Neutral Citation Number: [2018] EWHC 2199 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Claimants

(1) FUNDO SOBERANO DE ANGOLA
(2) FSDEA HOTEL INVESTMENT LIMITED
(3) FSDEA AFRICA AGRICULTURE (LP) LIMITED
(4) FSDEA AFRICA INVESTMENT (LP) LIMITED
(5) FSDEA AFRICA HEALTHCARE (LP) LIMITED
(6) FSDEA AFRICA MEZZANINE (LP) LIMITED
(7) FSDEA AFRICAN MINING (LP) LIMITED
(8) FSDEA AFRICA TIMBER (LP) LIMITED

- and -

Defendants

(1) JOSÉ FILOMENO DOS SANTOS
(2) JEAN-CLAUDE BASTOS DE MORAIS
(3) QUANTUM GLOBAL INVESTMENT MANAGEMENT AG
(4) QG INVESTMENTS AFRICA MANAGEMENT LIMITED
(5) QG INVESTMENTS LIMITED
(6) QUANTUM GLOBAL ALTERNATIVE INVESTMENTS AG
(7) INFRASTRUCTURE AFRICA (GP) LTD
(8) HOTEL AFRICA (GP) LTD
(9) AGRICULTURE AFRICA (GP) LTD
(10) HEALTHCARE AFRICA (GP) LTD
(11) MEZZANINE AFRICA (GP) LTD
(12) MINING AFRICA (GP) LTD
(13) TIMBER AFRICA (GP) LTD
(14) QG AFRICAN INFRASTRUCTURE 1 LP
(15) QG AFRICA HOTEL LP
(16) QG AFRICA AGRICULTURE LP
(17) QG AFRICA HEALTHCARE LP

(18) QG AFRICA MEZZANINE LP
(19) QG AFRICA MINING LP
(20) QG AFRICA TIMBER LP
(21) THE NORTHERN TRUST COMPANY

- -
- -

Paul McGrath QC, Nik Yeo, Alexander Milner, Samuel Ritchie and Joseph Farmer (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **First Defendant**
Stephen Auld QC and Alexander Brown (instructed by **Grosvenor Law LLP**) for the **Second Defendant**
Philip Edey QC, Andrew Fulton and Sam Goodman (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third to Twentieth Defendants**

Hearing dates: 24-27 and 30 July 2018
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimants in this action are the sovereign wealth fund of the Republic of Angola ("FSDEA") and seven of its subsidiaries. On 27 April 2018 Phillips J granted a worldwide freezing order and proprietary injunction ("the WFO") against the First to Twentieth Defendants restraining them from disposing of or dealing with assets up to the value of US$3 billion.

2. At the adjourned return date hearing before me, the Claimants sought an order that the WFO, as amended, be continued until trial or further order. The Defendants sought to set aside the WFO on a number of grounds, including material non-disclosure, and raised various jurisdiction challenges. At the conclusion of the hearing I announced my decision that the WFO should be discharged for non-disclosure, and no fresh order granted, and gave reasons. I reserved judgment in relation to all the issues which I did not address. This is my full judgment, including amplified reasons in relation to non-disclosure.

3. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between the First Defendant, Mr dos Santos, the former Chairman of FSDEA, and his friend and business partner, the Second Defendant, Mr Bastos, who is the 95% beneficial owner of the Quantum group of companies which include the Third to Twentieth Defendants. It is the Claimants' case that, pursuant to this conspiracy, Mr dos Santos placed some US$5 billion at the disposal of the Quantum group to manage and invest on FSDEA's behalf, when the Quantum group manifestly lacked the appropriate or any qualifications and experience for such a mandate; that in the event, most of the US$5 billion has not been invested at all and has simply been used by the Quantum group to extract what were described as an extraordinary levels of fees (amounting to some US$406 million); that of the limited proportion which has been invested, the investments have not been made in the interests of the Claimants but have mostly been channelled into other projects belonging to Mr Bastos; and that in addition, as part of the same conspiracy, Mr dos Santos committed FSDEA to pay around US$153 million to the Quantum and other companies controlled by Mr Bastos, under contracts for various purported services, which contracts, if genuine at all, were manifestly uncommercial and were intended mainly to divert money from FSDEA into the pockets of Mr Bastos without FSDEA receiving anything of remotely commensurate value in return. The Defendants' case is that they are the victims of political change in Angola and a desire on the part of those now in power to get their hands on money which the previous regime sensibly and appropriately invested on a long-term basis for the people of Angola; and that the allegations are a spurious and flawed attempt to achieve this political objective.

Narrative

4. Mr dos Santos' father was the President of Angola from 1979 until 26 September 2017, when he was replaced by President Lourenço, who was elected on 23 August 2017 following President dos Santos' decision to step down.

5. FSDEA was established by a Decree of President dos Santos of 9 March 2011. It was then called the Petroleum Fund. It was renamed FSDEA by a Decree of 19 June 2013.

By a further Presidential Decree of 28 June 2013 FSDEA was allocated a capital endowment of US$5 billion for investment. Its Chairman from 2012 to May 2013 was Dr Armando Manuel, who had been the Economic Adviser to President dos Santos. In 2012 its other directors were Mr dos Santos and Mr Gonçalves. In May 2013 Dr Manuel became the Minister of Finance of Angola, and shortly after FSDEA was renamed in June 2013, Mr dos Santos was appointed Chairman. Mr Fortunato was at that time appointed a director. Mr dos Santos remained Chairman until his removal in January 2018. His fellow directors were Mr Gonçalves and Mr Fortunato until the autumn of 2016, when Mr Gago replaced Mr Fortunato. Mr Gago had before that acted as Director of the Office of the Chairman of the Board of Directors from 2013 until 2015. He remains a director of FSDEA. Mr Gonçalves remained a director of FSDEA until January 2018, since when he has acted as a consultant to it. There is a dispute as to the degree of involvement that the other directors had in the running of the fund.

6. On 29 November 2013, Mr dos Santos on behalf of the FSDEA signed an Investment Management Agreement ("the IMA") with the Third Defendant ("QGIM"), acting by Mr Bastos, whereby QGIM was appointed to act as investment manager for FSDEA *"with respect to such monies and properties as are designated to it from time to time"*. QGIM is part of the Quantum group of companies which are 95% owned and controlled by Mr Bastos. Mr Bastos, who has dual Swiss and Angolan citizenship, is a long-standing business associate of Mr dos Santos. They were jointly involved in the founding and management of an Angolan Bank, Banco Kwanza Invest, which was launched in 2008, and they jointly owned several other companies in Angola. Mr Bastos' evidence is that Mr dos Santos relinquished his shareholdings in these companies prior to the IMA but that is not accepted by FSDEA.

7. The IMA is governed by English law and contains an arbitration clause providing for disputes to be resolved by arbitration in accordance with UNCITRAL Rules in Lisbon and in the Portuguese language. There is a dispute as to whether the seat of the arbitration is England (as FSDEA contends) or Portugal (as QGIM contends). The fee payable under the IMA was a base fee of 1% of the average value of the fund plus a performance fee of 20% above a hurdle rate equivalent to the Benchmark Bank of America/Merrill Lynch 3-month Treasury Bill Index.

8. The IMA provided for there to be a custodian of the assets other than QGIM. On the same day as the IMA, 29 November 2013, FSDEA entered into a Master Custody Agreement with the Twenty First Defendant ("Northern Trust"), a US bank established under the laws of Illinois with a London branch in Canary Wharf. It provided for cash and security accounts to be held in FSDEA's name. It did not in terms require the accounts to be at the London branch, although references to the London branch address and UK regulatory standards suggests that that was what was envisaged, and the accounts were in fact established at the London branch.

9. The US$5 billion was to be invested in two conceptually different portfolios. US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities etc) which were to be sufficiently liquid to be realisable within no more than 3 months ("the Liquid Portfolio"). The balance of US$3 billion was to be invested as private equity capital in longer term projects in sectors such as infrastructure, hotels, timber, agriculture, mining and healthcare, especially in Angola and elsewhere in Africa ("the Illiquid Portfolio"). It is FSDEA's case that the IMA appointed QGIM as investment manager in respect of the entire $5 billion, both the Liquid and Illiquid Portfolios. It is Mr Bastos' and the

Quantum group's case that the IMA was confined to the Liquid Portfolio, and that the Illiquid Portfolio was governed by separate contractual arrangements. These involved the establishment of seven limited partnerships governed by Mauritian law ("the Limited Partnership Agreements"), who are the Fourteenth to Twentieth Defendants ("the Limited Partnerships"). Each had a Mauritian limited partner, a subsidiary of FSDEA, who are the Second to Eighth Claimants, ("the Limited Partners") and a Mauritian General Partner owned and controlled by the Quantum group who are the Seventh to Thirteenth Defendants ("the General Partners").

10. The Limited Partnerships were established pursuant to seven agreements signed on FSDEA's side by Mr dos Santos in April 2014. Five Incorporation Service Agreements ("the ISAs") were made with the Fifth Defendant ("QGI Ltd"), to establish five funds to invest in various sectors in Africa. The ISAs were governed by Angolan law and provided for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language. Two Consultancy Agreements ("the CAs") were made with the Sixth Defendant ("QGAI") in relation to the establishment of two further funds to invest in the hotel sector and in infrastructure projects. Each of the Limited Partnerships had a management agreement with the Fourth Defendant ("QGIAM") under which the latter was entitled to an annual management fee of 2% (infrastructure) or 2.5% (other funds) plus in each case 20% above a rate of return of 8%.

11. The US$5 billion was paid to Northern Trust over a period concluding in December 2014. The Liquid Portfolio was held in accounts in FSDEA's name. QGIM was the asset manager which exercised the investment decision making and discretion from its base in Switzerland; Northern Trust's role was executory and as custodian of the investments. FSDEA had visibility over the Liquid Portfolio held in accounts in its name, and received regular investment reports in relation to the portfolio from QGIM.

12. The US$3 billion in the Illiquid Portfolio was transferred to accounts in the name of the Limited Partnerships at Northern Trust. Part of FSDEA's complaint is that it and the Limited Partners had no visibility or control over the monies in those accounts, which were under the control of the General Partners exercising their powers of management in relation to the Limited Partnerships. Only part of this had been invested by the time of the freezing order. Approximately US$2.27 billion remained at Northern Trust in liquid form at the time of the WFO, and has been secured. The balance, apart from deduction of fees, was paid into a number of investment projects of the kind envisaged, including projects controlled by Mr Bastos. For example, it is said that the hotel partnership (the Eighth and Fifteenth Defendants) invested US$157 million in a hotel project in Angola in which Mr Bastos had an interest (although this figure is difficult to reconcile with Table 4 of the EY Report – defined in paragraph 14 below); and the infrastructure partnership (the Seventh and Fourteenth Defendants) invested US$180 million into the Port of Caio in Angola, which Mr Bastos had a concession to develop. These are said to be stark examples of the conflicts inherent in the appointment of Quantum to manage FSDEA's funds with Mr Bastos able to dictate the terms of major transactions from both sides of the table.

13. In addition to the IMA and the agreements relating to the Mauritius funds, Mr dos Santos additionally committed FSDEA to some 49 other contracts with companies connected to Mr Bastos for the provision of various kinds of services (the "Service Contracts"). There is a dispute about whether services were provided to the value of what was charged by the relevant counterparties; FSDEA's case is that they were not

and that the Service Contracts were another element of the conspiracy whereby Mr dos Santos permitted Mr Bastos to extract large fees from the Claimants without any proper justification. These counterparties are not Defendants and no claim is brought against them in these proceedings. The Service Contracts have not been avoided or rescinded.

