



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

CAUSE NO: FSD 289 of 2023 (DDJ)

BETWEEN:

MYF MAXIMUS LIMITED

Plaintiff

AND

- (1) DNB BANK ASA**
- (2) SWEDBANK AB (PUBL)**
- (3) NIBC BANK N.V.**
- (4) EKSPORTFINANSIERING NORGE**
- (5) NM SHIPHOLDING AS**
- (6) MAXIMUS LIMITED**

Defendants

Appearances: Daniel Bayfield KC, James Eldridge and Luke Armitage of Maples and Calder (Cayman) LLP for the First to Fifth Defendants

Duncan Matthews KC, Peter Kendall and Adrian Fourie of Walkers (Cayman) LLP for the Plaintiff

Before: The Hon. Justice David Doyle

Heard: 1 May 2024

Draft Judgment Circulated: 27 May 2024

Judgment delivered: 3 June 2024

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Civil procedure - determination of an application to set aside an ex parte order giving permission to serve out of the jurisdiction on the ground of material non-disclosure and an application for a case management stay

JUDGMENT

Introduction

1. By *ex parte* summons dated 1 November 2023 (the “Service Out Application”) the Plaintiff, MYF Maximus Limited, a company incorporated under the laws of the Cayman Islands, (“MYF” or the “Plaintiff”) applied for permission to serve an originating summons dated 22 September 2023 (the “Originating Summons”) and any other relevant document on the First to Fifth Defendants (the “Overseas Defendants”). The First to Fourth Defendants are also referred to as the “Finance Parties”. The Originating Summons provides addresses for the First Defendant in Oslo, the Second Defendant in Sweden, the Third Defendant in the Netherlands, the Fourth Defendant in Oslo, the Fifth Defendant in Oslo and the Sixth Defendant in the Cayman Islands. The Finance Parties entered into a Norwegian law-governed Facility Agreement dated 27 September 2016 with the Sixth Defendant. MYF pledged shares in the Sixth Defendant to the Finance Parties under a Cayman law-governed Share Pledge Agreement dated 28 October 2016 with a Cayman courts jurisdiction clause. In March 2021 the Plaintiff commenced legal proceedings in Norway against the Finance Parties and NM Shipholding AS. In September 2023 the Plaintiff commenced legal proceedings in the Cayman Islands against the Finance Parties and the Fifth and the Sixth Defendants.
2. By order made on 6 December 2023 (the “December 2023 Service Out Order”) I granted permission for service out on the Overseas Defendants for the reasons provided in my judgment delivered that day which also sets out some further background to this case.
3. By summons dated 6 February 2023 (the “Set Aside Application”) the Overseas Defendants applied to set aside the December 2023 Service Out Order and in the alternative that the proceedings be stayed until the final determination of the Plaintiff’s appeal of the Oslo District Court judgment of 7 July 2023 (“the Oslo District Court Judgment”) handed down in proceedings commenced by the Plaintiff against the Overseas Defendants in Norway (the “Norwegian Appeal”).

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The grounds of the Set Aside Application

4. Unhelpfully, the grounds of the Set Aside Application were not specified in the Set Aside Application. At paragraph 10 of the affidavit of Henning Harborg (“Mr Harborg”) sworn on 6 February 2023 in support of the Set Aside Application, the following belief was however stated:

“... I believe that certain relevant details of the Norwegian Proceedings were not disclosed or properly explained by MYF to this Honourable Court at the *ex parte* hearing on 6 December 2023. Put simply, MYF failed to disclose the fact that MYF has appealed the Oslo District Court Judgment, which appeal is (and at the time of the 6 December 2023 hearing was) listed for hearing before the Borgarting Lagmannsrett (the “Borgarting Court of Appeal”) for 3 weeks commencing on 21 May 2024 (the “Norwegian Merits Appeal”), and the interplay between Norwegian Merits Appeal and the Originating Summons. A copy of the letter from the Borgarting Court of Appeal to the parties dated 6 November 2023, which gave notice that the appeal would start on 21 May 2024, is shown at page 29 of Exhibit HH-1”.

5. I should add for the sake of completeness that by letter dated 29 April 2024 from Agnar A Nilsen jr., Court of Appeal Judge of the Borgarting Court of Appeal, it was indicated that the May dates had been vacated, in light of the “remaining requests for access to evidence” and it was further indicated that “no new date and time is fixed for the appeal” as “the Court of Appeal will return to the issue of staying the case pending a final and enforceable decision in the Cayman Islands”.
6. It is also worth mentioning that on 14 April 2024 MYF applied to the Norwegian Court of Appeal to “stay the case until the decision on the merits of the case by the Grand Court of Cayman.” The respondents to the appeal filed a statement of case dated 22 April 2024 in which they indicated that they did not “want the case to be stayed.”
7. At paragraph 11 of his affidavit, descending into comment and argument, Mr Harborg adds:

“... the outcome of the Norwegian Merits Appeal may have a significant bearing on these Cayman Islands proceedings, which, other than the addition of Maximus as a defendant,

involves the same parties as the Norwegian Proceedings. In particular, the outcome of the Norwegian Merits Appeal has the potential to (i) obviate the need for these Cayman Islands proceedings altogether; or (ii) result in findings by the Borgarting Court of Appeal which resolve between the parties a central issue in these Cayman Islands proceedings, being the question of whether MYF continues to have an equity of redemption in the Subject Shares.”

8. The Overseas Defendants’ 40 page skeleton is dated 25 April 2024 and the grounds of the Set Aside Application were stated as follows:

“4. The basis on which the Set Aside Application is made is that MYF breached its duty to the court to make full and frank disclosure on the Service Out Application. In particular, MYF:

- 4.1 failed to disclose that, less than three weeks before issuing the Summons [the Service Out Application] it had launched the Norwegian Appeal;
- 4.2 failed to disclose a key claim that is part of the Norwegian Proceedings (the ‘Non-Compliance Claim’) and which will be heard *de novo* in the Norwegian Appeal;
- 4.3 failed to disclose that the issues falling to be determined in the Summons (‘the Equity of Redemption Issues’) may be determined in the Norwegian Appeal; and,
- 4.4 misled the Court as to whether the Summons is duplicative of the Norwegian Appeal.”

9. At paragraph 41 it is stated that the Plaintiff breached its disclosure duty on at least four counts:

- (1) the court was not informed at all that the Plaintiff had launched the Norwegian Appeal;

- (2) the court was not informed that the Equity of Redemption Issues which formed the subject matter of the Originating Summons may be determined, albeit “prejudicially”, in the Norwegian Appeal which at the time had been listed to be heard in May 2024;
 - (3) the court was not told about the Non-Compliance Claim and if the Plaintiff was successful in that respect in the Norwegian Appeal it would obtain various remedies that would obviate the need for the court to determine the Originating Summons;
 - (4) the court was actively misled in the sense that (i) it was told that the Originating Summons was not duplicative of the Norwegian Proceedings (which in part it is); (ii) it was not told that the Originating Summons is duplicative of the Norwegian Appeal (in which the Plaintiff’s claims in the Norwegian Proceedings will be heard and determined *de novo*) and (iii) the court would have been left with the impression that the proceedings in Norway had reached an end.
10. At paragraph 42.2.3 of the skeleton argument it is stated in effect that the disclosure of the Norwegian Appeal and issues arising in connection with it “was necessary to a fair presentation of the factors bearing on whether the Cayman Islands were clearly the appropriate forum.”

Law – disclosure of relevant facts

11. An applicant for *ex parte* relief is under a duty to make disclosure of relevant facts.
12. Counsel were agreed as to the relevant law but disputed the application of it to the particular circumstances of this case. Reference was made to the English judgments in this area of the law and my judgments in *Wang v Credit Suisse* (FSD unreported judgment 8 April 2022) and *Raier v Correa* (FSD unreported judgment 9 June 2023) where I had referred to the previous local and English authorities. In *Wang* I dealt with the relevant law in respect of the duty to make full and fair disclosure of material facts on *ex parte* applications from paragraphs 16 to 33.
13. In *Wang* at paragraph 18 I referred to Balcombe LJ’s comments in the oft-quoted *Brinks Mat* case at page 1358 to the effect that “the judge-made rule cannot be allowed itself to become an instrument of injustice”. Slade LJ in that case, at page 1359 stated that the application of the principles should not “be carried to extreme lengths.” Slade LJ in the context of *ex parte*

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injunctions, also commented to the effect that he had detected a growing tendency on the part of some litigants or their legal advisers to rush to the duty of disclosure cases as “a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of” the *ex parte* order “in cases where there is little hope of doing so on the substantial merits of the case.”

