IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 0070 OF 2023

BETWEEN:-

(1) GLOBAL MINING DEVELOPMENT L.P.

(2) GERALD METALS LLC

Claimants / Applicants

- AND -

(1) CHINA NATIONAL GOLD GROUP HONG KONG LIMITED

(2) SOREMI INVESTMENTS LIMITED

Defendants/Respondents

-AND-

(3) SOCIETE DE RECHERCHE ET D'EXPLOITATION MINIERE SA

Additional Parties

Mr Peter De Verneuil Smith KC and, with him, Ms Judy Fu (instructed by Harney Westwood & Riegels (BVI) LP) and, with them, Mr Jonathan Addo and Ms Natasha Guthrie, both of Harney Westwood & Riegels (BVI) LP, for the Claimants

Mr Stuart Adair (instructed by Walkers) and, with him, Miss Rosalind Nicholson and Ms McKay Drigo of Walkers, for China National Gold Group Hong Kong Limited

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2025: 26 to 29 May

16 July 2025

JUDGMENT

INTRODUCTION

[1] This is my judgment ("this Judgment" or "the Discharge Judgment") on the application of CNG dated 27 May 2024 to discharge the Freezing Injunction made by this Court on 28 March 2024 in these proceedings.

[2] Unless otherwise stated, or the context otherwise requires, the words and expressions used in the Discharge Judgment shall have the same meanings as the meanings ascribed to them in the Contempt Judgment.

[3] This judgment only deals with the Discharge Application. My judgments on the Contempt Application and the Rectification Application are dealt with separately.

[4] There is no need for me to set out the dispute between the parties in this Judgment. A summary of the relevant factual background is set out in the Contempt Judgment. Nor is there any need for me to deal with any issues arising in the Discharge Judgment that I have already dealt with in the Contempt Judgment.

[5] The amended notice of application to discharge the Order ("the Discharge Application", "this Application" or "the Application") seeks, *inter alia*:

"(1) An Order that the Order of **the Hon. Justice Gerhard Wallbank** (Ag) made ex parte on 28 March 2024 … and continued on 9 April 2024 and varied by an order dated 3 July 2024 be discharged to the extent that –

(i) it contains, in paragraph 6 of the Order or otherwise, a Freezing Order affecting any of CNG's assets;

(ii) it requires, by paragraph 14 of the Order or otherwise, that CNG inform the Applicants' legal representatives of the details of CNG's assets;

(iii) it requires, by paragraph 17 of the Order, that a director of CNG swear an affidavit setting out the details of CNG's assets;

(iv) it restricts, by paragraph 21 of the Order, CNG from spending sums on legal fees from its own assets and requires CNG to tell the Applicant's legal representatives how much and where the money is to come from; and

(v) paragraphs 11-13 of the Order impose obligations to repatriate funds to an account of the Eastern Caribbean Supreme Court."

[6] The basis upon which the Freezing Injunction was granted may be summarised as follows.

[7] Following the issue of the FPA by the Tribunal, on 10 March 2023, the Claimants obtained the Undertakings. The terms of the Undertaking are set out in the Contempt Judgment, but they are worth repeating here:

> "CNG shall by itself and through its representatives and agents (which include for the avoidance of doubt the CNG nominated directors of Soremi Investments):
>
> (a) Not take any action to cause Soremi Investments to (i) pay out any dividends (ii) transfer, sell, charge, encumber or dissipate any of Soremi Investments' assets (ii) incur any debt or (iv) make any form of distribution by Soremi Investments;
>
> (b) Not take any action to cause any direct or indirect subsidiary of Soremi Investments to (i) pay out any dividends, (ii) transfer, sell, charge, encumber or dissipate any of the subsidiary's assets, (iii) incur any debt, or (iv) make any form of distribution by the subsidiary;
>
> (c) Not take any action that would be detrimental to the value of Soremi Investments; and
>
> (d) Not operate Soremi Investments, other than in the ordinary course of business or in accordance with the SHA."

[8] The FPA was upheld by the Hong Kong Court of First Instance by an order of **Mimmie Chan J**, dated 30 August 2023. Judgment was handed down in full on 27 February 2024.

[9] The Claimants allege that, since the issue of the FPA, CNG holds the FPA Shares on constructive trust for the Claimants, pending enforcement of the Tribunal's award in the FPA. The Defendants disputed this contention and refused to transfer the legal title of the FPA Shares to the Claimants.

[10] Thereupon, the Claimants made an application to the Tribunal for specific performance of the FPA.

[11] On 21 November 2023, the Tribunal determined the specific performance application in the Claimants' favour and issued the SPA, which, *inter alia*: (a) declared that the Defendants were in breach of the terms of the FPA; and (b) required CNG, *inter alia*, to provide to the Claimants. (i) bank account details for the payment of funds pursuant to the FPA, so payment could be made by the Claimants to give effect to the legal transfer of the Shares; (ii) a signed and executed instrument effecting the immediate transfer of the FPA Shares to the Claimants; and (iii) a copy of SIL's Register of Members recording the Claimants as the holder of the FPA Shares.

[12] Both the FPA and SPA have been recognised as New York Convention awards which fall to be enforced as they were BVI Judgments by orders of this Court in these proceedings, dated 25 April 2023 and 20 December 2023 respectively (individually or collectively referred to as "the Recognition Orders").

[13] The Defendants applied to have each of the Recognition Orders set aside. **Wallbank J** dismissed both applications.

[14] On 12 March 2024, the Claimants' nominated directors of SIL successfully applied for disclosure of SIL's bank statements. The Claimants allege that it was the information disclosed in those bank statements that prompted the application for the Freezing Order. They claim that some US$140 million has been transferred out of SIL's bank accounts located in Paris to a new account with the Exim Bank in China (NRA10000058998) in the name of Soremi SA. These funds are therefore no longer in the control of SIL and have been transferred to an entirely separate legal entity with different shareholders from those of SIL.

[15] The Claimants assert that the limited records produced by SIL show that several transfers took place shortly after **Mimmie Chan J** dismissed CNG's application to set aside the FPA. The Claimants allege that there was strong evidence, *inter alia*, that the Defendants had engaged in a systematic asset stripping exercise in order to render the FPA nugatory, that they had given misleading evidence concerning SIL's assets, that the transactions that had taken place was without the knowledge of the Claimants'-nominated directors of SIL, and that they were in breach of the Undertakings.

[16] **Wallbank J** acceded to the Claimants' request to grant the Freezing Injunction at the hearing on 28 March 2024. The Freezing Order was amended at the hearing on 3 July 2024, at which the Defendants attended and filed a short skeleton argument.

[17] Before dealing with the substantive application, it is necessary for me to deal briefly with the circumstances in which a court will exercise its discretion to grant a freezing order.

[18] The leading case on freezing injunctions in the BVI is the Privy Council decision in **Convoy Collateral Ltd v Broad Idea International Ltd et al [2023] AC 389**. The main principles to obtain a freezing order remain as follows:

(a) The applicant must show that he has a "good arguable case" against the respondent. **In Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen) [1983] 2 Lloyd's Rep. 600 at 605**, **Mustill J** described a good arguable case as: "…one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success." In deciding whether a "good arguable case" has been shown, the court must not try to resolve conflicts of evidence on affidavit, or to decide difficult questions of law which call for "detailed argument and mature consideration": see **Derby & Co. Ltd. and Others v Weldon and Others [1990] Ch. 48 at 57**, per **Parker LJ**, citing **American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 at 407-408**.

(b) The applicant should give particulars of his claim against the defendant, stating the ground of his claim and the amount or likely amount thereof, and fairly stating the points made against it by the respondent.

(c) The applicant must show that there is a real risk that a judgment or award obtained by the applicant against the respondent may go unsatisfied. The test is an objective one of the assessment of the risk that a judgment may not be satisfied because of a risk of an unjustified dealing with assets: see, for example, **Congentra v Sixteen Thirteen Marine SA (The "Nicolas M") [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep. 602**, **Flaux J** (as he then was). The applicant must show, by adducing satisfactory evidence, of the existence of such a risk: see, by way of examples, **National Bank Trust v Yurov [2016] EWHC 1913** and **Ivanhoe Mines Ltd (formerly Ivanhoe Nickel and Platinum Ltd) v Gardner [2020] EWHC 144 (Comm).**

(d) The applicant needs to produce evidence that there are assets to which the freezing order could attach (whether within or outside the jurisdiction): see, for example, **Hill Samuel Brink Ltd v Nicholas Soutos, unreported 23 October 1996 (Comm)**, per **Langley J**.

(e) It must be just and convenient for the freezing order to be granted: see, for example, **Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 W.L.R. 670, Hoffmann J** (as he then was).

(f) The applicant must usually give an undertaking in damages in case he fails in his claim or the grant of the injunction turns out to be unjustified.

(g) The applicant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

[19] The summary of the requirements stated above is largely self-explanatory and does not need any further elucidation. However, the requirement to show a "risk of dissipation" needs brief comment.

[20] In **National Bank Trust v Yurov**, above, **Males J** (as he then was) said, at **[70]**:

"a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.

b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.

c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

e The nature, location and liquidity of the defendant's assets are important considerations.

f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

g. So too is the defendant's behaviour in response to the claim or anticipated claim."

GROUNDS OF THE DISCHARGE APPLICATION

[21] The grounds upon which the Discharge Application is made are set out in the application. They are summarised in Mr Adair's skeleton argument in support of the Application.

Ground 1 – is the Freezing Injunction irregular?

[22] **ECSC CPR 17.4(3)-(5)** state:

"(3) An application for an interim order under this rule may in the first instance be made on 3 days' notice to the respondent.

(4) The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these rules permits a longer period) if it is satisfied that – in a case of urgency no notice is possible; or that to give notice would defeat the purpose of the application.

(5) On granting an order under paragraph (4) the court must – fix a date for further consideration of the application; and fix a date (which may be later than the date under paragraph (a)) on which the injunction will terminate unless a further order is made on the further consideration of the application."

(Emphasis supplied).

[23] A return date for the Order was given for 9 April 2024, at which time the Order was continued. However, Mr Adair states that the Order stated that this date was "for directions with a time estimate of 30 minutes". He, therefore, contends that the return date was not for a "further consideration of the application", as required by **CPR 17.4(5)(a)**.

[24] There are several flaws with this argument. They include the following.

[25] First, I do not consider that the description given in the Order about the purpose of the hearing has any significance. The description or purpose of a hearing on a notice of application or order cannot be construed with the exactitude of a pleading, as Mr Adair appears to suggest and invites me to accept. The description of the nature of the hearing was both correct and appropriate. The notice of the hearing date made it clear that the Court was not going to make any substantive decision on the application and would not have expected the parties to prepare for a full hearing, not least because there would not be sufficient time to hear it, and the Defendants would not have had an opportunity to file written evidence in response to the application.

[26] Second, at the return date of the application, the primary concern of the court will be whether, on the material before it: (a) the applicant has shown a "good arguable" case for the grant of the freezing order; (b) there are assets to which the order can apply; and (c) whether there is a real risk of dissipation so as to render any judgment which the applicant may obtain nugatory. If these requirements are satisfied, the main concern of the court will be to see where the balance of convenience lies where there is doubt as to the adequacy of the remedy of damages available to either or both parties in line with the principles in **American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396.** The court will usually take whichever course seems likely to cause the least irremediable prejudice to one party or the other. If there are issues about the continuation of the injunction, the court will give directions to bring the hearing of the application as soon as possible before it. In most cases, a time estimate of 30 minutes to consider the appropriateness of the injunction continuing and giving directions will be adequate.

[27] It is plain from the transcript of the hearing that took place on 9 April 2024 that the Defendants had the fullest opportunity to put forward their case about whether the injunction should be continued. At page 30, lines 8 – page 31, line 3 of the transcript of that hearing, **Wallbank J** made it clear what the purpose of the hearing was, correctly identifying why it was not going to be possible for him to deal substantively with the points that were being advanced by Mr Adair

on behalf of CNG. Although the hearing to consider the continuation had been listed for 30 minutes, it took more than an hour and a half to complete: see transcript, page 48, lines 3-8.

[28] Mr Adair also applied for a stay of the Freezing Order, which, for similar reasons, **Wallbank J** was not able to deal with. He gave clear reasons why that was so: see page 35, line 22 – page 37, line 8 of the transcript. He went on, at pages 48 – 51, lines 1 to 10, to give detailed reasons about why he could not deal with the issues that CNG wished him to deal with. I cannot see that any injustice could conceivably be said to have been occasioned to CNG. Mr Adair was dissatisfied with how **Wallbank J** decided to deal with the matter, though it does seem to me, looking at the transcript as a whole, that even Mr Adair understood why the Judge could not deal with the matter as Mr Adair would have liked. I cannot pretend to have gone through the transcript with a fine tooth comb, but cannot find any suggestion by Mr Adair at that hearing that the Order should not have referred to a directions hearing.

[29] I cannot, therefore, see any possible breach of **ECSC CPR 17.4**. Even if there had been, it is difficult to see how it could result in the Order being set aside.

[30] In **Hualon Corporation (M) SDN BHD v Marty Limited CLAIM NO. BVI HC (COM) 2014/0090 (20 November 2015)**, a freezing order which was obtained, *ex parte*, omitted to contain a date for reconsidering the order. The Court refused to set aside the order. **Farara J** (as he then was) said:

> "[28] Clearly, applying rule 17.4 (4) and (5), the Injunction ought only to have been in effect, in the first instance, for a maximum period of 28 days. It is therefore irregular on its face. I have considered the decisions rendered on this issue by Justice d'Auvergne (as she then was) [in **Zhu Jaing Finance Ltd v American dream In Guangzhou Ltd et al Civil Claim No. BVIHCV 2003/0121**] who felt compelled to set aside such an order. I have also considered the submissions of Mr. Carrington on this issue, and the decision in **Keron Mathews** [i.e., **Attorney General of Trinidad and Tobago v Keron Mathew [2011] UKPC 38**] I am of the opinion, notwithstanding the irregularity, the order stands, unless and until it is set aside or discharged ..."

[31] Nor has there been any infringement of art. 6 or any convention rights of the Defendants or a breach of the "audi alteram partem" principle. The suggestion that they have been is a bare assertion, simply tagged on to bolster up the alleged breach of **ECSC CPR 17.4**.

[32] Nor would a breach of the art. 6 rights of a party usually result in the underlying decision made by a court being set aside: see **Markass Care Hire Ltd v Cyprus (Application no. 51591/99) (2 July 2002)**. I am not sure I understand the context in which it is said by Mr Adair that the decision of **Millet J** (as he then was) in **Gamlestaden Plc v Capital Expansion and Development Corporation [1992] Lexis Citation 2645**I accept the wisdom of the remarks made by **Millett J**, but there are no parallels to be drawn between that case and this. Specifically, so far as it is suggested by CNG that this Court did not secure a timely hearing date for the Discharge Application, I reject that suggestion.

[33] The short point is this: Mr Adair (on behalf of CNG) and Ms Cameron (on behalf of SIL) were able to address the Court for a substantial period of time at a hearing which took place within the period of 28 days from the date when the Order was granted. They were able, at that hearing, to put all the points they wished to the Court in the time that the Court had allocated for the consideration of the Freezing Order. **Wallbank J** righty said to them that, on the material before him, there was no reason not to continue the Order. He subsequently gave directions for the matter to come on for a substantive hearing. There is no breach of any of the Defendants' **art. 6** or other rights. The most that can be said by Mr Adair is that **Wallbank J's** decision not to accede to his request to deal with the matter there and then was wrong. It was not. It was completely consistent with how ECSC CPR 17.4(5)-hearings are meant to, and should be, dealt with. **Wallbank J** made that clear to Ms Cameron: see transcript p. 46, line 17 – p. 48, line 11. The Defendants can surely not think that they should be treated differently from other respondents against whom freezing injunctions are granted, because that, it seems to me, is what Mr Adair is complaining about.

[34] So far as there is a complaint by the Defendants about the Discharge Application not being listed until the Omnibus Hearing, the following chronology, taken from Mr Smith's skeleton argument, is of note:

(a) the Discharge Application was made on 27 May 2024;

(b) on or about 30 September 2024, an amended Discharge Application was lodged by the Defendants. This was supported by a detailed affirmation of Mr Lu Shudong ("Mr Lu") dated 27 September 2024; and

(c) before the Discharge Application could be listed for hearing, on or about 30 September 2024, an application was made by the Defendants to recuse **Wallbank J** from hearing any application in those proceedings. That application was heard on 2 October 2024 and dismissed.

[35] Neither in Mr Lu's affirmation nor in any communication preceding it can I see any complaint being made by the Defendants about the delay in listing the Discharge Application for a substantive hearing until 30 September 2024, not surprisingly because I cannot see how there can be any criticism of the Court, the Claimants or any other person for such delay. Once the application to recuse **Wallbank J** was made, it was not appropriate for him or any other Judge to deal with the Discharge Application until the recusal application, and any appeal against it, was determined. It follows that no part of that delay can be laid at the door of the Claimants or the Court.

[36] Following the issue of the decision of the Court of Appeal on 30 January 2025, directing this matter to be heard by another Judge, the Discharge Application and the other extant applications were listed before me for a directions hearing on 18 February 2025. Thereafter, a substantive hearing of the Discharge Application took place at the Omnibus Hearing. I do not believe that Mr Adair is complaining about any delay from 30 January 2025 to the date of the Omnibus Hearing. However, if he is, the complaint is unfounded. A period of delay of some four months to have a 4-day hearing (to include the substantive determination of the Discharge Application and the other applications listed before the Court) does not appear to me to be unreasonable.

[37] The assertion of CNG, therefore, that the Discharge Application was not determined much earlier than at the Omnibus Hearing is factually incorrect. In any event, CNG had evinced a clear intention of not complying with the terms of the Order, so the complaint that the Discharge Application should have been dealt with much earlier is simply misconceived.

[38] The basis for the Discharge Application on this ground is, therefore, rejected.

[39] The rest of the grounds are largely based on whether the Claimants demonstrated that there was "a good arguable case" for the grant of the Freezing Order when it applied for the order on an *ex parte* basis, and whether there continues to be such a case to continue the order. Nonetheless,

I will deal with the application by reference to the specific grounds for discharging the order advanced by CNG.

<u>Ground 2 – the application for the Freezing Injunction was not urgent</u>

[40] The urgency behind making the application for the Freezing Injunction is not difficult to see. It was entirely appropriate that the injunction was applied for *ex parte*.

[41] Whether or not the submissions that Mr Adair makes at paras. 31 to 34 of his skeleton argument are correct, I am clear that there was sufficient evidence of urgency to warrant the application for the injunction being made on an urgent and *ex parte* basis. **Wallbank J** did not have any reservations about this.

[42] I have already indicated in the Contempt Judgment that I do not read the Undertakings as excluding payments being made out of any SIL bank accounts. They do not exclude "intra-group" transfers. The fact that the transfers were allegedly made to obtain a better rate of interest, even if correct, did not justify the transfers being made. It seems to me to be clear that these matters, by themselves, warranted urgency and the application being made *ex parte*.

[43] But the fact is that when the limited disclosure was given by the Defendants, the information disclosed that substantial sums of money had been transferred out of SIL's bank accounts located in Paris. Whether or not, as Mr Adair alleges, the transfers were made before the issue of the FPA, the fact is that they were made after the dispute was referred to arbitration, and there has been no satisfactory explanation about them.

[44] In any event, what is now clear from the evidence is that the risk of dissipation is much greater. That is because CNG had deliberately not complied with the FPA and SPA even after its application to set aside the Recognition Orders was dismissed by **Wallbank J** on 15 April 2024 and has deliberately failed, as I have found in the Contempt Judgment, also to comply with the terms of the Order.

[45] In any event, even if the application for the Order should not have been made *ex parte*, that is not a basis for setting the Order aside. In my judgment, the risk is now as great, if not greater than it was before, and the refusal of CNG to comply with the Order, leading to findings of

contempt being made by me, is evidence that CNG will continue to avoid complying with their obligations under Order and the FPA and SPA.

[46] This ground of challenge is, therefore, refused.

Ground 3 – no likely dissipation of SIL's assets

[47] This is largely a repetition of Ground 2. However, the following points are appropriate for mention about the submissions made by Mr Adair.

[48] Whether or not the transfers amount to or are liable to amount to a dissipation of the assets of SIL, and whether or not they were in the control of CNG, the transfers were in breach of the Undertakings and, as I find, not in the ordinary course of business. In the absence of a satisfactory explanation about why they were made[1], they demonstrate a sufficient risk of dissipation, even if they do not amount, in effect, to dissipation, on which I form no concluded view at this stage. The fact that the Defendants have refused to comply with the Repatriation Order and the FPA and SPA is evidence that the Defendants are not prepared to allay the fears of this Court about the possibility of SIL's assets being put outside of the reach of the Claimants in the event of a claim for damages being brought by it.

[49] As part of this Ground, CNG challenges the assertion of the Claimants, and the finding that CNG alleged was made by **Wallbank J**, that Mr Cheng might have been "flat out lying". I am not sure about the relevance of this, other than in the context of the allegation by CNG that the Claimants did not make a full and frank disclosure of the circumstances leading to the grant of the Order by allegedly not clarifying what Mr Cheng was actually saying. Whether or not Mr Cheng was lying does not detract from my finding that there is a real risk of dissipation now, and there was also such a risk when the Order was made.

[50] It should also be noted that the Court does not have to be satisfied of an actual dissipation. It only needs to be satisfied that there is a real risk that this could happen. Even disregarding the assertion by the Claimants that further dissipation is currently taking place, or has already taken place, by reference to what Mr Smith says at para. 80 of his skeleton argument, I am satisfied

[1] The explanation about achieving a better rate of interest does not withstand proper scrutiny.

for the reasons stated above, and in the Contempt Judgment, that the risks are real and that they justify the continuation of the Freezing Order.

[51] This ground of challenge is, therefore, also refused.

Ground 4 – No breach of clause 4 of the SHA

[52] Given that I have found that CNG had breached the Undertakings, I am not sure that I need to find that clause 4 of the SHA was breached as well. So far as it is necessary to make that finding, I find that clause 4 was breached.

[53] It would appear that this assertion is made as part of the complaint made by CNG that the Claimants did not properly discharge their duty of full and frank disclosure.

[54] Clause 4 of the SHA provides that the acts set out in Schedule 2 to the SHA (comprising the "Reserved Matters") shall not be done by SIL or its subsidiary without the approval of all the directors of SIL:

> "The Shareholders agree and shall procure that the acts as set out in Schedule 2 shall not be done by the Company and shall use their respective best endeavours to procure that such acts shall not be done by any of the Subsidiaries, unless approved by all of the Directors. All other matters not stated in Schedule 2 should be approved by a simple majority of the Directors."

[55] At the *ex parte* hearing on 28th March 2024, the Claimants asserted that the transfers fell within the definitions of Reserved Matters in paragraphs (r), (s) and (t) of Schedule 2 to the SHA. Those paragraphs state:

> "(r) any decision or agreement of any Group Company out of the ordinary course of Business unless having an aggregate value below USD1,000,000, in one or more transactions over a rolling 12-month period;
>
> (s) Entering into, amendment or termination of any financing facility, loan agreement (including shareholder loan agreement), granting of any guarantee, pledge or security over the Company's assets, in each case having an aggregate value (value added tax) excluded, in excess of USD1,000,000, in one or more transactions over a rolling 12-month period;
>
> (t) any decision or agreement of any Group Company the subject matter of which has a value in excess of USD1,000,000 to the Group."

[56] The Defendants state that these provisions are directed at agreements between Group Companies and third parties and not transactions between Group Companies. They claim that it is clear from the wording of (t) that transfers between two group Companies do not have any value to the Group, since, as far as the Group is concerned, such a transaction will be "balance sheet neutral".

[57] I respectfully disagree. There are several flaws in this argument.

[58] The most important flaw is that it is difficult to see how the plain words of the Schedule can be amenable to the interpretation that Mr Adair invites me to adopt. Nor can there be any basis to suggest that, in deciding whether assets have been dissipated, one looks at the group balance sheet of the companies within a group of companies.

[59] But also important is the ease with which assets can be transferred between companies within a group to strip the assets of one company and increase the assets of another company in the group. While not suggesting definitively that this is the situation here, the company that is stripped of those assets will often be placed in a situation where it is unable to satisfy a judgment obtained by a creditor. Of course, it may be possible for such transfers to be impugned, but this will usually be at the behest of an office-holder, usually with little or no guarantee of success.

[60] In any event, even if the transfers do not fall within paragraph (s) or (t) of Schedule 2, they seem to me clearly to fall within paragraph (r). Further, and in any event, even if the transactions did not fall within Schedule 2, and required only a majority of directors to approve them, it is not disputed that the Claimants' nominated directors on the SIL board were not told about them. Accordingly, even if the board had resolved to make the transactions by a majority, at the very least, those nominated directors should have been informed of that fact so that they could object if they wished. That was not done.

[61] I have already indicated that I do not accept the reasons given by the Defendants that the transfer was made in order to maximise the interest earned on the sums transferred. Not a single piece of evidence has been produced by the Defendants (for example, by reference to past such transfers) to support this premise. But, on the clear wording of the expression "ordinary course

of business", in the context of the SHA, there is no basis to contend that this was not a Reserved Matter.

[62] The words "ordinary course of business" may have different meanings in the context in which those words are used. Case law suggests that what would amount to payments being made in the "ordinary course of business" will depend on the facts and circumstances of each case: see **Emmott v Michael Wilson and Partners Ltd [2015] EWCA Civ 1028**, at **[19]**:

> "The issue was whether the payments made fell within the exception to the freezing order … are highly fact-sensitive questions. What is in the ordinary and proper course of business will, of course depend on what business is carried on by the respondent in question, and how it is carried on. A payment which might be made in the ordinary and proper course of one business may not satisfy that description in the case of a different business. Likewise a payment which might be made in the ordinary and proper course of a business carried on in one location, may not satisfy that description in the case of the same kind of business carried on in a different location."

[63] Under UK fiscal legislation, for example, the words will have a wide meaning. However, in the context of the SHA, it can only be consistent with the construction advanced by the Claimants. A different construction might have been justified if the negotiations leading to the signing of the SHA set out what the parties meant by that expression.

[64] As I have indicated, the submission by Mr Adair goes to the question of whether there was full and frank disclosure by the Claimants on this issue. The most that can be said about the submission, even if, which I reject, it is right, is that there were two possible constructions of the above paragraphs, one of which (that suggested by Mr Adair) was so implausible that the Claimants could not have thought about it. The Claimants were entitled to advance the construction they believed should be applied. They drew the attention of **Wallbank J** to the terms of the SHA, and **Wallbank J** – a judge with not an insignificant amount of expertise and experience in this area of law – agreed with them. It has long been held that an applicant does not have to make every conceivable point that might be adopted by a respondent to an application for a freezing order known to the court, particularly where that point could not have been anticipated by the applicant that the respondent might take: see **Boreh v Republic of Djibouti [2015] EWHC 769 (Comm)**, **at [6]**, per **Flaux J** (as he then was); and **Millhouse UK Ltd v Sibir Energy Plc [2008] EWHC 2614 (Ch)**, at **[106]**, per **Christopher Clarke J** (as he then was). .

[65] The alleged failure to draw this argument by the Claimants did not, therefore, breach their duty of candour.

[66] Of course, CNG, as I have found in my various judgments, has no answer to its breaches of the Undertakings or its failure to comply with the SHA requiring it to transfer its shares to Global. The risk of dissipation is not diminished by the possibility that there was no breach of clause 4 of the SHA when there were clear breaches of the Undertakings and the provisions of the SHA that required the transaction for the sale of the SIL Shares to the Claimants to be completed.

[67] There is no substance in this Ground, which is also rejected.

No legal or evidential basis for freezing CNG's assets

[68] There are two separate allegations made here. The first is an allegation that "there was no legal or evidential basis for freezing CNG's assets, in particular, there was no evidence of any risk that CNG might dissipate its assets." Though combined together, the second allegation seems to me to be separate. It is formulated in the following terms: "The Mandatory Order was impossible to comply with and would not have been granted in those terms if the Court had been informed of this problem." Both allegations seem to me to be directed at the alleged failure of the Claimants to discharge their duty of candour when applying for the Freezing Order.

[69] The Defendants argue that neither the FPA nor the SPA required the Defendants to pay any sum of money to the Claimants; rather, it required the Claimants to pay the sum of $86.32 million to CNG for the SIL Shares. It is suggested by CNG that the Court was misled about this because the skeleton argument for the 28 March hearing said, *inter alia*:

> " If an applicant is already in possession of a judgment or award, the test of good arguable case is necessarily satisfied (see **Great Station Properties v UMS [2017] EWHC 330 (Admin)**… at **paragraph 55**)": para. 29 of the skeleton argument.
>
> "a The Applicants have the benefit of 2 arbitral awards in their favour and but for the 10 March 2023 undertaking being provided they would have applied for injunctive relief to preserve the position pending enforcement.
>
> b. As against CNG, it is clear that it has acted in breach of its undertaking dated 10 March 2023, and there is a real risk that this will cause the Applicants loss. If it transpires that once the proceedings are resolved, the Applicants are unable to access the funds transferred to Soremi SA, that will give rise to a direct claim

against CNG for loss and it is that prospective legal right which the Applicants now seek to preserve by virtue of the freezing injunction.

c. Furthermore, CNG is in breach of its fiduciary duties owed to Global by procuring SIL to transfer/dissipate its assets…": para. 53 of the skeleton argument

[70] Mr Adair argues that "none of what is stated in paragraph 53 establishes that the Claimants have a judgment or award for the payment of a sum of money or a good arguable case that they will obtain one. Under their duty of full and frank disclosure the Claimants were obliged to disclose this to the Court as well as the fact that the FPA entailed the Claimants paying USD 86.32 million to CNG as the price of the shares in SIL. This disclosure was not made."

[71] The argument continues that "[q]uite apart from the fact that there is no money judgment against CNG to be satisfied (and no basis for the figure of USD 200 million), the evidence filed by the Claimants does not even come close to establishing a real risk that CNG will dissipate its assets. There is no evidence at all, let alone solid evidence, of such a risk."

[72] This argument is factually incorrect and legally misconceived.

[73] The factual basis of this argument fails on several grounds.

[74] First, the skeleton argument expressly referred to the terms of FPA and SPA. Those awards were also included in the written evidence, which was filed in support of the Order. It is difficult to see how it could conceivably be said that **Wallbank J** was not aware of the terms of the awards.

[75] Second, a summary of the terms of the award was specifically set out in the skeleton argument. For example, para. 13 of the skeleton argument stated:

> "On 21 November 2023, the Tribunal determined the specific performance application in the Applicants' favour, and issued the Specific Performance Partial Award (***SP Award***) which, *inter alia*:
>
> i declared that the Respondents are in breach of the terms of the FPA; and
>
> ii. required the First Respondent to, *inter alia*, provide to the Applicants:
>
> 1. bank account details for the payment of funds pursuant to the FPA (so payment could be made by the Applicants to give effect to the legal transfer of the Shares);

2. a signed and executed instrument effecting the immediate transfer of the Shares; and

3. a copy of the Second Respondent's register of members recording the Applicants as the holder of the Shares."

[76] There was no suggestion in the skeleton argument that the Claimants had the benefit of a money judgment which they would not be able to enforce if the Freezing Order was not made.

[77] But third, and importantly, para. 14 of the skeleton argument stated that the FPA and SPA had been recognised as BVI Judgments by orders of this Court – orders which were made by **Wallbank J** himself, so the suggestion that he would need to be told that the orders that he had made were not orders for the recognition of any money judgment but orders requiring the Defendants to comply with the terms of the FPA seems to me is astonishing, almost straining credulity. Of course, **Wallbank J** knew what the nature of the awards were in relation to which the Claimants were seeking a freezing and repatriation order.

[78] Fourth, the position concerning the nature of the claim in relation to which the Order was sought was made abundantly clear to the Judge at the *ex parte* hearing on 28 March 2024, which lasted for over two hours, including the fact that SIL's Shares had been purchased for the value of $86 million: see transcript, p. 50, lines 2 to 11.

[79] Fifth, the nature of the FPA and SPA was explained to **Wallbank J** in detail in the course of the hearing: see, by way of examples, transcript, p. 5, lines 9 to 17; and p. 7, line 21 – p. 9, line 8.

[80] So far as the legal position about the viability of a money claim is concerned, while not expressing a view about the value of the claim, it would not be difficult to conceive of a claim for damages in or about that sum if – as has thus far shown to be the case – CNG refuses to comply with the orders recognising the FPA and refuses to comply with the SPA, also recognised by this Court. The SIL Shares may be worth substantially more than the price of $86.32 million, and even if those shares are ultimately transferred to the Claimants, the loss arising from the failure to do so when they should have been transferred some considerable time ago will not be insignificant.

[81] Importantly, also, when this matter came before **Wallbank J** on 9 April 2024, there was no suggestion that the freezing order should not have been made because there was no money claim being pursued by the Claimants. The main basis of the opposition to the continuation of

the Freezing Order was that there was no need to because of the financial standing of CNG: see transcript, p. 29, lines 1 to 24.

[82] Likewise, in relation to the 3 July 2024 hearing. By this time, the Discharge Application had been made, but the Defendants did not oppose the making of the amendments to the 28 March 2024 Order. The Discharge Application was not before the Court on that date. It was amended on 30 September 2024, but before it could be heard, an application was made to recuse **Wallbank J**, which he refused. However, CNG appealed that decision to the Court of Appeal, and this resulted in all the applications which were pending before him that had not been determined having to be heard before another Commercial Court Judge on the direction of the Court of Appeal.

[83] But the important point here is that a full disclosure of all relevant facts was made by the Claimants to the Court. Specifically, on 9 April 2024, the "impossible to comply" argument was raised before **Wallbank J**, but he did not seem to think that his decision giving the Defendants the short period of time to comply with the Repatriation Order deserved any comment from him: see transcript, p. 29 lines 7 to 24. This is perhaps not surprising because it also appeared that Mr Adair was suggesting that there was no difficulty in repatriating the amounts that had been transferred from SIL: see transcript, p.36, line 1 – p.37, line 8.

[84] I reiterate the terms of the Contempt Judgment. The "impossibility to comply" argument is unlikely to have persuaded **Wallbank J** to grant more time to the Defendants as, among other things, he was fully aware of the terms of the freezing order that he proposed to make. Likewise, having considered the matter afresh, I can see no basis for the time specified for compliance to have been increased. In any event, the fact is that the Freezing Order has not been complied with even now, so the point is largely academic. Nor, frankly, is it clear what giving more time to the Defendants would have achieved, because from the very outset, they had no intention of complying with the Order. So far as it is suggested that there was no full and frank disclosure on this point, I reject that suggestion.

[85] The same must apply to the argument that, given the financial standing of CNG, there was no risk of dissipation. Given the clear breaches of the SHA and the Undertakings, the Claimants were perfectly entitled to invite the Court to grant the Order. Whatever the size and financial worth of CNG, the value of the SIL Shares was not insubstantial, and the transfer of funds made in contravention of the SHA and the Undertakings made it entirely appropriate for the Claimants to seek the Order. **Wallbank J** appears to have taken the same view (by not expressly

acknowledging that the financial standing of CNG made it inappropriate to grant the Order), and I also take the same view. There was no failure to comply with the duty of candour about this either. Mr Adair's argument suggests that this Court should take judicial notice that a company such as CNG will have sufficient assets to be able to comply with any judgment that the Claimants can obtain against it. That seems somewhat fanciful to me, given that in the past, much larger companies have experienced spectacular failures, but, in any event, the other issue must be how difficult it might be to enforce any such judgment. The plain fact is that where, as I find, there has been a clear attempt to move assets out of the reach of the Claimants, I see no reason why the Claimants should take the risk of not having sufficient assets over which they can enforce any judgment that they obtain against CNG. To expect them to rely on the financial standing of CNG, based on its accounts or information in the public domain, absent compelling circumstances, seems to me to be inappropriate. There are no such compelling circumstances here.

Breach of the duty of full and frank disclosure

[86] **Paragraph 9-001** of **Gee** contains the following statement of principle (disregarding the footnotes in that paragraph) about the importance of an applicant complying with his duty of full and frank disclosure when he applies for an injunction without notice or on short notice:

> "Any applicant to the court for relief without notice must act fairly in all material respects in preparing and presenting the application and afterwards in connection with it and the *ex parte* order obtained. This includes a duty to act in the utmost good faith and to disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice, or on short notice."

[87] In **Brink's Mat Ltd v Elcombe. [1988] 1 W.L.R. 1350 at 1356–1357**, **Ralph Gibson LJ** set out the applicable principles about the duty of full and frank disclosure, in the context of a **Mareva** injunction, as follows:

> "(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see **Rex v Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac [1917] 1 K.B. 486 at 514**, per **Scrutton LJ**.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see **Rex v Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at 504**,

citing **Dalglish v Jarvie (1850) 2 Mac & G 231 at 238**; **Browne-Wilkinson J**. in **Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295**..

(3) The applicant must make proper inquiries before making the application: see **Bank Mellat v Nikpour [1985] FSR 87**. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an **Anton Piller** order in **Columbia Picture Industries Inc v Robinson [1987] Ch. 38**; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per **Slade LJ** in **Bank Mellat v Nikpour [1985] FSR 87 at 92–93**.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by the breach of duty': see per **Donaldson LJ in Bank Mellat v Nikpour, at 91**, citing **Warrington LJ in the Kensington Income Tax Commissioners' case [1917] 1 KB 486 at 509**.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus penitentiae* may sometimes be afforded', per **Lord Denning MR in Bank Mellat v Nikpour [1985] F.S.R. 87 at 90.** The court has a discretion,139 notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> '…when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed: per **Glidewell LJ in Lloyd's Bowmaker Ltd v Britannia Arrow Holdings Plc**, ante, **at 1343H–1344A**'."

[88] The basis upon which CNG alleges that there was a failure on the part of the Claimants to comply with their duty of full and frank disclosure is said to be as follows:

(a) The alleged failure to take the Judge to paragraph 9 of Cheng-1 and to paragraphs 16 to 18 of Dean-3 to demonstrate that the word 'we' in paragraph 17 of Cheng-1 referred to SIL and Soremi SA and was not misleading because cash had always been reported on a consolidated basis.

(b) The alleged failure to inform the Court that it might be argued that the transfer of funds into the bank accounts of Soremi SA was not a breach of clause 4 of the SHA.

(c) The failure to inform the Court that it might be argued that the transfer of funds into the bank accounts of Soremi SA was not a breach of the Undertakings.

(d) The alleged failure to inform the Court that the Claimants did not have a judgment or award for the payment to them by CNG of a sum of money and that the PFA entailed the Claimants paying USD 86.32 million to CNG.

(e) The alleged failure to inform the Court that there was no solid evidence that CNG would dissipate its assets.

(f) The alleged failure to inform the Court that the Claimants did not have a good arguable case for a judgment or award against CNG for the payment to them of a sum of money.

(g) The alleged failure to inform the Court that there was no evidential basis for freezing the assets of CNG up to the value of USD 200 million.

(h) The alleged failure to inform the Court that, in the light of the impending Easter Holidays, there was no real possibility that the Mandatory Order could be complied with.

[89] I have dealt with all the above heads of complaint apart from (a), above.

[90] There is no substance whatsoever in the complaint made under head (a) above. The alleged failure specified in that head was immaterial and would have made no difference to **Wallbank J** in deciding whether to make the Order, and makes none to me.

[91] The importance of an applicant making a "full and frank" disclosure where a person seeks an *ex parte* order can never be over-emphasised. However, it would require a counsel of perfection for an applicant to draw every conceivable area of dispute to the attention of a court where a "without notice" application is made to the court. In my judgment, the substance of what was in issue between the parties was sufficiently drawn to the attention of **Wallbank J** by a combination of: (a) the contents of the without notice application; (b) the contents of Mr Dean's affidavit in support of that application; (c) the contents of the skeleton argument that was filed on his behalf; and (d) the matters referred to by counsel at the oral hearing before the Judge.

[92] **Gee**, at **9-003**, states that the "duty of full and frank disclosure only extends to those issues which can be said to be material to the decision which the judge had to make on the application. Materiality depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing that application."

[93] So far as it is alleged that the above matters should have been disclosed to **Wallbank J**, I find:

(a) the substance of all those matters was disclosed to him;

(b) even if, which I do not accept, they were not, I do not see how their disclosure could have led **Wallbank J** to conclude that the Order should not be made or made on the terms in which it was; and

(c) if I were to find that these were disclosable matters, it would mean that I expected an applicant to disclose every conceivable point to the Court, no matter how trivial, rather than disclose material matters that should or could have a bearing on the decision of the court to determine whether the order should be made. So far as the material matters were concerned, the disclosure was not just sufficient but more than what I would have expected the Claimants to disclose.

[94] The fact is that on the crucial issue of whether the test for making the Order was satisfied, the Claimants:

(a) gave the Defendants the opportunity to respond to the allegations of wrongful dissipation by giving them short notice of the *ex parte* application;

(b) properly drew attention to the terms of the FPA and SPA;

(c) properly drew attention to the issues that had been raised by CNG, including communication from Walkers, which denied the substantive allegations and any risk of dissipation; and

(d) Walkers' communication in which they said that the SIL transfers were made to obtain a better rate of interest and contended that there was no urgency and no basis of application; and

(e) CNG's argument that it had not breached the Undertakings because an "intra-group" transfer was outside the meaning of the word "transfer".

[95] All the matters relied upon by the Claimants, without exception, in support of the allegation of failure to disclose seem to me to be so far-fetched or trivial that they do not warrant any, or any further consideration. One point that Mr Adair mentioned at the outset of his oral submissions was that **Wallbank J** should have been informed that some of the movements of cash complained about took place in April or May 2022, and the application for the Order was made in March 2024. Even if this was factually correct, the transfers took place after the arbitration proceedings were commenced in circumstances where the Defendants must have known that it was almost certainly unlikely to be successful in its opposition to the Claimants' claim in those proceedings. There was, therefore, a present and real risk of dissipation. But, in any event, there was sufficient evidence of recent movements, and a deliberate failure by the Defendants to provide the Claimants with sufficient information to know what was going on, to make it unnecessary for the Claimants to condescend to any more detail of those transfers.

[96] What is significant about this aspect of the Defendants' case is that **Wallbank J** himself needed persuading about some of the matters upon which the Claimants relied: see, for example, his exchanges with counsel about the ability of monies being moved freely within companies in the same group, at transcript, p. 49, line 20 – p. 50, line 1. This was not a judge who was unfamiliar with the case before him and the applicable law.

[97] What I deduce from this and other exchanges is not that **Wallbank J** was somehow misled into making the Order because he was not aware of the relevant facts, but that he had a full and thorough appreciation of all the relevant facts and had been taken through the law, even though he knew it well. When counsel took him through the disclosures he intended to make, the Judge identified those concerns that he had about the application for the Order and dealt specifically with them with counsel's assistance.

[98] It follows that I cannot see that there has been any failure to disclose matters to **Wallbank J** to warrant the setting aside of the Order on that ground.

[99] Accordingly, the application to set aside the Order on this ground is also refused.

Additional Matters

[100] Additional points that I have considered and that warrant mention include the following.

[101] Should the cross-undertaking in damages have been fortified?

[102] The court has jurisdiction to order fortification of a cross-undertaking in damages, provided the three **requirements Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1205** and **PJSC National Bank trust and another v Boris Mints [2021] EWHC 1089 (Comm)** are made out. Those requirements were summarised in **Von Der Heydt Invest S.A. v Multibank FX International Corporation BVIHCMAP2022/0008, 21 February 2023 (unreported), ECSC Court of Appeal**, in the following terms:

> "(i) whether the applicant can show a sufficient level of risk of loss to require fortification, which involves showing a good arguable case to that effect; (ii) whether the applicant can show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction; and (iii) whether there is sufficient evidence to allow the court to make an intelligent estimate of the quantum of losses. The criteria are cumulative and the applicant must satisfy all three. Only then will the court be required to consider the discretionary factors and decide whether fortification should be ordered."

[103] I am not able to see why fortification should be ordered. No evidence has been adduced dealing with the three-fold test referred to above. The matter was mentioned in the Claimants' skeleton

argument for the 28 March hearing. **Wallbank J** did not include a provision in the Order requiring the Claimants to do so. Neither do I.

[104] Nor do I see any reason why the provisions of paras. 6, 14, 17 or 21 of the Order should be amended in any way.

CONCLUSION

[105] I am satisfied, as Wallbank J was when he dealt with this matter on 28 March 2024 and subsequently, that the requirements referred to above for granting the Freezing Injunction were entirely made out.

[106] For the above reasons, the Discharge Application is dismissed.

[107] As stated in the Contempt Judgment, the parties should endeavour to agree the drafts, or updated drafts, of the orders for consideration by me to reflect this Judgment.

[108] I again thank counsel for how they presented their clients' cases and for their cooperation throughout the hearing.

Abbas Mithani KC

High Court Judge

By the Court

Registrar