14. In November 2017 details of the arrangements between the Claimants and Quantum were publicly leaked and discussed in the so-called "Paradise Papers". The Angolan government commissioned a report from Ernst & Young ("E&Y") regarding the operation of the FSDEA, which was produced on 15 December 2017 ("the E&Y Report"). Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018. Notice of termination of the IMA was given on 16 February 2018 and took effect two months later, on 17 April 2018. The Liquid Portfolio was put into the hands of a replacement investment manager. The Claimants brought these proceedings and applied for the WFO on 27 April 2018. In the light of some of the asset disclosure given by the Defendants pursuant to the WFO, E&Y updated their report on 9 July 2018 ("the Updated E&Y Report").

15. There is no evidence that Mr dos Santos benefited at all from any of the arrangements complained of. Following the termination of the IMA, the Liquid Portfolio has remained within FSDEA's control. Although FSDEA's case is that Quantum was manifestly ill qualified to undertake the investment management role of the Liquid Portfolio, there is not in fact any particularised allegation that QGIM acted negligently in the choice of investments or otherwise in the handling of the Liquid Portfolio during its time as investment manager. The complaint is not about the performance of the Liquid Portfolio investment, but about the level of fees set contractually under the IMA at 1% plus 20% above the benchmark hurdle, which EY describe in their report as "high given the size of the portfolio", a relatively slight basis for an allegation of fraud. The total of such fees over the life of the IMA was US$81.83m according to the Updated E&Y Report.

16. Accordingly the argument in respect of the WFO has focussed on the Illiquid Portfolio. The amount of the Illiquid Portfolio was US$3 billion, but at the time of the WFO some US$2.27 billion remained in the accounts in the names of the Limited Partnerships at Northern Trust in London. By letters in March 2018 Northern Trust and their solicitors had made clear to the Claimants that they would not deal with those funds without the written instructions of both sides, and would not change their position without giving the Claimants prior notification. In my view those assurances removed any risk of dissipation in justifying an order freezing that sum, which was more than two thirds of the amount frozen by the WFO. This was the subject matter of material non-disclosure on the without notice application to Phillips J, to which I return below. The Updated E&Y Report suggests that a total of US$454m was invested in projects in the seven Mauritian funds, with the balance presumably being accounted for by fees.

17. The fees alleged to have been paid to Quantum or to other Bastos related companies are set out in the Updated E&Y Report as follows (with figures in brackets being those identified in the E&Y Report which formed the basis for the without notice WFO application, where they differ):

    (1) QGIM was paid US$81.83m (US$82.965m per Table 1 or $92.48m per Table 5), under the IMA for managing the Liquid Portfolio.

(2) Under the five ISAs QGI Ltd was paid US$26.39m in respect of the establishment of the Illiquid Portfolio funds.

(3) A further sum of US$10m was due to QGAI for the setting up of the infrastructure and hotel funds under the two CAs, but it does not appear from the E&Y Reports that such sum was paid, although Mr Morris deposes that it was at paragraph 62 of his first affidavit, apparently on the basis that there were two earlier invoices from December 2012 from Quantum Global Wealth Management to the Petroleum Fund requesting payment of $5 million each; he does not exhibit any evidence of payment.

(4) Under the management agreements for the Illiquid Portfolio, QGIAM received by way of annual management fees a total of US$298.13m (US$263m).

(5) Under the Service Contracts the following companies received the following fees totalling $153m.

Stampa QG:	US$58.06m
Tome International AG:	US$40.04m
Djembe Communications:	US$9.91m (US$ 0)
African Innovation Foundation:	US$36.29m
Uniqua Consulting GmbH:	US$8.7m

18. The total fees taken by Bastos related entities are therefore put at US$559.35m (US$515m). It is worth emphasising that all these fees were in accordance with the contracts signed between the parties, and none of the contracts had been rescinded or avoided at the date of the WFO. This is not a case in which any of the Defendants are accused of extracting sums to which there was no contractual entitlement. The thrust of the complaint is the creation by Mr dos Santos of that contractual entitlement.

Jurisdiction

19. The following causes of action are asserted against the following Defendants:

(1) against Mr dos Santos:

(a) breach of duty under the Public Probity Law of Angola;

(b) conspiracy to injure by lawful and unlawful means;

(c) procuring breach of contract by QGIM (see below for the breaches of contract alleged against QGIM);

(d) constructive trust: dishonest assistance of breaches of fiduciary duty by QGIM (see below for the breaches of fiduciary duty alleged against QGIM);

(2) against Mr Bastos:

(a) conspiracy to injure by lawful and unlawful means;

(b) procuring breach of contract by QGIM;

(c) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM (I take this to be the intended reference in para 12(e)(ii) of the Claim Form which in fact refers to "QGIM Ltd").

(d) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds;

(3) against QGIM:

(a) breach of clause 4 of the IMA in failing to carry out the services under the IMA with due skill and care and/or in good faith;

(b) breach of clause 14 of the IMA in failing to disclose conflicts of interest and/or procuring contracts which involved a conflict of interest, including the Luanda Hotel and Port of Caio projects;

(c) breach of the IMA in failing to invest the Liquid Portfolio "properly or at all"; although this is a pleaded head of claim, it is not supported by any evidence on these applications of any particularised negligent management or investment of the Liquid Portfolio;

(d) breaches of fiduciary duty in the respects alleged to be breaches of contract under (a), (b) and (c) above;

(e) conspiracy to injure by lawful and unlawful means;

(f) constructive trust: dishonest assistance of breaches of fiduciary duty by Mr dos Santos (in breaching the Public Probity Law);

(g) constructive trust: unconscionable receipt of any part of the US$5 billion its traceable proceeds;

(4) Against QGIAM Ltd (D4), QGI Ltd (D5), QGAI (D6) the General Partners (D7-13) and the Limited Partnerships (D14-20):

(a) conspiracy to injure by lawful and unlawful means;

(b) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM

(c) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds.

20. In addition, there is a proprietary claim against each Defendant in respect of any part of the US$5 billion received by them or its traceable proceeds. The basis put forward for the proprietary claim was initially the claim based in constructive trust. In the course of argument, Mr McGrath sought to support it also on the basis that FSDEA at all material times retained a proprietary interest in the funds.

21. Mr dos Santos is resident and domiciled in Angola. There is a dispute whether Mr Bastos is domiciled in Switzerland or Dubai. QGIM (D3) and QGAI (D6) are incorporated in Switzerland. QGIAM (D4) is incorporated in Mauritius and is the manager of the Limited Partnerships, which are domiciled in Mauritius as are the General Partners. QGI Ltd (D5) is a company incorporated in the British Virgin Islands.

22. The challenges to jurisdiction involve the following submissions on behalf of the Defendants:

    (1) The claims against the Swiss companies, QGIM (D3) and QGAI (D6), are governed by the Lugano Convention, and those companies must be sued at their place of domicile which is Switzerland. The Claimants assert that under the Lugano Convention these claims may be brought in England. The Claimants also contend that the claims against Mr Bastos may be brought in England pursuant to the Lugano Convention on the grounds that he is domiciled in Switzerland. Mr Bastos disputes that he is domiciled in Switzerland and that jurisdiction over him is governed by the Lugano Convention.

    (2) Certain of the claims do not pass the merits threshold of a serious issue to be tried.

    (3) England is not the appropriate forum for the claims against the non-Lugano Defendants.

    (4) Insofar as any claims would otherwise remain to be tried in England, certain of the claims are within arbitration agreements and are subject to a mandatory stay under s. 9 of the Arbitration Act 1996; and there should be a case management stay of any remaining claims pending the determination of proceedings in arbitration and/or elsewhere abroad.

Jurisdiction: the Lugano Defendants (QGIM and QGAI and query Mr Bastos)

The claims against Mr Bastos

23. The Claimants submitted that jurisdiction could be established under the Lugano Convention against Mr Bastos because he was domiciled in Switzerland. The evidence of his residence is exiguous and there is no Swiss law evidence on domicile. The weight of the evidence is that he left Switzerland to go and live in Dubai in May 2017 and has resided in Dubai since then. Accordingly the Claimants have failed to establish that at the relevant time he was domiciled in Switzerland, and jurisdiction over him falls to be established under the common law, not the Lugano Convention.

FSDEA's breach of contract claim against QGIM (D3)

24. FSDEA invokes Article 5(1) of the Lugano Convention to establish jurisdiction for this claim, which provides that contractual claims may be brought in respect of a contract for services at the place where the services were or should have been provided. The question therefore is where the services were, and were to be, provided by QGIM under the IMA. FSDEA contends that this is London where the Northern Trust accounts were held. I am unable to accept this submission. The services to be provided by QGIM under the IMA were investment management services which involved determining how the Liquid Portfolio was to be invested in various short-term investments. That management function was to be, and was, carried out in Switzerland where Quantum had its place of business. That aspect of its business was regulated and supervised by the Swiss financial authorities, as the preamble to the IMA recorded at paragraph C. QGIM had no custody of the assets, in London or elsewhere. The IMA did not identify any place for the receipt of those instructions, which only became London as a result of FSDEA's choice of custodianship, which might originally have been elsewhere than London and could at any time have been changed to a different location. On any view, therefore, it cannot be said that the IMA provided for any part of the services to be performed in London. It is true that QGIM's investment management in Switzerland in the event resulted in instructions from Switzerland to London to the custodian of the funds in London, but that does not make London the place of performance of the services to be provided under the IMA. Those services do not consist solely or even primarily of the investment instructions, but rather the investment management activity in determining what investments to make, which took place in Switzerland, as envisaged by the IMA.

FSDEA's breach of fiduciary duty claim against QGIM (D3)

25. FSDEA seeks to found jurisdiction under Article 5(3) of the Lugano Convention, which provides that a party may be sued in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred, which is said to be in London where the payments out of the Northern Trust accounts occurred. However I accept Mr Edey QC's submission that the breach of fiduciary duty claim is properly characterised as being in a "matter relating to contract" so that allocation of jurisdiction falls to be determined in accordance with Article 5(1), not Article 5(3); and that accordingly Switzerland is the allocated jurisdiction for the same reason as for the contractual claims under the IMA. This is because the equitable claim for breach of fiduciary duties depends upon the existence of the IMA: the duties are said to arise by virtue of the relationship created by the IMA. The Claim Form describes them as "arising by virtue of the IMA and/or the authority thereby vested in QGIM to…handle and otherwise deal with assets belonging to the FSDEA". The position is accurately described in Briggs on Civil Jurisdiction and Judgments 6th Edn at paragraph 2.196:

> "The answer is to be found by deciding whether the obligation which lies at the heart of the claim is rooted in an agreement between the parties, or on an allegation of wrongful behaviour which has caused loss to another. If the obligation arises from the unconscionable disregard of the duties of an agreement, such as those imposed upon a person who has with the agreement of the other party placed himself in a fiduciary relationship with that other, such as an agent to his principal, the matter should be seen as one relating to a contract and the fiduciary aspect of the claim as going only to define or augment the remedies available to the claimant."

