit this may take some arranging and take some time. Thus, whilst as the saying goes, *"Hard things ARE hard"*, there is a difference between difficulty and impossibility.

164. In my judgment, the 1st to 4th Respondents must comply with the Disclosure Orders, but I accept that this may be more difficult, and require more time, based upon Mr. Batista's incarceration. Certainly, I see no reason why, for example, the proper request cannot be made to the prison's director, and Mr. Batista sign the properly worded Annex A Letters on his behalf and that of the 2nd to 4th Respondents, and to carry out complete compliance with the Orders, given sufficient time.

165. One of the factors that I must also look at is the likelihood of the jurisdiction challenge succeeding. On the materials presently before me, it is difficult to say more than that, albeit section 11A has been used in some novel circumstances in relation to Mr. Batista being a non-resident, he obviously has assets here in the Cayman Islands (this of course, having now been confirmed). It is also alleged that Mr. Batista has engaged in international fraud and that this Court is the only Court that could provide the necessary disclosure and world-wide freezing relief. Mr. Batista will therefore have quite a task on his hands to show that the grant of relief in the form of the Cayman Mareva was in all of the circumstances of this case inexpedient, unjust, inconvenient or exorbitant. I regard the application to set aside the Order for substituted service, as at presently advised, as not the most promising of applications. To my mind, again, just on what is before me now, the ground about the treble damages and the amount involved in the Cayman Mareva, as indeed, foreshadowed in my judgment on the *ex parte* application, at paragraph 87, seems the application with the most realistic prospect, as opposed to likelihood, of success. In other words, it seems the ground that will have the strongest arguability on the part of the 1st to 4th Respondents. If however, the 1st to 4th Respondents were to succeed on this point, this would not mean the discharge of the Cayman Mareva, but would simply mean a substantial reduction in the amount of frozen assets from USD 63 million, to USD 21 million.

166. In my judgment, having regard to all of the circumstances, and taking all matters into account, it would not be appropriate at this time to make an Unless Order against either Mr. Batista or the 2nd to 4th Respondents. I am minded to grant the periods of time suggested by the Applicants in their last draft Order (but not making any unless orders), i.e. 14 days to the 2nd to 4th Respondents in paragraph 4 of the Order, and 28 days to Mr. Batista (paragraphs 5 and 6), with a provision that if Mr. Batista is unable to comply with paragraph 5 and identifies the basis for this in the affidavit required by paragraph 6, he shall within 35 days issue a summons to vary that paragraph with an affidavit sworn to by Mr. Batista himself.

167. The parties have agreed that they are available on 25 and 26 April 2017 for the new Return Date. The Applicants wished me simply to list the matter for 25 April only, and treat that hearing only as a Directions hearing regarding the Applicants' application for the continuation of the Cayman Mareva, and the 1st to 4th Respondents' application for the discharge of the Mareva injunction. At this stage, I agree with Mr. McQuater QC that the 1st to 4th Respondents' applications to discharge the Cayman Mareva and to set aside the Order for substituted service, should also be listed for hearing. This would not prevent the Applicants making submissions, if so advised and if future circumstances dictate, that the 1st to 4th Respondents are in breach of the Court's orders and ought not to be heard. The Return Day is therefore to be fixed for the two days, 25 and 26 April. It is likely that more time will be needed, so contact should be made with the FSD Registrar to arrange further convenient dates. If the parties are unable to agree on a time table for the filing of evidence, and exchange of skeleton arguments, then they may make submissions in writing and I will make the directions administratively.

168. The question of costs in respect of the various applications dealt with in this Ruling should in my view follow the success in the application. However, because they are somewhat intertwined, I think it best to reserve the costs of these, in effect five applications (including that of the 2nd to 4th Respondents regarding historic disclosure), to the new Return Date. This issue should also be addressed in written skeletons in advance of the April hearing.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT