ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

UNION PROPERTIES P.J.S.C
First Claimant/ Applicant

UPP CAPITAL INVESTMENT CO. L.L.C.
Second Claimant/ Applicant

and

TRINKLER & PARTNERS LTD
First Defendant/ Respondent

THOMAS PIERRE TRINKLER
Second Defendant/ Respondent

PATRICK ALBERT HELD
Third Defendant/ Respondent

FIRST FUND MANAGEMENT LIMITED
Fourth Defendant/ Respondent

JORG KLAR
Fifth Defendant/ Respondent

PARESH CHANDRASEN KHIARA
Sixth Defendant/ Respondent

AMNA HASAN ALI SALEH ALHAMMADI
Seventh Defendant/ Respondent

DAHI YOUSEF AHMED ABDULLA ALMANSOORI
Eighth Defendant/ Respondent

NASER BUTTI OMAIR YOUSEF ALMHEIRI
Ninth Defendant

KHALIFA HASAN ALI SALEH ALHAMMADI
Tenth Defendant/ Respondent

STEFAN DUBACH
Eleventh Defendant/ Respondent

AHMED YOUSEF ABDULLA HUSSAIN KHOURI
Twelfth Defendant/ Respondent

HASSAN ASHOOR AL MULLA
Thirteenth Defendant/ Respondent

BLUE ROCK INVESTMENTS L.L.C
Fourteenth Respondent

DANA MIDDLE EAST INVESTMENT L.L.C
Fifteenth Respondent

MOHAMED HASAN ALI SALEH ALHAMMADI
Sixteenth Respondent

~~**ISLAND FALCON PROPERTY MANAGEMENT L.L.C**~~
~~Seventeenth Respondent~~

ISLAND FALCON INVESTMENTS L.L.C
Eighteenth Respondent

TEXTURE GLOBAL INVESTMENT LIMITED
Nineteenth Respondent

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2023] ADGMCFI 0009
Before:	Justice Sir Andrew Smith
Decision Date:	24 April 2023
Decision:	1. Extension of Time Application granted. 2. Jurisdiction Application refused. 3. Discharge Application in respect of the Freezing Order refused, subject to leave being granted to the Twelfth Defendant to restore his application that the cross-undertaking in damages should be fortified. 4. Discharge Application granted in respect of the Proprietary Order. 5. No order on the Service Application. 6. Further Information Application refused. 7. Any application concerning the costs of these applications or other consequential matters is to be made by 5.00 pm on 15 May 2023.
Hearing Dates:	29 March 2023 and 30 March 2023
Date of Order:	24 April 2023
Catchwords:	Failure to serve notice under CPR r.25. ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations, 2015, article 5(1): "*relating to any criminal offence*". Jurisdiction under article 13(8) of Founding Law. Jurisdiction under article 13(7)(a) of Founding Law. Jurisdiction under article 13(7)(b) of Founding Law. Jurisdiction under CPR r.24(2). The doctrine of *forum non conveniens*, and its application to a choice between UAE jurisdictions. Freezing order: dissipation of assets. Full and frank disclosure on application for *ex parte* order. Further information about disclosed assets.
Legislation cited:	Misrepresentation Act 1967 (UK) Application of English Law Regulations 2015 ADGM Financial Services and Markets Regulations 2015 UAE Civil Code ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations, 2015 Abu Dhabi Law No. (4) of 2013 (as amended by Abu Dhabi Law No. (12) of 2020)
Cases Cited:	Three Rivers DC v Bank of England, [2001] UKHL 16 Qatar Airways Group QCSC v Middle East News FZ LLC, [2020] EWHC 2975 Abu Dhabi Commercial Bank v Shetty, [2022] EWHC 529 (Comm) Lungowe v Vedanta Resources Plc, [2019] UKSC 20 Spiliada Maritime Corp v Cansulex, [1979] AC 460 JSC BTA Bank v Granton Trade Limited, [2010] EWHC 2577 (Comm) Investment Group Private Ltd v Standard Chartered Bank, [2015] DIFC CA 004 Fleming v Dubai Islamic Bank PJSC, [2021] ADGMCFI 006 Noor Capital PSC v NMC Healthcare Ltd, Claim 1 of 2023 (UAE Federal Supreme Court)

	Lakatamia Shipping Co Ltd v Moritomo, [2019] EWCA Civ 2033 Thane Investments Ltd v Tomlinson (No 1), [2003] EWCA Civ 1272 Ninemia Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen), [1983] 2 Lloyd's Rep 600 Abu Dhabi Commercial Bank v Manghat, [2022] ADGMCFI 0007 Bouvier v Accent Delight International Ltd, [2015] SGCA 45 Madoff Securities International Ltd v Raven, [2011] EWHA 3102 Brink's Mat Ltd v Elcombe, [1998] 1WLR 1350 Republic of Angola v Perfectbit Ltd, [2018] 3 WLUK 76 The Public Institute for Social Security v Fahad Maziad Rajaan Al Rajaan, [2020] EWHC 1498 (Comm) Broad Idea International Ltd v Convoy Collateral Ltd, [2021] UKPC 21 Bekhor v Bilton, [1981] 923
Case Number:	ADGMCFI-2022-265
Parties and representation:	Mr Patrick Dillon-Malone SC and Mr Nils de Wolff instructed by Clyde & Co LLP for the Claimants Mr Jeremy Richmond KC and Mr Benjamin Joseph instructed by Fichte & Co Legal Consultancy LLC for the Twelfth Defendant

JUDGMENT

Introduction

1. These proceedings were brought by the Claimants, Union Properties LLC ("**UP**") and UPP Capital Investment Co LLC ("**UC**"), on 14 November 2022 against thirteen defendants. The claim form describes their complaint as follows:

> "*In outline, the Claimants allege that a fraud was perpetrated against them resulting in the unlawful and unauthorised use of AED 320,712,867.84 to purchase 391,789,341 units of P-Notes (or Participation Notes), the great majority of the proceeds of which were misappropriated. The Claimants' case is that the Tenth Defendant, Khalifa Alhammadi, is the controlling mind of this fraud, and that he has operated with the assistance of and/or through persons and entities controlled by them or acting at their direction, in particular the other Defendants*".

2. On 15 November 2022, the Claimants applied for freezing orders and proprietary injunctions against all the defendants and six other respondents. The applications were supported by two affidavits of Mr Amer Khansaheb, the Managing Director of UP. After an *ex parte* hearing on 22 and 25 November 2022, on 25 November 2022, I made freezing and proprietary injunctions against nine of the defendants and the six other respondents, but refused relief against the other four defendants. The proprietary injunction prohibited dealings with most of the 891,789,341 P-Notes (all other than 25,840,000 P-Notes that, as I shall explain, had been transferred to SICO Financial Brokerage LLC ("**SICO**")), and the "*traceable proceeds*" of them. I ordered each of those against whom freezing and proprietary injunctions were made to provide information about assets within seven working days after service of the order, to be verified by affidavit fourteen days after service. The Claimants gave the usual cross-undertaking in damages that, "*If the Court later finds that this order has caused loss to any of the Respondents, and decides that the particular Respondent should be compensated for that loss, the Applicants will comply with any order the Court may make*".

3. One of the defendants against whom I made orders was Mr Ahmed Khouri, the Twelfth Defendant. The time for his disclosure of assets was extended with the Claimants' consent, and he has filed and served a list of his assets (the "**Assets List**") dated 6 February 2023 and an affidavit of the same date confirming it.

The Applications

4. By an application dated 6 February 2023 (the "**Jurisdiction Application**"), Mr Khouri challenged the jurisdiction of the Court to entertain the claims against him, and also contended that the proceedings had not been validly served upon him. By an application dated 3 March 2023 (the "**Discharge Application**"), Mr Khouri applied for an order that the freezing and proprietary injunctions against him be discharged. Mr Khouri also brought an application dated 21 March 2023 (the "**Extension of Time Application**") for permission to rely in support of the Jurisdiction and Discharge Applications on a witness statement dated 21 March 2023 of Mr Alessandro Tricoli, a Partner in Fichte & Co Legal Consultancy, LLC ("**Fichte**"), his legal representatives, which had been filed and served after the deadline that I had directed on 7 February 2023.

5. For their part, the Claimants have made two applications: by an application dated 10 March 2023 (the "**Further Information Application**"), they applied for order that Mr Khouri provide further information about his assets. By an application dated 23 March 2023 (the "**Service Application**"), the Claimants applied for a declaration that Mr Khouri had been effectively served with the proceedings, and in the alternative for "*retrospective permission … to have served the Claim Form on [Mr Khouri] without the Notice required by CPR Rule 25(2)(a)*": that provision of the Court Procedure Rules 2016 ("**CPR**") requires that, when a claimant intends to serve a claim form out of the jurisdiction, he must file and serve with the form "*a notice containing a statement of the grounds on which the claimant is entitled to serve [it] out of the jurisdiction and serve a copy of that notice with the claim form*".

6. The five applications came before me for hearing on 29 and 30 March 2023. At the hearing, Mr Khouri was represented by Mr Jeremy Richmond KC and Mr Benjamin Joseph. The Claimants were represented by Mr Patrick Dillon-Malone SC and Mr Nils de Wolff of Clyde & Co LLP ("**Clydes**"). The Extension of Time Application was not resisted by the Claimants at the hearing, and I grant it. At the end of the hearing, I permitted the parties to make further written submissions on one discrete point, and they did so.

The Claimants' Case

7. I first summarise the Claimants' case, essentially as it is pleaded in their Particulars of Claim.

(a) The Parties

8. UP is a real estate company registered in Dubai, and is listed on the Dubai Financial Market. It is the beneficial owner of UC, another Dubai company, which was established in 2002 to undertake and hold UP's investments in equities.

9. Mr Khouri, a citizen and resident of the United Arab Emirates ("**UAE**"), was the Chief Executive Officer of UP between July 2017 and July 2018, and its Managing Director from July 2017 to December 2019. He was a director of UC between June 2017 and November 2021, and was a member of its Investment Committee.

10. The other defendants include Mr Khalifa Alhammadi, the Tenth Defendant, who was the Chief Executive Officer of UP between December 2019 and March 2020, its Vice Chairman from March to June 2020 and its Chairman between June 2020 and November 2021. Between June 2020 and November 2021, he was also a director of UC and a member of its Investment Committee. His sister, Ms Amna Alhammadi, is the Seventh Defendant. Their brother, Mr Mohamed Alhammadi, is not a defendant, but was a respondent to the application for freezing and proprietary injunctions. So too were companies apparently associated with one or more of the siblings: Blue Rock Investments LLC,

registered in Abu Dhabi; Dana Middle East Investment LLC, also registered in Abu Dhabi; and Island Falcon Investments LLC, registered in Dubai. Another respondent to the applications who was not made a defendant is Texture Global Investment Limited, registered in the Jebel Ali Free Zone. (At the time of the *ex parte* application, it was said that another respondent company, Island Falcon Property Management LLC, also acted under the directions of Mr Khalifa Alhammadi, but that allegation is not pursued and, with the Claimants' agreement, the injunctions against it were discharged by order of 24 January 2023: it no longer has any part in these proceedings). Mr Khalifa Alhammadi, Ms Amna Alhammadi and Mr Mohamed Alhammadi are all under detention in the UAE, apparently in connection with the allegations of financial improprieties relating to the Claimants.