FSDEA's proprietary claim against QGIM (D3)

26. A proprietary claim only exists "against" a person to the extent that that person holds property in which the Claimant is entitled to a legal or equitable interest. It is a claim to the property itself, and is only asserted against the holder of the property or one who is in a position to give effect to the proprietary interest. Accordingly, in the current context the question is whether, assuming that there is a sufficiently arguable case that QGIM holds such property, the claim to enforce the proprietary interest in respect of the property against QGIM falls within Article 5(3). Mr McGrath QC submitted that the proprietary claim fell within Article 5(3) as being in a matter relating to tort, delict or quasi delict. Mr Edey submitted that if the proprietary claim passed the threshold merits test of raising a serious issue to be tried, it did not fall within Article 5(3). He submitted that it was clear from ***Kalfelis v Bankhaus Schröder*** 189/87 [1988] ECR 5565 and ***Kleinwort Benson Ltd v Glasgow City Council*** [1999] 1 AC 153 that Article 5(3) only covered claims which gave rise to a personal liability. This submission is in my view well founded. The proprietary claim has nothing to do with any personal liability on the part of QGIM; it is a claim to property insofar as it remains in the hands of QGIM irrespective of fault; it is not based on a constructive trust (which would give rise to a claim falling within Art 5(3): see ***Casio Computer Co Ltd v S*** [2001] EWCA Civ 661 and ***Dexter v Harley*** [2001] All ER (D) 79) because dishonest assistance constructive trust claims are not proprietary: see per Lord Millett in ***Paragon Finance Plc v D B Thackerar & Co*** [1999] 1 All ER 400 at p. 409e-g.

Proprietary claim against QGAI (D6)

27. For the same reasons as apply in relation to QGIM, the proprietary claim against QGAI does not fall within Article 5(3) of the Lugano Convention and can only be brought at its place of domicile which is Switzerland.

Jurisdiction: serious issue to be tried

28. The Defendants argued that the Claimants had failed to establish a serious issue to be tried in respect of the following causes of action:

    (1) the proprietary claim;

    (2) the claim for lawful means conspiracy;

    (3) the claims against Mr dos Santos in unlawful means conspiracy and dishonest assistance constructive trust;

    (4) the claims by FSDEA against QGIM (D3) for breach of contract and breach of fiduciary duty;

    (5) the claims by FSDEA against the general Partners and Limited Partnerships;

    (6) the "cross claims" between the Partnerships, i.e. the claims by the Limited Partners against General Partners of other Partnerships, and against those other Partnerships; and

    (7) some of the knowing receipt claims.

The proprietary claim

29. The Liquid Portfolio was held in FSDEA's name by Northern Trust. The proprietary claim in respect of those funds, which have been returned to FSDEA's control, is limited to the fees taken by QGIM and their traceable proceeds. So far as the Illiquid Portfolio is concerned, the funds were initially in accounts under QGIM's control at FSDEA and were transferred to accounts at Northern Trust in the names of the Limited Partnerships pursuant to written instructions from FSDEA to QGIM dated 30 June 2015 signed by Mr dos Santos which stated "The transfers doesn't [sic] cause a change in the ultimate beneficial ownership". Mr Edey submitted that there could be no proprietary claim for property which was transferred pursuant to contracts where those contracts had not been avoided or rescinded. He accepted that the Claimants retained a beneficial interest in the investments in the Illiquid Portfolio, but submitted that those interests were held on the terms of the Limited Partnership Agreements which were long term contracts (of 10 or 15 years), such that there was no immediate entitlement to possession. He submitted that property passed in full under the contracts (the IMA and the Limited Partnership Agreements), and unless and until they were avoided there could be no vesting of any equitable interest in the transferor. Until very shortly before the hearing before me the Claimants had not suggested that the agreements were invalid or had been avoided, and indeed had proceeded on the basis that they remained validly in place. Mr McGrath sought to argue before me that they were void, alternatively voidable and had been rescinded. In my view Mr Edey was correct to submit that it was too late to run such an argument, which gave rise to issues of election and affirmation, and to allow the Claimants to do so would have been unfairly prejudicial to the Quantum Defendants, who would have been able to deploy arguments of election and affirmation. Accordingly the question whether there is a serious issue to be tried that the Claimants have a proprietary claim falls to be addressed on the footing that the sums transferred were paid in accordance with contracts which are not void and have not been rescinded.

30. On that footing, Mr McGrath submitted that where a contract split the legal and equitable interests so as to confer a legal title whilst retaining an equitable title, there is no need to rescind or avoid the contract in order for the transferor to assert the equitable proprietary right to the property. That was, he submitted, the effect of the contractual arrangements in this case because the funds were always invested for benefit of the Claimants who retained an equitable interest throughout; the Liquid Portfolio was held in accounts in the name of FSDEA and funds for the Illiquid Portfolio were transferred into the Limited Partnership accounts by instructions from FSDEA to QGIM which expressly purported to retain "ultimate beneficial ownership" in the funds. This argument does not work for the fees in respect of the Liquid Portfolio, where it was intended by the IMA that legal and beneficial interest in the fees should pass to QGIM. However, the main issue on this point was whether there was a sufficiently arguable proprietary claim to the sums transferred in the Illiquid Portfolio because the challenge is aimed at the proprietary element of the WFO, which is confined in amount to $3 billion to reflect such transfer. So far as that is concerned I was referred to a number of authorities on each side. This is an issue which raises difficult questions of law which will have to be applied to the facts once established. I am inclined to the view that the Claimants have met the relatively low merits threshold of a serious issue to be tried. However I do not propose to explore the legal issues in this judgment which would fall to be addressed in the light of the fact specific circumstances once established, nor to

express a concluded view, because in the event this issue is not determinative of the outcome of the applications which I have to decide. I shall assume, without deciding, that there is a serious issue to be tried for the proprietary claim advanced.

Lawful means conspiracy

31. The Claimants submitted that it was sufficient to establish the necessary predominant intention to injure that the predominant intention of the Defendants was to benefit themselves in circumstances in which the benefit could only be at the expense of the Claimants, relying on what was said by the Court of Appeal in ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174 at [34]. The passage relied upon does not support the suggested principle, and the suggested principle is inconsistent with the essence of the tort which is that if lawful means are deployed a conspiracy can only be unlawful if it involves a predominant intention to injure the claimant. If the predominant intention is to benefit the conspirators, by definition the predominant intention cannot be to injure the claimant, even if such injury is the inevitable result and even if it is intended. The lawful means conspiracy does not surmount the merits threshold of raising a serious issue to be tried on the facts alleged by the Claimants in this case, which clearly involve an allegation that the alleged conspirators were motivated by a desire to benefit themselves without any animus against the Claimants.

Claims against Mr dos Santos in conspiracy and dishonest assistance

32. Mr Anderson QC accepted that there was a serious issue to be tried (and a good arguable case) that Mr dos Santos was in breach of the Public Probity law of Angola, but contended that the merits threshold was not met for the claims in conspiracy and dishonest assistance. He submitted that under Article 4 of the Rome II Convention the question was governed by Angolan Law; and that there was no evidence that Angolan law recognised such causes of action. The difficulty with this submission is that the evidence before me simply did not purport to address the question whether Angolan law recognised a liability based on facts which would in English law establish liability for unlawful means conspiracy or dishonest assistance constructive trust. Accordingly, even if the appropriate law is Angolan law, the Court proceeds on the evidential assumption that Angolan law does not differ from English law in the absence of evidence to the contrary. I therefore reject Mr Anderson's submission on this point.

FSDEA claims against QGIM (D3)

33. This argument is of no consequence to the current application because jurisdiction for these claims is governed by the Lugano Convention, which involves no merits threshold, and in any event if there were otherwise jurisdiction, they are governed by the arbitration clause in the IMA (and Mr McGrath confirmed that he was not seeking to maintain any aspect of the WFO under the jurisdiction conferred by s. 44 of the Arbitration Act 1996). Since any such claims are a matter for arbitrators to decide, I decline to express any views on their merits.

FSDEA claims against the Limited Partnerships and the General Partners

34. The argument in respect of these claims was that any loss had been suffered by the Limited Partners, not FSDEA, and that a claim by FSDEA fell foul of the principles

that a shareholder may not sue for reflective loss. Mr McGrath countered that the principles were not applicable to the facts of this case, in part at least because FSDEA's claim was in its capacity as the source of the funds and transferor to the Limited Partners, not merely as shareholder in the Limited Partners. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

The cross claims

35. Mr Edey's argument was that there is no evidence that any of the Limited Partnerships or General Partners said or did anything in relation to the project outside its own partnership, and that the Limited Partner of one partnership could not have been caused a loss by anything done by the General Partner or the Limited Partnership itself in another partnership. Mr McGrath's response was that if there was as alleged, a single conspiracy which the General Partners and Limited Partnerships joined, they became liable as conspirators for the losses suffered by any of the victims of the conspiracy, irrespective of their own acts of participation. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

Knowing receipt claims

36. Mr Edey's argument was that the only receipts which could found a knowing receipt constructive trust claim were for the Liquid Portfolio such fees as QGIM received from the US$2 billion Liquid Portfolio; and in respect of the Illiquid Portfolio, the only relevant receipts were by the General Partners of their US$1,000 per annum in fees, and by QGAIM of its fees under the management fees due under the Limited Partnership Agreement; and that there was no wider knowing receipt claim in respect of the US$3 billion because although the Limited Partnerships did receive the US$3 billion, they did not do so beneficially: they held the funds for the Limited Partners on the terms of the Limited Partnership Agreements. The contrary is plainly arguable and on this aspect the Claimants have established a serious issue to be tried.

Jurisdiction: the arbitration agreements

37. By the conclusion of the hearing it was common ground that insofar as there would otherwise be jurisdiction, the following claims must be stayed in favour of arbitration under the mandatory provisions of s. 9 Arbitration Act 1996:

    (1) All FSDEA's claims against QGIM (D3) are governed by the arbitration clause in the IMA, which provides for arbitration to take place in Portugal. QGIM commenced an arbitration by a Request dated 18 June 2018. It is common ground that those claims must be the subject matter of a mandatory stay under s. 9 of the Arbitration Act 1996 to the extent that there is otherwise jurisdiction over them. On my findings this catches the claims in conspiracy, dishonest assistance and knowing receipt, the others being claims in respect of which the Claimants have failed to establish jurisdiction under the Lugano Convention in

any event. I am inclined to think that the seat of the arbitration is Portugal, not England, but since this does not affect the outcome of anything I have to decide I prefer to express no concluded view.

(2) All FSDEA's claims against QGI Ltd, which are governed by the arbitration agreements in the ISAs which provide for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language.

(3) All the claims by the Limited Partners against their General Partners are governed by the arbitration agreement in the Limited Partnership deeds which provide for arbitration in Mauritius. The General Partners and Limited Partnerships commenced arbitrations against the respective Limited Partners in Mauritius on 8 May 2018. The Limited Partners have disputed whether the Partnerships are entitled to invoke the arbitration clause. In the light of my earlier conclusions, I do not need to resolve that question.

Jurisdiction: Forum conveniens

38. This is not a case where fragmentation can be avoided. The starting point is that there are arbitrations in Mauritius which involve the disputes between the Limited Partners and the General Partners in relation to the Illiquid Portfolio, to which the Limited Partnerships are arguably properly joined parties. There are also winding up proceedings commenced by the Limited Partners in Mauritius which will raise some of the issues which arise in these proceedings. There is no jurisdiction under the Lugano Convention over certain of the claims against QGIM (D3) and over the proprietary claim against QGAI (D6), who must be sued in Switzerland; and in any event, even were jurisdiction otherwise to be established, any claims by FSDEA against QGIM would have to be stayed in favour of arbitration in Portugal. It is FSDEA's case that the IMA (and therefore its arbitration clause) governs the Illiquid as well as the Liquid Portfolio. Accordingly, on the Claimants' case, all the tortious and contractual claims by FSDEA against QGIM will have to be dealt with in that arbitration. On any view, and even if the arbitration is confined to the issues in relation to the Liquid Portfolio, that will involve an examination of the circumstances in which the Quantum group came to be appointed, which raises many of the issues at the heart of the dispute in these proceedings.