14. At paragraph 22 of *Wang*, I referred to Popplewell J’s judgment in *Banco Turo* at paragraph 34 (1). Popplewell J stated:

“The absence of any explanation makes it impossible to identify where the fault lies. But it gives rise to a strong inference that there is no innocent explanation which can be put forward. The very least that can be said is that no innocent explanation has been put forward, and if an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, it is incumbent upon it to explain how it came about.”

15. At paragraph 45 Popplewell J added:

“Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court’s process will almost always make it appropriate to impose the sanction.”

16. At paragraph 24 of *Wang*, I referred to Bingham J’s comments in *Siporex SA* at paragraph 437:

“He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application.” (paragraph 437)

17. At paragraph 27 of *Wang* I referred to the judgment of Jacobs J in *Amonzegar*, who in turn quoted from Christopher Clarke J in another case cautioning against not recognising the benefit of hindsight:

“In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question first arose.”

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18. At paragraph 28 of *Wang*, I referred to the judgment of Males J in *Yurov* and the comment that “a failure may be regarded as “innocent” if the fact in question was not known to the applicant or its relevance was not perceived ...”

19. In *Raier* at paragraph 1 I stated:

“It is important that applicants for judicial relief on an *ex parte* basis make full and frank disclosure of all material facts and make a fair presentation of the case. Judges are heavily reliant on attorneys, as officers of the court, complying with their onerous duties in respect of *ex parte* applications. If there are serious failings in respect of such duties to the Court, any orders made at the *ex parte* hearing may be discharged and they may not always be regranted.”

20. In *Raier* I stated at paragraph 10:

“Where there are applications to discharge orders on the basis of a failure in the duty of full and frank disclosure and fair presentation, the precise grounds of such applications and the specific failings relied upon should be set out in the application. In this way the recipient of such an application will know what case he has to meet and the Court will know exactly what issues it has to determine ...”

21. I referred at paragraph 16 of *Raier* to *Wang* and at paragraphs 17-19 to certain English authorities including *Tugushev* where at paragraph 7 v) Carr J stated that “Material facts are those which it is material for the judge to know in dealing with the application as made ... The duty ... extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction” (my underlining). At paragraph 7 x) Carr J stated:

“... Immediate discharge (without renewal) is likely to be the court’s starting point, at least when the failure is substantial or deliberate ...”.

22. Carr J at paragraph 7 xi) added:

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“The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties.”

23. At paragraph 22 of *Raier* I referred to Toulson J’s comments in *MRG*:

“Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it ...” (paragraph 25).

“The focus of the inquiry [in respect of an application for permission to serve out of the jurisdiction] is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case ...” (paragraph 26).

24. Both counsel placed reliance on the test referred to by Toulson J in *MRG (Japan) Ltd v Englehard Metals Japan Ltd* [2004] 1 Lloyd’s Rep 731 at paragraph 29:

“If MRG was aware of matter which might reasonably have caused the Judge to have any doubt whether he should grant permission to serve out of the jurisdiction, those would have been relevant matters and therefore ought to have been disclosed. This must be so in principle, and it is implicit in the authorities to which I have referred.” (my underlining)

And at paragraph 30:

“... It is for the Court to determine what is material, but the test of materiality is that to which I have referred: whether the matter might reasonably be taken into account by the Judge in deciding whether to grant the application.”

And at paragraph 24 Toulson J had stated:

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“It is for the Court to determine what is material according to its own judgment and not the assessment of the applicant: *Brink’s Mat Ltd v. Elcombe*. This means that if the Court considers there to have been material non-disclosure, it is not an answer that the applicant in good faith took a different view, although that may affect the Court’s exercise of its discretion in deciding what to do in the light of the non-disclosure. It does not mean that an applicant is under a duty to disclose facts which could not reasonably have a bearing on the decision which the Judge has to make.”

25. Toulson J in *MRG* was not persuaded that material facts had been withheld and at paragraph 43 added:

“If I had concluded that there had been wrongful non-disclosure, I would still have declined to set aside the order, because I would have regarded such a step as disproportionate and contrary to the overriding objective of dealing with the case justly. If there are serious issues to be tried, arising out of contracts containing English choice of law and jurisdiction clauses, and in respect of which England is clearly the appropriate forum, it would not advance the objective of dealing with the case justly to decline jurisdiction. In the absence of any intention on the part of MRG to mislead the Court, non-disclosure could be penalized without prejudicing that objective by some form of costs sanction.”

26. Mr Bayfield also referred to the comments of Woolf LJ in *Behbehani v Salem* [1989] 1 WLR 723, albeit in the context of *Mareva* and *Anton Piller* orders:

“However, as Mr Brodie concedes, although it is proper to bring proceedings in more than one jurisdiction, it is a highly material matter to be consigned by a judge when granting relief in this jurisdiction on an *ex parte* application that there are proceedings either actually taking place or contemplated within another jurisdiction. It is, in my view, of great importance that that should be the position, because clearly in exercising his discretion as to whether or not to grant the draconian remedies which such injunctions amount to, the judge should be satisfied that the case warrants the granting of such relief, and in particular that it is not oppressive for the defendants to be subject to orders of the court in more than one jurisdiction.” (my underlining)

27. Mr Bayfield also took me to the well-known and frequently cited English authority of *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 where Ralph Gibson LJ at page 1357 stated:

“(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.”

28. Ralph Gibson LJ also acknowledged at (7) that it is not for every omission that the *ex parte* order will be automatically discharged. The court has a discretion, 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.

29. Both counsel referred to *Punjab National Bank (International) Ltd v Srinivasan and others* [2019] EWHC 3495 (Ch) where Sir Geoffrey Vos, Chancellor of the High Court of England and Wales, as he then was, in the context of an application for permission to appeal, considered arguments in respect of exclusive jurisdiction clauses and whether there had been a material non-disclosure in that PNB had failed to properly inform the court about two sets of proceedings, one in the United States and another in Chennai, India (paragraph 4). The “Pesceo” claims had not been the subject of the claims overseas (paragraph 64).

30. Mr Bayfield referred to the English authority referred to at paragraph 68 of the judgment of Sir Geoffrey Vos, where the point was made that the court should address the importance and significance to the outcome of the *ex parte* application of the matters which were not disclosed to the court and “In making this assessment, the fact that the Judge might have made the order anyway is of little if any importance.” (my underlining). I also note that it was stated “The jurisdiction is penal in nature and the courts should have regard to the proportionality between the punishment and the offence”.

31. Sir Geoffrey Vos at paragraph 69, referred to and agreed with another judicial extract which stressed the importance of the duty of full and frank disclosure on applications for permission to serve out which “cannot be over-stated”:

“A failure to comply with that duty is by its very nature serious – an individual or entity has been brought into the jurisdiction without having had an opportunity to address the court as to why permission should not be granted, and ... they are then exposed to very considerable costs upon an application to set jurisdiction aside.”

32. Mr Bayfield placed particular reliance on paragraph 71 of the judgment of Sir Geoffrey Vos, which stated that PNB’s failure to refer to the US proceedings and the Chennai proceedings was a serious default:

“It was deliberate in that PNB and its solicitors were fully aware of those proceedings. The relevance of the foreign proceedings must have been obvious to any lawyer. The English proceedings were in large part duplicative of the US and the Chennai proceedings. It is of little importance that the duplication might have been justified. PNB had a duty to tell the full story and failed to do so. The Chief Master was absolutely right to conclude that the normal consequence of such a default was that the orders made should be set aside ...” (my underlining)

33. Sir Geoffrey Vos at paragraph 72 added:

“... the general rule is, in a case of deliberate and material non-disclosure, that the orders should be discharged, but there is a discretion to reinstate. That jurisdiction should, however, be exercised sparingly. I take into account the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.”

34. Sir Geoffrey Vos at paragraph 73, assessed the degree and extent of PNB’s culpability as “at a high level”. He had no doubt that disclosure of the foreign proceedings would have given the relevant judges “cause to reconsider whether the orders sought were appropriate.” Sir Geoffrey Vos commented that “the jurisdiction clauses would also have weighed heavily in favour of allowing service out of at least the Pesco contractual claims” and felt that one question was whether it would simply be unjust to prevent PNB bringing those claims. Sir Geoffrey Vos also bore in mind “the

need to have regard to the proportionality between the default on the one hand, and the impact on PNB of setting aside the orders on the other hand.” He concluded (at paragraph 74) that it had been right to set aside both orders and not to reinstate them: “These were serious breaches of the duty of disclosure”. The proper order was to set aside the orders and “leave PNB to seek to bring any new proceedings if it chooses to do so.” Mr Matthews referred to paragraph 9 and the wording of the jurisdiction clause in that case.

35. In the mass of evidence, law and legal argument that is frequently presented to a judge on an application to set aside an *ex parte* order on the ground of non-disclosure, it is important for the judge to keep a proper perspective and adopt a just and proportionate response. It is also important for the judge to bear firmly in mind the purpose of the judge-made rule of disclosure of material facts at an *ex parte* hearing. At an *ex parte* hearing only the applicant and/or its legal representatives are present. The opposing side are not present or represented. The hearing takes place in the absence of the opposing side. In such circumstances it is important for the applicant to present the case fairly and ensure that the court has the relevant material upon which to make an informed and just decision. The applicant must bring the relevant facts to the attention of the court and must also highlight any reasonably perceived defences or arguments the absent opposing side may have wished to raise if present. The judge-made rule should not be taken to extremes or become an instrument of injustice as Ralph Gibson LJ fairly recognised in *Brink's Mat*. It is not for every omission that an *ex parte* order will be automatically discharged and not regranted. After considering the law and the legal arguments the judge should stand back and also consider the overall justice of the case in accordance with the overriding objective.
36. It is, of course, important to have regard to the relevant legal principles. It is also worth stressing that these material non-disclosure cases are all very fact sensitive and each case must be determined on its own facts and circumstances. I now turn to the facts and circumstances of this particular case.

Determination

37. This is a somewhat unusual case. From the evidence placed before the court it seems that MYF commenced legal proceedings in Norway on 2 March 2021. MYF obviously felt that Norway was the appropriate jurisdiction for the claims it was then advancing. It did not in March 2021

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commence proceedings in the Cayman Islands. The Finance Parties unsuccessfully challenged the jurisdiction of the Norwegian Courts to hear and determine what was described as the Breach of Loyalty Claim. The challenge seems to have been on the basis that the Share Pledge Agreement contained a jurisdiction clause in favour of the Cayman Islands courts. Pursuant to the Oslo District Court Judgment it was concluded that the damages claim for breaching duties of loyalty was regulated by Cayman Islands law and for that reason it could not succeed in Norway as MYF had “not pleaded that the Cayman Islands law imposes duties of loyalty that the Banks have breached.”

38. Faced with this defeat in Norway on 7 July 2023, over 2 years after it had commenced proceedings in Norway, the Plaintiff commenced proceedings in the Cayman Islands by way of the Originating Summons on 22 September 2023. On 1 November 2023 the Plaintiff filed the Service Out Application and on 6 December 2023 the December 2023 Service Out Order was granted.
39. The Plaintiff did not, at the *ex parte* hearing disclose to the court the existence or content of the Norwegian Appeal. The Overseas Defendants (including the Finance Parties) filed the Set Aside Application on 6 February 2023. They sought to set aside the December 2023 Service Out Order solely on the ground of the Plaintiff’s failure to disclose the existence and content of the Norwegian Appeal. It is in effect a free-standing challenge presented almost in the abstract. The arguments presented on behalf of the Overseas Defendants, at times, had an almost surreal, or at least unrealistic, feel to them. The Overseas Defendants do not launch a frontal attack directly challenging the satisfaction of any of the three limbs referred to by Lord Collins in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7. Instead, they rely on various statements of English judges that it matters not that the non-disclosure would not cause the judge to make a different decision to the decision made. The Overseas Defendants say that the failures of disclosure were deliberate, not innocent, and a conscious decision was taken by MYF to keep the court in the dark. They add that had MYF provided the court with a full and accurate picture, the court would have had doubt as to whether the Cayman Islands were clearly the appropriate forum notwithstanding the Cayman jurisdiction clause in the Share Pledge Agreement and also notwithstanding that the Equity of Redemption Issues cannot be determined finally by the Norwegian courts. They add that the fact that the Grand Court may have eventually overcome the doubt and made the December 2023 Service Out Order is irrelevant. The Overseas Defendants say that all they need to establish is that the Norwegian Appeal should have raised a reasonable doubt as to the appropriate forum in

the mind of the Grand Court and that is sufficient to require the Grand Court to follow the general rule and set aside the December 2023 Service Out Order and not renew it.

40. The Plaintiff in effect says that the Set Aside Application is a tactical, technical and opportunistic move by the Overseas Defendants. The Plaintiff adds that the Overseas Defendants do not contend that the Equity of Redemption Claims can be pursued anywhere other than the Cayman Islands.
41. When the disputes first arose between the parties the Plaintiff felt that Norway was the appropriate forum for their determination. The Overseas Defendants appear to have felt that the Cayman Islands was the appropriate forum for determination of the disputes and raised the Cayman jurisdiction point unsuccessfully in Norway. The Plaintiff lost in Norway but lodged an appeal. At the same time, it commenced legal proceedings in the Cayman Islands and applied for and was granted leave to serve out of the jurisdiction. It did not refer this court to the Norwegian Appeal. The Overseas Defendants now seek to set aside the December 2023 Service Out Order solely on the basis of this non-disclosure. The Plaintiff subsequently applied for a stay of its Norwegian Appeal. All in all a rather unusual and strange set of circumstances.
42. In reaching a determination in respect of the Set Aside Application, it is important to consider what the court had to be satisfied upon in respect of the Service Out Application, the issues arising in the Originating Summons and the Norwegian Appeal, what was disclosed and what was not disclosed, the evidence and submissions placed before the court and the consequences of any breach of the duty of disclosure.

The test for service out

43. It is beyond reasonable dispute (and indeed the Plaintiff accepts this, see paragraph 2 of its undated skeleton “As to permission to serve out of the jurisdiction” and paragraph 28 of its skeleton argument dated 25 April 2024 citing *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7) that on an application for leave to serve out of the jurisdiction the court is concerned as to whether it is satisfied in 3 main areas:

- (1) is there a serious issue to be tried against the relevant defendant(s);

- (2) is there a good arguable case that the claim falls within at least one of the jurisdictional gateways; and
 - (3) in all the circumstances, is the Cayman Islands clearly or distinctly the appropriate forum where the case can be tried for the interests of all parties and for the ends of justice and ought the court exercise its discretion to permit service of the proceedings out of the jurisdiction (the “Appropriate Forum and Discretion Factors”).
44. In dealing with the applications to set aside service out orders solely on the ground of alleged non-disclosure, it is important for the court to bear in mind that in dealing with an application for permission to serve out of the jurisdiction the court is mainly concerned with whether it is appropriate for the court to assume jurisdiction. As Toulson J made clear in *MRG* at paragraph 26 “The focus of the inquiry is on whether the Court should assume jurisdiction over the dispute.”

The Originating Summons and the Norwegian Proceedings including the Norwegian Appeal

45. In the Originating Summons the Plaintiff seeks a declaration that:
- (1) the purported sale on 3 March 2021 of 91,215,000 Ordinary Shares in Maximus Limited (the “Subject Shares”) to NM Shipholding AS is void and/or voidable and should be set aside;
 - (2) the Finance Parties have held the Subject Shares as mortgagees in possession for the Plaintiff since 3 March 2021; and/or
 - (3) the Plaintiff has retained an equity of redemption in the Subject Shares, or alternatively should have such equity of redemption restored.
46. In the Originating Summons the Plaintiff also seeks orders requiring:
- (1) NM Shipholding AS to execute all documents necessary to transfer the Subject Shares to the Plaintiff and deliver such documents to the Plaintiff;

- (2) the Finance Parties to do likewise;
 - (3) rectification of the share register of Maximus Limited to reflect the Plaintiff as holder of the Subject Shares since 18 October 2022; and
 - (4) the Finance Parties to account to the Plaintiff on a wilful default basis in respect of the period while the Finance Parties were mortgagees in possession.
47. MYF summarises the basis of its claim in these proceedings in the Cayman Islands as follows:

- (1) MYF was the owner of 75% of the shares in the Sixth Defendant (the Subject Shares);
- (2) the Finance Parties entered into a facility agreement with the Sixth Defendant to finance the purchase of a vessel, the Normand Maximus (the “Vessel”). Clause 33 of a document dated 27 September 2016 entitled “USD266,280,000 Senior Secured Term Loan Facilities Agreement for Maximus Limited as Borrower” reads as follows:

“33 GOVERNING LAW AND ENFORCEMENT

33.1 Governing law

This Agreement shall be governed by Norwegian law.

33.2 Jurisdiction

- (a) Each Party agrees that the courts of Oslo, Norway, have jurisdiction to settle any disputes arising out of or in connection with the Finance Documents including a dispute regarding the existence, validity or termination of this Agreement, and each Party accordingly submits to the non-exclusive jurisdiction of the Oslo District Court (No. *Oslo tingrett*).

- (b) Nothing in this Clause 33.2 shall limit the right of the Finance Parties to commence proceedings against the Borrower in any other court of competent jurisdiction. To the extent permitted by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions...”
- (3) Pursuant to a Share Pledge Agreement governed by Cayman Islands law, MYF mortgaged the Subject Shares to the Finance Parties to secure the loan granted to the Sixth Defendant. Clause 25 of a document dated 28 October 2016 and entitled “Equitable Mortgage Over Shares in Maximus Limited” reads as follows:
- “25 Law and Jurisdiction
- 25.1 This Mortgage is governed by, and shall be construed in accordance with, the laws of the Cayman Islands.
- 25.2 The Mortgagor irrevocably agrees for the exclusive benefit of the Security Trustee that the courts of the Cayman Islands shall have jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute which may arise out of or in connection with this Mortgage and for such purposes irrevocably submits to the jurisdiction of such courts.
- 25.3 No Finance Party shall be prevented from taking proceedings relating to a dispute in any other jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.”
- (4) On 3 March 2021 the First Defendant, in its capacity as agent of the Finance Parties, declared an Event of Default and sought to enforce certain rights under the Share Pledge Agreement;

- (5) The Finance Parties implemented a plan which provided for “warehousing the shares on behalf of the Finance Parties”. They purported to “sell” all of the shares in the Sixth Defendant to the Fifth Defendant for USD1. The Finance Parties control the Fifth Defendant and retain the right to “buy back” all of the shares in the Sixth Defendant for USD1 and enjoyed the benefit of the Subject Shares in the interim;
 - (6) On 18 October 2022 the sale process for the Vessel completed and the proceeds were more than sufficient to and were used to discharge all the outstanding debts secured by the Share Pledge Agreement;
 - (7) MYF’s position is that (a) the purported sale was void or voidable as the Fifth Defendant was and is holding the Subject Shares merely as a nominee of the Finance Parties (b) the Finance Parties became mortgagees in possession of the Subject Shares and (c) MYF has retained an equity of redemption in the Subject Shares.
48. The Plaintiff’s Norwegian Appeal runs to 31 dense pages. It appeals the Oslo District Court Judgment “in its entirety”. The Plaintiff says that the District Court was wrong to conclude that its claims for damages related to the Banks’ breach of loyalty and abuse of rights are governed by Cayman law. It says its claim for damages is governed by Norwegian law. The Plaintiff also avers that the District Court made an error in the application of the law when it concluded that the Banks’ wrongful rejection of MYF’s highest bid for the Vessel during the auction process could only form the basis for compensation for negative contractual interest. A complaint is also made that the District Court made an error in its application of the law when it concluded that there was no violation of the “former Financial Contracts Act Section 61”, and it is further averred that due to the District Court arriving at an erroneous conclusion on the choice of law issue it failed to address several of MYF’s arguments.
49. Section 2 sets out various facts to supplement the alleged inadequate presentation of the facts by the District Court.
50. Section 3 deals with the topic of the Norwegian choice of law. Cayman first gets a mention (at paginated page 401; no internal page references are visible) in the context of “the loss incurred in

Cayman” under the main heading “3.2 The main rule – the law of the place where the immediate damage occurs, where the direct loss arises, is in Norway.” Under the heading “Regardless, the claim has closer connection to Norway” (on paginated page 405) it is stated “The decisive factor therefore is whether, after an overall assessment of all the circumstances of the case, it indicates that the case has a clear closer connection to Norway, and not whether the case has a connection to the Cayman Islands.” There are further mentions of the Cayman Islands at the bottom of paginated page 405 and throughout paginated pages 406-408.

51. The detailed section 4 dealing with the Auction Process starts on paginated page 408 and finishes at paginated page 413. At paginated page 411 there is a heading under 4.3 “MYF’s argument that it has an “equity of redemption” under Cayman Islands law and its significance for the auction process is an important aspect of MYF’s case”. On the top of paginated page 412 the Plaintiff does the Norwegian Court of Appeal the courtesy of informing it as follows:

“The Court of Appeal is informed that MYF intends to bring a declaratory action before the Grand Court of the Cayman Islands, seeking a determination that the Banks are obligated to return the shares in Maximus Limited to MYF.

During the main hearing in the district court, a whole day was dedicated to witness testimonies from experts on Cayman law regarding this prejudicial question.”

52. Section 5 deals with “Section 61 of the Financial Contracts Act”. The Plaintiff says that the District Court made an error in legal application when it agreed with the Banks’ argument that section 61 of the Financial Contracts Act was not internationally mandatory in this case. MYF argues that the loan agreement in this case naturally belongs to Norway which it says, “leads to section 61 of the Financial Contracts Act having internationally mandatory effect in this case”.

53. MYF says that it will submit the following claims:

“1. DNB Bank ASA, NIBC Bank N.V., Swedbank AB (publ), Eksportfinansiering Norge, and NM Shipping AS are ordered to pay MYF Maximus Limited compensation to be determined at the court’s discretion.

2. NM Shipholding AS is obligated to transfer ownership of all A shares in Maximus Limited back to MYF Maximus Limited.
 3. [legal costs].”
54. I have considered the evidence which refers to the proceedings in Norway and the procedure that is adopted by an appellate court in Norway. I have considered the various claims including a claim in relation to section 61 of the Norwegian Financial Contracts Act and those defined as the Breach of Loyalty Claim, the Non-Compliance Claim, the Auction Deficiencies Claim and I have considered the Equity of Redemption Claim and the Equity of Redemption Issues. I have also considered the evidence in respect of the Oslo District Court Judgment and what is defined as the Norwegian Merits Appeal together with MYF’s application to the Norwegian Court of Appeal for a stay of its Norwegian Appeal and the response of the respondents to that. In section 3.2 of MYF’s stay application MYF deals with its submissions that “The case depends wholly or in part on a legal issue that will be decided with final and enforceable effect through the Cayman Islands proceedings.” The legal issue referred to is the “equity of redemption” issue. MYF says that:

“... the outcome of the Cayman law issue is of particular importance to the following matters:

- 1) the assessment of the content and scope of the Banks’ duty of loyalty to MYF in its capacity as co-financier of the Normand Maximus ship,
 - 2) the assessment of whether the Banks acted lawfully when they rejected the MYF’s offer to repay the loan at the end of April 2022,
 - 3) the assessment of whether the Banks had a duty to safeguard MYF’s interest in the auction process when the Normand Maximus ship was sold, and
 - 4) for the size of MYF’s financial loss.”
55. It appears common ground that the Court of Appeal in Norway conducts a *de novo* hearing of both evidence and law and that any determination on the Equity of Redemption Issues will not be binding on the parties in Norway or operate as an issue estoppel in the Cayman Islands. The Court of

Appeal in Norway may also make different determinations as to various jurisdictional issues covered by the Oslo District Court Judgment.

56. It can be seen therefore that, in particular, the subject of any equity of redemption forms an issue in the Norwegian Appeal and is a claim in the proceedings in the Cayman Islands. I accept that it arises in a different context in both jurisdictions but there is an overlap as it arises in both sets of parallel proceedings.

The evidence placed before the court prior to the December 2023 Service Out Order

57. There was no reference in the evidence placed before the court in December 2023 to the Norwegian Appeal. In fairness to the Plaintiff and its legal advisers, I accept that in parts of the evidence placed before the court before it made the December 2023 Service Out Order there are references to the word “ongoing” in the context of the legal proceedings in Norway.
58. Magnus Valeberg (“Mr Valeberg”) in his first affidavit of 2 November 2023 on behalf of the Plaintiff said at paragraph 1 that he had “the requisite knowledge” to swear the affidavit on behalf of the Plaintiff. In his 30 page affidavit he refers to the grounds of the Service Out Application and the good cause of action and at paragraph 26 he refers to “separate proceedings currently ongoing between the parties in Norway, which are discussed further at paragraph 47 *et seq* below” (my underlining). There is no reference to the Appropriate Forum and Discretion Factors. Mr Valeberg in the section IV under the heading “Full and Frank Disclosure” at paragraph 44 refers to the Plaintiff’s duty of full and frank disclosure and says that he has “sought to bring all relevant material matters to this Honourable Court’s attention.”
59. At paragraph 45, Mr Valeberg uses the past tense “was the subject of argument in the Norwegian Proceedings” (my underlining) and says that certain questions “will be addressed by Counsel for the Plaintiff in submissions.”
60. At paragraph 47 reference is made to a claim in the Oslo District Court and at paragraph 48 Mr Valeberg uses the present tense “MYF’s claim in Norway is essentially ...” and at paragraph 49 states that “The Norwegian Proceedings have been ongoing since 2 March 2021 ...” (my underlining) and at paragraph 50 refers to various appeal court decisions. From paragraph 57

onwards, Mr Valeberg refers to the expanded scope of the Norwegian Proceedings including expert evidence on the law of the Cayman Islands. At paragraph 63, Mr Valeberg refers to the Oslo District Court Judgment and at paragraph 64 says “will be dealt with by Counsel in submissions” but summarises it by saying that:

- (a) the court did not need to reach a determination of matters of Cayman Islands law which are of relevance to the substance of the Plaintiff’s claim in order to dismiss the claim by MYF; and
- (b) reaffirmed that the Norwegian Courts did not have jurisdiction arising out of or in connection with the Share Pledge Agreements.

61. Neither Mr Valeberg nor counsel referred to any appeal being lodged against the Oslo District Court Judgment.
62. At paragraph 65 “For completeness” Mr Valeberg says that he sets “out a schedule of all relevant pleadings and judgments in the Norwegian Proceedings (see pages 1346 to 1349 of Exhibit “MV-1”). That schedule provided “for completeness” does not refer to the Oslo District Court Judgment or the subsequent appeal against it. It does include a “Court decision by Oslo District Court for dismissal of proceedings regarding MYF” dated “07.07.2021”. It also includes “Appeal to Bogarting Court of Appeal regarding court decision by Oslo District Court” dated “15.09.2021”. It includes reference to various other judgments and appeals. It finishes with the date 2 May 2023. Mr Matthews says that a page was missing. I was not provided with the missing page. The incomplete schedule is also a matter of concern. It appears that there was a certain lack of care in respect of the preparation of the evidence in support of the Service Out Application.

The Plaintiff’s skeleton argument in support of the Service Out Application

63. In the 28 page undated skeleton argument of the Plaintiff “As to permission to serve out of the jurisdiction” Mr Matthews invited the court to read the skeleton argument, the affidavit of Mr Valeberg, the Service Out Application, the Originating Summons and Sections 1-111 and V-VI of a report on behalf of the First to Fourth Defendants and filed in the Norwegian Proceedings, which was said to set out their case on Cayman law which they can be expected to raise in answer to the

Plaintiff's claim. Mr Matthews, no doubt a quick reader, estimated the time for pre-reading at 1 hour and the estimated time for the hearing is optimistically put at 1 hour.

64. At paragraph 2 of section 1 of the skeleton argument, Mr Matthews referred to the 3 requirements specified in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7 including requirement number 3 “that in all the circumstances the Cayman Islands is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the Court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.”
65. In section II of the skeleton argument, Mr Matthews deals with “Serious Issue to be Tried on the Merits” and in section III, “Good arguable claim that the case falls within Order 11, rule 1(1) of the GCR” and in section IV “Exercise of discretion”. At paragraph 34 (c) the point (frequently repeated at the hearing on 1 May 2024) is made that:

“There is a jurisdiction clause contained in the Share Pledge Agreement which would allow the Finance Parties to prevent MYF from pursuing this claim in any jurisdiction other than the Cayman Islands.”

66. Under the sub-heading “The Norwegian Proceedings” starting at page 17, at paragraph 36 Mr Matthews using the past tense says:

“MYF has pursued claims against the Finance Parties in Norway. However, the claims in these proceedings before the Grand Court of the Cayman Islands are not duplicative of the claim that was brought by MYF before the Norwegian courts and the existence of those proceedings is not a good reason to refuse permission to serve out of the jurisdiction” (my underlinings).

67. At paragraph 37, reference is made to principles summarised in *Dicey, Morris & Collins on the Conflict of Laws* (16th edition) and the following points are made:

- (a) the existence of foreign proceedings is no more than a factor relevant to the determination of the appropriate forum;

- (b) where the same claimant sues the same defendants on the merits of the same claim abroad, the court may not allow the continuation of the two proceedings in two different jurisdictions. The court may require a claimant to elect; and
- (c) where there is not a complete unity of parties and issues between the two actions, the court may in the exercise of its case management powers decline to grant a stay.
68. At paragraph 38 of his skeleton argument, Mr Matthews says that the “Finance Parties objected to the jurisdiction of the Norwegian courts on the basis that the Share Pledge Agreement contained an exclusive jurisdiction clause in favour of the Cayman Islands courts. On appeal from the District Court, the Borgarting Court of Appeal dismissed this objection ...”. (footnotes omitted).
69. At paragraph 39 of his skeleton argument, Mr Matthews brings to the attention of the court that “On 8 July 2023 the Oslo District Court handed down a judgment in which it dismissed all of MYF’s claims.”
70. In section V Mr Matthews deals with “Compliance with Order 11, Rule 4 (1) – (2) of the GCR.”
71. In section VI Mr Matthews deals with “Full and Frank Disclosure”. At paragraph 43 he opens this important section by saying:
- “MYF brought proceedings in the Norwegian courts. By a judgment of the Oslo District Court these claims were dismissed.”
72. At paragraph 44 there is reference to the claim for damages on the basis that the Finance Parties had breached their duties of loyalty and it is added “The Oslo Court ultimately dismissed this claim ...”. At paragraph 44(b) it is stated:
- “... given the reasons for the dismissal of MYF’s claim there was no need for the Oslo District Court to determine any matters of Cayman Islands law which are of relevance to the substance of MYF’s claims before this Court ...”
73. Nowhere in the skeleton argument is there reference to the Norwegian Appeal, or to the word “ongoing” in the context of the proceedings in Norway.

The hearing on 6 December 2023

74. I have also considered the transcript of the hearing on 6 December 2023. Again, there was no reference at such hearing to the Norwegian Appeal. At page 26 of the transcript at the end of Mr Matthews' submissions and before he made some points on the draft order, I specifically asked Mr Matthews:

“There's nothing else that you want or need to bring to my attention is there?”

That was in effect a reminder of the important duty of disclosure. Mr Matthews did not take that opportunity to refer to the Norwegian Appeal, he simply proceeded to take the court through the draft order. After exchanges on the draft order, I asked “Anything else?” and Mr Matthews responded “Not from me My Lord.”

75. As is apparent from the transcript of the hearing on 6 December 2023, one of my concerns was whether there was any argument that the Overseas Defendants were being vexed twice (namely once in Norway and then again in the Cayman Islands). I commented that I had looked at Tab 57, a translated extract from a Norwegian judgment and I stated: “It's right that you were unsuccessful in the proceedings in Norway”. Mr Matthews replied, “we were unsuccessful in the proceedings in Norway on the tort claim under Norwegian law and the no claim under Cayman Islands law was considered or addressed because they very properly took the view that disputes between the parties in relation to the Share Pledge Agreement under Cayman law was not a matter for the Norwegian courts ...”. I specifically asked if there was any issue or argument which the Finance Parties could raise in respect of the Plaintiff not bringing forward their whole claim at the outset. Mr Matthews responded in the negative. I then state:

“You say that parallel proceedings in both jurisdictions would have been inappropriate. I'm just thinking, this is an *ex parte* application, I'm just thinking you do set out defences and you do full and frank disclosure, but there's nothing that the Finance Parties could say in support of an argument that ‘look, we're being vexed twice here, it's oppressive.’”

76. To which Mr Matthews replied:

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“My Lord, no, we don’t anticipate that they could raise any argument in relation to that. What we have addressed is any possible argument as to delay and we’ve addressed that under our full and frank disclosure section of our skeleton beginning at paragraph 60, on page 27.”

77. Mr Matthews made no reference to the Norwegian Appeal (filed by his client on 5 September 2023) in his oral submissions or in the skeleton argument. Moreover, it was not mentioned in the evidence filed in support of Service Out Application. Furthermore, there was no reference in the skeleton argument to the proceedings in Norway being “ongoing”.

The Norwegian Appeal of 5 September 2023 and the Plaintiff’s explanations as to why it was not brought to the attention of the court

78. It now transpires that on 5 September 2023, MYF had lodged the Norwegian Appeal. MYF and its legal team did not see fit to bring this to the attention of the Grand Court in the Cayman Islands prior to the December 2023 Service Out Order. How is that failure explained by MYF? I have searched the evidence, the skeleton argument and the oral submissions for the explanation.

Plaintiff’s evidence in response to allegation of non-disclosure

79. What does the Plaintiff say in its evidence in respect of the allegations of non-disclosure?
80. Mr Valeberg, in his second affidavit of 23 February 2024 at paragraph 16(a), says that on 5 September 2023 the Plaintiff filed the Norwegian Appeal and notified the Norwegian court and the Overseas Defendants that the Plaintiff intended to bring a declaratory action before the Grand Court in the Cayman Islands. Mr Valeberg says nothing about why the Plaintiff did not, before the December 2023 Service Out Order, notify this court of the Norwegian Appeal.
81. Kyrre Eggen (“Mr Eggen”) in his first affidavit of 22 February 2024, says that he is a partner at a law firm in Norway and is authorised to file the affidavit on behalf of the Plaintiff. He responds to the Set Aside Application and Mr Harborg’s affidavit of 6 February 2024. He devotes 10 pages to

the Norwegian Proceedings but nowhere explains why the Plaintiff failed to bring to the attention of this court the fact that an appeal in Norway had been filed.

82. Mr Eggen, in his second affidavit of 10 April 2024, responds to the second affidavit of Mr Harborg and the first affidavit of Mr Raanes and says at paragraph 5, that he has sworn his affidavit “to update this Honourable Court in relation to certain developments in the Norwegian Proceedings that have occurred since Eggen 1 was filed.” Again, he does not seek to explain the Plaintiff’s lack of reference to the Norwegian Appeal at or before the *ex parte* hearing in December 2023, but he considers it relevant and appropriate to update the court in respect of the Norwegian Proceedings. Mr Eggen at paragraph 13, says that the nature of the relief sought in the Norwegian Proceedings is separate and different to the relief sought in the proceedings in the Cayman Islands. At paragraph 29 he says that the Equity of Redemption Claims are subject to the jurisdiction of the Grand Court and the Norwegian Courts do not have jurisdiction to “hear these issues.”

What does the Plaintiff say in this respect in its skeleton argument dated 25 April 2024?

83. What does the Plaintiff say in its skeleton argument dated 25 April 2024 in respect of the allegations of non-disclosure? At paragraph 5(c) the following generalised denial is made:

“There was no relevant non-disclosure ...”

It is then added:

“The Overseas Defendants do not contend that the Equity of Redemption Claims can be pursued anywhere other than the Cayman Islands. The points which the Overseas Defendants now raise go to the issue of whether there should be a stay of the present proceedings not the question of whether this Court has jurisdiction. The dispute between the parties is essentially one of case management;”

84. At paragraph 30 it is stated that “MYF did not have any duty to make full and frank disclosure in respect of other matters, including whether the Court, having jurisdiction, might then go on to order a temporary stay. These were properly matters for the Overseas Defendants to raise, if so advised, once they had been served.”

85. At paragraph 31 it is stated that “MYF did make disclosure to this Court. It explained that the proceedings in Norway were “*ongoing*” (Valeberg-1 49 [B/10/128]. In its skeleton, MYF referred to the Norwegian proceedings and it addressed the rule on *lis pendens* in light of the “*existence of those proceedings*”. (Skeleton 36-37, [B11/157-158].” No mention of any appeal.
86. The Plaintiff in its skeleton argument, dated 25 April 2024, denies that it is guilty of any relevant non-disclosure and at paragraph 32 says that even if there was non-disclosure:
- (a) any breach of the duty of full and frank disclosure was innocent;
 - (b) the Overseas Defendants were on notice that MYF intended to pursue the proceedings commenced by the Originating Summons. They had ample opportunity to raise any concerns but they chose to remain silent which meant that MYF was not aware of the position of the Overseas Defendants;
 - (c) in hearing commercial cases, the borderline between material facts and non-material facts maybe a somewhat uncertain one and the application of the principle should not be carried to extreme lengths (*Wang* unreported judgment delivered on 8 April 2022);
 - (d) it would be disproportionate to set aside the December 2023 Service Out Order as the practical effect of this would be that MYF cannot advance the Equity of Redemption Claims in any other jurisdiction; and
 - (e) the non-disclosure has not provided any advantage to MYF nor disadvantage to the Overseas Defendants. The matters which they have identified do not go to jurisdiction, instead they go to the issue of whether there should be a temporary stay. Having been served, the Overseas Defendants have had the opportunity to make that application.

Mr Matthews’ oral submissions in respect of allegations of non-disclosure

87. What did Mr Matthews say in his oral submissions on behalf of the Plaintiff in respect of the allegations of non-disclosure?

88. In his oral submissions Mr Matthews made the following points, amongst many others, on behalf of the Plaintiff:

- (1) the fact that an appeal had been lodged was not material to the jurisdiction issue;
- (2) it is accepted that there was no specific reference to the appeal in Norway but the court was informed that the proceedings in Norway were “ongoing”;
- (3) it is important to appreciate the distinction between issues and claims. The Equity of Redemption Claim is a claim in the Cayman Islands. It is not a claim in Norway but it is an issue which arises in Norway. Any resolution of that issue by the Court of Appeal in Norway would not however even be binding against the parties in Norway and does not give rise to any issue estoppel between the parties. The claim could not be brought in Norway because of the Cayman jurisdiction clause. Cayman is the only forum for determination of that claim;
- (4) the disclosure of the appeal in Norway would have had no impact on the decision for permission to serve out of the jurisdiction. It was not relevant or material to the jurisdiction issue;
- (5) information was provided in respect of the proceedings in Norway insofar as it was relevant. It was relevant for the court to know about the circumstances in which issues that were common to both sets of proceedings had arisen in the Norwegian courts but could not be definitively determined in Norway. Information in that respect was put before the court. It was also identified that the Norwegian proceedings were “ongoing”. The proceedings could only have been “currently ongoing” on the basis that there was an appeal. The submissions were to the effect that there was no need to expressly refer to the appeal in Norway. The simple point is that there was no available forum other than the Cayman Islands. The Equity of Redemption Claim could only be litigated in Cayman. The Plaintiff does not seek to criticise the court for “operating under the impression that proceedings were at an end in Norway”. There were however references in the evidence to the proceedings in Norway being “ongoing” and paragraph 36 of the skeleton argument dealt with *lis alibi pendens* (Latin for “dispute elsewhere pending”) which would only be relevant to the existence of concurrent proceedings. It is accepted that it was the Plaintiff’s

failure which led the court to believe that the proceedings in Norway had been terminated when they had not;

- (6) the fact of the existence of the Norwegian Appeal would not have given rise to a reasonable doubt given that Cayman is the only jurisdiction in which such claim could be brought. Even if the existence of the Norwegian Appeal had been disclosed to the court it would not have caused any doubt. Cayman is the only forum in which the proceedings can be brought. There was no possibility that the court would have concluded that by reason of the Court of Appeal hearing in Norway the Plaintiff should be barred from bringing its equity of redemption proceedings in the only jurisdiction in which it can bring them;
- (7) the existence of the Norwegian Appeal is not relevant to any arguments that the Overseas Defendants could advance to dispute jurisdiction;
- (8) Mr Matthews in response to a submission by the Overseas Defendants (at paragraph 43.3.4 of their skeleton argument dated 25 April 2024) that his availability to give evidence at the hearing of the Norwegian Appeal had been checked approximately 2 weeks prior to the Plaintiff's skeleton argument in support of the Service Out Application being lodged stated that "there was not and never has been any inquiry of me as to my availability for any such hearing";
- (9) in respect of his state of knowledge at the hearing in December 2023 in the Cayman Islands Mr Matthews volunteered the following:

"I, unlike your Lordship, was aware that the proceedings were currently ongoing and must have assumed that there was some sort of appeal since there was a judgment at first instance. I can't actually remember the detail of what I knew or didn't know, but the fact is that I've seen Mr Valeberg's affidavit and I was clearly aware of the fact that the proceedings were ongoing. And so I must have been aware that there was some kind of appeal, but I'm afraid I can't take it further than that and I am not at liberty in relation to privilege to take further questions in relation to what I was notified, when, by whom and so on ...";

- (10) the court is not entitled to draw any negative inferences from the non-waiver of privilege;

(11) Mr Matthews later added:

“I do not know exactly what I assumed because I cannot remember. But I certainly understood that there was something ongoing in Norway, because that is what Mr Valberg’s affidavit said, that is how I understood it and there we are ...”

(12) in respect of the existence of the Norwegian Appeal Mr Matthews stated:

“... given everything that we disclosed, what conceivable reason might there have been for my holding back that one piece of information? ... but our whole point is that this was not a point of major significance. That is how we perceived it, that is how we still perceive it, because it comes back to the question that if you have an exclusive jurisdiction clause in favour of Cayman, and you have explained why you have not brought those proceedings in another jurisdiction, namely Norway, in which there are parallel proceedings, and you have explained the nature of those parallel proceedings it might be said that you have dealt with the gravamen of the situation.”;

(13) Mr Matthews added:

“... it was not deliberate. It had simply not been appreciated ... No decision was taken not to address the court on the Court of Appeal in Norway ... I was not on the ball of the question of whether there was an appeal ongoing and what the implications of that might be because in circumstances where there is no other appropriate forum, the most that that could amount to would raise questions on a case management stay application. What it would not do is give rise to doubt on this court’s part ... as to whether proceedings could be initiated here at all ... it was not perceived that the fact that the proceedings in Norway required further treatment in circumstances where Norway was not a possible, let alone an appropriate forum for the claim to be brought ... I can only stress it was not deliberate and reiterate our apology in relation to that”;

- (14) although recognising that it was not for the Overseas Defendants to do the Plaintiff's job for the Plaintiff, in the correspondence between the parties in respect of service of the originating claim, at no stage did the Overseas Defendants raise any issues as to the Cayman proceedings being vexatious or oppressive or otherwise objectionable;
- (15) the duty of full and frank disclosure does not require fanciful arguments to be brought to the attention of the court;
- (16) with the references to the proceedings in Norway being "ongoing" it could be reasonably inferred that there was an appeal in respect of the Oslo District Court Judgment; and
- (17) it would be wholly disproportionate and contrary to the interests of justice to set aside the December 2023 Service Out Order let alone without reinstatement.

Determination of the Set Aside Application

89. In arriving at my determination of the Set Aside Application I need to deal with the various specific issues arising, namely:

- (1) Was the court made aware of the existence and content of the Norwegian Appeal before or at the *ex parte* hearing in December 2023?
- (2) Was the existence and content of the Norwegian Appeal a relevant factor to take account of in the determination of the Service Out Application?
- (3) What is the explanation for the failure to refer to the Norwegian Appeal?
- (4) Can the failure properly be categorised as "innocent"?
- (5) Should the December 2023 Service Out Order be set aside?
- (6) Should a case management stay of the proceedings in the Cayman Islands be granted?

90. I deal with these issues as follows:

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(1) *Was the court made aware of the existence and content of the Norwegian Appeal before or at the ex parte hearing in December 2023?*

91. The court was not made aware of the existence and content of the Norwegian Appeal before or at the *ex parte* hearing in December 2023. In his oral submissions presented to the court on 1 May 2024 Mr Matthews stated “I fully appreciate that your Lordship was not told about” the Norwegian Appeal.
92. I have to say that the flavour of Plaintiff’s skeleton argument and oral submissions led me to the view at the December 2023 hearing that the proceedings in Norway had been completed. There was certainly no reference to any outstanding appeal. In fact, under the heading “The Norwegian Proceedings” at paragraph 36 of the Plaintiff’s undated skeleton argument the reference is in the past tense to “MYF has pursued claims against the Finance Parties in Norway” (my underlining) although I accept at paragraph 36 there is also reference to “the existence of those proceedings”. Then at paragraph 38 there is a reference to the “Finance Parties objected [again past tense] to the jurisdiction of the Norwegian courts on the basis that the Share Pledge Agreement contained an exclusive jurisdiction clause in favour of the Cayman Islands courts” (my underlining). The Plaintiff then adds that “the Borgarting Court of Appeal dismissed this objection”. At paragraph 39 (the last paragraph in the skeleton argument under the heading “The Norwegian Proceedings”) it is stated that “On 8 July 2023 the Oslo District Court handed down a judgment in which it dismissed all of MYF’s claims.” The skeleton argument and the oral submissions did not clearly bring to my attention that the proceedings in Norway were continuing and did not mention that an appeal had been filed and determination of such was awaited.
93. It can be seen from the transcript of the hearing on 6 December 2023 that I referred to a translated extract of a Norwegian judgment and raised the following question of Mr Matthews “And it’s right that you were unsuccessful in the proceedings in Norway?”. Implicit in that question is that fact that I was under the impression that the proceedings in Norway had been completed and the Plaintiff had been unsuccessful. Mr Matthews did not respond to the effect “Yes, we were unsuccessful before the Oslo District Court but we filed an appeal in September and there are many issues that need to be resolved by the Norwegian Court of Appeal on a *de novo* basis.” He responded by saying “We were unsuccessful in the proceedings in Norway on the tort claim under Norwegian law and the no claim under Cayman Islands law was considered or addressed because they very

properly took the view that disputes between the parties in relation to the Share Pledge Agreement under Cayman law was not a matter for the Norwegian courts.”

94. I do not wish to be overly defensive or unduly sensitive but I think this court can be forgiven for being under the impression at the 6 December 2023 hearing that the legal proceedings in Norway had been completed. In fairness Mr Matthews accepted that it was “our fault which clearly led your Lordship to believe that the proceedings had been terminated when they had not” and Mr Matthews added “I certainly do not seek to criticise your Lordship in any way for that.”

(2) *Was the existence and content of the Norwegian Appeal a relevant factor to take account of in the determination of the Service Out Application?*

95. In my judgment the existence and content of the Norwegian Appeal was a relevant factor to take account of in the determination of the Service Out Application. It was information that was relevant to a proper determination in respect of the Appropriate Forum and Discretion Factors.
96. Each case must be decided on its own facts and circumstances but I note that other judges in the contexts of the cases before them have made the following comments: (1) the duty extends to disclosure of related proceedings in another jurisdiction (Carr J, see paragraph 21 above); (2) it is a highly material matter to be considered by a judge when granting *Mareva* and *Anton Piller* orders on an *ex parte* application that there are proceedings either actually taking place or contemplated within another jurisdiction (Woolf LJ, see paragraph 26 above); (3) a failure to comply with the duty of disclosure in applications for permission to serve out is by its very nature serious because foreign legal entities are brought into the jurisdiction via an *ex parte* hearing without having had an opportunity to address the court (Sir Geoffrey Vos, see paragraph 31 above); and (4) the relevance of the foreign proceedings must have been obvious to any lawyer (Sir Geoffrey Vos, see paragraph 32 above).
97. I accept that there were extensive references to the proceedings before the Oslo District Court but there was no reference to the Norwegian Appeal.
98. If the court had been made aware that there was an outstanding appeal pending determination in Norway it would have considered such fact in determining the Appropriate Forum and Discretion

Factors and whether it was appropriate to bring the Overseas Defendants into the jurisdiction. It was not made so aware. Such information could reasonably have caused the court to have a doubt as to whether to grant the relief requested in the Service Out Application. It would not have resulted in a different decision but it was a relevant fact to take account of.

99. Even if, as Mr Matthews submitted, the exclusive jurisdiction clause meant that the Cayman Islands was the only appropriate forum, the fact that an appeal was pending in parallel proceedings in another jurisdiction was still relevant to the exercise of the court's discretion whether or not to grant leave to serve out of the jurisdiction. This was particularly so where the court had expressly raised the issue as to whether the Overseas Defendants were being vexed twice. I agree with Mr Bayfield that the fact that there is a jurisdiction clause in favour of the Cayman court in respect of the Equity of Redemption Claim was not determinative of the application for permission to serve out of the jurisdiction.

100. I caution myself in respect of the benefit of hindsight and the unfairness of an unrealistic counsel of perfection noting that it is perhaps easier after the event, once a detailed challenge is made, to identify the relevance of a particular fact (see the comments of Christopher Clarke J referred to above at paragraph 17). The existence of the Norwegian Appeal was however a matter of relevance that should, in a perfect world, have been disclosed. The considerable eloquence and ingenuity of Mr Matthews cannot hide its relevance to the determination of the Service Out Application.

(3) *What is the explanation for the failure to refer to the Norwegian Appeal?*

101. The explanation (not advanced in the evidence but referred to in the skeleton argument and oral submissions put forward on the Plaintiff's behalf) appears to be that the Plaintiff's Cayman legal representatives did not perceive the Norwegian Appeal to be a relevant fact.

(4) *Can the failure properly be categorised as "innocent"?*

102. The relevant authorities establish that a failure may be regarded as "innocent" if the fact in question was not known to the applicant or its relevance was not perceived. I think the failure in this case can properly be categorised as "innocent". In this case the fact of the Norwegian Appeal was known to the Plaintiff. It was the Plaintiff's appeal. It appears, however, that the relevance of the

Norwegian Appeal was not perceived. This is the explanation that Mr Matthews has put before the court and I accept it at face value.

