Neutral Citation Number: [2024] EWCA CIV 65

Case No: CA-2022-002311

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE ANDREW BAKER
[2022] EWHC 3110 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between:

GFH CAPITAL LIMITED	**Claimant/ Appellant**
- and -	
(1) DAVID LAWRENCE HAIGH	**First Defendant/ Respondent**
(2) THE COVE ESTATES LIMITED **(3) HOTEL COVE LIMITED** **(4) COVE LAMORNA LIMITED** **(5) MONT FLEURY LIMITED** **(6) CLOATLEY HOSPITALITY LIMITED** **(7) SPORT CAPITAL LIMITED** **(8) ALISON LOUISE THOMAS**	**Second to Eighth Defendants**

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Mr Daniel Benedyk (instructed by **Preiskel & Co LLP**) for the **Claimant/Appellant**
The **First Defendant/Respondent** appeared in person

Hearing date: 2 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 5 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Phillips:

1. This appeal concerns the duration of a domestic freezing injunction ("the Injunction") contained in an order made by Males J on 13 August 2014 ("the Without Notice Order"), as varied by Flaux J on 5 December 2014 ("the Order"). The Injunction was by way of interim relief pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 ("section 25") and was granted in support of proceedings brought by the appellant ("GFH") against the first defendant ("Mr Haigh") in the courts of the Dubai International Financial Centre ("the DIFC")

2. The Injunction, both as originally granted and as varied, provided that those paragraphs restraining Mr Haigh from dealing with his assets (paragraphs 4-7) would continue "[U]ntil the disposal of the Claim or further order…". The issue is whether, properly interpreted, the Injunction expired on disposal of the DIFC proceedings it was designed to support, or whether it has continuing force until the Part 8 claim in which the Injunction was granted has been formally terminated.

3. On 11 November 2022 Andrew Baker J ("the Judge"), in an *ex tempore* judgment, determined that the Injunction had expired on its own terms on 4 July 2018 when Sir Jeremy Cooke, sitting as a Judge of the DIFC, gave judgment in favour of GFH against Mr Haigh. Accordingly the Judge declared that paragraphs 4-7 of the Order stood discharged as of 4 July 2018 and that Mr Haigh was not subject to any prohibition or restraint by reason of them.

4. GFH appeals that decision on two grounds, permission for both having been granted by Males LJ on 1 March 2023. By the first ground GFH challenges the Judge's interpretation of the Order, asserting that the "the Claim" in the phrase set out above refers to the Part 8 claim, not the DIFC proceedings. The second ground is an assertion that, even if the Judge's interpretation is correct, the disposal of the DIFC proceedings has not yet occurred because (GFH contends) Mr Haigh has an undetermined application for permission to appeal against Sir Jeremy Cooke's judgment.

The background

5. Until 14 March 2014 Mr Haigh was the Deputy CEO of GFH, a company incorporated in the DIFC, carrying on business in the field of financial services, investment and wealth management.

6. By claim form dated 28 May 2014 GFH brought proceedings in the DIFC, alleging that Mr Haigh had embezzled in the region of US$5m from GFH by procuring the submission of false invoices and fraudulently directing payments in respect of those invoices for his own benefit, in breach of his contract of employment and fiduciary duties.

7. On the basis of that claim, Sir John Chadwick (as Deputy Chief Justice of the DIFC) granted a worldwide freezing order against Mr Haigh on 3 June 2014 and continued that order on 17 June 2014 until further order of the DIFC court.

8. On the 7 August 2014 GFH issued the Part 8 Claim Form in the Commercial Court, seeking a freezing order pursuant to section 25 prohibiting Mr Haigh from dealing

with any of his assets in England and Wales up to a value of US$5m, stating that the order was sought in support of the worldwide freezing order granted in the DIFC. The Claim Form, at this stage naming only Mr Haigh as defendant, stated:

> "[GFH] has brought a claim against [Mr Haigh] in the DIFC courts… The total value of the claim is presently US$5m."

9. GFH's without notice application for an interim order in the Part 8 claim came before Males J on 13 August 2014. Mr Haigh had been given short informal notice of the hearing and was represented by solicitors and counsel. In his judgment, giving reasons for making the Without Notice Order, Males J explained at [2] that the proceedings were under section 25, in support of the substantive claim in the DIFC and that an English injunction was sought to reinforce the worldwide freezing order obtained in the DIFC. At [10] Males J noted observations by Lord Bingham CJ in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 "to the effect that on any application under s. 25 the English Court must recognise that its role is subordinate to and must be supportive of the primary court".

10. Males J concluded that, notwithstanding that the assets sought to be frozen were also covered by the freezing order granted in the DIFC, it was appropriate to grant the Injunction because, in particular, an English order would bind banks holding accounts in this jurisdiction to refuse to act on instructions from Mr Haigh for the removal of assets (see [19-20]). Males J stated at [22] that he would hear from counsel as to the terms of the Without Notice Order, but no transcript or note of that discussion is available.

11. The Without Notice Order recorded, at paragraph 3, as follows:

> "This order was made after the Order made between the same parties by the Court of First Instance of the [DIFC] in claim no. CFI 020/2014 on 17 June 2014. To the extent that there is an overlap in the subject matter of the two aforesaid Orders, the DIFC [has] the primary role for enforcement as regards [Mr Haigh]."

12. Paragraph 4 contained the central freezing provision:

> "Until the disposal of the Claim or further order of the court, [Mr Haigh] must not remove from Engand and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of US$5m…"

13. Paragraph 9 provided for costs in the following terms:

> "The costs of and occasioned by this Order shall be costs in the Claim."

14. Schedule B recorded the undertakings given by GFH to the Court, including the following:

> "(5) [GFH] will not without the permission of the Court use any information obtained as a result of this order for the purpose of any

> civil or criminal proceedings, either in the DIFC or in any other jurisdiction, other than this claim."

15. On 23 October 2014 GFH applied to vary the Without Notice Order by (i) joining the second to sixth and eighth defendants and (ii) freezing specified assets held in their names on the basis that those assets were acquired with or funded by proceeds of Mr Haigh's fraud and were held on constructive trust for GFH.

16. Following a hearing on 5 December 2014 Flaux J made the Order, to which the second to sixth and eighth defendants were added as the first to sixth respondents. The Without Notice Order was varied and attached as Schedule 1 to the Order in its amended form. By that schedule, the Injunction against Mr Haigh was continued in precisely the same terms, save that (i) certain assets held in the names of the respondents (including the shareholdings in the second to sixth defendants) were specifically identified in paragraph 6 as subject to the freezing injunction and (ii) the words "or the claim before the DIFC" were added at the end of undertaking (5) in Schedule B.

17. Paragraph 9 of the schedule contained a new freezing injunction against the second to sixth defendants and paragraph 11 froze assets of the eighth defendant. Both of those paragraphs provided that the relevant freezing injunction would continue "Until further order of the court…".

18. Paragraph 14 of the schedule provided for costs in the same terms as paragraph 9 of the Without Notice Order.

19. On 16 October 2016 Sir Roger Giles granted GFH Immediate Judgment against Mr Haigh in the DIFC proceedings, but the DIFC Court of Appeal granted Mr Haigh permission to appeal on 2 March 2017 and on 14 September 2017 set aside the judgment.

20. The trial of the DIFC proceedings took place between 1 and 3 July 2018, Mr Haigh not attending. Sir Jeremy Cooke delivered judgment on 4 July 2018, holding that Mr Haigh had received AED 8,735,340, US$50,000 and £2,039,793.70 on constructive trust for GFH and awarding GFH damages in those sums together with interest and indemnity costs.

21. In the meantime, in January 2017, GFH had brought separate proceedings in the Commercial Court to enforce the Immediate Judgment obtained in the DIFC and to trace the funds held on trust into assets held by Mr Haigh or the other defendants. Those proceedings were duly amended following the developments in the DIFC proceedings to seek enforcement of the final judgment of Sir Jeremy Cooke.

22. On 19 May 2020 Henshaw J granted GFH summary judgment on its enforcement and tracing claim, entering judgment in this jurisdiction against Mr Haigh based on the DIFC judgment and declaring that the interests of the second, third, fifth and sixth defendants in various properties were purchased with funds misappropriated from GFH by Mr Haigh and held by them on constructive trust for GFH.

23. In his judgment Henshaw J recorded the position in relation to an appeal against the DIFC judgment as follows:

> "31. Time for seeking permission to appeal the DIFC Judgment expired on 25 July 2018 pursuant to rule 44.10 of The Rules of the Dubai International Financial Centre Courts 2014. It appears that no appeal was filed by that date. The evidence indicates that Mr Haigh subsequently filed papers, at least by email, including a request for waiver or deferral of the appeal fee, which he said he could not pay without release of funds to which GFH has not consented."

24. At [162] Henshaw J rejected Mr Haigh's contention that his wish to appeal the DIFC judgment was a compelling reason for a trial or a stay, both because Mr Haigh had obtained neither a fee waiver nor permission to appeal out of time and also because his proposed appeal did not have a realistic prospect of success.

25. On 3 November 2021 Mr Haigh applied to set aside the Order, issuing his application in the enforcement proceedings rather than in the Part 8 claim. The basis of the application was that GFH's claim had been "disposed of" in both the DIFC and in England and that there was no valid reason for the freezing injunction to continue following Mr Haigh's bankruptcy.

The judgment

26. The Judge gave the following concise reasons for holding that the "the Claim" referred to in paragraph 4 of the Order was the DIFC claim:

> "5. I have no doubt at all….that, as granted in December 2014, any sensible recipient of that order would understand "the Claim" in paragraph 4 to refer to and to mean the substantive claim brought by [GFH] against [Mr Haigh] before the DIFC referred to in paragraph 3. As I put it during the opening submissions by Mr Haigh this morning, and he adopted this characterisation, the sensible reading of the order is surely that at the end of the first sentence in paragraph 3 what was intended was "("the Claim")". That is to say "the Claim", for the purposes of this order, was the claim brought by the claimant before the first instance court in Dubai.
>
> 6. It is well known in practice before this court that an important and sharp distinction is drawn between pre-judgment and post-judgment relief of various kinds. In circumstances where the freezing order was granted at the outset, broadly speaking, of the overall litigation process in this wider case, by reference to the substantive claim being pursued in the DIFC, for the court to say at that stage that it was granting an injunction by way of freezing order relief, until the disposal of the Claim, is to say that the injunction thus granted existed until the final determination of the claim before the court in the DIFC. That occurred as long ago now as 4 July 2018 by and under a judgment of that date of Sir Jeremy Cooke sitting as a judge of the DIFC.
>
> 7. In those circumstances, inconvenient though [GFH] may regard it and unusual though it is that it has taken four years to get to it, but the wide range of other things that have gone on in the litigation between

> these parties may be an explanation for why it is only now that the point is being confronted, in my judgment the only sensible reading of the order granted by Flaux J in December 2014 is such that it expired on its own terms on 4 July 2018…".

27. The argument that the DIFC proceedings were still on foot by reason of Mr Haigh's wish to appeal the DIFC judgment was not advanced before the Judge and was not addressed in his judgment.

GFH's arguments on appeal

28. GFH contends that, contrary to the Judge's instinctive reaction, the words "the Claim" in paragraph 4 of the Order must refer to the Part 8 claim in which the Order was made. GFH states this is clear from the wording of the Order itself and as a matter of what was necessary to give practical effect to the Order.

29. As for the wording, GFH points to the costs order in paragraph 9 of the Without Notice Order (replicated in paragraph 14 of the Order), providing that costs would be "in the Claim". GFH argues that, as the English court has no authority to make costs orders in respect of foreign litigation, "the Claim" must be a reference to the Part 8 claim, indicating that "Claim" as a defined term must refer to that claim, not the DIFC proceedings. Further, GFH contends, the wording "this claim or the claim before the DIFC" in undertaking 5 in Schedule B to the Order (varied from the wording in the Without Notice Order) demonstrates that where the Order intends to refer to the DIFC proceedings, it identifies them expressly rather than by using the term "the Claim".

30. As for the effect of the Order, GFH argues that it cannot have been intended that the Injunction would expire automatically on the occurrence of an event in foreign proceedings (amounting to "disposal" of those proceedings) over which the English court had no control and of which the parties (and particularly GFH) might not have advance warning. The result of interpreting the Order in that way would be that, despite GFH having obtained a substantial judgment against Mr Haigh in the DIFC, Mr Haigh's assets would be released automatically from any restraint without further order and he would be free to deal with them so as to avoid GFH enforcing the judgment against them. GFH submits that such an outcome would be contrary to the enforcement principle which underlies freezing injunctions, as recognised by the Supreme Court in *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64, namely: "the purpose of a freezing order is to stop the injuncted defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case…"

31. GFH also points to the potential uncertainty of whether "the disposal" of foreign proceedings has or has not occurred. In the present case summary judgment was granted against Mr Haigh in 2016 (but subsequently reversed). GFH asks, rhetorically, why the Judge did not regard the Injunction as discharged at that point.

32. GFH further contends that it would be strange if the effect of the wording was that the Injunction ceased to have effect against Mr Haigh, the principal defendant, whilst the Order continued to restrain the ancillary defendants "until further order".

33. In relation to its second ground of appeal, GFH simply relies upon the matters recorded in Henshaw J's judgment, namely, that Mr Haigh has an outstanding application for permission to appeal the DIFC judgment. GFH argues, on that basis that there has not been a disposal of the DIFC proceedings.

The principles governing interpretation of the Order

34. In *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [13] Lord Sumption described the correct approach to the construction of a judicial order as follows:

> "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

35. In *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525 at [41] Flaux LJ (with whom Gross and Lewison LJJ agreed) summarised the relevant principles as follows, drawing in particular on the judgment of Lord Clarke of Stone-cum-Ebony JSC in the Supreme Court in *Ablyazov (No. 10)*:

> "(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of the judgment).
>
> (2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of the judgment…..).
>
> (3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]-[26] of the judgment...)."

Discussion

Ground 1: the meaning of "the Claim" in the Order

36. Although the ultimate issue is the meaning of the "the Claim" in paragraph 4 of the Order, the key task is the proper interpretation of that term in the Without Notice Order. The Without Notice Order provides the context in which paragraph 4, and indeed paragraph 3, were first deployed, following Males J's judgment. The wording

of those paragraphs was reproduced in identical terms in Schedule 1 to the Order and it is inconceivable that the meaning of "the Claim" changed when so deployed, particularly in the absence of any reasoned decision to that effect. None of the variations to be found in the Schedule would justify re-interpreting paragraphs 3 and 4. GFH does not suggest otherwise.