39. It is against that background that the Claimants bear the burden of establishing that England is clearly and distinctly the appropriate forum: ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460.

40. There are weighty factors in favour of Angola as the appropriate forum:

(1) The claim is brought by the sovereign wealth fund of Angola and its special purpose subsidiaries. Of the two personal Defendants, Mr dos Santos is resident in Angola, and Mr Bastos, although resident in Dubai, is currently confined to Angola because his passport has been confiscated. These are the protagonists whose conduct is at the heart of the issues between the parties.

(2) The central ingredient in most of the causes of action against most defendants is the allegation that Mr dos Santos was in breach of the Public Probity Law in granting the contracts to the Quantum Defendants and Bastos-related entities.

This is the foundation for the claims in unlawful means conspiracy, dishonest assistance, knowing receipt and the proprietary claims. These allegations of breach are of what occurred in Angola and are clearly more suitably tried in Angola, not only because they are governed by Angolan law, but also because the Public Probity Law imposes duties expressed in terms of generality which take their content from their Angolan context. Article 3 provides: that "*Public agents should, in performance of their duties, be guided by the following principles: (a) principle of legality (b) principle of public probity (c) principle of competence (d) principle of respect for public property (e) principle of impartiality (f) principle of the pursuit of public interest….(j) principle of prudence (k) principle of loyalty to public institutions and entities and to the higher interests of the State.*" The subsequent articles develop these principles, again using language of some generality (e.g. "*the highest criteria for public professionalism*"). These duties are properly to be interpreted in accordance with the cultural standards and norms of Angolan public life at the time, which is clearly a matter on which the Angolan court is better equipped than the English Court.

(3) The projects of which complaint is made include major projects in Angola, including in particular the hotel project in Luanda and the Port of Caio project.

(4) The witnesses or potential witnesses likely to be of central importance, apart from Mr Bastos and Mr dos Santos, will be those involved in the appointment of Quantum and supervision in Angola of its activities, including Dr Manuel, Mr Gonçalves, Mr Fortunato and Mr Gago, who are to be found in Angola.

(5) Similarly, the predominance of the documentary evidence is likely to be found in Angola, and some will be in Portuguese.

41. There are also factors in favour of Mauritius. In particular the claims are in part governed by Mauritian law, and the evidence will have to be gathered and deployed in Mauritius for the purposes of the Mauritian arbitrations and the winding up proceedings.

(1) The Limited Partnership Agreements contain a Mauritian governing law term which is of very wide ambit, such that it will govern both contractual and non-contractual claims between the Limited Partners and the General Partners.

(2) The Limited Partnership Agreements contain Mauritian arbitration clauses and arbitrations have been commenced in Mauritius. The arbitrations will cover much of the ground which is in issue in these proceedings, although Mr dos Santos and Mr Bastos will not be parties.

(3) The winding up proceedings commenced by the Limited Partners in the Mauritian courts involve allegations covering almost exactly the same ground as the allegations in relation to the Illiquid Portfolio in the current proceedings. Such winding up proceedings were foreshadowed at the time of the without notice application and have subsequently been commenced.

(4) The Claim Form in these proceedings does not contain a claim by the Limited Partners against Mr dos Santos for breach of duty, but the Claimants' skeleton argument asserts that such a claim clearly exists for breach by Mr dos Santos of his duties under Mauritian law, and states that the Claimants will seek to amend the Claim Form to include such a claim by the Limited Partners, and ancillary claims for dishonest assistance in relation to such breaches.

42. Some factors also point towards Switzerland. QGIM, the Third Defendant and party to the IMA under which, on FSDEA's case, the entirety of the management took place, is a Swiss company. QGIM is based in and operating from Switzerland. Indeed this is the centre of gravity of all the Quantum group and its activity. The investment management took place from Quantum's offices in Switzerland.

43. Against this there is relatively little which points to England as an appropriate forum.

(1) None of the parties is resident or incorporated in England or carries on business here, other than Northern Trust whose stance is essentially neutral. At the heart of the case against all the Defendants is the personal relationship between an Angolan individual, Mr dos Santos, and a Swiss/Angolan individual, Mr Bastos; breach of Angolan duties owed by the Angolan individual; and Mr Bastos' alleged knowledge of or collusion in that breach (which is relied on as that of all the corporate Quantum Defendants).

(2) None of the relevant witnesses or documents are located in London. (save to the extent brought there for the purpose of these proceedings, and save possibly for a few Northern Trust documents). Much of the relevant evidence, both of witnesses and in documents will originate from Angola and Switzerland. Most of the evidence will have to be collected and deployed abroad: in Portugal in any arbitration with QGIM; and in Mauritius in relation to the partnership arbitrations and the winding up proceedings.

(3) The fact that the Liquid Portfolio and Limited Partnerships bank accounts were held at the London branch of Northern Trust provides only a slight connection with England for the purposes of determining the appropriate forum. The location of the accounts under the Master Custody Agreement was a matter of choice for FSDEA, not a matter of contractual agreement with Mr Bastos or the Quantum group. Under the IMA, FSDEA could have chosen to establish the custodian accounts at any bank anywhere, for example in New York. The funds were dollar denominated and the Liquid Portfolio was invested in a range of international securities in the usual way. The centre of gravity for the allegations in relation to investment of the Illiquid Portfolio is not in London, from where the funds were to be transferred to be invested in projects, but in the places where the events giving rise to the complaints arises: Switzerland for the decision to set up Mauritian limited partnerships and Angola or elsewhere in Africa in relation to investment in projects where a conflict of interest is complained of. The fact that a London branch of a US Bank was chosen by FSDEA as the place of custody is of no significance to the issues in the case. Nothing turns on the place at which the funds or securities were held.