103. The Plaintiff had made detailed references to the Norwegian proceedings culminating in the judgment in July 2023 of the Oslo District Court, but simply did not refer to the Norwegian Appeal. On the material placed before the court, I regard that omission as unfortunate and disappointing but inadvertent and “innocent” within the meaning of that word in this context. The Plaintiff’s Cayman legal team did not regard the Norwegian Appeal as a relevant fact. In this judgment I have disagreed with that assessment but such determination does not turn an otherwise “innocent” breach into a “deliberate” one.

(5) *Should the December 2023 Service Out Order be set aside?*

104. I appreciate that the case law suggests that the court needs to take a penal approach and even with “innocent” breaches the starting point is usually to set aside the *ex parte* order. It will not always be the finishing point. The discretion not set aside the *ex parte* order where there has been a material non-disclosure must, however, be exercised sparingly. Courts need to take into account the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure. The court however must, in these especially fact sensitive cases, carefully consider the overall interests of justice. The case law also suggests that “the judge-made rule cannot be allowed itself to become an instrument of injustice” (see Balcombe LJ above at paragraph 13). I am also conscious of the wise words of Slade LJ (see above at paragraph 13) and note that in the case presently before me, the only ground upon which the Overseas Defendants seek to attack the December 2023 Service Out Order is the non-disclosure ground. There are plainly serious issues to be tried, arising from a contract governed by the laws of the Cayman Islands with a Cayman jurisdiction clause, appropriate jurisdictional gateways were present, and the Cayman Islands is clearly the appropriate forum for the determination of the issues raised in the Originating Summons.
105. Furthermore, this case is at the opposite extreme of a case where an applicant for *ex parte* relief, alongside its legal representatives, makes a deliberate decision not to disclose to the court a highly relevant fact with the objective of obtaining an improper advantage by doing so and be granted the *ex parte* relief it seeks when if such fact had been disclosed the *ex parte* relief would have been refused. This is a case where it appears that the Plaintiff’s legal representatives did not seem to

perceive the relevance of a particular fact (the Norwegian Appeal) but not a fact of any real crucial significance in the particular circumstances. It appears that it was an innocent simple mistake of no real crucial significance in the context of this particular case.

106. In the particular circumstances of this case, I do not think it would be a just or proportionate exercise of this court's discretion to set aside the December 2023 Service Out Order. The Plaintiff does refer to "ongoing" proceedings in Norway and at paragraph 37 of its skeleton argument mentioned the legal principle in respect of "two proceedings in two different jurisdictions". In this area of the law there are degrees of relevance and it is important to have regard to the principle of proportionality and the overriding objective of dealing with cases justly. A due sense of proportion must be kept and sensible limits have to be drawn. The court was not deliberately misled and the existence of the Norwegian Appeal was not a crucial detail essential to an informed determination of the Service Out Application. Moreover, if the December 2023 Service Out Order is set aside the Plaintiff may not be able to properly advance its claim elsewhere. It could be shut out from access to justice. Its claim may be successful or it may fail, but the Plaintiff should have an opportunity of its claim being determined on the merits, if that is otherwise appropriate. It would be disproportionate and unjust to set aside the December 2023 Service Out Order and I do not do so.

(6) *Should a case management stay of the proceedings in the Cayman Islands be granted?*

107. I can deal with the case management stay application of the Overseas Defendants, described by Mr Bayfield as "very much our alternative remedy" and "very much our fallback remedy", very briefly.
108. I have considered the relevant law including *Athena Capital Fund v Holy See* [2022] EWCA Civ 1051; [2022] 1 WLR 4570 delivered on 26 July 2022 and my judgment *New Silk Route Advisors LP* (FSD unreported judgment delivered 10 February 2022). It is interesting to note that the case management stay in that case was subsequently lifted principally in view of the extended timeline for the determination of issues in legal proceedings in New York (see FSD unreported judgment delivered on 27 June 2023). In *New Silk Route* (10 February 2022) at paragraph 70, I stated that Lord Bingham's "rare and compelling circumstances" comments in *Reichhold* may need to be read in light of the more modern litigation culture in 2022. It is also interesting to note that the English Court of Appeal (Peter Jackson, Males, Birss LJ) in *Athena Capital* held that there was no separate test of "rare and compelling circumstances" in cases where there were parallel proceedings in

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another jurisdiction. The single test to be applied was whether in the particular circumstances of the case it was in the interests of justice for a stay to be granted and that is the test I apply in this case.

109. I have considered the written and oral submissions of the parties in respect of the application for a case management stay and have concluded that, in the particular circumstances of this case, it is not in the interests of justice for a case management stay to be granted.
110. We have no date as to when the legal issues in Norway will be heard, let alone determined. The Norwegian Court of Appeal has recently vacated the appeal hearing dates and fresh dates have not yet been set. I also note that the Share Pledge Agreement contains a Cayman Islands jurisdiction clause.
111. I do not accept that the outcome of the Norwegian Appeal will “obviate the need for these Cayman Islands proceedings altogether” or “resolve between the parties a central issue in these Cayman Islands proceedings, being the question of whether MYF continues to have an equity of redemption in the Subject Shares” (paragraph 11 of the affidavit of Mr Harborg sworn on 6 February 2024). Although there is some overlap of issues in both sets of proceedings, the outcome of the proceedings in Norway will not have a significant impact on the determination of the proceedings in the Cayman Islands.
112. The fact that the courts in Norway and/or the Cayman Islands may have to take care to avoid any double recovery in respect of any remedies they award does not lead me to conclude that a stay of the proceedings in the Cayman Islands should be granted. MYF accepts that there cannot be double recovery (see paragraph 16 of Mr Eggen’s second affidavit).
113. The outcome of the proceedings in Norway would not be determinative of the Cayman proceedings nor would it have an important effect on the proceedings in the Grand Court or significantly assist this court in determining the issues raised in the Originating Summons in a fair, expeditious, just, economical and cost-effective manner. A temporary case management stay in this case would not “better serve the interests of justice” and I do not grant one.

Ancillary applications

114. Any ancillary applications (such as costs) should be filed and served within 14 days of the delivery of this judgment together with concise (no more than 5 pages) submissions in support and any concise (no more than 5 pages) written submissions in opposition to be filed and served within 14 days thereafter. I intend to deal with any such applications on the papers without the need for a further hearing.

Order

115. Counsel should provide within 7 days from the date of the delivery of this judgment a draft order, agreed as to content and format, setting out the determinations contained in this judgment.

Postscript

116. In response to receipt of the draft of this judgment James Eldridge, on behalf of the Overseas Defendants, in an email dated 31 May 2024, took issue in respect of the contents of paragraph 39 of the judgment and submitted that the Overseas Defendants had made “a frontal attack directly challenging the satisfaction of [one] of the three limbs referred to by Lord Collins in *AK Investment*.”
117. Mr Eldridge misses the point the court was endeavouring to make at paragraph 39. The court is willing to provide some further clarification in order that the Overseas Defendants, and others, may properly be informed and advised as to the correct interpretation of paragraph 39.
118. The court acknowledges, of course, that using the ammunition of the non-disclosure of the Norwegian Appeal, the Overseas Defendants launched a minor skirmish against the Plaintiff’s flank and persuaded the court that the existence of the Norwegian Appeal was a material relevant factor on the basis that it could have caused the court to doubt whether the Grand Court was clearly the appropriate forum, stressing correctly on the authorities that, on the question of relevance, it was no answer that even if due disclosure had been given, the court may have overcome such doubts and made the same decision. It was in effect a “free-standing” challenge because it was not attached

to a submission challenging the satisfaction of any of the three limbs referred to by Lord Collins in *AK Investment*.

119. The Overseas Defendants did not launch a “frontal attack directly challenging the satisfaction of any of the three limbs referred to by Lord Collins in *AK Investment*.” In particular, the Overseas Defendants did not submit that the court should not have made the December 2023 Service Out Order as the third limb referred to by Lord Collins in *AK Investment* had not been satisfied.
120. Mr Eldridge in his email submitted that the statements in the judgment that (1) the Overseas Defendants’ challenge was “free-standing” and (2) that the Overseas Defendants did not directly challenge the satisfaction of any of the three limbs in *AK Investment* were not factually correct. For the reasons stated in this judgment the court disagrees.
121. The court does not wish this postscript to be taken as an encouragement to attorneys to seek to respond to the receipt of a draft judgment by attempting to re-argue a lost case or otherwise abusing the procedure. The main purpose of providing a draft judgment in advance of its finalisation and delivery is as stated in the email to the attorneys on 27 May 2024, reflecting the contents of the Grand Court Practice Direction No 1/2004, namely to enable the attorneys to provide suggestions as to the correction of any typing errors, wrong references of fact or citation of authority or other minor corrections of that kind.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT