



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

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

**CAUSE NO. FSD 205 of 2017 (NSJ)**

**BETWEEN:**

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

**Plaintiffs**

**and**

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

**Defendants**

**AND**

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

**Third Parties**

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

**Appearances: Mr John Machell QC instructed by Ms Jessica Williams of  
Harneys Westwood & Riegels appeared on behalf of the Fifth  
Defendant**

**Mr Graeme McPherson QC instructed by Campbells LLP  
appeared on behalf of the Trustees**

**Heard: 28 April 2022**

**Draft judgment  
distributed: 24 May 2022**

**Judgment handed  
down: 31 May 2022**

## HEADNOTE

*Proceedings for contempt – in proceedings commenced by the Plaintiffs seeking to establish proprietary rights to a share held by the Trustees, the Plaintiffs obtain an injunction preventing the Trustees from disposing of, encumbering or dealing with a share and dividends paid – one of the Defendants to the proceedings claims that assets held in a trust of which she is a discretionary beneficiary are subject to the injunction and that the Trustees have acted in breach of the injunction by obtaining litigation funding that gives the Trustees and the litigation funder rights of recourse to those trust assets – applications by the Fifth Defendant under GCR O.24 r.11 for inspection of the funding agreement and for an interim injunction*

## JUDGMENT

### Introduction

1. On 23 March 2022 the Fifth Defendant issued a Notice of Motion claiming that the First and Ninth Defendants (the **Trustees**) breached the terms of a proprietary injunction made by this Court on 17 October 2017 (as subsequently amended) (the **Injunction**) by entering into a financing (litigation funding) agreement on 22 June 2018 (the **Litigation Funding Agreement**). The relief sought in the Notice of Motion includes an order that the Trustees be fined for contempt. The evidence in support of the Notice of Motion includes the Fifth Defendant's Eleventh Affidavit (**D5 11**) and Twelfth Affidavit (**D5 12**).
2. On 22 April 2022, the Fifth Defendant issued a summons (the **Summons**) seeking (a) an order that certain paragraphs in the Sixth Affidavit of Mr Klaus Boehler (**Boehler 6**), filed by the Trustees in opposition to the Notice of Motion, be struck out and (b) an order pursuant to GCR O.24, r.11 that the Trustees produce the Litigation Funding Agreement for inspection (the **O.24 Application**). The evidence in support of the Summons was the Fifth Defendant's Thirteenth Affidavit (**D5 13**).

3. The Summons was listed to be heard on 28 April 2022 (by video link) at the same time as the first hearing of the Notice of Motion. In addition to the relief sought in the Summons, the Fifth Defendant sought:
  - (a). an order, in the terms of paragraph 2 of the Notice of Motion, that the Trustees disclose, within seven days, copies of the evidence filed in the application they made to this Court in 2018 in Cause No. 98 of 2018 (the *Champerty Application*), when they sought and obtained (see my Ruling dated 26 July 2018 (the *Champerty Ruling*) an order that the Litigation Funding Agreement did not constitute or involve unlawful maintenance or champerty and a transcript of the hearing before me on 1 June 2018 (if one was made) (the *Paragraph 2 Application*).
  - (b). an interim (or interlocutory) injunction (the *Interim Injunction*) prohibiting the Trustees from borrowing further funds in their capacity as trustees of the Ypresto Trust whether pursuant to the Litigation Funding Agreement or any existing or future variation thereto (the *Interim Injunction Application*). Prior to the hearing, it appeared that the Fifth Defendant was also seeking an order for the appointment of receivers over the bank accounts opened by the Trustees as trustees of the Ypresto Trust, but it was made clear at the hearing that this was not in fact the case.
  - (c). directions for the future conduct of the Notice of Motion.
4. The Trustees oppose the Fifth Defendant's applications for the relief sought in the Summons and in the Notice of Motion and have made submissions as to the appropriate directions to be made. The Trustees relied on the evidence of Mr Boehler, a member of the board of the Ninth Defendant, who filed and served Boehler 6.
5. At the hearing, Mr John Machell QC appeared for the Fifth Defendant and Mr Graeme McPherson QC appeared for the Trustees.

6. I have concluded that:

- (a). the application to strike out paragraphs in Boehler 6 is granted.
- (b). the O.24 Application is granted, but only on the basis and to the extent that the Trustees must give inspection of those parts of the Litigation Funding Agreement (and any amendment thereof) (i) that require or permit the Trustees to have (or give the funder) recourse to (or which give the Trustees or the funder rights over) assets of the Ypresto Trust for the payment of sums due under the Litigation Funding Agreement (and the terms which condition and regulate those rights of recourse or rights over the Ypresto Trust assets) and (ii) on which the Trustees rely in support of their case that the Trustees and the funder do not have and cannot exercise rights of recourse to those assets until after the Injunction has been discharged (the *Relevant Terms*). The Fifth Defendant and the Court need to see these parts of the Litigation Funding Agreement so that the Fifth Defendant can fairly prosecute and the Court can fairly dispose of the claim set out in the Notice of Motion that the effect of entry into and the making of advances under the Litigation Funding Agreement was to dispose of, encumber or deal with assets of the Ypresto Trust subject to the Injunction. The requirement to give inspection is however subject to the Trustees' right to redact any clauses or provisions that are subject to legal advice privilege or which contain commercially sensitive information that can be redacted without affecting the ability of the Court and the Fifth Defendant to understand and interpret the nature and extent of the rights of recourse to and rights over the Ypresto Trust assets that I have described. It seems to me to be appropriate to require the Trustees and their legal advisers to review the Litigation Funding Agreement (and any amendments thereto) in light of this judgment and then to make available for inspection a redacted copy of the agreement showing the Relevant Terms but redacting the terms and provisions which the Trustees consider to be irrelevant to and unconnected with the Relevant Terms or are protected by legal advice privilege or confidentiality of the kind I have described. The redacted copy of the Litigation Funding Agreement must be supported by evidence that explains why the redactions are justified and is as specific as possible without making disclosure of the very matters that the claim for privilege or commercial sensitivity is designed to protect. If the proposed redactions are challenged by the Fifth Defendant, I will require short written

submissions from the parties to be filed (including submissions as to whether I should see the unredacted Litigation Funding Agreement) and I will then deal with any challenge on the papers. I will invite the parties to agree within fourteen days from the handing down of this judgment the timetable and process for giving inspection and for the making of any challenge, but if they are unable to do so within that period they will need within twenty-one days of the date of hand down to file short submissions with their competing views as to timetable and process and I shall then make a suitable order without a further hearing.

(c). the Paragraph 2 Application is dismissed.

(d). the Interim Injunction Application is dismissed.

7. The Fifth Defendant also sought directions for the filing of evidence in answer and reply in respect of the Notice of Motion. The Trustees have indicated that they do not see the need for the filing of further evidence and I therefore assume that they do not wish or intend to serve further evidence. Therefore, once the timetable for and process with respect to the production of the Relevant Terms have been agreed or settled by further order, a hearing of the Notice of Motion can be listed and the timetable for the filing of skeleton arguments and bundles agreed. The Trustees in their written submissions indicated that Leading Counsel be permitted to appear remotely at the hearing. I do not consider that to be appropriate. The Notice of Motion involves proceedings for contempt and in view of the quasi-criminal nature of the proceedings and their seriousness, I consider that an in-person hearing is appropriate. I also consider that counsel should be robed. While not a requirement for the hearing of contempt proceedings in this jurisdiction, as it is in England and Wales (see CPR 81.8(2)), it seems to be best practice to require robing.

### **The application to strike out paragraphs in Boehler 6**

8. As I have noted, the Fifth Defendant has applied in the Summons for an order that certain paragraphs in Boehler 6 be struck out.

9. The relevant paragraphs are [5(e)] and [46] to [52] of Boehler 6 and pages 181 to 183 and 196 to 197 of the exhibit KB5 (the *Material*). In D5 13 at [5], the Fifth Defendant says that she notes that “*it is not in dispute between the parties that the communications referred to and exhibited by Mr Boehler arose in the course of a mediation/without prejudice process. What Mr Boehler has done is redact references to the mediation....*” The Fifth Defendant submits that Mr Boehler seeks to rely on communications that took place in the course of a confidential mediation and are protected by the without prejudice rule. The Fifth Defendant argued that any discussions between the parties for the purpose of resolving the dispute between them are not admissible, even if the words “*without prejudice*” or their equivalent were not expressly used. The Fifth Defendant submitted that there was no proper basis for the Trustees to seek to admit the Material and invited me, if I concluded that I needed to read the Material *de bene esse*, to read and have regard to the evidence in the Appendices to D5 12 and D5 13.
10. The Trustees argued that they were entitled to rely on the Material because either the correspondence related to funding and not the mediation discussions or alternatively because the mediation agreement was subject to Israeli law which imposed a duty of good faith on the parties and it would be a breach of this duty by the Fifth Defendant to rely on any obligation of confidentiality. At the hearing, Mr McPherson QC submitted that the without prejudice rule did not apply to independent facts not connected with without prejudice negotiations or the merits of the dispute and the Material, or at least the parts of it on which the Trustees wished to rely, fell within that carve out to the without prejudice rule.
11. At the hearing, I told Mr Machell QC and Mr McPherson QC that it was clear that I needed to read the Material *de bene esse* in order to be able to understand the issues and decide the application. I took the opportunity to do so and then heard further submissions from Mr Machell QC and Mr McPherson QC.
12. It seems to me that the Material cannot be relied on and that [5(e)] and [46] to [52] of Boehler 6 should be struck out. I shall therefore ignore and not take the Material into account. The Material and Mr Boehler’s evidence is based on statements made by or on behalf of the Fifth Defendant at and in a without prejudice mediation. The modern approach to the without prejudice rule is to say that without prejudice discussions as a whole are protected. All matters disclosed or discussed in without prejudice discussions are protected. It is neither necessary nor appropriate on this

application to discuss the authorities. A number of the relevant cases were cited in the written submissions some were briefly mentioned during the oral argument. It will suffice for me to refer to the judgment of Walker LJ in *Unilever v The Proctor & Gamble Co* [2000] 1 WLR 2436 at 2443 where he noted that he doubted:

*“whether the large residue of communications which remain protected can all be described as admissions (again, unless that expression is given an unusually wide meaning). One party’s advocate should not be able to subject another party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions.”*

**The Injunction, its impact on assets of the Ypresto Trust and the Fifth Defendant’s standing to bring contempt proceedings**

13. The relevant part of the Injunction provides that:

*“... the Defendants must not in any way ... (ii) dispose of, encumber, or deal with any dividend or distributions in respect of such Shares or any asset or property representing such dividend or distribution or the proceeds of sale of such asset or property ...”*

14. The Injunction was obtained by the Plaintiffs in support of and to maintain the *status quo* pending the conclusion of the proceedings they had brought to set aside the transfer of and assert proprietary rights in the share (*the Share*) in Britannia Holdings (2016) Ltd (**BH06**). The Share had been transferred to the Trustees (originally just to the First Defendant) as trustees of the Lake Cauma Trust, a Liechtenstein trust. The Plaintiffs asserted that the Share had either been transferred by mistake, in which case it should, following the death of the settlor, revert in and be available to those with an interest in the settlor’s estate or, in the alternative, that the First Plaintiff held a joint interest in the Share which had not been overreached or discharged upon the transfer and was binding on the Trustees.

15. The Trustees are also trustees of another related Liechtenstein trust, created by the same settlor, namely the Ypresto Trust. The Fifth Defendant is the party with the main interest in the Ypresto Trust (see D5 11 at [5] where the Fifth Defendant avers that “*I am a member of the class of discretionary beneficiaries of the Ypresto Trust. It is common ground that the Ypresto Trust has always [been] intended [sic] to be my private trust*”). Dividends had been paid by BH06 (see the

grounds set out in the Notice of Motion at [1]) and some dividends or sums paid out of dividends (in the sum of \$40m) (the *Ypresto Dividends*) had been received by the Trustees qua trustees of the Ypresto Trust and are held as assets of that trust (see the grounds set out in the Notice of Motion at [2]). The Fifth Defendant submitted that, since the Injunction prevented dealings not only with the Share but also with dividends paid by BH06 and sums representing those dividends, assets of the Ypresto Trust were caught by the Injunction.

16. In the Notice of Motion at [7], the Fifth Defendant avers that:

*“The Ypresto Dividends are “any dividend or distributions in respect of such Shares [in BH06]”, and as such fall within the terms of paragraph 1(1)(ii) of the Injunction; and any asset or property representing such Ypresto Dividends, or distribution or the proceeds of sale of such asset or property, likewise fall(s) within the terms of such provision.”*

17. The Trustees do not challenge this claim and accept that the Injunction covers the \$40m held by them as trustees of the Ypresto Trust (see Boehler 6 at [25]).

18. I should note that the Fifth Defendant and the Trustees consider that email correspondence with the Court has “clarified” this issue. However, I must say that in my view, as I explained at the hearing, while the point does not arise on this application in view of the parties’ positions, there remain certain open issues as to the proper treatment of the \$40m held by the Trustees as trustees of the Ypresto Trust. Let me briefly explain.

19. As the Fifth Defendant noted in her skeleton argument (at [8]), “*On 15 March 2018 the Court [had] clarified [in an email forwarded to the parties by my assistant] (what was always or should have been obvious) that these monies were caught by the injunction.*” That email from my Personal Assistant responded to an email to the Court also dated 15 March 2018 from the Trustees’ attorneys Campbells. I set out below both emails, starting with the Campbells email:

*“Secondly, the First Defendant, previously with the Third Defendant, now with Admintrust Verwaltungs Anstalt, as Trustees of the Perry Trusts including the Lake Cauma Trust, are obliged to manage the trusts and their interests in accordance with Liechtenstein law. Such obligations include defending litigation. The Courts of Liechtenstein permit the use of monies held by the Trustees within the trust structure for such purposes. Since its creation on 1 May 2013, the Lake Cauma Trust has been a primary source of funding for the trusts to enable such obligations to be discharged by the Trustees, albeit that no monies have*



been paid from the Lake Cauma Trust into the wider structure since 2 March 2016, and so no monies have been paid from the Lake Cauma Trust into the wider structure since the making of the 17 October 2017 Order. The issue of the use of monies paid historically from the Lake Cauma Trust by way of dividends from BHO6, including into other trusts within the structure, has not been addressed before the Court and the First Defendant does not wish there to be a further unnecessary dispute about whether the forthcoming Order is intended to affect such amounts or the use of such amounts for purposes prima facie permissible under the Trust Deeds. It is the position of the Trustees that such amounts, including sums currently held by the Ypresto Trust are available to allow them to meet their obligations subject to the control of the Liechtenstein Court, including, inter alia, the Supervisory Proceedings recently started in Liechtenstein by the Fifth Defendant, Yael Perry. In these circumstances it would be of assistance if His Lordship could indicate whether it is his intention that the forthcoming Order should place additional conditions on the use of monies held by the Trustees within the wider trust structure for the Perry Trusts to those that may be deemed appropriate by the Courts of Liechtenstein

“second question: the injunction (already) prohibits dealings with, or disposals of any dividend paid or distributions made by BHO6 or any property representing such dividend or distribution. Therefore to the extent that the Trustees continue to hold the dividends/distributions or their proceeds, the injunction bites and applies. Furthermore, the Plaintiffs have two outstanding applications which relate to this issue covering both the Lake Cauma Trust and the Ypresto Trust, both of which are mentioned in Mr. Tracey’s email (the summons dated 19 February for disclosure of information regarding BHO6 dividends – issue 7 at the hearing on 21-23 February that was not heard - and the contempt motion dated 20 February). As Mr. Tracey remarks, “the issue of the use of monies paid historically from the lake Cauma Trust by way of dividends from BHO6, including into other trusts within the [wider Perry trust] structure” has not been addressed before the Court. I had assumed that counsel would be discussing and seeking to agree the timetable for listing or otherwise disposing of these two outstanding motions and I would request that they do so (and that the Trustees consider whether they require and need to apply for any further amendment to the injunction on this issue) now and revert to the Court with details of what is proposed when filing the draft orders.”

20. This email exchange followed a notice of motion filed by the Plaintiffs on 20 February 2018 in which the Plaintiffs alleged that the Trustees were in contempt by reason of the manner in which the Trustees had dealt with some assets of the Ypresto Trust. The circumstances are briefly set out in Boehler 6 at [27]. Following receipt of the Trustees’ evidence in opposition to the Notice of Motion, the Plaintiffs discontinued the Notice of Motion, however the Trustees apologised to the Court for any possible breach of the Injunction which they said was inadvertent. Mr Boehler, in Boehler 6 (at [27]), referred to my judgment dated 10 December 2018, which he considered did not deal with the withdrawn Notice of Motion, and said that I had “*accepted that [the First Defendant] had made full disclosure and apologised to the Court and sought to rectify its errors*”

and actions.” The full passage in which that comment appears is worth setting out in full. It is at [19(g)(ii)] of the 10 December 2018 judgment and is in the following terms (underlining added):

*“I do have some concerns about the First Defendant’s conduct in relation to the construction of the orders of this Court. In particular, the construction of the April Order and the Injunction which purportedly justified the use of TP’s fifth and sixth affidavit in the English probate proceedings and to give security over the assets of the Ypresto trust seemed strained and difficult to justify. It must have been clear that the First Defendant’s construction was contentious and that the prudent and proper course was to seek clarification and confirmation from the Court. I also have some concerns in relation to the Swiss criminal complaint since, at least on the basis of the position as I currently understand it, there was bound to be a risk that the action taken by the Swiss prosecutor could be inconsistent with and at least cut across the exercise by the receivers of their powers in relation to Solid and its Swiss accounts. I would have expected there to be a prior discussion with the receivers or an application to this Court. Nor do I consider that the Plaintiffs’ adoption of an unsustainable construction of the April Order (in relation to actions) can count as an excuse. But I accept that the First Defendant has, as regards the breaches of Court orders, made full disclosure, and apologised to the Court and sought to rectify its errors and actions. I also accept that the other allegations of misconduct made in relation to the Panamanian proceedings are as yet unconfirmed and yet to be proved and that the complaint about the bringing of the double derivative claim is without substance. In any event I am not satisfied that the Plaintiffs have established that the First Defendant cannot be trusted to observe and may deliberately breach the Court’s orders (or its implied undertaking) or is seeking relief for a collateral and improper purpose. It is advised by respected and responsible counsel and legal advisers and will I anticipate act carefully and conscientiously in future to ensure that there is no breach of any orders of the Court (and that if necessary prior clarification will be sought from the Court).”*

21. As is clear from the passages in emails and my 10 December 2018 judgment quoted above, the status of the funds held by the Trustees as trustees of the Ypresto Trust has not been determined and the question of whether, if they were properly paid away by the Trustees as trustees of the Lake Cauma Trust with the consent of the Plaintiffs before the granting of the Injunction, the funds should properly remain subject to the Injunction, whose purpose was to prevent the disposal of or dealings with property that the Plaintiffs claimed a proprietary interest in, has not been considered.
22. There are no doubt good reasons as to why the parties have not brought these issues before the Court for determination. As the evidence filed in relation to the Notice of Motion shows, there remains a dispute as to whether the Plaintiffs assert (or can assert) that they are entitled to the return of the Ypresto Dividends if their claims succeed and maintain that they have a proprietary interest, by way of tracing or otherwise, in them. Mr Boehler asserts in Boehler 6 at [25] that the

Plaintiffs by “including [the Ypresto Dividends] within the scope of the [Injunction]” had intrusively interfered with the Ypresto assets and may seek the return of the Ypresto Dividends if their claim is successful. But the Fifth Defendant claims that “*It has always been the Plaintiffs’ position that they have no intention of interfering with any assets emanating from BH06 which were settled on the Ypresto Trust*” (D5 11 at [12]). It may be that the Fifth Defendant and the other parties have taken the view that a determination of these issues would give rise to complex questions of law which they do not wish to deal with or consider do not need to be dealt with before the conclusion of the main proceedings. But I do think that it is important to be clear that a number of key issues have not been decided by the Court.

23. In any event, the Fifth Defendant asserts that since the Ypresto Dividends, held by the Trustees as trustees of the Ypresto Trust, are subject to the Injunction, she has a sufficient interest entitling her to bring a claim for a breach of its terms, even though the Plaintiffs, on whose application and for whose benefit the Injunction was granted, have not taken any action (or supported or participated in the proceedings commenced by the Notice of Motion). As I pointed out at the hearing, and as is made clear by *Home Office v Harman* [1983] 1 AC 280 at 310E-F (per Lord Scarman), a civil contempt arising from non-compliance with an order of the Court constitutes an injury to the private rights of a litigant and so the litigant may waive or consent to the non-compliance. An issue might be said to arise here as to whether the only parties entitled to complain about the alleged breach of the Injunction by the Trustees are the Plaintiffs or at least that they must join in the action and confirm that they have not consented to or waived the alleged breach (query whether the Fifth Defendant could bring a claim for contempt if the Plaintiffs had waived or consented to the breach). But in this case, the Trustees have not taken this point (at least yet) and therefore the issue does not arise on this application. There is a related issue which should be mentioned. The complaint made by the Fifth Defendant against the Trustees is in substance a complaint that they have improperly encumbered the assets of the Ypresto Trust by entering into the Litigation Funding Agreement. The injury suffered by the Fifth Defendant is the alleged diminution in the value of the Ypresto Trust assets resulting from the claim against them which may be made by the Trustees pursuant to their right of indemnity or possibly by the funder if it has a right of recourse against the trust assets. This complaint appears to involve an allegation of a breach of Liechtenstein law. It might be said that while the Notice of Motion makes out a case based on an alleged breach of the Injunction, the Fifth Defendant is really seeking relief in

this Court by way of the Notice of Motion for an alleged breach of trust, which should either be formulated as such and/or made in Liechtenstein. Once again, these are not points that have been taken by the Trustees (at least so far) and therefore they do not arise on this application. I mention them since this is the first hearing of the Notice of Motion and they occur to me as being at least issues that could arise and be relevant.

### **The basis on which the Fifth Defendant claims that the Trustees breached the Injunction**

24. In the Notice of Motion the Fifth Defendant, after asserting that the Ypresto Dividends were and remain subject to the Injunction, recites (at [9]) that the Trustees have a right of indemnity against or a lien over the assets of the Ypresto Trust (arising as a matter of law and/or pursuant to clause 14 of the deed of settlement of the Ypresto Trust) and then claims (in [10]) that (underlining added):

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

25. At [14] of D5 11, the Fifth Defendant said that “*My contention is that, by entering into the [Litigation Funding Agreement] the Trustees breached the [Injunction] because by borrowing funds, they encumbered or dealt with the [Ypresto Dividends] by reason of their indemnity or lien.*” The Fifth Defendant set out the terms of clause 14 of the deed of settlement and article 920(1) of the Liechtenstein Persons and Companies Act (at D5 11 at [8] and [9] respectively) and exhibited to D5 11 a copy of a letter dated 26 May 2021 from Withers (the **Withers Letter**) in which they gave advice regarding the Litigation Funding Agreement to Solid Virgin Islands Limited, a company settled on the Ypresto Trust. In D5 12, at [6], the Fifth Defendant said that Withers had consented to her seeing the Withers Letter. The Fifth Defendant also exhibited, *inter alia*, a copy of the deed of settlement of the Ypresto Trust. The Fifth Defendant, however, does not have and therefore was unable to exhibit a copy of the Litigation Funding Agreement, which is not in evidence on this application, and disclosure of which is now sought by her.

26. The Fifth Defendant's position is further explained in the skeleton arguments filed on this application. At [13] and [14] it was submitted that:

“13. *By entering into the [Litigation Funding Agreement], the Trustees covenanted to pay sums of money to the funder in certain circumstances. Whilst, ordinarily, the entering into of financial obligations (whether contingent or otherwise) will not be a breach of a proprietary or freezing injunction, the position so far as trustees are concerned is different. This is because, by entering into a financial obligation in its capacity as trustee, a trustee encumbers or deals with the trust assets: the trust assets become charged or otherwise made subject to the trustee's right of reimbursement or indemnity. It would appear that the covenants to pay given by the Trustees in the [Litigation Funding Agreement] were on a personal non-recourse basis (that is, they did not accept personal liability) (see Mr Boehler's affidavit in support of the Champerty Application at [34]) and so, on the face of it, it seems likely that the [Litigation Funding Agreement] contains express or implied provisions under which assets of the trusts were charged in favour of the Funder or, at least, were otherwise to be made available to satisfy liability to the funder (which would itself be a dealing with the injunctioned assets). Indeed, it is difficult to understand how the [Litigation Funding Agreement] could operate unless there was provision for recourse to the trust assets; and the Withers' advice suggests that there are provisions to this effect (whether described as charges or not): paragraph 5.13-5.15. Any such provision would constitute a breach of paragraph 1(1)(ii) of the injunction.*

14. *There can be no doubt that, had the promise to pay (whether personal or from the trust assets) been a present promise to pay (i.e. not subject to conditions), that would have involved an encumbrance or dealing with the trust assets, whether or not the [Litigation Funding Agreement] expressly granted the funder a charge or other security over the trust assets. This is because, by incurring the liability, the Trustees will have subjected the trust assets to the Trustees' right of reimbursement or indemnity.”*

27. The Fifth Defendant submitted that it did not matter that, as the Trustees had asserted, their liability under the Litigation Funding Agreement was non-recourse (to them personally) or conditional on success, as defined in the Litigation Funding Agreement, being achieved. Even if the liability was non-recourse, once a liability was incurred the Trustees would have rights over the Ypresto Trust assets or the funder must have been given such rights for the purpose of paying what was due to the funder (the Fifth Defendant assumed that this must be the case, even though she had not seen the Litigation Funding Agreement). The Trustees argued, as I explain below, that there was in any event currently no borrowing due and payable or present liability to repay the funder under the Litigation Funding Agreement since funds advanced were repayable if and only if there was success (which the Trustees argued would necessitate the lifting of the

Injunction). The Fifth Defendant argued that by entering into contractual obligations that committed the Trustees to pay sums to the funder out of trust assets upon and subject to the satisfaction of certain conditions, the Trustees had (certainly once funds had been advanced) created an encumbrance on or dealt with the assets of the Ypresto Trust. Once the Trustees had entered into the Litigation Funding Agreement and accepted funding, those assets were irreversibly exposed to the risk of having to discharge the Trustees' right of indemnity or reimbursement (the right of indemnity under Liechtenstein law appeared to be the same as the right under Cayman law). The position was no different to a person charging an asset in respect of a liability that is subject to conditions. A charge is an encumbrance or dealing whether or not the liability it secures is payable in the future subject to conditions.

28. While Mr Boehler said (Boehler 6 at [22]) that he could “*confirm that unless and until the Cayman litigation is resolved in favour of the Trustees and the [Injunction] is discharged, there can be no claim against assets that are covered by the [Injunction]*” this was mere assertion without any documentary basis or explanation, which raised a doubt as to its truth or at least what precisely was meant by the statement. The Trustees had not put in evidence an extract from the Litigation Funding Agreement which showed a term stipulating that no sums were payable until the Injunction had been discharged or that success was defined so that it could only occur once the Injunction had been discharged.

#### **The Fifth Defendant's submissions in support of the O.24 Application**

29. GCR O.24, r.10 provides as follows:

- “(1) *Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.*
- (2). *The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.*”

30. Notice was given by the Fifth Defendant's attorneys, Harneys, in their letter to Campbells dated 12 April 2022 and an objection to production was made by Campbells in their letter to Harneys dated 20 April 2022. The Fifth Defendant sought an order for production by paragraph 3 of the Summons.

31. GCR O.24, r.11(2) states that:

*“Without prejudice to paragraph (1), but subject to rule 14(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.”*

32. GCR O.24, r.14 is in the following terms:

*“(1). No order for the production of any documents for inspection or to the Court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*

*(2) Where on an application under this Order for production of any document for inspection or to the Court or for the supply of a copy of a document privileged from such production or supply is claimed or objection is made to such production or supply on the ground that it contains confidential information or on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.*

33. The Fifth Defendant says that the Litigation Funding Agreement is referred to in Boehler 6 and therefore the Fifth Defendant has a right to inspect it unless good cause to the contrary is shown. There is no such good cause in the present case. The Fifth Defendant referred to *Quilter v Heatley* (1883) 23 Ch D 42 at 51 and *Lemos v Couetts & Co (Cayman) Limited* [1992-93 CILR 5] at 11-12.

34. The Fifth Defendant submitted that the requirements of GCR O.24, r.14(1) were satisfied since the Court was unable properly to adjudicate upon the Fifth Defendant's claim that by entering into the Litigation Funding Agreement (and obtaining the advance of funds thereunder) the Trustees had breached the Injunction, without reviewing the terms of and considering the legal effect of the Litigation Funding Agreement. The Fifth Defendant said that, as set out above, the basis on which her claim was made demonstrated, she claimed, that under the Litigation Funding

Agreement the Trustees were immediately subject to various liabilities and that in consequence the Trustees had an immediate right of indemnity and therefore rights of a proprietary nature against the Ypresto Trust assets, and that the creation of those rights or the attachment of the trust assets resulting from the incurring by the Trustees of a liability covered by their indemnity, when properly understood and characterised, constituted (or had resulted in) a disposal, encumbrance or dealing with the property subject to the Injunction. The Fifth Defendant submitted that it was necessary to see and interpret the terms in the Litigation Funding Agreement in order to determine its effect and the nature and extent of the liabilities to which the Trustees were subject thereunder. An understanding of the precise terms of the Litigation Funding Agreement was essential in order for the Court to be able to decide whether by entering into and borrowing pursuant to it the Trustees had disposed of, encumbered, or dealt with the Ypresto Dividends (recognising of course that the Court would also need to form a view as the nature of the rights under the applicable law given by the Trustees' indemnity).

35. In the Fifth Defendant's skeleton it was suggested that it was arguable that the terms of the Litigation Funding Agreement no longer remained confidential. Reference was made to a number of references to the Litigation Funding Agreement in Court and other documents. Details of some of its terms were before the Court on this application; some of its terms had been referred to in the Champerty Ruling and the Liechtenstein decision of 12 February 2018 (which was exhibited to Boehler 6); the Trustees had previously disclosed to the Fifth Defendant the affidavits (but not the exhibits) filed in the Champerty Application which made detailed reference to the Litigation Funding Agreement and its terms, including an indication of the multiplier (see D5 11 at [19] and the exhibit to Boehler 6 which contained Mr Boehler's affidavit filed in the Champerty Application); the Litigation Funding Agreement had been referred to in the 2020 Ypresto Trust accounts (which were exhibited to D5 11) and in the 2018 Solid Virgin Islands Limited accounts (exhibited to D5 12) and the Trustees had referred to the Litigation Funding Agreement and its terms in discussions with the Fifth Defendant's lawyers (an email in 2021 from the Trustees' Liechtenstein lawyer was exhibited to D5 11 which discussed the Litigation Funding Agreement). The Fifth Defendant also noted that she was the principal discretionary beneficiary of the Ypresto Trust and so was someone directly affected by the Litigation Funding Agreement.



36. But even if the terms of the Litigation Funding Agreement did remain confidential, inspection should still be ordered because sight of its terms (and any amendments to it, including the variation referred to in the Withers Letter) was critical to the determination of the Fifth Defendant's claim and therefore discovery was necessary for disposing fairly of the proceedings. Confidentiality was not, by itself, a justification for refusing inspection and when it was established that discovery was necessary for disposing fairly of the proceedings, discovery must be ordered notwithstanding confidentiality (citing *Science Research Council v Nasse* [1980] AC 1028 at 1065-1066).
37. The Fifth Defendant noted that Mr Boehler had in Boehler 6 at [44(d)] referred to and quoted from his Third Affidavit in which he had asserted that the Litigation Funding Agreement was privileged. However, the Fifth Defendant argued that the Trustees had not established such a claim. She accepted that the Litigation Funding Agreement could be protected by legal advice privilege if its terms gave an indication of the legal advice that the Trustees had been given (by recording, revealing, or casting light on such advice) but the Trustees had made no attempt to show how the conditions for claiming privilege were satisfied in this case by reference to the content of the Litigation Funding Agreement. A bare assertion of privilege was insufficient. Furthermore, even if the Litigation Funding Agreement had been protected by legal advice or litigation privilege that privilege had been lost as soon as copy of Mr Boehler's affidavit filed in the Champerty Application had been provided to the Fifth Defendant.
38. The Fifth Defendant submitted that she and the Court needed to see, and that the Court should order inspection of, the whole Litigation Funding Agreement. This was required in order to enable the Litigation Funding Agreement to be interpreted and understood as a whole. However, in response to a question from me during the hearing, Mr Machell QC said that if I was not persuaded that it was necessary for the Fifth Defendant and the Court to see the whole agreement but only the parts that were relevant to the nature and extent of the Trustees' or the funder's rights of recourse to the Ypresto Trust assets, then the Fifth Defendant would accept that result.

### **The Paragraph 2 Application**

39. The Fifth Defendant's skeleton argument did not deal with the Paragraph 2 Application, but Mr Machell QC addressed it during his oral submissions.

40. He submitted that the Court needed to review what had been shown to the Court on the Champerty Application in order to be able to determine the Trustees' state of mind and what they believed at the time of the Champerty Application regarding the impact of the Litigation Funding Agreement on property subject to the Injunction. But Mr Machell QC accepted during the hearing that this was only relevant to the question of what sanction to impose on the Trustees after and if the Court decided that there had been a breach of the Injunction. It would go to the issue of whether the Trustees' breach had been deliberate and premeditated.
41. Mr Machell QC said that the Trustees appeared to have understood that entering into the Litigation Funding Agreement required a variation of the Injunction and to have treated the Champerty Application as an application for such a variation and approval by the Court of the Trustees' entry into the Litigation Funding Agreement. This, Mr Machell QC said, had been borne out by what the Trustees had said in a statement made to the Liechtenstein court dated 2 July 2018 (which were exhibited to D5 11, at page 229 of the bundle). The Trustees had told the Liechtenstein court that:

*“The contract to finance the legal proceedings has been submitted to the Cayman Court for approval. This had to be done as the contract to fund the legal proceedings itself has to be seen as a disposal of the assets of the Ypresto Trust....The contract to finance the legal proceedings has been approved by the responsible judge of the Cayman Court.”*

#### **The Trustees' submissions in opposition to the O.24 Application**

42. The Trustees submitted that an order for inspection of the Litigation Funding Agreement should not be made because the agreement contained a confidentiality clause, and the Trustees were therefore subject to a duty of confidentiality. They argued that GCR O.24, r.14 made it clear that there was no absolute right to inspection of documents which are mentioned in affidavit evidence. The test was one of fairness. They cited the following passage from the judgment of Ramsay J in *Croft House Care Limited v Durham County Council* [2010] EWHC 909 (TCC) (a case which considered Order 24(13)(3) of the English Supreme Court Rules 1999, in force in England and Wales prior to 2000, which was in identical terms to GCR O.24, r.14(1)) (underlining added):

*“The fact that documents may contain confidential information in any of those categories is not, in itself, a reason for not providing such documents on disclosure and inspection. However, as was pointed out in *Science Research Council v Nassé* [1980] AC 1028 the Court in deciding whether to give disclosure must have regard to the fact that any*

*documents are confidential and that discovery would be a breach of confidence, so that the fact that a document is relevant alone is not determinative of the need to give disclosure. Rather, as the House of Lords set out in that case, the ultimate test is whether disclosure and inspection is necessary for disposing fairly of the proceedings. In making this decision the Court should consider whether any special measure, such as redaction or hearings in private should be adopted: See Lord Wilberforce at 1065 E to 1066 B, Lord Salmon at 1072 G to 1073 A, Lord Fraser at 1085 D to G and Lord Scarman at 1089 D to 1090 A.*

43. The Trustees also submitted that inspection should not be ordered because the Litigation Funding Agreement was protected by legal advice privilege. As I have noted, Mr Boehler had in Boehler 6 at [44(d)] referred to and quoted from his Third Affidavit in which he had asserted that the Litigation Funding Agreement was privileged. The Trustees argued that it was established in a number of English cases that litigation funding agreements could attract legal advice privilege and the test adopted in those cases should be applied in this jurisdiction. The Trustees cited and relied on a passage from the judgment of Popplewell J in *Excalibur Ventures LLC v Texas Keystone Inc* [2012] EWHC 2176 (QB):

*"If and insofar as the disclosure of the funding agreements would or might give the other side an indication of the advice which was being sought or the advice which was being given, it would be covered by legal advice privilege."*

44. They also referred to the judgment of Morgan J in *Re Edwardian Group Limited* [2017] EWHC 2805 (Ch) in which Morgan J had decided that a funding agreement could attract legal advice privilege and had declined to order that it should be inspected on that ground, in reliance on the evidence of solicitor (Mr Mervis) for the party concerned. The relevant passages from Morgan J's judgment are these (underlining):

36. *The question as to what is a sufficient reference to legal advice for present purposes has been considered in a number of Australian decisions. In Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501, Gummow J said at 569 that legal advice privilege extended to any document prepared by a lawyer or a client "from which there might be inferred the nature of the advice sought or given". The judge in that case then gave examples such as draft pleadings, draft correspondence and bills of costs. This statement of principle was repeated by Finn J in *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122 at [21]; this passage was cited in *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc*. In *Pratt Holdings*, the Federal Court of Australia remitted the case to the judge at first instance, Kenny J, for her to apply the identified test to the disputed documents in that case. The subsequent decision of Kenny J is reported*

at [2005] FCA 1247. At [58] to [79], the judge applied the test to the disputed documents. However, her reasoning is not stated in detail as in most cases she simply stated her conclusion as to whether one might be able to infer the nature of the legal advice from the disputed document. However, what is clear is that the documents being considered were not confined to draft pleadings, draft correspondence and bills of costs. Further relevant Australian decisions are summarised in *Passmore on Privilege*, 3rd ed. at paras. 2-015 and 2-016. The cases cited are *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325 at 333-334 and *AWB v Terence Cole* [2006] FCA 571 at [133] and [142]. In the first of these cases, Anderson J stated that privilege extended to documents which would, if disclosed: “reveal, or tend to reveal the content of the privileged communications”. In the second of these cases, Young J stated that the inference of fact to be drawn “must have a definite and reasonable foundation in the contents of the document” and that it was not enough if there was something in the document which would cause the reader “to wonder or speculate whether legal advice had been obtained and what was the substance of that advice”.

37. *Mr Lightman submitted that I should apply the approach in Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc. I consider that there are considerable arguments in favour of that approach, as explained by David Richards J. However, the learned judge in that case was not referred to Lyell and I do not have the benefit of his comments on that authority. After the Financial Services Compensation Scheme case, there has been a number of cases where it has been assumed that the relevant test to be applied is that stated in Lyell or in Ventouris v Mountain. I consider that I should apply that test in this case also. I also consider that I can derive assistance from the discussion in the Australian cases to which I have referred. I would adopt the distinction drawn in AWB v Terence Cole between a case where there is a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given and merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice.*
38. *Having identified the legal test to be applied to the Litigation Funding Documents for the purpose of determining whether the documents withheld, and the redacted parts are privileged, the next task is to ask whether that test has been correctly applied. I have summarised the witness statement of Mr Mervis who described the approach which was adopted. In paragraph 37.1 of his witness statement, Mr Mervis stated that documents had been withheld or redacted because “they tend to reveal the advice which the Petitioners have received in relation to the merits of the case, in relation to strategy and tactics, and in relation to the funding itself”. Mr Mervis' reference to “advice” did not specifically say “legal advice” but I consider that read in context he is only referring to legal advice. The advice to which he referred was not confined to advice on the merits of the case but extended to advice on strategy, tactics and funding. It was not argued that privilege was not available in relation to legal advice on those subjects.*

39. Mr Mervis' description of the basis of the claim would satisfy the test in Lyell as to giving a clue as to the legal advice given and the test in Ventouris v Mountain as to betraying the trend of the legal advice. I also consider that Mr Mervis' description of the basis of the claim is on the right side of the line between documents from which a party's legal advice can be inferred and documents which allow one to wonder or speculate as to whether legal advice had been given and as to its possible substance.

.....

51. Having now dealt with the submissions made to me, I need to stand back and consider what should be done. I conclude that I should make no order on the First Respondent's application in relation to the Litigation Funding Documents. I am not persuaded that Mr Mervis has not properly applied the test for privilege although it is possible that he has not done so. Therefore, I am not "reasonably certain" that the claim to privilege has not been properly made...."

45. The Trustees submitted that in these circumstances inspection should not be ordered because:
- (a). the detailed terms of the Litigation Funding Agreement were privileged. In particular, another party to litigation was not entitled to know either the litigation budget or the definition of success.
  - (b). the Court had already accepted that the court file in the Champerty Application (FSD 98 of 2018) should be sealed and not open to inspection without the prior leave of the Court.
  - (c). the Litigation Funding Agreement was clearly confidential. This had been made clear in all of the Trustees' evidence which had justifiably referred to some of the confidential information in order to address the various challenges that had been made on the Funding Agreement. However, this had always been done expressly without waiver of any obligation of confidentiality or privilege.
  - (d). inspection was not required for the fair resolution of this matter. The Summons was based on the premise that entering into the Litigation Funding Agreement was itself a breach of the Injunction. Therefore, discovery of the precise terms of that agreement was not needed to determine this issue.

- (e). further, the relevant terms of the Litigation Funding Agreement had been set out in Boehler 6 so that inspection of the underlying document was not required. If the Court had any concerns as to the accuracy of the statements made in Boehler 6, it could review the Litigation Funding Agreement without requiring inspection.
- (f). in addition, there were policy reasons why discovery and inspection should not be ordered. The Trustees submitted that if the Court always or too readily ordered that inspection should take place of confidential agreements referred to in affidavits this would discourage parties referring to them and thereby make the resolution of disputes more difficult. Furthermore, the disclosure of the terms of third-party funding arrangements was likely to make parties reluctant to enter into such agreements and may limit the availability of such funding.
46. The Trustees further argued that, as could be seen from the description of the Litigation Funding Agreement given by Mr Boehler, it was a non-recourse agreement which gave rise to no liability in respect of any assets subject to the Injunction unless and until the Injunction had been discharged. There was no arguable case that entering into the Litigation Funding Agreement resulted in a breach of the Injunction and no need for the Court or the Fifth Defendant to see the agreement in order to be able to conclude that no breach had occurred or could occur. In Boehler 6, Mr Boehler had confirmed as follows:
- “22. *...I can confirm that unless and until the Cayman litigation is resolved in favour of the Trustees and the [Injunction] is discharged, there can be no claim against assets that are covered by the [Injunction]. This is obvious as the Plaintiffs’ claim in this case is that the BH06 assets were not properly settled in trust and so are not, effectively trust assets.*
23. *One specific point I will make is as to the position of The Ypresto Trust under the [Litigation Funding Agreement]. Even if the Cayman claim fails and it is confirmed that the Ypresto Trust assets are properly trust assets, the Funder only obtains a direct right to assets of The Ypresto Trust in circumstances where there had been a prior termination of the [Litigation Funding Agreement] by the Funder (either as a new Trustee has been appointed without consent or if there has been a material breach of the agreement).”*

47. During the hearing, Mr McPherson QC elaborated on this point. He said that it was a condition to liability under the Litigation Funding Agreement that there be “*Success.*” The only way in which the Trustees could achieve success was by obtaining “*Control*” over assets subject to the Injunction. This could only be done if and happen when the Injunction was discharged. Accordingly, he argued that there could never be recourse by the Trustees or the funder to the assets caught by the Injunction while the Injunction remained in force. Mr McPherson QC submitted that the Withers Letter did not represent an authoritative interpretation of the Litigation Funding Agreement and was of no assistance to the Court on this application.
48. Mr Machell QC submitted in reply that Mr McPherson’s argument was flawed and should be rejected. During the hearing he argued that based on the description of the Litigation Funding Agreement in the Withers Letter, the Champerty Ruling and Mr Boehler’s evidence, it appeared that success would occur where the Trustees obtained control of assets not subject to the Injunction. That, he said, could be done, before the Injunction was, and without it being, discharged. That would result, it appeared, in the Trustees or the funder having a right of recourse against all of the trust assets held by the Trustees, including the Ypresto Dividends, even while the Injunction was in force. There was, therefore, at least an arguable case that the Litigation Funding Agreement had resulted in the Trustees and/or the funder having rights of recourse against and over assets subject to the Injunction before and without the need for the discharge of the Injunction.

### **The Trustees’ submissions in opposition to the Paragraph 2 Application**

49. The Trustees argued that the Fifth Defendant’s application failed because it needed to be made in the proceedings commenced by the Champerty Application and not these proceedings. The Fifth Defendant sought the production of documents produced in the Champerty Application, which was an action between the Trustees and the funder. The Court file in those proceedings had been sealed in accordance with GCR, O.63, r. 4 which prevented anyone inspecting the file without permission of the Court (the sealing order being made because the documents were confidential). Any application for production of the documents would therefore require an application to be made under GCR, O.63, r.5 and Practice Direction 1/2015 in the proceedings commenced by the Champerty Application, on notice to the parties to the proceedings, including the funder. This has not been done and therefore the Paragraph 2 Application must fail.

50. The Trustees said that the basis for the Paragraph 2 Application was unclear. If, as appeared to be the case, it was based on a breach by the Trustees of their duty of full and frank disclosure to the Court, the Fifth Defendant's argument was misconceived. There was no such duty on the Trustees and even if there was it had not been breached. The Champerty Application, although formally *ex parte*, had been on notice to the funder and the Attorney General, both of whom declined to appear. In those circumstances, there was no duty of full and frank disclosure. Even if there were, the duty would neither be owed to or enforceable by a non-party to proceedings such as the Fifth Defendant. In addition, the Trustees could not have acted in breach of any such duty when the whole premise of the Champerty Application had been that the Injunction rendered it impossible for the Trustees to fund the proceedings in any other way. No further disclosure was required. The Trustees said that the Fifth Defendant's position appeared to be that the Trustees were under an obligation to disclose an alleged breach of the Injunction which had occurred to no one (including the Plaintiffs, this Court or the Court of Appeal) for almost four years.
51. The Trustees also argued that the evidence filed in (and the transcript of the hearing) in the Champerty Application were of no relevance to the issues in the Notice of Motion. The Champerty Application was directed at whether the (then) draft Litigation Funding Agreement amounted to unlawful maintenance or champerty. Whether it amounted to a breach of the Injunction was simply not before the Court. Therefore, which documents were before the Court on the Champerty Application and what was said to the Court was of no relevance when considering the question whether the Litigation Funding Agreement amounted to a breach of the terms of the Injunction. The Fifth Defendant did not require any of the documents before the Court in the Champerty Application to advance her case in the Notice of Motion and had she required any specific document she could have made an application for specific discovery. The reality was that the application for discovery of the documents produced for the Champerty Application was being used by the Fifth Defendant as a proxy for obtaining a copy of the Litigation Funding Agreement, a document to which she had no entitlement.

### **Discussion of and decision on the O.24 Application and the Paragraph 2 Application**

52. I have carefully considered the parties' submissions and the authorities to which I have been referred. In my view, in the circumstances, the Trustees should be ordered to give inspection of those parts of the Litigation Funding Agreement which deal with and govern the Trustees'



or the funder's rights of recourse to the Ypresto Dividends as assets of the Ypresto Trust, and the other parts of the Litigation Funding Agreement on which they rely, subject to those parts protected by legal advice privilege or which are commercially sensitive being redacted. To the extent necessary and to the extent that redaction can be justified, any language which would reveal the legal advice which the Trustees have received in relation to the merits of their defence of the Plaintiffs' claims (or their counterclaims), the strategy and tactics to be adopted in conducting such defence (or counterclaims) and in relation to the terms and documentation of the funding can be redacted. In addition, any language which discloses commercially sensitive material can be redacted. However, I do not expect that material that is protected by legal advice privilege or that is commercially sensitive needs to be inspected and disclosed in order for the Fifth Defendant to be able to inspect those parts of the Litigation Funding Agreement that deal with rights of recourse to the Ypresto Dividends.