37. The standard form Commercial Court without notice freezing order (departure from which in a draft order must be highlighted and explained to the court), provides that the injunction will continue "Until the return date or further order…".[1] Although there is no standard form for a freezing order continued on the return date (or otherwise made on notice), the wording usually adopted is "Until after judgment or further order.." or simply "until further order..". The former practice of extending an injunction "Until trial or further order…" has been superseded to avoid the need to start a trial with an application to continue the freezing injunction: a further application is instead made on the handing-down of judgment, when a judgment creditor will seek a post-judgment injunction "Until further order ..".

38. It is therefore apparent that the Without Notice Order, continuing the Injunction "Until disposal of the Claim or further order..", departs significantly from the standard wording. There is no evidence as to what was said to Males J by way of explanation for that departure, but the obvious reason is that the Injunction was not sought, in the usual way, pending judgment in the Commercial Court proceedings themselves, but was sought pursuant to section 25, in support of primary proceedings in the DIFC.

39. In that context, whilst the reference to "further order" is clearly to any further order of the Commercial Court, the expression "disposal of the Claim" would appear inapposite to refer to final judgment in the Part 8 claim, both because that is not recognised terminology for that purpose and also because the grant of an Injunction is the final relief sought by way of an application under section 25 (as in the present case): there is no further claim to progress to disposal.

40. Indeed, the use of the term "the Claim" in paragraph 4, starting with a capital letter, invites the reader to identify the claim to which it refers in the earlier paragraphs of the Without Notice Order, rather than simply to read the expression as referring to the Part 8 claim itself. That "Claim" is readily found in the immediately preceding paragraph, expressly referring to the DIFC proceedings, giving its "claim no." and confirming that the DIFC has the "primary role" for enforcement as regards Mr Haigh. I agree with the Judge that what was plainly intended was that the DIFC claim referred to in paragraph 3 would be defined as ("the Claim") and that any sensible recipient of the order would so understand the wording.

41. The above interpretation is reinforced, in my judgment, by reference to the Part 8 claim form, in which GFH stated that it had "brought a claim against [Mr Haigh] in the DIFC courts" and the judgment given by Males J (as per *Sans Souci*, an authoritative statement of the circumstances in which the Without Notice Order was made), referring in [2] to the DIFC proceedings as "the substantive claim" and recognising at [10] that under section 25 the role of the English Court "is subordinate to and must be supportive of the primary court".

[1] The current version of the standard form is set out in Appendix 11 to the Commercial Court Guide, 11th ed 2022, revised July 2023. The 9th ed 2011, which was in force at the date of the Without Notice Order, used the same wording.

42. In my judgment the further provisions of the Without Notice Order relied upon by GFH support the above interpretation rather than undermine it. As for the costs provision in paragraph 9:

    i) If the intention was to provide for costs in the Part 8 claim, the standard wording set out in CPR 44 PD4.2 would have been "costs in the case". The phrase "Costs in the Claim" is not usual wording for a costs order in English proceedings, but makes sense in section 25 proceedings where the costs could appropriately follow the event in the substantive proceedings to which the Part 8 claim is subordinate;

    ii) GFH's contention misunderstands the nature and effect of the costs order. There is no question of the Commercial Court seeking to make an order in relation to the costs of foreign proceedings. The Court is simply directing that the "event" which will determine the costs of the Part 8 claim is the outcome of the DIFC proceedings. That makes entire legal, practical and commercial sense, particularly as there is no further "event" in the Part 8 claim which would determine which party should pay the costs.

43. As for undertaking (5) in Schedule B to the Without Notice Order, the expression "other than this claim" is used to refer to the Part 8 claim, notably using the term "claim" without a capital letter. It seems plain from this usage that "the Claim" in paragraphs 4 and 9 of the Without Notice Order is a reference to another claim, namely, the DIFC proceedings identified in paragraph 3.

44. It is right to note that the strength of the support to be drawn from the wording of undertaking (5) for reading "the Claim" as the DIFC proceedings may have been removed by the variation to that undertaking in the schedule to the Order. The addition of the words "or the claim before the DIFC" means that the term "the Claim" is not used for either the Part 8 claim or the DIFC proceedings in the varied undertaking. However, as explained above, that change of wording as between the Without Notice Order and the Order cannot sensibly be taken to have changed the meaning of "the Claim" from the DIFC proceedings to the Part 8 claim.

45. I also see no real force in GFH's arguments as to the practical effects of making the continuation of the Injunction dependent upon the disposal of the DIFC proceedings. If an Injunction is expressed to last until trial or judgment (or "disposal of") English proceedings, the claimant would have to be astute to apply for continuation or a fresh order upon such event, including where the court unexpectedly granted summary judgment or struck out a claim (in which case an injunction might be sought pending an appeal). The position is no different in relation to proceedings in the DIFC courts, where procedures mirror those in this jurisdiction and GFH was just as able to anticipate outcomes as in the Part 8 claim. When judgment was imminent in the DIFC (either summary judgment in 2016 or final judgment in 2018), GFH could and should have been ready to make the appropriate application in the Commercial Court: such application would certainly have been successful to give effect to the enforcement principle. The fact that GFH failed to so apply does not mean that the discontinuance of the Order on the disposal of the DIFC proceedings would be contrary to the enforcement principle, any more than discontinuing a pre-judgment freezing order at trial or on judgment (accordingly to its terms) is contrary to that principle. The courts require a claimant availing itself of the "nuclear weapons" of civil litigation to

monitor actively their use and effect and to be astute to apply to the court to maintain their effectiveness and fairness.

46. I have already indicated that there is nothing in the Order that would alter my interpretation of the term "the Claim". But there is one aspect that strongly supports that interpretation. If "the Claim" was a reference to the Part 8 claim, that phrase would also have been appropriate for the duration of the new injunction included in the schedule to the Order against the additional defendants. But that injunction is expressed to last "until further order". The obvious reason for the difference is that those defendants are not party to the DIFC proceedings, so the injunction against them cannot be controlled by the outcome of "the Claim". There is nothing inconsistent, in my judgment, in the Injunction against Mr Haigh being continued until disposal of the DIFC proceedings, whilst the injunction against the ancillary defendants (who are domiciled in England and not parties to the DIFC proceedings) continues until further order.

47. I would accordingly dismiss ground 1 of the appeal.

<u>Ground 2: whether the disposal of the DIFC proceedings has occurred</u>

48. In my judgment the principle of certainly, which is so important in the context of freezing orders which have their main effect by service on third parties, entails that such an order comes to an end immediately on the occurrence of the specified event, whether it is trial, judgment or "disposal". The fact that there may be further proceedings, or an appeal by either party, does not alter that effect: the claimant may apply for a continuation of the injunction pending such an appeal, but the existing injunction must come to an end. It cannot continue in some form of "limbo" until appeal rights are exhausted.

49. It follows that the Judge was right, in my judgment, to hold that the Injunction ceased to have effect on its own terms on judgment being granted in the DIFC. In my view that occurred when summary judgment was granted against Mr Haigh in 2016, notwithstanding its subsequent reversal, but there was no challenge by way of respondent's notice to the Judge's finding that it occurred on final judgment being granted in July 2018.

50. Even if the above analysis is wrong, and "disposal" means final disposal after all appeal rights are exhausted, that undoubtedly occurred in this case. Final judgment was granted against Mr Haigh in July 2018 and he did not apply in time for permission to appeal. At that point all appeal rights were exhausted. Yet further, whilst Henshaw J recorded that Mr Haigh had lodged an application out of time, he also noted that Mr Haigh was unable to pay the application fee and had applied for a waiver. By the time Mr Haigh's application came before the Judge in November 2022, there was no suggestion that Mr Haigh had been granted permission to apply for permission to appeal out of time and, indeed, there is no evidence to suggest that any application he had made in that regard would even have been considered given that he did not pay the relevant fee and did not obtain a fee waiver. Consistently with the above, Mr Haigh confirmed to this Court during his oral submissions that he does not have an extant application for permission to appeal in the DIFC.

51. I see no merit whatsoever in ground 2 of the appeal.

Conclusion

52. I would dismiss the appeal.

Lord Justice Arnold:

53. I am grateful to Phillips LJ for setting out the background to this appeal, the judge's reasoning, GFH's arguments and the applicable principles, but I respectfully disagree with his conclusion. I would allow the appeal on ground 1. My reasons are as follows.

54. The starting point is to try to be clear as to what is meant by a "claim". Although the word "claim" is repeatedly used in the Civil Procedure Rules, the CPR contain no definition of that term. Furthermore, the CPR use the term in two senses. Usually the term is used to refer to a court process as a procedural concept. For example, the CPR state that "A claimant must use form N1 to start a claim under Part 7" (Practice Direction 7A paragraph 3.1) and refer to the "alternative procedure for claims" (Part 8), "the small claims track" (Part 27), "possession claims" (Part 55), "admiralty claims" (Part 61) and so on. Synonyms for this sense of the word are "action" (as in "pre-action conduct" and "pre-action protocol", rule 3.1(5)), "case" (as in "court's duty to manage cases", rule 1.4) and "proceedings" (as in "how to start proceedings – the claim form", Part 7). Sometimes, however, the term is used to refer to a cause of action, or at least something similar to a cause of action: see in particular rule 7.3 ("A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings"). Which of these meanings is intended is usually clear from the context. For present purposes the second meaning can be disregarded.

55. As Phillips LJ has explained, we are concerned with an appeal in an English claim that was commenced in the Commercial Court by GFH on 7 August 2014. GFH commenced the claim by issuing a claim form under CPR Part 8. The claim form was issued by solicitors instructed by GFH. GFH incurred costs in doing so comprising the costs of the work done by its solicitors and the court fee of £480. GFH's solicitors used form N208 for this purpose. (I note that there is no rule or practice direction in the current version of the CPR which requires form N208 to be used to start a Part 8 claim. Note 8.2.1 in *Civil Procedure* (2023 edition) states that this is required by Practice Direction 7A paragraph 3.1, but that is incorrect as can be seen from paragraph 54 above. Plainly this is what is intended, however.)

56. The claim form identified the "Claimant" as GFH and gave the "Claim No." as "2014 Folio 956". It set out, as Form N208 requires, "details of claim" verified by a statement of truth. This can only mean the details of the English claim being commenced by that claim form under that claim number. The details of claim supplied by GFH stated, in compliance with CPR rule 8.2:

> "The Claimant has brought a claim against the Defendant in the DIFC courts alleging … The total value of the claim is presently US$5 million.
>
> …

> The Claimant was granted an interim world-wide freezing order over the assets of the Defendant by Deputy Chief Justice Sir John Chadwick at a hearing in the DIFC Court of First Instance on 3 June 2014. At the return date on 17 June 2014 Sir John Chadwick renewed the world-wide freezing order, which is now in force …
>
> The Claimant seeks from the Commercial Court of England & Wales a freezing order pursuant to s.25 of the Civil Jurisdiction and Judgments Act 1982, prohibiting the Defendant from dealing with any of his assets anywhere in England and Wales up to a value of USD 5 million (such order being in support of the worldwide freezing order granted in the DIFC Courts)."

57. The "details of claim" made it clear that GFH had already brought a claim in the DIFC. The substantive claim was the extant claim in the DIFC, while the new claim in the Commercial Court was ancillary to the claim in the DIFC. The fact that the new claim in the Commercial Court was ancillary to the existing claim in the DIFC did not alter the fact that, procedurally, it was a distinct claim in a different court in a different country.

58. It was in the claim commenced by this claim form that Males J made his order dated 13 August 2014. Phillips LJ has set out the key provisions of this order in paragraphs 11-14 of his judgment. The question raised by ground 1 of the appeal is the meaning of the word "Claim" in the context of the phrase "Until the disposal of the Claim or further order of the court" in paragraph 4 of the order as varied by the order of Flaux J dated 5 December 2014, but I agree with Phillips LJ that it is first necessary to consider the meaning of that expression in the context of Males J's order since there is no good reason to think that its meaning can have changed as a result of the variation.

59. Although the upper case C appears to suggest that "Claim" is intended to be a defined term, there is no definition of it in the order. It follows that the meaning must be ascertained from the context.

60. In my judgment the most natural interpretation of the term "Claim" is that it refers to the claim within which the order was made, namely the English claim. This is for the following cumulative reasons.

61. First, the order bears the claim heading and claim number of the English claim.

62. Secondly, the heading and paragraph 1 of the order both recite that the order was made by Males J i.e. a judge of the English court hearing the English claim and exercising the jurisdiction conferred by section 25 of the 1982 Act.

63. Thirdly, while it is true that, as both the judge and Phillips LJ emphasise, paragraph 3 of the order refers to the order dated 17 June 2014 in "claim no. CFI 020/2014" in the DIFC, I do not agree that it follows that that must be the claim being referred to in paragraph 4 of order. That claim is referred to in contradistinction to the claim in which the order is being made, just as in the "details of claim" in the claim form. In my view, if paragraph 4 had been intended to refer to the DIFC claim, it would have been more likely for this to have been spelt out, whether by inclusion of a definition

in paragraph 3 or a cross-reference from paragraph 4 to paragraph 3 or a repetition of the DIFC claim number. Phillips LJ regards the use of the upper case C in "Claim" as indicative of some meaning other than the claim in which the order was made, but I disagree with this. Reading the order as a whole, it is much more likely to be a typographical artefact: see paragraph 70 below.

64. Fourthly, as Phillips LJ accepts, the words "or further order of the court" plainly refer to a further order of the English court. That indicates that the "disposal of the Claim" must be by the English court as well. It would be very odd in my opinion to read the composite phrase as meaning "Until the disposal of the Claim [by the DIFC] or further order of the [English] court". The natural reading is that the composite phrase is referring to alternative acts by the same court.

65. Fifthly, this is supported by the reference to "disposal" of the Claim rather than "judgment" or "determination". I agree with Phillips LJ that the obvious explanation for this is that the English claim was made pursuant to section 25 of the 1982 Act, but I do not agree that this supports the judge's interpretation. Although the only relief sought by GFH from the English court was a freezing order in respect of assets in England and Wales, the grant of the freezing order did not mean that the English claim was at an end. There could be, and in fact was, an application to vary the freezing order. There could be an application by Mr Haigh to discharge the order (e.g. for material non-disclosure). There could be, and in fact was, a dispute about how much Mr Haigh could spend on ordinary living expenses and/or on legal advice and representation (this led to a further order varying the freezing order made by Phillips J (as he then was) on 20 February 2017 which, among other things, allowed Mr Haigh to spend a reasonable sum on medical expenses and to spend at least £50,000 on legal advice and representation after that date). There could be an application by GFH to use information disclosed by Mr Haigh pursuant to the order for the purposes of other proceedings, and in particular GFH's claim in the DIFC. There could be an application by Mr Haigh to enforce GFH's cross-undertaking in damages. All such applications would be, and those that transpired were, applications within the English claim. Furthermore, the costs of the English claim, including but not limited to the costs of obtaining and varying the freezing order, still remain to be dealt with. "Until the disposal" contemplates a hearing (not a trial of a substantive claim) at which any such issues which have not already been dealt with and the order as to costs can be determined, thus disposing of the English claim. (The term "disposal hearing" normally refers to a hearing to assess the amount payable as a consequence of a judgment or order lasting no more than 30 minutes at which no oral evidence is heard: see Practice Direction 26 paragraph 12.4. In my experience the term is also used, however, to denote other kinds of hearings which are intended to bring proceedings to a conclusion without the need for oral evidence.) By contrast with the English claim, the claim in the DIFC would have been expected to, and did in fact, lead to a substantive judgment on GFH's causes of action.

66. Sixthly, this interpretation is also supported by the fact that the disposal of the English claim might have taken place before or after the determination of the substantive claim in the DIFC, for example if the DIFC discharged its worldwide freezing order before trial and this led to the English order being discharged.

67. Seventhly, nothing in Males J's judgment setting out his reasons for making the order suggests anything different. Like the claim form, Males J recognised that the English

claim was ancillary to the DIFC claim, but equally he clearly recognised that it was procedurally a distinct claim.

68. This reading of paragraph 4 is strongly supported by paragraph 9, which provides that "The costs of and occasioned by this Order shall be costs in the Claim". In my experience "costs in the claim" is a commonly used alternative expression to "costs in the case". Either way, such an order means what it says: the costs become part of the claim or case. It does not mean that the costs become automatically contingent upon the result of the claim or case. Although the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, the court retains a discretion and can make a different order, such as an issue-based order or a percentage order, and can take the parties' conduct into account: see CPR rule 44.2. Moreover, the court may have to decide whether or not to assess costs summarily or order a detailed assessment, whether the assessment should be on the standard or indemnity basis, whether to order an interim payment of costs and what order to make in respect of interest on costs. The court will do all this as part and parcel of its determination, or here disposal, of the claim. It is common for freezing orders made or continued after an *inter parte*s hearing to provide for the costs to be in the case or claim, and this order made perfectly good sense in the present situation for the reasons I have canvassed in paragraph 65 above.

69. It is not possible for an English court to empower a foreign court such as the DIFC to make orders of the kind I have described in the preceding paragraph, nor can a foreign court such as the DIFC unilaterally make such orders, with respect to the costs of the English claim (such costs may be recoverable as damages in the foreign proceedings, but that is a different matter). Thus the order for "costs in the Claim" is a strong indication that the claim being referred to is the English claim.

70. The only pointer the other way in the order is that paragraph 5 of Schedule B contains an undertaking by GFH not "without the permission of the Court" to use information obtained "as a result of this order" for the purpose of any proceedings "other than this claim". There is a linguistic contrast between the reference to "the Claim" in paragraph 4 and the reference to "this claim" in Schedule B paragraph 5. In my view, however, the force of this point is blunted by other inconsistencies in drafting between Schedule B paragraph 5 and other parts of the order. Thus Schedule B paragraph 5 refers to "the Court" whereas paragraph 4 refers to "the court", and Schedule B paragraph 5 refers to "this order", as do paragraphs 2 and 10, whereas paragraphs 1, 3, 9 and 15 all refer to "this Order". If Schedule B paragraph 5 had said "this Claim" it would have been entirely consistent with my reading of paragraph 4. (I would add that drafting inconsistencies of this nature are one of the reasons why the standard form of freezing order should always be used unless there is good reason to depart from it, and any variation must be carefully considered both as to its substance and as to its drafting.)

71. The interpretation of paragraph 4 of the order that I have set out is supported by the enforcement principle recognised by the Supreme Court in *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64, [2015] 1 WLR 4754. The purpose of a freezing order is to prevent the respondent from dissipating or disposing of their assets in a manner which may prevent, obstruct or delay enforcement of any judgment which the claimant may obtain. The effect of the judge's interpretation is that the freezing order was discharged the moment GFH obtained judgment in the DIFC, potentially jeopardising

enforcement of the judgment against Mr Haigh's assets in England and Wales, whereas GFH's interpretation avoids that consequence.

72. It is also supported by considerations of practicality. Making the continuation of the freezing order entirely dependent on the contingencies of the DIFC proceedings would give rise to an obvious risk of unintended consequences. As counsel for GFH pointed out, it is unclear from the judge's judgment why the freezing order was not discharged when GFH obtained summary judgment against Mr Haigh even though that was later reversed on appeal.

73. Phillips LJ's answer to both of these points is that GFH could and should have been ready to make an appropriate application to the English court. I do not find this a convincing answer. In the first place, it places an undue burden on a party in the position of GFH to make what could be a very urgent and time-critical application to the English court. Secondly, it fails to allow for the practical exigencies of litigation, such as the possibly of judgment being given extempore or a written judgment being promulgated without advance notice, which could happen in either case after court hours in a different time zone. Thirdly, it does not answer the point about what actually happened in this case. In fact, GFH made no application to the English court when it obtained summary judgment in the DIFC, and yet the judge did not hold that the freezing order came to an end then, but only when GFH obtained judgment after trial. No order was made reinstating the English freezing order after the successful appeal against summary judgment.

74. In my judgment the order as varied by Flaux J on 5 December 2014 is consistent with the interpretation I have set out above. Phillips LJ has set out the key provisions of the order as varied in paragraphs 16 to 18 of his judgment, but two additional points should be noted.

75. First, the respondents to the application before Flaux J (who were identified in the order in terms that excluded Mr Haigh, although he was in fact also a respondent to the application) were not at that stage joined as defendants to the English claim. This is consistent with the fact that the respondents were not defendants to the DIFC claim. At first glance, it is not obvious what jurisdiction Flaux J had to make the order against the respondents given that they were not parties to the DIFC claim. Although we did not receive much argument on this question, it appears to me that the answer to it is that the basis for the application was that GFH alleged that Mr Haigh owned certain assets in England and Wales which were held in the names of the respondents. Thus the immediate purpose of extending parts of the injunction to the respondents was to prevent those assets from being disposed of prior to any dispute over their beneficial ownership being resolved.

76. If those assets were beneficially owned by Mr Haigh, then it is well arguable that Flaux J had jurisdiction to make the order against the respondents pursuant to section 25 of the 1982 Act. GFH evidently anticipated the possibility, however, that it might turn out that some or all of the assets were beneficially owned by the respondents, in which case it might want to bring a tracing claim against the respondents in respect of such assets (as GFH in fact subsequently did by a Part 7 claim form dated 27 January 2017). A tracing claim against the respondents would be a substantive claim in this jurisdiction, and thus freezing relief could be obtained and maintained against the respondents pursuant to the ordinary jurisdiction of the English court.

77. In my view this explains the point noted by Phillips LJ that paragraphs 9 and 11 of the freezing order as varied restrained the respondents "Until further order of the court" whereas paragraph 4 continued to restrain Mr Haigh "Until the disposal of the Claim or further order of the court". Although the English claim against Mr Haigh remained to be disposed of in the sense explained above, the freezing order against him was final relief against him in this jurisdiction pursuant to section 25 of the 1982 Act, whereas the freezing order against the respondents was, at least potentially, only interim relief against them. This point can be illustrated by the fact that, even if the English claim against Mr Haigh were to be disposed of (and, indeed, even if that led to discharge of the freezing order as against him), GFH might still wish to maintain the freezing order as against the respondents until a tracing claim against them was determined.

78. Secondly, paragraph 2 of Flaux J's own order (as opposed to the freezing order as varied by him) provided that GFH's costs of the application should be "costs in the case". I do not understand it to be in dispute that this means costs in the English claim. Although this refers to "costs in the case" whereas paragraph 14 of the freezing order as varied refers to "costs in the Claim", this is purely a linguistic difference. As explained above, these orders mean the same thing (save that paragraph 2 of Flaux J's order only applied to GFH's costs rather than both parties' costs). Thus this point supports interpreting the order as varied by Flaux J in the way that I consider that the order as originally made by Males J should be interpreted.

79. As Phillips LJ acknowledges, Schedule B paragraph 5 of the order as varied refers to "this claim or the claim before the DIFC", rather than simply "this claim" as in the original order. I agree with Phillips LJ that this change on its own cannot justify interpreting paragraph 4 of the order as varied differently to paragraph 4 of the original order; but it is consistent with the way in which I read the original order.

80. If I am wrong about ground 1 of the appeal, I agree with what Phillips LJ says about ground 2.

Lord Justice Peter Jackson:

81. I would dismiss the appeal for the reasons given by Phillips LJ.

82. No question of law arises. We are concerned with the construction of the Order, which was not happily drafted. For me the essential points are these:

    (1) While respecting the view of Arnold LJ at [60] about the most natural interpretation of paragraph 4 of the Order, that is not how I read that paragraph. To my mind, in agreement with Phillips LJ at [40], the reference to "the Claim" naturally takes one back to an earlier part of the order, where the DIFC claim has just been described in paragraph 3, and is the only claim mentioned. It is also the claim that was important to the parties, with the English proceedings being a mere adjunct. Further, and more telling than my own reading of the Order, is the fact that it is the reading favoured by two judges with experience of the Commercial Court.

    (2) In a case where the Order has no consistent system of nomenclature, logic is of relatively limited assistance when considering the later provisions of the

Without Notice Order or the Order.

(3) I agree with Phillips LJ at [45] that what matters is what the order said, not what it could, or even should, have said.

(4) The principle of certainty favours a restrictive construction: *Ablyazov (No. 10)* at [19].

83. I would therefore reject ground 1 of the appeal, and I also agree with what Phillips LJ says about ground 2.

84. The appeal is therefore dismissed.