11. According to the Claimants, a company called First Fund Management Limited ("**FFM**"), the Fourth Defendants, was "*central*" to the fraud against them. FFM was incorporated in the Abu Dhabi Global Market ("**ADGM**") on 16 March 2018 under the name of Bluestone Fund Managers Limited, and changed its name on 10 June 2018. Between 26 April 2018 and 20 October 2020, it was regulated by the Financial Services Regulatory Authority. In September 2021, it was voluntarily struck off the Company Register, but by order of Justice William Stone dated 24 October 2022 made upon the application of UC, it was restored for the purpose of making it a defendant to these proceedings. Mr Khalifa Alhammadi was a director until 22 May 2018, and the Claimants include as defendants other persons who were FFM's directors: Mr Thomas Trinkler, the Second Defendant, who is the founder and Chief Executive Officer of Trinkler & Partners Limited ("**TAP**"), the First Defendant, a Swiss asset management company; Mr Jorg Klar, the Fifth Defendant, who was a director of UP between June 2020 and November 2021; Mr Paresh Kharia, the Sixth Defendant, who was the Chief Financial Officer of UP between June 2020 and November 2021; Mr Dahi Almansoori, the Eighth Defendant, who was a director of UP between June 2020 and November 2021; Mr Naser Almheiri, the Ninth Defendant, who was a director of UP between April 2017 and September 2019 and Chairman of UC between June 2017 and November 2021; and Mr Stefan Dubach, the Eleventh Defendant. Mr Trinkler, Mr Klar and Mr Dubach are Swiss nationals and apparently reside in Switzerland (although there is some suggestion that Mr Klar might reside in Germany). Mr Kharia, an Indian, and Mr Almheiri, a UAE national, apparently reside in the UAE.

12. The other defendants are Mr Patrick Held, the Third Defendant, a Swiss national and apparently a Swiss resident, one of TAP's directors until July 2021; and Mr Hassan Al Mulla, the Thirteenth Defendant, a UAE National. Mr Al Mulla is a lawyer at Hassan Al Mulla Advocates & Legal Consultants, who formerly acted for UP, UC and FFM. He is in detention in the UAE, in relation, it seems, to complaints of UP and UC.

13. At the *ex parte* hearing on 25 November 2022, I refused the Claimants' applications for relief against TAP, Mr Trinkler, Mr Held and Mr Dubach. As I have said, I granted freezing and proprietary injunctions against all the other Defendants and against all the Respondents who were not themselves defendants.

(b) The Alleged Scheme

14. The Claimants allege that they were the victims of a scheme to misappropriate their property. Mr Richmond helpfully described the scheme, as alleged by the Claimants, as falling into five stages:

    (i) Between 29 January and 17 April 2018, the Claimants transferred AED 300 million and US$ 10 million to an account with Julius Baer & Co Limited ("**Julius Baer**" and the "**Julius Baer Account**"), which UC had opened on 10 July 2017. The original purpose of the Julius Baer Account was to invest in a project in Egypt called the Palm Hills Development project. However, the project was delayed, and most of the funds, AED 286,592,960.89, were invested in the interim in an Abu Dhabi UAE Focus Fund (the "**Focus Fund**") of Julius Baer.

    (ii) The Palm Hills Development project was further delayed. On 19 June 2018, UC's Investment Committee decided to postpone the intended investment in it, and to divert the monies in the Focus Fund to other projects. By a letter dated 23 June 2018, Julius Baer was so instructed. Between 24 June 2018 and 25 July 2018, Julius Baer was instructed to use the monies realised

from the Focus Fund and other money that it held to buy for AED 320,717,867.84 a total of 391,789,341 units of Participation Notes, or P-Notes, issued by Arqaam Capital Limited ("**Arqaam**"), an investment bank with headquarters in Dubai.

(iii) On 1 June 2018, UC had entered into a Mandate Agreement with TAP, which contemplated that UC would set up a Special Investment Fund with TAP for "*dedicated investments in real estate, private equity and other financial activities*". On 1 July 2018, UC entered into an Investment Management Agreement ("**IMA**"), under which UP was to provide investment management services in consideration of management and performance fees. It contemplated that TAP would set up a fund and "*direct the investment and reinvestment of those assets in [the account] … in securities or cash or cash equivalents*". Between 29 August 2018 and 24 September 2018, as it appears, Mr Khouri and Mr Khalifa Alhammadi signed instructions to Julius Baer to transfer the P-Notes to TAP. By a Service Level Agreement (the "**SLA**") of 4 September 2018 between TAP and FFM, it was agreed that FFM would identify and set up a specialised investment fund for TAP's clients, and provide services as an investment manager, executing transactions and managing assets.

(iv) However, Julius Baer did not transfer the P-Notes to TAP. Between 10 September 2018 and 5 October 2018, 390,389,341 units of P-Notes were transferred to Arqaam. 364,549,341 units were converted into shares in UP and transferred into accounts held by Mr Al Mulla. The other 25,840,000 units, comprising shares in Al Salam Bank, Bahrain, were delivered on about 4 September 2018 to SICO, an Abu Dhabi company, and they were later sold, the proceeds being paid to UC: no claim is brought in respect of these units or their proceeds.

The Claimants' case is that Blue Rock Investments LLC, Dana Middle East Investments LLC, Island Falcon Investment LLC and Texture Global Investment LLC acquired properties of UP at an undervalue, and apparently used assets misappropriated from the Claimants to do so.

(v) The true position was disguised: as the Claimants plead, "*TAP and/or FFM provided [UC] with regular security balance reports and cash flow statements, which purported to show a picture of active trading in UAE, Saudi and Egyptian stocks*", and "*the reports were either compiled by TAP based on reports retrieved online from two websites …. and sent to FFM for review, or generated by FFM …*". Specifically, according to the Claimants' evidence in support of the ex parte applications, on 20 September 2018 and 2 October 2018, FFM confirmed the receipt of 264,549,431 P Notes with a purported value of AED 286,230,331.37; TAP provided to UC's Investment Committee a confirmation dated 30 September 2018 that, by its custodian, it held 180 million P-Notes for the beneficial ownership of UC, and a confirmation dated 11 January 2019 that, as at 13 October 2018 , it so held 364,549,341 units; and by a confirmation addressed to UC's Investment Committee dated 3 April 2019, TAP reported the sale on 18 February 2019 of 364,549,341 units of P-Notes for AED 286,230,331.37.

(c) The Claimants' Investigation

15. In October 2021, UP was alerted to a criminal investigation by the Federal authorities into the activities of Mr Khalifa Alhammadi. He was detained, and he and others were dismissed by the Claimants. On 15 December 2021, a new board of directors of UP, including Mr Khansaheb, was appointed. In December 2021, UP commissioned an investigation by Ardent Advisory and Accounting LLC ("**Ardent**") into the activities of UC, and received a report, the so-called Ardent Report, about the alleged misappropriations. It recommended, inter alia, that Julius Baer, TAP, Arqaam and SICO be asked for information about "*their relationship with UP*" and that legal action be brought "*where appropriate*". It also recommended proceedings against Mr Khalifa Alhammadi and Mr Khiara, and against former directors of FFM, namely, Ms Amna Alhammadi, Mr Klar, and Mr Trinkler, as well as Mr Khalifa Alhammadi and Mr Khiara. It did not suggest any action against Mr Khouri, or make any allegations or voice any suspicions about him.

Is there a real issue to be tried against Mr Khouri?

16. I shall first consider whether there is a real issue to be tried on the claims against Mr Khouri on the case as pleaded by the Claimants: Mr Richmond described this as the critical issue for decision. I

emphasise that I am here concerned only with the case as presented by the Claimants, and whether it gives rise to a real issue or a good arguable case against Mr Khouri. I do not take even a provisional view about whether their case would succeed after a trial, and am not in a position to do so.

17. Mr Richmond did not dispute that the Claimants have sufficiently shown that they were the victim of a fraudulent scheme that caused them very substantial losses. His submission was that they have not shown a sufficient basis for their contention that Mr Khouri was party to it and liable in respect of it. He argued that:

    (i) the only claim pleaded against Mr Khouri is in unlawful conspiracy;

    (ii) the matters alleged and pleaded with regard to Mr Khouri do not, on proper examination, support a case that he was party to the alleged conspiracy; and

    (iii) in any event, the law governing the claim is not the law of ADGM, but of the UAE, which does not recognise a tort of conspiracy.

(a) Breach of Fiduciary Duty and Dishonest Assistance

18. It is not in dispute that the Claimants' pleading includes a claim in unlawful conspiracy against Mr Khouri. Mr Dillon-Malone submitted that the Particulars of Claim also plead causes of action against him for breach of his fiduciary duties as a director of UC and for dishonestly assisting others in breach of their duties. (It had appeared from the Claimants' evidence on Mr Khouri's applications that they accepted that no claim of dishonest assistance had been advanced: in a witness statement of Mr de Wolff of 10 March 2023, it was said that, "*To the extent that it was said by Mr Khansaheb and repeated by Counsel [at the ex parte hearing] that a secondary case of dishonest assistance was alleged against Mr Khouri, as opposed to a primary case for breach of fiduciary duty, it is accepted that this was incorrect*". Nevertheless, at the hearing on 29 March 2023, Mr Dillon Malone asserted that the claim is pleaded.)

19. As for the claim of breach of duty, Mr Dillon-Malone relied on paragraphs 55 and 56 of the Particulars of Claim. In paragraph 55 it is pleaded that Mr Khouri (and others) owed fiduciary duties to the Claimants. In paragraph 56, it is pleaded that he was (and others were) in breach of their duties. It is then pleaded at paragraph 57 that "*The First to Tenth Defendants (and each of them) assisted in such breaches of fiduciary duty, and each Defendant was dishonest in relation to the assistance of such breaches of fiduciary duty as may be established against the others*".

20. Mr Richmond submitted that the pleading in paragraphs 55 and 56, in its context, is not to be understood as making a separate claim of breach of fiduciary duties against Mr Khouri, but the paragraphs only set out an ingredient in the claims of dishonest assistance that is brought against other defendants. He points out that these paragraphs are in a section of the pleading that is headed "*Dishonest assistance and/or knowing receipt*".

21. I have sympathy with Mr Richmond's complaint that the claim of breach of fiduciary duty is not pleaded as clearly as it should be. Indeed, to my mind, here and elsewhere the Particulars of Claim are confused and confusing, as will be apparent from my consideration of paragraph 85 below. However, I cannot accept Mr Richmond's argument about this. If he were right that the claim is not pleaded against Mr Khouri, then by parity of reasoning, no claim of breach of fiduciary duties is pleaded against the other defendants. That would be surprising in a case where the whole thrust of the Claimants' complaint is that the various defendants acted together in breach of their duties.