53. The Fifth Defendant's case, as Mr Machell QC explained, is based on the Litigation Funding Agreement creating rights of recourse to and proprietary rights over the Ypresto Dividends while those funds are subject to the Injunction. The Trustees say that the Litigation Funding Agreement does no such thing. But whether or not it does so is a matter of construction of the relevant terms of that agreement. The Trustees, as Mr Machell QC pointed out, have not been able to put in evidence and refer to a term that says that there is no right of recourse against any assets subject to the Injunction until the Injunction is discharged. Furthermore, as Mr Machell QC also submitted, it appears to be possible that success can be achieved when control is obtained over other assets, not subject to the Injunction, and that the cross-collateralisation provisions in the Litigation Funding Agreement might result in there being rights of recourse against the Ypresto Trust's assets subject to the Injunction. Mr McPherson QC may well be right that the Litigation Funding Agreement has been drafted so that there can be no recourse against assets subject to the Injunction until, and so that any rights against such assets are conditional upon, the discharge of the Injunction. That is what one would expect the Trustees' legal advisers to have done. However, in order to decide whether that is the case the Court needs to see the Relevant Terms and in order to give the Fifth Defendant a proper opportunity to argue her case she too needs to see the Relevant Terms. Inspection is necessary for disposing fairly of the Notice of Motion.

54. However, the only terms or provisions that need to be inspected are those which define and determine when the Trustees must, or the funder is entitled to, have recourse to (or acquires rights over) the assets of the Ypresto Trust for the purpose of discharging sums payable under the Litigation Funding Agreement. In other words, only some of the terms of the Litigation Funding Agreement are relevant to the issues raised by the Notice of Motion. It seems to me that what the Fifth Defendant and the Court need to see, and what I should order needs to be made available for inspection, are those parts of the Litigation Funding Agreement (and any amendment thereof) (i) that require or permit the Trustees to have (or give the funder) recourse to (or which give the Trustees of the funder rights over) assets of the Ypresto Trust (in particular the Ypresto Dividends) for the payment of sums due under the Litigation Funding Agreement (and which condition and regulate those rights of recourse) and (ii) on which the Trustees rely in support of their case that they and the funder do not have and cannot exercise rights of recourse to those assets until after the Injunction has been discharged. The Trustees will need to disclose not only the main operative provisions but related and relevant definitions and terms. From a review of these terms, the Court can determine whether the Fifth Defendant's case is made out. Without seeing them, it cannot do so.
55. As I have said, I do not consider that the Fifth Defendant or the Court need to see the whole of the Litigation Funding Agreement. Most of its terms will be irrelevant to the question of whether the effect of that agreement is to give the Trustees or the funder rights over or to have recourse to the Ypresto Dividends before the Injunction is discharged. In particular, the terms governing the cost of the funding and the relationship between the Trustees and the funder are irrelevant.
56. The evidence includes various references to the terms of the Litigation Funding Agreement (and a draft deed of variation of that agreement) but the terms referred to are not complete and may be out of date. The Court and the Fifth Defendant need to see the relevant operative provisions clearly set out in one place, both as currently in effect and if amended as they were in effect prior to amendment.
57. It appears, from the references to the Litigation Funding Agreement in evidence, that the Trustees will have to pay the funder and will require recourse to trust assets to do so once they have achieved "*Success*", but it is unclear as to precisely when and what needs to happen before

the Trustees are required to have recourse to the Ypresto Dividends (and other Ypresto Trust assets).

58. I do not envisage that inspection of the terms I have identified will involve the disclosure of the commercially sensitive parts of the Litigation Funding Agreement (that would be damaging to the position of the Trustees in the litigation, such as the amount of the budget). In so far as rights of recourse depend on the definition of “*Success*” and “*Control*”, and the Trustees’ case is based on the argument that there can be no “*Success*” or “*Control*” while the Injunction is in place, the relevant parts of the definitions should in principle be disclosed. In view of the references already made to these definitions in the evidence it is hard to see how any further disclosure or confirmation of the definitions could give rise to the disclosure of commercially sensitive material that is not already available to the Fifth Defendant. I note that I referred in the Champerty Ruling (at [23(e)(iii)]) to the definition of “*Success*” in the draft Litigation Funding Agreement filed in the Champerty Application. I said that it covered “*achieving, obtaining, or regaining Control over Assets meeting the Asset Threshold.*” The definition of “*Control*” is set out in the Withers Letter (at [5.7]). Withers say that “*Control is defined as meaning “any actual control, in each case whether direct or indirect, any legal, equitable, beneficial, signatory or other control exercisable by or on behalf of a Claimant (whether alone or together with another Claimant) including any rights of distribution.”*”
59. Nor do I envisage that giving inspection of the terms I have identified will involve the disclosure of parts of the Litigation Funding Agreement that are protected by legal advice privilege. That is parts from which the nature of the advice sought or given can be inferred or which reveal the advice which the Trustees have received in relation to the merits of the case, in relation to strategy and tactics, and in relation to the funding itself.
60. If, however, the Trustees consider that allowing inspection of the terms that define and are relevant to rights of recourse will result in the disclosure of commercially sensitive or privileged material, they may redact the wording and parts which they consider to be commercially sensitive or privileged and explain why such redaction is justified.
61. In my view, the Fifth Defendant is not entitled to the relief sought in the Paragraph 2 Application, at least at this stage.

62. Mr Machell QC did not address the jurisdiction issue raised by Mr McPherson QC. He did not explain the basis on which the Paragraph 2 Application was being made. However, for the purpose of this application, I am prepared to treat it as an application properly made against the Trustees in the proceedings commenced by the Notice of Motion (and to be an application for specific discovery therein under GCR O.24, r.11(2)). It does not seem to be right to say, as the Trustees submitted, that an application for the documents filed and disclosed in the Champerty Application can only be made in those proceedings and by way of an application for inspection of the Court file. However, I do accept that before making an order for inspection of such documents the Court should require the funder to be served and to be given an opportunity to be represented and make submissions.
63. But in my view, leaving aside that procedural point, no order should be made, at least at this stage, for inspection or discovery of the evidence filed in (or any transcript made of the hearing of) the Champerty Application. As Mr Machell QC accepted, he has not been able to show that the evidence filed in the Champerty Application will or is likely to be relevant to the question of whether the effect of the Litigation Funding Agreement was to dispose of, create an encumbrance on or give rise to a dealing with the Ypresto Dividends. The answer to that question depends on the terms of the Litigation Funding Agreement and not what said about it or what the Trustees might have said about its effect at the Champerty Application. That application, as the Trustees submitted, was solely concerned with the narrow and limited issue of whether the Litigation Funding Agreement (as then drafted) would constitute or involve unlawful maintenance or champerty. The terms of and impact of the Litigation Funding Agreement did not arise on the Champerty Application.
64. I made this point very clear in the Champerty Ruling when I said (at [11] and [26]) as follows (underlining added):
11. *Leading Counsel for the Trustee, in response to a question from me, confirmed that the Originating Summons did not involve any consideration by this Court of whether the Trustee was properly exercising its powers or otherwise acting in accordance with applicable law and in the best interests of the potential beneficiaries of the Trust in entering into litigation funding in general and the litigation funding agreement with the Funder in particular (this was not an application to which GCR O.85 applied). These issues are of no concern and do not arise on this application. The only issue which arises on the Originating Application is whether the Trustee and the Funder in entering the litigation*

funding agreement would be committing the criminal offence or the tort of maintenance or champerty as a matter of Cayman law.

.....

26. Two aspects of the Funding Agreement did however cause me some concern. First, the amount payable to the Funder in the event of complete success and secondly the cross-collateralisation feature. But:

.....

- (b). *while the cross-collateralisation feature could result in assets of the Trust being used to fiord the litigation costs of proceedings relating to the Other Trusts, the reverse proposition is also true and the assets of the Other Trusts may end up being used to pay the costs of the Trust in the Main Proceedings. Furthermore, as I have explained, on this application I am not considering whether the Trustee is properly exercising its powers as trustee of the Trust. It will remain accountable for its conduct to the potential beneficiaries and subject to orders of the court (or courts) with the jurisdiction over them in relation to the exercise of such powers. In the present context the issue is whether the cross-collateralisation terms either of themselves or together with other terms (or effects) of the Funding Agreement create a material risk that the integrity of the litigation process will be jeopardised, corrupt public justice or give rise to a risk of abuse. It seems to me that this is not the case where it appears, as the evidence in this case demonstrates, that (i) the Trustee qua trustee of the 'trust has concluded that the funding arrangement is necessary to protect the assets of and those with an interest in that trust and that the funding arrangement is for the benefit of the Trust and (ii) such views are not unreasonable in the circumstances (having regard to the potential benefit and risks to the Mist and the effect and extent of potential cross-collateralisation). If the Court concluded that by entering into a litigation funding agreement trustees were in breach of trust then the question would arise as to whether, in addition to the trustees being exposed to a breach of trust claim, the funding agreement should be treated as an abuse of the litigation process for the purposes of the law of maintenance and champerty. In the present case there is no basis on which I could conclude that the cross-collateralisation feature gives rise to a breach of bust under the applicable law or is an improper exercise of the Trustee's powers. Mr B in his evidence in support of the Originating Summons has confirmed the reasons and justifications for resort to third party funding in this case and the Trustee's approach and conclusions justifying entering to the Funding Agreement with the Funder on the terms proposed, which include the cross-collateralisation (although the reason and justification for cross-collateralisation was not directly addressed in Mr B's evidence) and Leading Counsel for the Trustee reiterated and expanded on these in his written and oral submissions."*

65. But I accept that the Trustees' understanding and presentation of the impact of the Litigation Funding Agreement on the Injunction as shown by all the evidence relied on at the Champerty Application might be relevant to establishing their state of mind at the time that the Litigation Funding Agreement was entered into and therefore may be admissible and relevant for the purpose of considering, if the Court determines that the Trustees acted in breach of the Injunction, whether the Trustees acted deliberately and what sanction should be imposed. But in my view, having regard to the overriding objective and the need to avoid incurring unnecessary costs, this is an issue which should only be dealt with if, and only after, the Fifth Defendant succeeds in showing that the Trustees have acted in breach of the Injunction. At that point, it will be necessary to consider further whether the evidence filed by the Trustees in the Champerty Application, beyond what has already been disclosed by the Trustees on this application, is admissible and relevant.
66. Of course, I heard the Champerty Application, as both parties are fully aware. It was not suggested that this created an issue on the Paragraph 2 Application or that this application or indeed the Notice of Motion and associated applications should be heard by another judge. In truth, without going back to the Court file and reviewing the evidence filed by the Trustees, I cannot recall what evidence was filed and what was said at the hearing of the Champerty Application, beyond what appears in the Champerty Ruling, which of course the Fifth Defendant has seen.
67. As I made clear at the hearing, in light of the fact that the Champerty Application did not seek and the Champerty Ruling clearly did not give approval to the Trustees to enter into the Litigation Funding Agreement and the Champerty Ruling clearly did not address the question of whether the Trustees might be in breach of duty by entering into the Litigation Funding Agreement (save to say that for the purpose of the champerty and maintenance issue, there was no evidence before the Court of a breach of duty), I was extremely concerned to see what the Trustees had told the Liechtenstein court about the Champerty Ruling. As is set out above, it appears that the Trustees' Liechtenstein counsel told the Liechtenstein court that "*The contract to finance the legal proceedings has been submitted to the Cayman Court for approval. This had to be done as the contract to fund the legal proceedings itself has to be seen as a disposal of the assets of the Ypresto Trust....The contract to finance the legal proceedings has been approved by the responsible judge of the Cayman Court.*" This is a complete

mischaracterisation and misrepresentation of the Champerty Application and the Champerty Ruling. As I also said at the hearing, I regard that as a very serious matter. The fact that the Trustees' Liechtenstein counsel went on to say that the approval of this Court was needed because the Litigation Funding Agreement had “*to be seen as a disposal of the assets of the Ypresto Trust*” compounds the concerns and raises a number of questions as to what the Trustees and their legal advisers thought they were doing. At the least, it is very surprising that the Trustees' Cayman attorneys (Campbells) and counsel did not spot this serious error and take steps immediately to have it corrected and to bring the mistake to the attention of the Liechtenstein court.

68. After the hearing, on 29 April 2022 Campbells wrote to the Court and enclosed a copy of an email from the Trustees' Liechtenstein attorneys. They said as follows:

*“Please see enclosed Florian Zechberger’s, of Paragraph 7 (the Trustees’ Liechtenstein attorneys), email to the Liechtenstein Court dated 29 April 2022. Mr Zechberger has confirmed that the statement made to the Court, on the Trustees’ behalf by AKRZ, on 02.07.2018 was incorrect and potentially misleading. He has confirmed that the submissions were based on a misunderstanding of the status of the Cayman proceedings at that time and he has confirmed the correct position.”*

69. In my view, this is an incomplete explanation. It does not address when the Trustees' Cayman attorneys (and London counsel) were made aware of this serious error and what action they took to bring the error to the attention of the Trustees and their Liechtenstein attorneys and to request or require it to be rectified. It cannot be the case that the error was only identified at the hearing or that it was sufficient to wait until after the hearing to correct it. It seems to me that Campbells need to provide a further explanation to deal with these further points.

#### **The Fifth Defendant’s submissions on the Interim Injunction Application**

70. In D5 11 at [22] the Fifth Defendant said that she was very concerned that the Trustees intended to borrow further funds from the funder. She said that the Trustees had not suggested to the contrary. In the circumstances, she sought an interim injunction pending disposal of the Notice of Motion preventing the Trustees from incurring further liabilities under the Litigation Funding Agreement as trustees of the Ypresto Trust.

71. The Fifth Defendant submitted that the Court was required to apply the usual *American Cyanamid* [1975] 2 WLR 316 test. There were three main guidelines (laid down by Lord Diplock): is there a serious issue to be tried on the merits; will damages be an inadequate remedy and where does the balance of convenience lie? The Fifth Defendant submitted that in the circumstances the Interim Injunction should be granted for the following reasons:
- (a). the first element of the test was satisfied. There was a serious question to be tried. The Fifth Defendant relied on her submissions, summarised above, as to the effect of the Litigation Funding Agreement. There was a serious issue as to whether by entering into the Litigation Funding Agreement or borrowing thereunder the Trustees had disposed of, encumbered, or dealt with the Ypresto Dividends in breach of the Injunction.
  - (b). the second element of the test was satisfied. Damages would not be an adequate remedy. This was because the Trustees, in the event that the Court decides that by entering or borrowing under the Litigation Funding Agreement the Trustees had acted in breach of the Injunction, will be liable to repay any sums received or for which there is liability (including the uplift payable to the funder) under the Litigation Funding Agreement and had adduced no evidence that they have personal (i.e. non-trust) assets from which such repayments could be made.
  - (c). the balance of convenience lay in favour of granting injunctive relief. To the extent that the Trustees required yet further funding, they can obtain it by using assets of the other trusts which were not subject to the Injunction. The fact that the Fifth Defendant had been aware of the Litigation Funding Agreement for some time was not a reason to refuse to grant an injunction.
72. The Fifth Defendant argued that since she was a beneficiary of the Ypresto Trust, the Court should exercise its discretion not to require her to provide a cross-undertaking in damages in the event that it was minded to grant an injunction. She was acting to protect the Ypresto Trust for the benefit of its beneficiaries and the position was analogous to the Court taking the view when



the investment manager issue was before the Court that the Fifth Defendant should have her costs out of the Ypresto Trust assets.

### **The Trustees' submissions on the Interim Injunction Application**

73. The Trustees submitted that it would not be just and convenient to grant the Interim Injunction. Their position can be summarised as follows:

- (a). there is no serious issue to be tried. As noted above, the Trustees argued that there was no arguable case that entering into the Litigation Funding Agreement resulted in a breach of the Injunction or that doing so had resulted in the disposal, encumbrance or dealing with the Ypresto Dividends.
- (b). since the period between the hearing of the Interim Injunction Application and the final hearing of the Notice of Motion would be very short, the loss suffered by the Fifth Defendant would be small. It would at most be the amount due to the funder in the event of success in this short period. This would likely be a relatively small sum for which the Fifth Defendant could be compensated in damages.
- (c). the balance of convenience was plainly against granting the Interim Injunction as it would prevent the Trustees from being able to defend the balance of this Notice of Motion and, at least until the Notice of Motion is discharged, the appeal in the main proceedings pending before the Privy Council. This would lead inevitably to an application to use the funds subject to the Injunction to fund the defence to the Notice of Motion and, if unsuccessful, the appeal to the Privy Council (there being no other available funds), assuming that funding could be obtained for any such application.
- (d). the Fifth Defendant had failed to adduce any evidence to make good her claim that the Trustees had access to other funds which could be used to pay the costs of dealing with the Notice of Motion and the outstanding appeal to the Privy Council in the main proceedings in this jurisdiction. The Trustees said that given the Swiss freezing injunction, the corporate structure under the Lake Cauma Trust and the appointment of the receiver (by

this Court) over the Share, the only assets directly available to the Trustees may be those in the Ypresto Trust. The need to make such applications and to obtain further funding to do so would disrupt and delay both the hearing of the Notice of Motion (as the issue of funding would need to be considered before the Notice of Motion could be listed) but also, potentially, the ongoing preparation for the appeal before the Privy Council.

- (e). the Fifth Defendant's delay in seeking the Interim Injunction was another strong reason for refusing to grant it. She admits that she has known about the Litigation Funding Agreement for "*some time*" (see D5 12 at [14]). Mr Boehler's evidence also explained how and when the Fifth Defendant had been told about and become aware of the Litigation Funding Agreement. In Boehler 6 at [18], Mr Boehler had referred to the Trustees' application to the Liechtenstein court on 7 February 2018 seeking that court's approval to the Trustees entering into the Litigation Funding Agreement, and in [19] he confirmed that the Trustees' Liechtenstein legal advisers had on 16 February 2018 sent a copy of the court's decision on this application to the Fifth Defendant's Liechtenstein legal advisers. Had the Fifth Defendant genuinely been concerned that the Litigation Funding Agreement put the Ypresto Dividends at risk and that there had been a breach of the Injunction, she could and should have sought injunctive relief years ago. Doing so at this stage would cause particularly serious disruption and delay to the Trustees' defence of the Notice of Motion and the Privy Council appeal. The Fifth Defendant had failed to provide a good reason as to why she had waited until now to seek injunctive relief. In the absence of any or any sufficient explanation the Court was entitled to infer that the Fifth Defendant had no proper justification for seeking injunctive relief and that it was simply tactical, in that she was seeking to cause maximum disruption to the Trustees and to put pressure on them during the mediation that was underway.
- (f). the Fifth Defendant's refusal to give a cross-undertaking in damages was also a relevant and material factor for the Court to take into account. The Interim Injunction would have the effect, if it prevented the Trustees from obtaining further advances under the Litigation Funding Agreement, of preventing the Trustees from having access to critical funding needed to pay the costs not only of defending the Notice of Motion but also preparing the appeal to the Privy Council and their participation in other litigation in other jurisdictions

(and indeed the mediation). The Trustees would have to apply for a variation of the Injunction at least to allow them to obtain advances for the purpose of paying the legal costs associated with defending the Notice of Motion but would not have funding for that purpose. Even if they could secure further funding that did not result in recourse to the Ypresto Dividends, and there was no evidence or basis before the Court for concluding that they could do so, if for any reason the full hearing of the Notice of Motion was delayed, the Trustees' preparation of the Privy Council appeal and their ability to take other steps to protect the assets of the trusts in respect of which they had been appointed might be seriously prejudiced.

#### **Discussion and decision on the Interim Injunction Application**

74. Having carefully considered the evidence and the parties' submissions, I have concluded that it would not be just and convenient to grant the Interim Injunction. My reasons can be summarised as follows.
75. First, it seems to me that there is no justification for dispensing with a cross-undertaking in damages. As between the First Defendant and the Trustees, the Notice of Motion represents ordinary *inter partes* and hostile litigation. The Fifth Defendant may separately be able to recover any costs and liability incurred from the Ypresto Trust assets, but her position as one of the discretionary beneficiaries does not relieve her of the need to provide the usual protection for the party to be restrained by an interim injunction. The Court, of course, cannot compel a party seeking an interim injunction to give an undertaking in damages but a refusal to give such an undertaking is a proper basis for refusing to grant the injunction.
76. Secondly, it appears that the Fifth Defendant is seeking injunctive relief to prevent the Trustees from committing a further breach of the Injunction. Paragraph 8 of the Notice of Motion states that the Fifth Defendant seeks "*an order prohibiting [the Trustees] from borrowing further funds in the capacity as trustees of the Ypresto Trust.*" That is arguably *qui timet* relief because the Fifth Defendant is seeking to restrain a future and separate breach of the Injunction before it has occurred. Interim injunctive relief in connection with contempt proceedings relating to a previous breach is probably inappropriate to restrain further and future breaches, although I can see that

they might be said to be continuing breaches (the Fifth Defendant did not address this issue). In any event, even assuming that the Interim Injunction is being sought because damages would not be an adequate remedy for the alleged breach on which the Notice of Motion is based, namely the breach said to arise on the Trustees entering into the Litigation Funding Agreement and drawing down advances thereunder (see the Notice of Motion at [6], [8] and 10)), it seems to me that the justification and need for (further) injunctive relief is substantially reduced where, as here, the party to be restrained is, on the claimant's case, already subject to an injunction and that injunction already prohibits the acts sought to be restrained by the new interim injunction. The Fifth Defendant is seeking an interim injunction to restrain the Trustees from doing that which the Fifth Defendant claims is already prohibited by the Injunction. The further injunction is not needed to protect the Fifth Defendant's position, or at best only spells out, reiterates, and confirms that if the Trustees continue to obtain advances under the Litigation Funding Agreement they will be acting in breach of the Injunction. If the Fifth Defendant is right, were the Trustees to exercise their rights under the Litigation Funding Agreement to obtain further advances the Trustees would be committing a (further) breach of the Injunction. Furthermore, from the Trustees' perspective, they are already in jeopardy even without a further Interim Injunction. They are already at risk if they obtain such further advances. Even if the Interim Injunction is not granted, the Trustees will need to consider very carefully whether they can safely obtain further advances before the Notice of Motion is heard and decided. This seems to be a strong reason for refusing to grant the Interim Injunction Application.

77. Thirdly, even ignoring this difficulty, and even assuming that the Fifth Defendant is to be treated as having satisfied the first and second *American Cyanamid* guidelines, I consider that the balance of convenience is clearly against the granting of the Interim Injunction. Let me address each of the three guidelines in turn.
  
78. I am prepared to accept for the purpose of the Interim Injunction Application that the Fifth Defendant's case passes the threshold merits test for the granting of interim (or interlocutory) injunctive relief. She has raised a serious issue to be tried, at least pending the relevant parts of the Litigation Funding Agreement being made available for inspection, as to whether by entering into or obtaining advances under the Litigation Funding Agreement the Trustees or the funder acquired a right of recourse to the Ypresto Dividends which would become exercisable upon

Success being achieved, perhaps by the obtaining of Control over assets not caught by the Injunction, and thereby disposed of, encumbered or dealt with the Ypresto Dividends (being assets subject to the Injunction). While the Trustees' defence is, assuming that the documents support their position, strong, there are triable issues and the Fifth Defendant's prospects of success cannot at this stage be said to be only fanciful.

79. There is an issue as to whether the Fifth Defendant has shown that a failure to grant the Interim Injunction will result in irreparable harm (and that damages would not be an adequate remedy for the breach arising on the Trustees entering into the Litigation Funding Agreement and drawing down advances thereunder). She argued that she would not be adequately compensated by an award of damages (at the trial of the Notice of Motion) because there was no evidence showing that the Trustees would have funds of their own out of which to make payment. When addressing what the Trustees would need to pay, she referred (as I understood it) to sums advanced by the funder. But (even assuming that this would be a consequence of a decision that the Trustees acted in breach of the Injunction) the Fifth Defendant will not suffer (any loss) as a result of such an inability and failure. That will be a loss suffered by the funder. Furthermore, she is not seeking damages or compensation for any loss. She is asking that the Trustees be sanctioned for breach of a Court order by being required to pay a fine. The Fifth Defendant might have a claim against the Trustees for improperly encumbering or incurring costs recoverable against the assets of the Ypresto Trust but, as I have noted, that is not a claim covered by the Notice of Motion and would need to be made under Liechtenstein law and probably in the Liechtenstein court. The right that the Fifth Defendant seeks to vindicate is that of a party for whose benefit an injunction has been granted. The harm in respect of which the Fifth Defendant seeks redress is the breach of that injunction. But the Interim Injunction does not address the consequences of the breach on which the Notice of Motion is based and for which sanctions are sought therein. The Fifth Defendant has not said how the Interim Injunction will assist her and prevent the harm resulting from the Trustees having entered into the Litigation Funding Agreement and obtaining advances thereunder.
80. As regards the balance of convenience, the prejudice suffered by the Trustees if the Interim Injunction is granted will be significant (even assuming that the Notice of Motion can be heard

and disposed of promptly). Their litigation funding will dry up at a time when they need it to defend the Notice of Motion and other proceedings. As the Trustees submitted, if the Interim Injunction prevented them from obtaining further advances under the Litigation Funding Agreement, they would cease to have access to critical funding needed to pay the costs not only of defending the Notice of Motion but also preparing the appeal to the Privy Council and their participation in other litigation in other jurisdictions (and indeed the mediation). The Trustees could in theory apply to vary the Injunction but there is currently no basis for concluding that they would have funds to do so.

81. In the Fifth Defendant's submissions and during Mr Machell QC's oral submissions it was said, as I have noted above, that the Trustees could obtain further funding "*by use of non-injuncted assets of the other trusts.*" However, as Mr Machell QC accepted at the hearing, the Fifth Defendant had not adduced any evidence to show this. Mr Machell QC offered and requested permission to file further evidence after the hearing on this point. I do not consider that it would be appropriate to grant such permission. The Fifth Defendant had an opportunity to adduce such evidence before the hearing. The Interim Injunction Application is her application and she had plenty of opportunity to gather and file all the evidence she needed. To grant her permission to file further evidence after the hearing would result in further delay and costs (particularly because it would be necessary to allow the Trustees to have the opportunity to file responsive evidence themselves).
82. The Fifth Defendant's delay in seeking injunctive relief is also a material factor weighing against the granting of the Interim Injunction. The delay has meant that the Litigation Funding Agreement has been in place for many years, the Trustees have obtained substantial advances and substantial liabilities have been incurred to the funder thereunder and the Trustees have become dependent on the funding it provides. The Fifth Defendant has also known about the Litigation Funding Agreement for many years. She has had ample opportunity to bring proceedings seeking a declaration that entering into and obtaining advances under the Litigation Funding Agreement had resulted in and in future would constitute a breach of the Injunction. She has given no sufficient justification for the delay or reason why injunctive relief is sought and required now. While delay is only a factor in the Trustees' favour, and by itself is not decisive, in this case it seems to me a factor of material weight.

83. Against this, for the reasons I have given above, it seems likely that the Fifth Defendant is unlikely to suffer serious prejudice or irreparable harm as a result of the refusal to grant the Interim Injunction. The Injunction remains in place and prohibits the action which she says she needs the Interim Injunction for. While it appears that the Trustees will need to obtain further advances under the Litigation Funding Agreement, in part to deal with the proceedings commenced by the Fifth Defendant, the extent to which the further funding will result in additional claims against the Ypresto Dividends is unclear. If the Fifth Defendant is right that obtaining further advances under the Litigation Funding Agreement is prohibited by the Injunction, and material further advances are obtained before the disposal of the Notice of Motion and the Trustees or the funder are entitled under the Litigation Funding Agreement to have recourse to the Ypresto Dividends, there will be an issue as to whether the Trustees' right of indemnity could be exercised against the Ypresto Dividends in such circumstances (and at present it is wholly unclear as to the basis on which the funder would have rights of recourse – if by subrogation to the Trustees' right of indemnity, the funder's claim would be subject to a similar issue). So there are a number of protections that appear already to be available that may prevent the Fifth Defendant suffering any loss.

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**The Hon. Justice Segal**  
**Judge of the Grand Court, Cayman Islands**  
**31 May 2022**