22. More importantly, it is clear from paragraph 85 of the Particulars of Claim that a claim is made for breach of fiduciary duties. It is headed "Loss and Damage and Other Remedies", and reads as follows:

> "*By reason of the aforementioned deceit and/or fraudulent misrepresentation and/or unlawful conspiracy and/or dishonest assistance and/or breaches of Section 242 FSMR*

[sc the Financial Services Market Regulations] and/or breaches of fiduciary duty and/or breaches of contract and/or negligent misstatement and/or negligence, the Claimants have suffered loss and damage. They accordingly claim:

a. as against the First Defendant, damages for breach of contract;

b. as against the First Defendant, compensation and/or an order to account for breach of fiduciary duty;

c. as against the First and Fourth Defendants, damages for negligent misstatement;

d. as against the First to Twelfth Defendants, damages in the tort of deceit and/or pursuant to Section 2(1) of the Misrepresentation Act 1967;

e. as against the Second and Fourth to Twelfth Defendants, compensation pursuant to Section 242 FSMR; and

f. punitive damages at common law".

23. The first sentence of paragraph 85 makes clear that the Claimants claim for breach of fiduciary duties. That claim can only be based on the allegations pleaded in paragraphs 55 and 56, against, among others, Mr Khouri. I so understand the pleading although the Claimants do not make reference in the second sentence of paragraph 85 a claim for damages against Mr Khouri for damages for breach of duty or dishonest assistance. However, they do not there refer to a claim in conspiracy either. I do not interpret the second sentence as listing all the claims made by the Claimants. The word "*accordingly*" is misleading,

24. Before I leave paragraph 85 of the Particulars of Claim, I note that, despite sub-paragraphs d and e, the pleading does not include claims against Mr Khouri in deceit, under the *English Misrepresentation Act 1967*, incorporated into ADGM law by the *Application of English Law Regulations 2015* (the "**ELR**"), or under the *ADGM Financial Services and Markets Regulations 2015* ("**FSMR**"), although no doubt the Claimants' case is that the alleged conspiracy involved them being deceived and misrepresentations being made. A case in "*deceit and/or fraudulent misrepresentation*" is pleaded against TAP, FFM and their directors: that is to say, against all the defendants other than Mr Khouri and Mr Al Mulla. There is a plea that FFM and the "*FFM Directors*" acted in breach of the FSMR and are liable under them, but Mr Khouri never was a director of FFM, and is not within the definition of the term "*FFM Directors*" in the pleading. These causes of action are not asserted against Mr Khouri, and Mr Dillon-Malone did not submit otherwise.

25. I do not consider that a claim for dishonest assistance is pleaded against Mr Khouri: paragraph 57 of the pleading, which I have set out above, specifically pleads the cause of action against only the First to Tenth Defendants: the pleading goes on to set out the basis of the allegation of dishonesty in this context against TAP and the TAP Directors, and paragraph 59 does so against FFM and the FFM Directors. Paragraphs 60 and 61 plead a case against Mr Al Mulla. Paragraphs 62 and 63 similarly refer to claims of dishonest assistance against the First to Tenth Defendants and Mr Al Mulla. No reference is made to Mr Khouri, nor indeed to Mr Dubach.

(b) The Case in Conspiracy

26. Do the matters pleaded with regard to Mr Khouri support a case that he was party to the alleged conspiracy? Mr Khouri argued that it is inadequately pleaded, and that the Claimants should have pleaded distinctly the elements of an unlawful conspiracy, including:

(i) a combination, arrangement of understanding between two or more people, including the defendant;

(ii) an intention on the part of the defendant to injure the Claimants;

(iii) the use of unlawful means as part of the concerted action; and

(iv) loss to the target of the concerted action.

27. Mr Khouri's criticisms of the pleading are that it is insufficiently specific as to what combination was formed, how it was formed or when it was formed; that it is not said what Mr Khouri did in furtherance of the conspiracy; and that the basis for the alleged intention to injure the Claimants is not particularised. I reject these criticisms: claimants in a case such as this will seldom know in detail when or how alleged a conspiracy was hatched, and these Claimants plead expressly that the combination is to be inferred. I consider it clear that they also contend that an intention to do them injury is likewise to be inferred. I refer below to what that they allege Mr Khouri did in furtherance of the alleged conspiracy.

28. Mr Khouri further submits that the allegation that he was dishonest is inadequately pleaded. Here, I was referred to the speech of Lord Millett in *Three Rivers DC v Bank of England, [2001] UKHL 16*, who said (at paragraph 186) that "*an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient*". He continued, "*since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference*".

29. It is pleaded, and not disputed, that Mr Khouri, together with Mr Khalifa Alhammadi, instructed Julius Baer to buy the P-Notes; that he was party to making the Mandate Agreement and the IMA with TAP; and that he and Mr Khalifa Alhammadi instructed Julius Baer to transfer the P-Notes to TAP. Mr Khouri contends (as it is put in Mr Tricoli's witness statement of 17 March 2023) that he did so "*in reliance on the advice and explanations of his colleagues including Mr Alhammadi as to their content and effect*". Mr Richmond submitted that this conduct is consistent with Mr Khouri acting within his powers as a director of UC and honestly.

30. However, the Claimants also plead that:

(i) "*It is the Claimants' belief that the shares in Union Properties were transferred to, and held by, Mr Al Mulla, under the instructions of Khalifa Alhammadi and/or Mr Khouri*"; and

(ii) Mr Khouri knew that the investments underlying the P-Notes were not diversified, but comprised almost entirely shares in UP. This allegation is made in the context of the dishonest assistance claims and in support of the contention that FFM and its directors were dishonest, but the fact remains that it is part of the Claimants' pleaded case.

31. In my judgment, a case of conspiracy is sufficiently pleaded against Mr Khouri. I also reject his submission that the material now before me does not make out a good arguable case and does not raise a real issue against him. Mr Richmond pointed out that there is no documentary evidence that Mr Khouri had any involvement in the transfer of the P-Notes to Arqaam, or the underlying shares coming into the control of Mr Al Mulla; nor in the misleading reports from TAP and FFM. That is so: one instruction to Julius Baer to sell the P-Notes, apparently for delivery to Arqaam, dated 10 September 2018 was signed by Mr Khalifa Alhammadi and Mr Naser Almheiri, and instructions to sell the other P-Notes have not been found by the Claimants. Nevertheless, the Claimants submitted that "*it is at least arguable ... the missing instructions were in fact signed by or specifically approved by Mr Khouri*", in view of the extent of his involvement in dealings with Julius Baer: the fact that he was appointed UC's attorney for dealings with Julius Baer under a power of attorney signed by UC on 25 July 2018; and because it appears from an email dated 18 September 2018 that Julius Baer usually acted on instructions from UC bearing two signatures.

32. Taken by themselves, I do not find these points entirely persuasive. However, the Claimants have a stronger point: Mr Khouri signed instructions to buy the P-Notes and the purported instructions to transfer them to TAP. It is distinctly arguable that, as a member of UC's Investment Committee, he must have known that the investments underlying the Notes were UP's shares: indeed, he signed instructions to Julius Baer dated 28 June 2018 to buy "*as P-Notes with Arqaam Capital*" inter alia shares in UP. The Claimants submit that P-Notes "*are designed and intended to allow investments*

in underlying securities to remain anonymous whilst keeping the securities private from others". Certainly, I see no good reason that UC should invest in UP shares in this way.

33. There is a further point: Mr Khouri received in copy an email from Mr Khalifa Alhammadi dated 31 October 2018 to UP's Finance Director, Mr Abrar Alif. Mr Asif had asked, for auditing purposes, for information about the divestment of the Focus Fund and for some details of the investment as at 30 September 2018 in P-Notes. In reply, Mr Alhammadi said that the UC Investment Committee had decided "*to redeem the entire investment in the Focus Fund and to utilize the redemption proceeds towards investment in Diversified Notes*", and to discontinue the relationship with Julius Baer, and that it had appointed another investment manager. He said that the "*diversified Notes worth USD 47 Million were transferred from Julius Baer to the Investment Manager*", but said nothing about the underlying investment in UP shares. On the face of it, this response is incomplete and evasive, and the term "*Diversified Notes*" misleading, given the preponderance in the underlying investment of the UP shares. There is no evidence that Mr Khouri corrected the incomplete and misleading response to Mr Alif, and the Claimants are entitled to submit that this suggests that he was party to a scheme to mislead UP about their funds.

34. Having regard to all the material before me, I have concluded that the Claimants have shown real issues to be tried both that Mr Khouri as party to a conspiracy of the kind that they allege, and that he acted in breach of his fiduciary duties. In coming to this view, I do not overlook that the Ardent Report recommended legal proceedings be brought against some of the defendants but not Mr Khouri, but that is not, to my mind, a telling point: I must make my own assessment of the material before me, rather than adopt the views expressed by others at an early stage of the investigations. Nor do I overlook that Mr Khouri relies on the absence of documentary evidence directly showing his involvement in a conspiracy: that is not surprising in cases of this kind, which commonly depend upon inference rather than direct evidence.

(c) The Law Governing the Conspiracy Claim

35. The third stage of Mr Richmond's argument is that the conspiracy claim against Mr Khouri is fatally flawed because the putative cause of action is not governed by the law of the ADGM, but by the law of the UAE, which does not recognise such a tort. The Claimants argue that the law of ADGM applies. If I am right that a claim in breach of fiduciary duty is brought against him, relatively little turns on this question, and I can consider it relatively briefly.

36. By the ELR, the *English Private International Law (Miscellaneous Provisions) Act 1995* is incorporated, with immaterial modifications, into the law of the ADGM. Sections 11 and 12 provide for how the law governing torts is to be identified, including in cases where (as here) elements of the events constituting the tort in question occur in different countries. The general rule in cases such as this is the tort is governed by the law of "*the country in which the most significant element of the tort occurred*" (section 11(2)(c)), subject to the general rule being displaced under the provisions of section 12.

37. Mr Khouri's contention is certainly arguable, and I shall assume, without deciding, that it is correct. Mr Richmond submitted that, if this is so, then the tortious claim against Mr Khouri fails both (i) because no claim in UAE law is pleaded and (ii) because the facts on which the Claimants rely would not give rise to an arguable claim in UAE law. I reject both arguments.

38. As for the pleading argument, I need only refer to the judgment in the English Court of Saini J in *Qatar Airways Group QCSC v Middle East News FZ LLC, [2020] EWHC 2975*, who had to consider a similar question. He said (at paragraph 171):

> "*Ultimately, I consider the answer to this objection on the part of the Defendants to be straightforward. In short, in my judgment [the Claimant] is entitled to rely upon the evidential presumption that foreign law is the same as English law such that unless and until it is shown that foreign law applies to part of the claim, and is materially different, the concepts of English law will be sufficient to show that that part of the claim is civilly actionable under any*

applicable foreign laws. It follows that the question of a real prospect of success can be assessed by reference to English law concepts".

39. Although it is not disputed that UAE law does not have a tort of conspiracy as such, there is no material before me that satisfies me that it does not have a corresponding cause of action that imposes materially similar civil liability.

40. Though not disputing that UAE law does not recognise conspiracy as a cause of action, the Claimants contend that, on the facts that would give rise to Mr Khouri's liability in conspiracy under ADGM law, they have a claim against him under article 282 of the UAE Civil Code, which provides that: "*Any harm done to another shall render the actor, even though not a person of discretion, liable to make good the harm*"**.** The Claimants' contention about article 282 is disputed, but I am not in a position to decide whether or not it is correct. I am satisfied that the Claimants have shown that there is a serious issue to be tried on this point. I note that a similar question came before HHJ Pelling QC in the English Commercial Court in *Abu Dhabi Commercial Bank v Shetty, [2022] EWHC 529 (Comm)*, and he reached a similar conclusion (at paragraph 114).

41. I therefore conclude that the tortious claim that the Claimants have brought against Mr Khouri gives rise to a real issue to be tried, and that they have a good arguable case against him both in tort and for breach of fiduciary duty.

The Jurisdiction Application

(a) The Issues

42. Against this background, I come to the Jurisdiction Application. Mr Khouri contended that (i) this Court does not have jurisdiction over the claims against him, (ii) if it has jurisdiction, it should not exercise it. In his written submissions, Mr Richmond contended that the burden is on the Claimants to prove that (i) there is a real issue to be tried between them and Mr Khouri and that it is reasonable for this Court to try and in respect of which this Court has subject matter jurisdiction; (ii) there is a good arguable case that the alleged basis for jurisdiction over the claims against him applied; and (iii) the ADGM was clearly and distinctly the appropriate forum for the trial of the claims, and in all the circumstances the Court ought to exercise its discretion over the claims. This analysis was drawn from English law, under which a claimant may make an *ex parte* application for the Court to exercise its discretion to permit service proceedings on a defendant outside the jurisdiction: he is required to show at the time of the ex parte application that these three requirements are met.

43. The position in this Court is quite different: here the regime for service out of the jurisdiction is not discretionary, and a claimant does not need the Court's permission to serve a claim form outside the jurisdiction. Under Rule 24 of the CPR, a claimant is entitled to do so where each claim is one which the Court has power to determine under the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations, 2015* (the "**Regulations**"), under any ADGM enactment other than the Regulations or under *Abu Dhabi Law No. (4) of 2013* (as amended by *Abu Dhabi Law No.(12) of 2020*) (the "**Founding Law**"). (I observe that, because this Court does not require an *ex parte* application for permission, Mr Khouri was constrained to submit that the Claimants here had to prove that the three requirements were met on 25 November 2022, when the *ex parte* application for the freezing and proprietary injunctions was heard, a date apparently chosen as a surrogate for English law's requirements when permission is granted: this submission only underlines that the English procedural requirements cannot sensibly be transposed to the different regime in the ADGM.)

44. Faced with this point, Mr Richmond accepted my suggestion during the hearing that the substance of Mr Khouri's arguments might be presented under the ADGM regime as follows: that he advanced three arguments that the Court has no jurisdiction: (i) that the proceedings have not been validly and effectively served on him (the "**Service**" argument); (ii) that the Court has no jurisdiction because the claims relate to criminal matters (the "**Criminal Law**" argument); and (iii) that the Claimants' complaints are not covered by article 13(7) of the Founding Law or any other provision conferring

jurisdiction on the Court (the "**No Jurisdictional Gateway**" argument). Further, Mr Khouri advanced three submissions that, if it has jurisdiction, the Court should not exercise it: (i) that, even if the pleaded case falls within a provision conferring jurisdiction on the Court, the case pleaded and advanced against him raises no serious issue to be tried, and the Court should not entertain it (the "**Merits**" argument); (ii) that, even if the pleaded case falls within the jurisdiction of the Court, the argument that it does so is so strained and contrived that the Court should decline jurisdiction (the "**Spirit of the Gateway**" argument); and (iii) that this Court is not the *forum conveniens* (the "**Forum Conveniens**" argument).

45. However, as will appear below, it remains the case that many of Mr Khouri's arguments on the Jurisdiction Application were founded in an attempt to introduce into the ADGM the principles adopted by the English Courts for its discretionary procedure for service out of the jurisdiction. I cannot accept that is a proper approach.

(b) The Service Argument

46. The Claimants' solicitors, Clydes, sought to serve Mr Khouri by sending the claim form and the particulars of claim to him by email on 29 November 2022, and by having them delivered by hand to his "*place of work*" (as it is put in the witness statement of Ms Caitlin Coady of Clydes dated 23 March 2023) on 30 November 2022. Clydes filed a certificate of service on 5 December 2022, and on 21 December 2022 Mr Khouri filed and served an acknowledgement of service.

47. Rule 25(2) of the CPR provides that, where a person is served outside the jurisdiction *"(a) the claimant must file with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction and must serve a copy of that notice with the claim form; and (b) the claim form may only be served once the claimant files the notice referred to in Rule 25(2)(a)*". It is not disputed that Mr Khouri was served outside the jurisdiction, and that he was not served with a notice as required by Rule 25: a notice was duly filed by the Claimants on 14 November 2022, but it was not served on Mr Khouri until 21 February 2023, after Mr Khouri had brought the Jurisdiction Application, in which he relied upon this point. I infer that the notice was not served through oversight.

48. The Service Argument is not properly characterised as a challenge to the Court's jurisdiction over the Claimants' claims. It is an argument that the Court is not yet in a position to exercise its jurisdiction against Mr Khouri because he has not been validly served. If I agreed with Mr Khouri's complaint about service, the Claimants could still serve the proceedings afresh with the Rule 25 notice, and so pursue their claims against Mr Khouri.

49. In support of the submission that the claim form has not been served validly and effectively, Mr Richmond emphasised that Rule 25 stipulates the service of the notice in mandatory terms. However, I reject the argument for these reasons:

    (i) First, while the Claimants were undoubtedly in breach of the CPR in omitting to serve the notice, that does not necessarily mean that service of the proceedings was therefore invalid or ineffective. I consider it an irregularity of a kind that, in an appropriate case, the Court will excuse. To my mind, this is such a case.

    (ii) Secondly, by filing the acknowledgment of service, Mr Khouri acknowledged that the claim form had been served on him. He has thereby waived any complaint of this kind. CPR r.38(4) provides that a "*defendant does not lose any right that he may have to dispute the Court's jurisdiction by filing and serving an acknowledgment of service*", but that is concerned with challenges to the Court's jurisdiction properly so called, and does not cover challenges to the validity of the service that is acknowledged.

50. As I have said, shortly before the hearing the Claimants brought the Service Application for an order that "*The steps already taken by [them] to bring the Claim Form and the Particulars of Claim to the attention of [Mr Khouri] by email received by [him] on 29 November 2022 are hereby declared to be*

effective service of the Claim". Because I reject the Service Argument, I need make no order on the Service Application. Otherwise, I would have granted it: the failure to serve the notice was an oversight that caused Mr Khouri no prejudice.

(c) The Criminal Law Argument

51. The Criminal Law Argument is based on section 5(1) of the Regulations, which reads as follows: "*The Courts [of the ADGM] shall not have any jurisdiction to hear, examine, try or determine any issue, case or matter relating to any criminal offence or any alleged criminal offence. In particular, the Courts shall not have any jurisdiction to review the arrest or detention of any person or property (including any real property) or any other dealing with such property, executed pursuant to any Federal Law applicable to the Abu Dhabi Global Market and no proceedings issued in the Court seeking to review or challenge such arrest or detention or other dealing may be heard, examined, tried or determined by any Court*".

52. Mr Richmond submitted that the matters alleged by the Claimants would, if proved, constitute criminal offences. Indeed, four other defendants or respondents are in detention in the UAE, and Mr Khouri is subject to a criminal investigation, and his travel is restricted. Accordingly, it is argued, the civil claims that are alleged are "*related to*" a criminal offence (or alleged criminal offence), and the Court is prohibited by section 5 from entertaining them.

53. I am unable to accept that submission. The Claimants do not need to allege, and do not allege, that Mr Khouri, or any of the defendants, committed any criminal offence. This Court is not concerned with whether any criminal offence has been committed, but only with civil liability. In my judgment, it cannot be said that this Court is being asked to assume jurisdiction over any issue, case or matter "*relating to any criminal offence or any alleged criminal offence*". It is irrelevant whether the same facts as give rise to civil liability might or might not also constitute a criminal offence.

54. In his written submissions, Mr Richmond also submitted that, in any event, the Court should exercise its discretion to stay the civil proceedings against Mr Khouri pending resolution of the criminal investigation. That argument was not pursued at the hearing, and in my judgment Mr Richmond was right not to pursue it.

(d) The No Jurisdictional Gateway Argument

55. In their Rule 25 Notice, the Claimants said that the Court has jurisdiction over these proceedings for these reasons:

    (i) because the IMA includes a jurisdiction provision that "*the place of resolution of any dispute shall be the ADGM court ...*", and the Founding Law provides that the ADGM Courts "*may hear and adjudicate any civil or commercial claim or dispute where the parties agree in writing to file such claim or dispute with them whether before or after the claim or dispute arises*": article 13(8);

    (ii) because section 13(7)(a) of the Founding Law confers jurisdiction on the Court "*to consider and decide on... [c]ivil or commercial claims and disputes involving the Global Market or any of the Global Market Authorities or any of the Global Market Establishments*";

    (iii) because section 13(7)(b) of the Founding Law confers jurisdiction on the Court "*to consider and decide on ... [c]ivil or commercial claims and disputes arising out of or relating to a contract entered into, executed or performed in whole or in part in the Global Market...*"; and

    (iv) because section 13(7)(b) confers on the Court jurisdiction "*to consider and decide on ...[c]ivil or commercial claims or disputes arising out of or relating to...a transaction entered into or performed in whole or in part in the Global Market, or to an incident that occurred in whole or in part in the Global Market*".

56. I do not accept that the Court has jurisdiction over the claims against Mr Khouri under the jurisdiction term of the IMA. The only parties to the IMA were TAP and UC: the jurisdiction agreement does not apply to the claims against Mr Khouri, nor indeed to any claim brought by UP.

57. I accept that the Court has jurisdiction over the claims brought against Mr Khouri under section 13(7)(a) of the Founding Law. The term "*Global Market Establishment*" is defined in the Founding Law to cover any company registered in the ADGM, and so covers FFM. It is irrelevant that FFM had been struck off and was restored to the Company Register for the purpose of these proceedings. On the Claimants' case, FFM was established in the ADGM and entered into the SLA with TAP as an essential part of the scam to misappropriate their property, and in particular to provide the deceptive reports that were designed to mask the misappropriations. I consider that the claims against Mr Khouri are claims "*involving*" FFM: its purpose and activities are integral to the Claimants' contentions. The disputes between the Claimants and Mr Khouri are disputes "*involving*" FFM.

58. Mr Richmond argued that section 13(7)(a) should be given a narrower interpretation, and pointed out that neither of the Claimants nor Mr Khouri is a "*Global Market Authority*" or a "*Global Market Establishment*". I cannot accept that section 13(7)(a) requires a party to the claim or dispute to be a Global Market Authority or a Global Market Establishment. The word "*involving*" must be given a wider meaning if sensible effect is to be given to the concepts of a claim or dispute "*involving*" the Global Market, and of a claim or dispute "*involving*" a Global Market Authority; and the word bears the same meaning when the question is whether a claim or dispute involves a Global Market Establishment.

59. I am not persuaded that the Court has jurisdiction under section 13(7)(b) of the Founding Law. The Claimants argued that the IMA and the SLA were "*performed*" in whole or in part in the ADGM because FFM was charged with TAP's responsibilities under the IMA, and the claims relate to the actions of FFM and those acting or purporting to act on its behalf. I assume that these submissions were referring to FFM providing UC with misleading reports about its investments, but there is no reason to think that these were sent from ADGM or those acting for FFM did anything from within the ADGM; indeed, according to the evidence of Mr de Wolff, the Claimants believe that the fake websites used to mask the misappropriations were created by employees of UP, and so presumably in Dubai. It was also said that the very establishment of FFM in May 2018 was an "*incident*" that "*occurred*" within the ADGM. I am prepared to accept that the company was incorporated for the purposes of the planned misappropriations and deception, but, in my judgment, this does not in itself mean that the claims "*relate to*" its incorporation within the meaning of section 13(7)(b).

60. CPR Rule 24(2) provides that,

> "*The claimant may, in accordance with this Part, serve the claim form on a person out of the jurisdiction where:*
>
> *(a) there is between the claimant and the defendant a real issue which it is reasonable for the Court to try; and*
>
> *(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.*"

61. The Claimants did not rely upon this provision is their Rule 25 Notice, nor in their claim form, which required it to state the "*Basis of the jurisdiction of the ADGM Courts*". However, Mr de Wolff did invoke it in his witness statement of 10 March 2023 in response to Mr Khouri's applications, and in my judgment it provides an alternative basis for the Court's jurisdiction over the claims against Mr Khouri.

62. Mr Richmond disputed this. His first argument was that "*the question of whether permission was properly granted falls to be determined by reference to the position at the time permission is granted, not by reference to the circumstances at the time the application to set aside service out is heard*". This argument is based on English authorities about the discretionary regime, and has no application to the ADGM regime.

63. Mr Richmond also argued that the Claimants had ample opportunity before now to rely on Rule 24 and did not do so; and that they should not be permitted to do so now, at least in the absence of an application to amend their Rule 25 Notice (and also, presumably, the claim form). The Claimants have not explained why they did not rely on rule 24(2) earlier, and in view of my conclusion that the Court has jurisdiction under section 13(7)(a) of the Founding Law, they do not need to rely on it. However, had they needed to do so in order to establish jurisdiction over Mr Khouri, I would have allowed them to rely on Rule 24(2), despite the justified criticisms of them for not doing so earlier, and provided they amended the claim form and the notice.

64. Mr Richmond also submitted that the requirements for the Court for assuming jurisdiction under Rule 24 are not satisfied. He relied upon judgment of Lord Briggs in the English case of *Lungowe v Vedanta Resources Plc, [2019] UKSC 20*, in which a corresponding provision in the English Practice Direction was considered. Lord Briggs said this (at paragraph 20):

> "*The express terms of the Practice Direction set out only part of what a claimant relying upon the necessary or proper party gateway must show. It is common ground that, by reference to those terms and well-settled authority, the claimant must demonstrate as follows:*
>
> *i) that the claims against the anchor defendant involve a real issue to be tried;*
>
> *ii) if so, that it is reasonable for the court to try that issue;*
>
> *iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant;*
>
> *iv) that the claims against the foreign defendant have a real prospect of success;*
>
> *v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum*".

65. Once again, I do not consider that English jurisprudence about when the English Court should exercise its discretion to allow service on a defendant outside the jurisdiction assists the interpretation of the non-discretionary regime in this Court. In any case, I am not persuaded by Mr Richmond's submissions. He argued that there is no real issue to be tried against Mr Khouri, but I reject that argument for reasons that I have explained. Mr Richmond also argued that it is not reasonable for the Court to try the issue because, whilst there is a real issue to be tried on the claims against FFM, the Claimants have no proper financial interest in suing it, and it is to be inferred that FFM is being sued only in order to bring other defendants to the jurisdiction. I see no proper evidential basis for this submission, but in any case, the proceedings are brought against other defendants who have not disputed the jurisdiction of this Court.

66. Finally, Mr Richmond submitted that the ADGM is "*not the proper place in which to bring the combined claims*" that are the subject of these proceedings. I cannot accept that this would be a proper reason for restricting the application of Rule 24(2), and in any case I do not accept that the ADGM is not a suitable forum for these proceedings, for reasons that I shall explain when considering the Forum Conveniens argument.

67. If I had not concluded that the Court has jurisdiction under section 13(7)(a) of the Founding Law, I would have permitted the Claimants to amend the claim form and the Rule 25 Notice so as to rely on the jurisdiction under Rule 24(2) to establish jurisdiction for its claims against Mr Khouri.

(e) The Merits Argument and the Spirit of the Gateway Argument

68. I have said enough to explain why I reject Mr Khouri's first two arguments that the Court should not exercise its jurisdiction to hear the claims against him. Even assuming, without deciding, that in appropriate circumstances the Court might, on an application of this kind, decline to exercise its jurisdiction on the grounds that there is no serious issue to be tried against a defendant, or that a

claim, while falling within the jurisdiction of the Court, is outside its spirit, I do not accept that this is such a case.

(f) *The* Forum Conveniens *Argument*

69. It remains to consider the Forum Conveniens argument. Mr Khouri submitted that the facts of this case weigh heavily against ADGM being the natural or proper forum for the proceedings. He submits that the proper forum is Switzerland, or alternatively the on-shore Courts of Dubai.

70. The doctrine of *forum non conveniens* was established in English law by the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex, [1979] AC 460*, and it remains the leading English authority. Lord Goff summarised the law as follows (at pp.476C-477A):

> "*(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*
>
> *(b) ..., in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the [claimant] to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country ....*
>
> *(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the [claimant] has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the [claimant] an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant,": see Scoles and Hay, Conflict of Laws (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see Castel, Conflict of Laws (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions*".

71. I make three preliminary observations:

(i) In this case, the Claimants chose to bring proceedings in this Court as of right. They did not have to rely on the Court exercising a discretionary jurisdiction to permit them to do so.

(ii) In so far as Mr Khouri contends that the on-shore Courts of Dubai or other on-shore Courts of the UAE are the appropriate forum, it is important to have in mind the observations of Lord Goff about the application of the doctrine where the choice is between competing jurisdictions within a federal state.

(iii) On the face of it, it is highly desirable that the claims against all the Defendants, alleged to be parties to the same conspiracy, be heard in the same Court, both for reasons of efficiency and to avoid the injustice of inconsistent decisions. None of the Defendants other than Mr Khouri supports his application or has suggested that the ADGM is not the appropriate forum for these proceedings.

72. With regard to the last of these observations, Mr Richmond relied on the judgment of Christopher Clarke J in *JSC BTA Bank v Granton Trade Limited, [2010] EWHC 2577 (Comm)* at paragraph 28, and submitted that the forum for a multi-party dispute should not be dictated by the presence of a "*minor player*" within the jurisdiction. I have explained that I do not consider FFM, the defendant within ADGM, to be a "*minor player*" in this dispute or these proceedings, but in any case Christopher Clarke J was concerned with the English discretionary regime. The observation of Christopher Clarke J in this paragraph of his judgment that that does seem to me applicable here is that "*a decision as to appropriate forum must necessarily take account of the relative importance in the case of different defendants and particularly those against whom proceedings in England are practically bound to continue*". Here, it seems likely that the proceedings in this Court will continue against at least some of the Defendants.

73. With this introduction, I come to Mr Khouri's contention that the appropriate jurisdiction to decide the claims is Switzerland. In his evidence, Mr de Wolff said that "*the Claimants accept that by reason of the claims against the defendant individuals who are domiciled or habitually resident in Switzerland ..., the Courts of Switzerland would be likely to be 'available' to hear the claims in Switzerland*", and I shall assume that Mr de Wolff included in this concession the claims under the FSMR. However, the Claimants contend that the Courts of Switzerland are not a more appropriate forum that this Court, and I agree.

74. The events alleged by the Claimants that are the focus of their claims took place in the UAE. While the transfer of UC's investments fund by Julius Baer to TAP was a transfer between Swiss entities, the core of the complaint is that, through a fraud the "*controlling mind*" of which was Mr Khalifa Almahaddi, a UAE resident, their investment funds were, for the most part, converted into shares in UP, a Dubai company, and put into the hands of Mr Al Mulla, a resident and lawyer of the UAE. The Claimants are both UAE companies. The majority of the defendants are resident in the UAE, and three are in detention here. Some of the claims are based on the FSMR, and none is governed by the law of Switzerland, but by a law of the UAE (although, as I have said, there is a dispute about which law). It is, of course, the case that TAP and four individual defendants are apparently based in Switzerland, but three of them, Mr Trinkler, Mr Klar and Mr Dubach, are said to be involved in the scheme as directors of FFM.

75. Mr Khouri's main argument that the claims should be made in the Swiss Courts was Julius Baer "*is properly a defendant to these proceedings*", and that "*its omission is glaring and weighs heavily against the Claimants*". As I understand the submission, it is that the Claimants decided not to sue Julius Baer because it and its employees are based in Switzerland and the agreement with Julius Baer that UC signed on 10 July 2017 included a provision that Switzerland should be "*the exclusive place of jurisdiction for all proceedings*" (subject to the right of Julius Baer to bring proceedings elsewhere). The suggestion is, I think, that the Claimants have artificially fashioned the proceedings without Julius Baer as a defendant in an attempt to circumvent the jurisdiction clause and to avoid having their claims heard in Switzerland; and that, while it is acknowledged that the Claimants are entitled to make the allegations that they wish, this should not prevent the Court from taking a broader view to identify the natural forum.

76. I cannot accept this argument: there is no proper basis for rejecting the evidence of Mr de Wolff that the Claimants consider that they have no sufficient evidence that Julius Baer was party to misappropriation of their assets. In any case, the Claimants do not make any claim against Julius Baer, and the question before me is about the proper forum for the claims that have been brought. I concluded that this Court is a more natural and appropriate forum for those claims than the Swiss Courts.

77. Mr Khouri certainly has a stronger argument that the proceedings are closely connected with Dubai and that the on-shore Courts of Dubai would be a proper forum for resolving the disputes. I need not identify all the considerations that support this contention: they include that the Claimants are both incorporated there, that many of the Defendants are apparently resident there, that many of the matters complained of took place in Dubai, and that it is distinctly arguable, to say the least, that the tortious claims are governed by UAE law. However, Mr Khouri here faces a more formidable objection: that the doctrine of *forum non conveniens* has no application where the choice is between different courts of the UAE.

78. This proposition is supported by the decision of the Court of Appeal of the Dubai International Financial Centre ("**DIFC**") in *Investment Group Private Ltd v Standard Chartered Bank, [2015] DIFC CA 004*, which I considered in my judgment in *Fleming v Dubai Islamic Bank PJSC, [2021] ADGMCFI 006* at paragraph 112ff. The dispute in the Standard Chartered Bank ("**SCB**") case concerned lending by SCB to Investment Group Private Ltd ("**IGP**"). SCB brought proceedings in the DIFC Courts in debt and to enforce security for the loans. IGP responded by applying for a declaration that the DIFC Courts had no jurisdiction to hear the proceedings, and alternatively for a stay on the grounds of *forum non conveniens* in favour of the Sharjah Courts, where IGP had brought overlapping proceedings. The DIFC Court of Appeal considered that the doctrine of *forum non conveniens* plays no part in deciding which of two UAE Courts should determine a dispute. Its essential reason was that under article 99 of Federal Law 10/1973 the power to determine conflicts between the decisions of different courts of the UAE is vested in the Federal Supreme Court. Article 99 provided, "*The Federal Supreme Court shall have jurisdiction in the following matters: … Conflict of jurisdiction between the judicial authority in one Emirate and the judicial authority in another Emirate. The rules relating thereto shall be regulated by a Federal Law*". The DIFC Court's reasoning was that, "*Although Article 99 does not adopt the language of 'exclusive jurisdiction', it cannot be understood as conferring on the [Federal Supreme Court] anything less than exclusive jurisdiction over the matters set out in that provision*" (at paragraph 187), and that "*It is true that a jurisdictional conflict crystallizes, and the* [Federal Supreme Court] *intervenes, only after the competing UAE courts issue conflicting and final judgments on jurisdiction …. But that fact does not mean that the DIFC can apply the* [forum non conveniens] *doctrine before the jurisdictional conflict crystalizes …The power to resolve jurisdictional conflicts … is vested in the [Federal Supreme Court] absolutely*" (at paragraph 190). The Court concluded (at paragraph 191) that the power to determine jurisdictional conflicts was "*absolutely and exclusively*" vested in the Federal Supreme Court and "*therefore removed from this Court's power in all circumstances*".

79. As I observed in the *Fleming* case, the SCB judgment is not binding authority in this Court, but it is of considerable persuasive authority. In any case, I respectfully agree with the reasoning of the DIFC Court of Appeal. Mr Richmond submitted that the SCB was wrongly decided, but he advanced no detailed argument in support of that submission, and I reject it. His main submission was based on recent legislative amendments in the UAE.

80. When the SCB case was decided, the powers of the Federal Supreme Court were set out in Federal Law 10/1973, including article 99 cited above. Federal Law No 33/2022, which came into force on 2 January 2023, made amendments to Federal Law, but not to Article 99. Nevertheless, Mr Richmond submitted that, read in the context of the amended legislation, Article 99 is no longer to be understood to be conferring exclusive jurisdiction on the Federal Supreme Court over the matters there set out because it is to be interpreted in light of articles 4 and 33 of Federal Law 33/2022.

81. Article 33 reads as follows: "*In case of conflict of jurisdiction between two or more entities of the judiciary entities mentioned in Clauses (10 and 11) of Article (4) of this Decree-Law, as such entities did not abandon the case or all of them have abandoned the cases or issued contradictory final judgements, then the application of appointment of a competent court or determination of the judgement to be executed shall be submitted to the Federal Supreme Court by a petition based on the request of any litigant or the Public Prosecutor*." By clauses 10 and 11 of Article 4, it is provided that:

"*The Federal Supreme Court shall adjudicate on the following matters: ...*

10. Conflict of jurisdiction between the Federal Judiciary and the local judicial entities of the concerned Emirate

11. Conflict of jurisdiction between a judicial authority of an Emirate and the local judicial authority of another Emirate".

82. As I observed in paragraph 113 of the *Fleming* judgment, before the recent legislative changes, the conclusion of the DIFC Court of Appeal that Article 99 conferred exclusive jurisdiction on the Federal Supreme Court was reinforced by Article 33 of Federal Law 10/1973, which provided that "*The Supreme Court has exclusive jurisdiction to look into the following matters: …. 10. Conflict of jurisdiction between a judicial body in an Emirate and another judicial body in another Emirate or between the judicial bodies in any Emirate between them*". Mr Richmond argued that, under article 33 of the new legislation, "*a relevant court is able to abandon the case (i.e. decline jurisdiction), and that the conflict over which the Supreme Court has jurisdiction to determine only arises where there are two contradictory judgments*".

83. I cannot accept that, for this or any other reason, the power of the Federal Supreme Court to resolve conflicts of jurisdiction between Court of different Emirates is no longer exclusive to it. The legislative amendments do not affect the essential reasoning of the DIFC Court of Appeal. The position is confirmed by the recent judgment of the Federal Supreme Court in *Noor Capital PSC v NMC Healthcare Ltd, Claim 1 of 2023*: there the Court said this: "*It is a rule of this Court that Article 4 of Federal Decree by Law No. 33 of 2022 Concerning the Federal Supreme Court in its paragraphs 10 and 11 provides that the Federal Supreme Court shall have exclusive jurisdiction to resolve conflict of jurisdiction between the federal courts and the local judicial bodies in the Emirates or between a judicial body in an Emirate and a judicial body in another Emirate*".

84. I therefore need not examine in detail the argument that the onshore Courts of Dubai are a more appropriate forum to try these claims than this Court. I only say that, notwithstanding the obvious connections that they have with Dubai, I am not convinced, given the central role that the Claimants attribute to FFM and given the FSMR claims, that Mr Khouri's argument overcomes what Lord Goff called "*the strong preference … given to the forum chosen by the [claimant] upon which the constitution of the country which includes both alternative jurisdictions*".

The Discharge Application

(a) The Legal Principles: Freezing Orders

85. By the Discharge Application, Mr Khouri seeks an order that the Court discharge the freezing order made against him at the ex parte hearing on 25 November 2022. In *Lakatamia Shipping Co Ltd v Moritomo, [2019] EWCA Civ 2033*, Haddon-Cave LJ (at paragraph 33) described the basic legal principles governing the grant of worldwide freezing orders as "well-known and uncontroversial", and endorsed this summary of Peter Gibson LJ in *Thane Investments Ltd v Tomlinson (No 1), [2003] EWCA Civ 1272* at paragraph 21: the court must be satisfied that "*the applicant for the order has a good, arguable case, that there is a real risk that judgment would go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them, and that it would be just and convenient in all the circumstances to grant the freezing order.*" It was submitted on behalf of Mr Khouri that the freezing order of 25 November 2022 should be discharged because:

(i) there is no good arguable case against him over which this Court has jurisdiction;

(ii) there is no real risk of "*dissipation*", that is to say, no real risk that he would, unless restrained, dispose of his assets so as to prevent a judgment being enforced against him; and

(iii) it is not just and convenient to continue the freezing order.

86. It is also challenged on the grounds that Claimants failed to make full and frank disclosure to the Court when they obtained it.

(b) Good Arguable Case

87. For reasons that I have already explained, in my judgment the Claimants do have a good arguable case against Mr Khouri on claims over which the Court has jurisdiction. In the *Lakatamia* case (cit sup, at paragraph 35) Haddon-Cave LJ described the test here as "*not a particularly onerous one*". As was explained by Mustill J in *Ninemia Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen), [1983] 2 Lloyd's Rep 600, 605*, the Claimants have to show that their case is "*one that 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*".

(c) Real Risk of Dissipation

88. Is there a real risk of dissipation? In my judgment in *Abu Dhabi Commercial Bank v Manghat, [2022] ADGMCFI 0007*, I said this (at paragraphs 46 and 47):

> "*The test is stated in the Lakatamia judgment (loc cit at para 33) in the following terms: 'The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer". Again, the applicant for a freezing order does not have to prove on the balance of probabilities that there is the risk of dissipation: it must show a good arguable case of a risk: Lakatamia at para 36.*
>
> *[Counsel for Mr Manghat] also cited these propositions, all of which are supported by the judgment of Haddon-Cave LJ in the Lakatamia case (at para 34) and which I accept:*
>
> a. *'The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient';*
>
> b. *'The risk of dissipation must be established separately against each respondent';*
>
> c. *'It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty'; and*
>
> d. *'The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation'*".

(The fourth principle does not apply in this case.)

89. I have concluded that the Claimants have a good arguable case that Mr Khouri was dishonest. While dishonesty in question is not by itself necessarily enough to show a risk of dissipation, in this case its nature and scale are significant. The Claimants allege, and have shown a good arguable case, that Mr Khouri was party to a subtle and sophisticated fraud on an international scale over a long period, that assets of great value were misappropriated and that the wrongdoing was disguised by fraudulent reports and accounts. This in itself, to my mind, indicates a real risk of dissipation.

90. The Claimants seek to reinforce their argument by reference to the information about his assets that Mr Khouri provided in response to the *ex parte* order. Mr Richmond submitted that arguments of this kind are discouraged, citing *Bouvier v Accent Delight International Ltd, [2015] SGCA 45*, in which the Singapore Court of Appeal said this (at paragraph 102):

"*Where the [freezing] injunction itself is ultimately found not to have been justified on the basis of the material before the court at the time it was granted, it seems to us inherently unfair to nonetheless allow the [claimant] to use information that he has obtained through the ancillary disclosure orders to try to shore up a case for a real risk of dissipation. Ancillary disclosure orders have been recognised to be highly intrusive and can entail potentially severe ramifications. But, these severe intrusions on privacy are tolerated because a [freezing] injunction without an accompanying disclosure order will often be toothless. To further prejudice the defendant by allowing the [claimant] to use information extracted from an ancillary disclosure order to support an otherwise unsustainable [freezing] injunction would be to provide the [claimant] with an unfair and improper advantage*".

91. In my judgment, this point should not be pushed too far: in this case, I consider that the original freezing order was justified on the basis of the material then before me, and I see no reason in principle that, when it is challenged by Mr Khouri in reliance on new evidence, it is unfair for the Court to revisit the order in light of all the material that has now become available.

92. The Claimants' argument is that Mr Khouri applied to the Court to increase the amount that he is permitted to spend under the freezing order on the grounds that his monthly expenditure exceeds AED ***[redacted***], and this claim cannot be reconciled with the assets that he has disclosed pursuant to the information requirements of the order: see paragraphs 120 and 121 below. It is said that I should infer that Mr Khouri's disclosure of his assets has been less than frank, and that this is further evidence that he might hide or dispose of assets, so that they will not be available to satisfy any judgment against him. I do not consider that the Claimants need this additional argument in order to establish a sufficient risk of dissipation, but I see something in it: it provides some additional support for the Claimants' contention.

93. Mr Richmond had another argument: that the Claimants delayed in applying for a freezing order, and did so only after it had approached some of the defendants with settlement proposals. As I have said, the Claimants were aware of the essential nature of the alleged fraud by the end of 2021. Mr Khansaheb explained the delay by reference to the extensive investigation required to understand the wrongdoing, the need to restore FFM to the Company Register in order to bring proceedings against it, and the need to instruct lawyers in Switzerland and elsewhere, as well as in the UAE. Despite these explanations, I am not persuaded that the Claimants brought proceedings with the urgency that would be expected in a case of this kind.

94. There are circumstances a freezing order will be refused because the applicant has delayed seeking one and undermined case for a risk of dissipation, but it is not always fatal. As Flaux J said in *Madoff Securities International Ltd v Raven, [2011] EWHA 3102* at paragraph 156 "*The mere fact of delay in bringing an application for a freezing injunction … does not, without more, mean that there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it*".

95. In February 2022, Mr Khouri was approached by Ardent, who asked him for a meeting. No meeting in fact took place, but I am invited to infer that, had it done so, Mr Khouri would have been told that a claim was to be made against him. Further, in 2022, before bringing these proceedings, UP had two discussions with Mr Khalifa Alhammadi in connection with their allegations. On 17 July 2022, they had a meeting about a possible settlement at the offices of the Federal Prosecutor in Abu Dhabi, which was also attended by Mr Al Mulla. On 7 November 2022, UP had telephone discussions with Mr Alhammadi for the purpose of exploring settlement. Moreover, it is said that the Defendants were made aware of the Claimants' intention to bring civil proceedings in respect of their allegations of misappropriation because they applied for FFM to be restored to the Company Register in order that a claim might be brought against it, and in his evidence in support of the application Mr de Wolff referred to potential proceedings against "*FFM and others (including FFM's directors)*".

96. I am not persuaded that, on the facts of this case, the Claimants' case against Mr Khouri is answered by their apparent willingness to enter into settlement discussions with him and other defendants. There is no satisfactory evidence that he apprehended that proceedings would be brought against him, or that the Claimants intended to alert him to their intention to do so. His position was, on the face of it, different from others who were in detention and others who were or had been directors of FFM, and this might understandably have led him to expect that he would not be sued by the Claimants, an expectation consistent with the Ardent report and possibly encouraged by it. Similarly, the evidence in support of the application to restore FFM is consistent with that. In so far as it was submitted that the Claimants' apparent willingness to enter into discussions of this kind before seeking a freezing order, together with the delay in bringing proceedings, is inconsistent with their expressed concern about a risk that Mr Khouri, and other defendants, would dissipate their assets, this seems to me too speculative to be persuasive. In any case, I am concerned with my own assessment of the risk of dissipation, and not what the Claimants did or did not believe.

97. I conclude that the Claimants have shown a sufficiently arguable claim against Mr Khouri and a sufficient risk of dissipation to justify the continuation of the freezing order.

(d) Is it "Just and Convenient" to continue the Freezing Order

98. I also consider it just and convenient to continue the freezing order. Mr Richmond submitted that it would be right to discharge it in view of the Claimants' failure to put forward a properly pleaded and evidenced case, in view of the "*jurisdictional obstacles*" that he raised, in view of the delay in applying for the injunction and in view of the criticisms of the discourse made when it was obtained. For the reasons that I have explained, I am not persuaded by these objections.

99. It is also said that the freezing order should be discharged because it is causing Mr Khouri prejudice. Mr Tricoli gave evidence that Mr Khouri is having difficulties in using credit cards, in his day-to-day activities, and in obtaining and satisfying loans that he would have taken out in the ordinary course of his personal and family life, but the evidence about these matters is vague: general inconveniences of this kind are almost an inevitable consequence of a freezing order against an individual, and not in themselves sufficient reason not to make or continue one, except perhaps in exceptional circumstances.

100. Finally, Mr Tricoli complains that the Claimants have not pursued the proceedings efficiently and expeditiously, and he voices concern that, if the freeing order is continued to trial, it will remain in force for an excessive time. I am troubled that the proceedings have not made more progress, and I have expressed my concern about that previously. However, on the material presently available, I am not persuaded that the Claimants or their representatives are to be criticised in that regard: the slow progress is largely due to the requirements for serving some of the defendants in Switzerland. I therefore do not consider that, as things stand, there is sufficient reason to conclude that it is not just and convenient to continue the freezing order. That said, the Claimants should have no doubt that it is incumbent upon them, having been granted freezing orders against Mr Khouri and others, to pursue the proceedings as vigorously as possible, and that if they do not do so, they might well face further applications to discharge the orders for that reason.

(e) Full and Frank Disclosure

101. I come to Mr Khouri's argument the ex parte orders against him should be set aside because the Claimants did not make full and frank disclosure when they applied for it. The applicable legal principles are well settled. It is sufficient to quote the summary of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe, [1998] 1 WLR 1350* at *1356F to 1357G*:

> "*In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.*
>
> *(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts':....*

(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: ...

(3) The applicant must make proper inquiries before making the application: .... 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: ....

(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 that breach of duty:' ...

(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 or 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 poenitentiae may sometimes afforded:' per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. 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....".

102. I add only that the duty of full and frank disclosure does not, I think, require an *ex parte* applicant to labour points that he can reasonably assume will be thoroughly familiar and perfectly obvious to the Court.

103. In his written submissions, Mr Richmond contended that the Claimants failed to make full and frank disclosure on their *ex parte* application in seven respects. First, Mr Khansaheb gave evidence in support of the application that the Claimants were advancing claims in dishonest assistance (and, I add, for compensation under the FSMR) against the UC directors, and in his submissions on the *ex parte* application Mr Dillon-Malone told me that "*claims against the [UC] directors are for conspiracy, dishonest assistance and compensation*". This was misleading: as I have said, claims for dishonest assistance and compensation under the FSMR are not brought against Mr Khouri. That said, it is not suggested that there was any intention to mislead the Court, and the error was inconsequential: it did not affect the outcome of the application, and it is difficult to think how it might have done.

104. Secondly, Mr Khouri complains that the Claimants did not present separately the cases against each of the defendants, and in particular did not make separate submissions about the risk of dissipation in his case. I do not consider that there is anything on that criticism: it is axiomatic that the Court must consider the position of each respondent discretely on an application of this kind. The Claimants did not need to labour that point on the *ex parte* application.

105. Next, it is said that the Claimants should have drawn to my attention the fact that the Ardent Report did not identify any wrongdoing on the part of Mr Khouri, and did not recommend proceedings against him. Again, I see nothing significant in that complaint: the application for the freezing order was advanced on the basis of the material then available to the Claimants, and they did not rely on the findings of what was essentially a preliminary investigation many months earlier.

106. It is then said that the Claimants omitted to point out to the Court that the matters alleged by them were consistent with him being honest and having no intention to cause them harm. In effect, the

complaint is that the Claimants did not identify on the *ex parte* application the argument presented on his behalf that there was no real issue to be tried against Mr Khouri. Certainly, the Claimants did not formulate a potential answer to their claims against Mr Khouri in quite the terms of his argument on these applications, but quite clearly the Court had to consider on the *ex parte* application whether an inference of dishonesty might properly be drawn from the Claimants' allegations. I reject this complaint.

107. Fifthly, it is said that the Claimants did not fairly present the financial position of UC. Mr Khansaheb exhibited to his evidence the annual accounts of UP and its subsidiaries for the year ended 31 December 2021, pointed out that they referred to the Group's net asset position of around AED 2 billion, and added that that position had been maintained throughout 2022. He also said that the Group had undertaken an "*emergency business restructuring program*", that the Group had been making good progress, that in the third quarter of 2022 it was "*back to profit*", and that it had recently completed an "*AED 595 million debt restructuring".* Mr Khouri's complaint is that the Claimants did not draw attention to the statement in the accounts about the net asset position: in particular, that as at 31 December 2021, it had current assets of *"AED 531,694,000 as against total current liabilities of AED 1,931,267,000*". It was said that this information would have better indicated the Group's cash-flow liquidity, which was relevant to whether the cross-undertaking in damages should have been fortified.

108. I agree that it would have been more satisfactory if the Claimants had specifically drawn to my attention the current assets and liabilities shown in the financial statements, but I hesitate to characterise the omission as a breach of duty. At the *ex parte* hearing, I was taken to the very page of the accounts that showed them, and the shortfall was obvious on the page, and I was expressly told of the debt restructuring that was required after the losses.

109. It was also said that the Claimants did not explain the arguments that the challenges that the Defendants might raise to this Court's jurisdiction. The questions whether the claims fell properly within a jurisdictional gateway were of a kind which the Court could properly be expected to have well in mind, and I do not think that the other jurisdictional challenges raised by Mr Khouri were sufficiently cogent for the Claimants to be required to anticipate them.

110. Finally, the Claimants are criticised for failing to "*highlight to the Court that there was no plausible basis for the application of ADGM law in respect of the claim against Mr Khouri and/ or that UAE law does not include a cause of action in unlawful conspiracy*". In my judgment, the Court could reasonably be supposed to have in mind in a case of this kind that the causes of action might well be governed by UAE law or by some law other than that of the ADGM. I agree that the Claimants should have pointed out that there is not a cause of action in conspiracy as such under the law of the UAE, although in fact I was well aware of that.

111. In his oral submissions, Mr Richmond submitted that the Court had been misled on the *ex parte* applications in a further respect. In his evidence in support of the freezing orders, Mr Khansaheb referred to the application to restore FFM to the Company Register, and said that "*the documents do not provide full details of the claim or those involved*". Mr Richmond argued that that evidence was misleading because in a witness statement in support of the application to restore Mr de Wolff had said this, *"[UC] has a potential legal claim against FFM … On 1 July 2018, [UC] engaged a Swiss firm, Trinkler and Partners Ltd (TAP), to provide it with investment management services pursuant to the terms of an Investment Management Agreement (the IMA) …. FFM was, in turn, engaged by TAP to provide the said services pursuant to the terms of a Service Level Agreement dated 4 September 2018 …. It was presented to [UC] by TAP on 11 January 2019 that around AED 286 million was transferred to TAP for management under the IMA (the Investment) …. It is understood by [UC] that the Investment was in fact misappropriated by, inter alia, FFM and its directors. [UC] intends to bring proceedings against FFM and others (including FFM's directors) to seek to recover the Investment*".

112. I do not consider that this summary provided "*full details of the claim or those involved*". Mr Khansaheb's evidence was not, in my judgment, misleading nor materially incomplete.

113. I therefore reject the majority of Mr Khouri's complaints about full and frank disclosure, but accept that in some limited respects the presentation of the *ex parte* application fell short of the high standard demanded. However, in my judgment, the failings fell far short of what would justify discharging the freezing order on that account.

The Terms of the Freezing Order

114. Mr Khouri submitted that the freezing order should be confined to his assets by way of real estate and company shares. He developed no argument in support of this submission, and I see no good reason to accept it.

115. Mr Khouri also submitted that the cross-undertaking in damages that the Claimants should be reinforced in respect of his total legal costs of these proceedings, which were likely, it was said, to exceed US$2 million (if the Jurisdiction Application is refused). This question was not fully argued before me, and in any case, in my judgment, it is better to consider any argument that the cross-undertaking should be fortified on the next return date of the freezing order and in light of any submissions that other parties might make, and not to deal with the position of Mr Khouri in isolation. I shall give Mr Khouri leave to restore this application.

The Proprietary Injunction

116. Mr Khouri submitted that the proprietary order concerning the P-Notes and their traceable assets should be discharged. He argued that, in order to justify the continuance of the order, the Claimants would have to show that there is a serious issue to be tried that Mr Khouri has, or has control over, such assets.

117. The Claimants' pleaded case is that their "*belief [is] that the shares in Union Property [underlying the P-Notes] were transferred to, and held by, Mr Mulla under the instructions of Khalifa Alhammadi and/or Mr Khouri*". According to Mr de Wolff, the Claimants believe that Mr Al Mulla held the shares "*as nominee for Khalifa Alhammadi and/or Mr Khouri*", and this belief is formed on the basis that Mr Khouri and Mr Khalifa Alhammadi instructed JB to buy the P-Notes; that Mr Al Mulla apparently had no involvement with the Notes; that Mr Al Mulla was the lawyer of UC, which was controlled by Mr Khouri and Mr Khalifa Alhammadi, and that they "*issued instructions to [Julius Baer] with respect to any dealings relating to the P-Notes, including with respect to their 'delivery-free-of-payment' (i.e. delivery to Arqaam) and appeared to have created documentation (maintained internally) to document the transfer of assts to TAP, which never took place".*

118. I consider this a speculative basis for the (unpleaded) case that Mr Al Mulla held the shares as nominee for Mr Khouri. I conclude, on the basis of all the material now available, that the Claimants have not shown a real issue that Mr Khouri has beneficial property in, or possession or control over any of the P-Notes or their traceable proceeds. I accept his submission that the proprietary order against him should be discharged.

The Further Information Application

119. As I have said, under the freezing order of 25 November 2022 those against whom the freezing and proprietary injunctions were made were ordered to provide information to the Claimants and verify it on affidavit: by paragraph 13 of the order, each respondent was "*within seven (7) working days after service of this Order and to the best of his ability*" to inform Clydes of any assets exceeding US$ 10,000 in value, "*giving the value, location and details of all such assets.*" By paragraph 14, *"… within fourteen (14) working days of service of this Order"* each was to serve an affidavit (i) setting out that information and disclosing any changes to it; and (ii) giving details of any dealings with the assets in which the Claimants claimed a proprietary interest or their traceable proceeds.

120. Mr Khouri did not provide the information or give an affidavit within the specified time limits, but on 19 December 2022 his legal representatives, Fichte, sought an extension of time to provide it. On 21 December 2022, at a hearing on the return date of my orders, I extended to 16 January 2023 Mr Khouri's time for providing the information and to 23 January 2023 the time for the affidavit. At the

same hearing, Mr Khouri applied for an increase in the amount that he was permitted to spend under the Freezing order to AED [***redacted***] per week. In a witness statement in support of the application dated 21 December 2022, Mr Tricoli said that Mr Khouri's "[***redacted***]".

121. Mr Khouri did not comply with the time limits in the order of 21 December 2022. On 30 January 2023, he applied for an extension of time for serving his Assets List and the affidavit to 6 February 2023, and they were served on that day. The Assets List ***[redacted]***. On 7 February 2023, Mr Khouri requested the Claimants to allow him expenditure of an additional [***redacted***].

122. By their Further Information Application, the Claimants seek orders:

(i) that Mr Khouri provide further information about the assets that he listed in his Assets List of 6 February 2023, stating whether it *"includes all of the assets within the class of assets ordered to be disclosed that were held by him as at 8 December 2022; and … [i]f and to the extent that [his] List of Assets does not include such assets, [Mr Khouri] shall provide a complete list of assets within the class of assets ordered to be disclosed as at 8 December 2022*";

(ii) that he provide an affidavit verifying this information, and, "[i]n respect of all differences (irrespective of value) between the assets in the [his] List of Assets and the assets as at 29 November 2022, the Affidavit shall include full and detailed particulars of the following: a. the movement of those assets to include the dates of transfer or disposal, the identity and value as well as the nature of disposal of those assets; b. the account/location from where the assets were moved; c. the account/location to where the assets were moved; and d. the names and putative interests of the transferees/recipients"; and

(iii) that the affidavit should also provide "*the same full and detailed particulars of all subsequent movements of those assets made at the direction of or known to or controlled by [Mr Khouri], from the date of disposal or transfer from the him to the date of the swearing of the Affidavit* …".

123. The Claimants argue that Mr Khouri should be required to provide this further information because of (i) the delay before he provided the information required by the order of 25 November 2022, and (ii) a disparity between the information in the Assets List and the monthly expenditure that he has sought. They say that the information is required to establish whether he has dissipated assets since being served with the *ex parte* order, and in order to dispose fairly of these proceedings.

124. Mr Dillon-Malone cited a number of English authorities that establish the proper approach to applications of this kind. It suffices to refer to the judgment of Jacobs J in *The Public Institute for Social Security v Fahad Maziad Rajaan Al Rajaan, [2020] EWHC 1498 (Comm)* and other authorities referred to in paragraphs 18 and 19 of that judgment:

> *"A useful starting point is the decision of Popplewell J. in Angola v Perfectbit Ltd, [2018] 3 WLUK 76, paragraph [8]:*
>
> *'The importance of disclosure in rendering freezing orders effective has often been emphasised. …. Unless proper disclosure is given, it is impossible to police the freezing order, and if it cannot be policed, then fraudulent defendants are able to ignore the order and to breach it with impunity. Disclosure is, in almost all cases, essential in order to render effective a worldwide freezing order. The importance of disclosure is reinforced where a claimant has a proprietary claim and is seeking to recover specific sums or their traceable proceeds. Again, an order freezing such sums will be ineffective if the claimant cannot know what has happened to them. It is essential to the protection of the claimant's rights to pursue its proprietary claim that full disclosure is given of what has happened to the money so that the claimant may take steps to freeze the proceeds and then to establish its right to recover those traceable proceeds. That is all part of the substantive claim which has to be adjudicated on in the proceedings. Those are considerations which apply with full force in the current case, in which [the claimant] has established a strong prima facie case that these defendants have perpetrated a large scale fraud, and that there is a real risk of*

dissipation of their own assets as well as a risk of dissipation of the assets to which [the claimant] has a proprietary claim'.

This does not mean that the court will always require, via injunctive relief prior to determination of the parties' rights at trial, an extensive disclosure exercise whenever a proprietary claim is made. Questions of proportionality will always arise, as is clear from the case-law which was summarised in BDW Trading Ltd. v Fitzpatrick, [2015] EWHC 3490 (Ch), paragraphs [49] – [55]. In Arab Monetary Fund v Hashim (No.5), [1992] 2 All ER 911, Hoffmann J. said that the plaintiff must demonstrate a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim. He also said that the potential advantage of the order to the plaintiff in that case (AMF) 'must be balanced against the detriment to the person against whom the order was sought, not merely in terms of cost … but by way of invasion of privacy and requiring breach of obligations of confidence to others'".

125. I add only that the observation of Hoffmann J is reinforced with regard to freezing orders by the judgment of Lord Leggatt in *Broad Idea International Ltd v Convoy Collateral Ltd, [2021] UKPC 21*. It is important to keep the point firmly in mind: the proper purpose of an application of this kind is not to discover or prove past breaches of an order to provide information (that is to say, of course, truthful information about assets), avoiding the need to meet the demanding requirements to establish contempt of court, but to support the claimant's prospects of enforcing any judgment that he obtains. This was emphasised by Stephenson LJ in *Bekhor v Bilton, [1981] 923* at paragraph 82: "*[The Judge at first instance] described the … application and his order for discovery as in aid or support of the [freezing] injunction and so in a sense they were. But insofar as they relate to the [defendant's] assets at past dates as distinct from their present whereabouts their purpose seems to be not so much to help the court or the [claimant] to locate and 'freeze' particular assets now, as to open the way to incriminating and ultimately punishing the appellant for contempt of court in formerly disobeying the [freezing] injunction and/or breaking his undertaking. … To that extent the order goes beyond the legitimate purpose of an order for discovery in aid of a [freezing] injunction … and is not necessary for the proper and effective exercise of the [freezing] injunction*".

126. There was a difference between the Claimants and Mr Khouri about whether, when he provided the Assets List, it should have set out his assets as at 8 December 2022, the date when it should have been provided under the order of 25 November 2022, or whether it should have set out his assets as at 6 February 2023, when he did provide it. In fact, Mr Khouri listed his assets as at 6 February 2022. I am inclined to agree with the Claimants that it should have provided information as at 8 December 2022, but there is no reason to think that this was a deliberate breach of the order. In any case, I do not need to decide that question: it is not in dispute that the Court may, in an appropriate case, make an order for further information which is not already within the scope of the freezing order.

127. Mr Dillon-Malone emphasised the Claimants' contention that there is credible evidence of a serious discrepancy between the information in the Assets List and what the Court was told about his living expenses. Mr Tricoli suggested in his evidence that [**redacted**]. I found these explanations too vague to be convincing, but there are other objections to the Further Information Application.

128. As I have said, the Court will order further information on an application such as this if it considers that further information sought will reduce the risk that the respondent will dissipate assets and that the request is proportionate to what is required for that purpose. In my judgment, the Claimants have requested information that goes far beyond that. To give just three illustrations: (i) the order does not contemplate that the information is only required in respect of assets over a stated value, and would cover expenditure within the permitted exception to the freezing order for living expenses; (ii) the order sought would require information of the position as at 25 November 2022, although there is no reason to think that Mr Khouri dissipated assets before he was served with the order, and (iii) I see no possible justification for the application for information about "*putative interests of the transferees/recipients*", an expression which, to say the least, is difficult to understand.

129. In some circumstances, the Court will seek to re-formulate an order sought by an over-ambitious applicant, but in this case, I decline to do so. Ms Coady said in her evidence that the information was requested "*in order fairly to dispose of these proceedings*", and there is every sign that the information is sought by the Claimants, at least in part, in order to obtain evidence that they might deploy in support of their claims against Mr Khouri. I am not persuaded that any of the information is reasonably required to enhance the Claimants' prosects of enforcing any judgment that they obtain against him, and certainly the application goers far beyond what might be justified for this purpose.

Conclusions

130. Accordingly,

(i) I grant the Extension of Time Application;

(ii) I refuse the Jurisdiction Application;

(iii) I refuse the Discharge Application in respect of the Freezing Order, except that I give Mr Khouri leave to restore his application that the cross-undertaking is damages should be fortified;

(iv) I grant the Discharge Application in respect of the Proprietary Order;

(v) I make no order on the Service Application;

(vi) I refuse the Further Information Application; and

(vii) any application concerning the costs of these applications or other consequential matters is to be made by 5.00 pm on 15 May 2023.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
24 April 2023