(4) Some of the issues in the case are, at least arguably, governed by English law. Others, however, are not. Angolan law governs the breach of duty allegation by

FSDEA against Mr dos Santos which is at the heart of the complaint. Mauritian law governs the claim intended to be added by amendment by the Limited Partners against Mr dos Santos for breach of duties owed under Mauritian law. Mauritian law governs the Limited Partnership Agreements. The fact that English law governs the IMA is of no significance because there is no jurisdiction over the contractual claims against QGIM which will in any event have to be determined in arbitration in Portugal.

44. For these reasons I conclude that the Claimants have failed to establish that England is clearly or distinctly the appropriate forum. Accordingly, the Court should not exercise jurisdiction over any of the Defendants in relation to any of the causes of action, save those governed by the Lugano Convention (D3 and D6).

Conclusion on jurisdiction

45. The upshot of my conclusions is that there is only a small rump of causes of action in respect of which jurisdiction is established and which do not fall to be stayed for arbitration, namely some, but not all, of the claims against the Lugano Convention Defendants, QGIM (D3) and QGAI (D6). What remains are the claims against QGIM by the Limited Partners in unlawful means conspiracy, dishonest assistance and knowing receipt, (but not any of the claims by FSDEA against QGIM, for which jurisdiction under the Lugano Convention is not established and which are governed by the arbitration clause in the IMA); and the claims by the Limited Partners and FSDEA against QGAI (D6) in those causes of action.

46. The Defendants submitted that there should be a case management stay in respect of any claims which fell into this category. It was agreed at the hearing that arguments in respect of a case management stay should be deferred until after I had given judgment identifying which of the claims might be affected.

The WFO

47. There were essentially four grounds on which the Defendants sought to have the WFO set aside and not continued:

(1) There was no jurisdiction over the claims. FSDEA did not seek to support the relief as appropriate in aid of foreign proceedings. Nor was the application made under s. 44 Arbitration Act 1996. At one stage Mr McGrath did seek to invoke this latter jurisdiction and a s. 44 application was belatedly issued on 25 July 2018, the second day of the hearing. Mr Edey submitted that such an application was made far too late for it fairly to be addressed, correctly in my view, and it was not ultimately pursued by Mr McGrath.

(2) There is no good arguable case in respect of some of the causes of action, including, most relevantly for present purposes, the proprietary claim.

(3) There was a breach of the duty of full and frank disclosure.

(4) FSDEA has not established a sufficient risk of dissipation.

(5) In addition, the Defendants submitted that none of the arguable causes of action raised a good arguable case of a claim to $3 billion or any identified sum.

WFO: No Jurisdiction

48. I have held that the court has no jurisdiction over the claims save for a small rump of some of the claims against QGIM (D3) and QGAI (D6), in respect of which there is an as yet undetermined application for a case management stay. I shall reserve questions of whether this would be a sufficient ground to discharge the WFO or to refuse to continue it, if necessary, until after determination of the question whether there should be a case management stay.

WFO: No good arguable case

49. Although there is a distinction between the merits threshold of a serious issue to be tried, for the purposes of jurisdiction, and that of a good arguable case which is required for the purposes of a freezing order, the Defendants submitted that it made no difference on the facts of this case, and asked me to treat the causes of action as standing or falling together under both tests. Accordingly, my earlier conclusions on the question whether there is a serious issue to be tried in relation to the various impugned causes of action should be treated as conclusions to the same effect in relation to whether the Claimants have established a good arguable case for the purposes of the WFO, including the conclusion that I will assume, without deciding, that the merits threshold is reached in respect of the proprietary claim.

WFO: Non-Disclosure

50. The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in ***Brink's Mat Ltd v Elcombe*** [1998] 1WLR 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:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

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

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

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

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was 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.

> "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could

> properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp.1343H-1344A."

51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in ***Memory Corporation v Sidhu*** (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in ***Bank Mellat v Nikpour*** [1985] FSR 87, 92, Bingham J in ***Siporex Trade v Comdel Commodities*** [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in ***Marc Rich & Co Holding v Krasner*** (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to

disclosure of documents (see CPR PD31A and ***Hedrich v Standard Bank London Ltd*** [2008] EWCA Civ 905).

54. In this case I have concluded that there has been a breach of the duty to make a fair presentation of the case in eight material respects.

(1) The selection of Quantum

55. There was non-disclosure and an unfair presentation in respect of the Quantum selection process in a number of ways.

56. The Claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr dos Santos being chairman of that organisation (which subsequently became FSDEA), and at a time when Dr Manuel was Chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered into an Investment Management Agreement with Quantum on 13 July 2012, signed by Dr Manuel. Further, Quantum entities had been engaged as managers in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, each signed by Dr Manuel.

57. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments and two in respect of equity investments, in infrastructure and hotel projects respectively. None were by Mr Bastos. The presentation in relation to the Liquid Portfolio was by Gareth Fielding, QGIM's Chief Investment Officer since 2008, with 25 years' experience in asset management including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, Ulrich Otto, who had more than 10 years' experience of private equity investments involving assets which reached more than $2 billion in value, and sat on the supervisory board of a company with revenues of US$ 1 billion. It contained a detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by Mr Antoine Castro, Quantum's managing director of Real estate, with extensive prior experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages.

58. There was no attempt to put those presentations before the Judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA or other appointments, nor to address whether that selection was made otherwise than on merit. Instead Mr Morris' first affidavit and the skeleton argument before Phillips J gave the misleading impression that the selection had been entirely that of Mr dos Santos and made in 2013 when he was Chairman.

59. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of Mr Morris' first affidavit he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and

that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, and before any selection process; whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and December 2012 addendum were each signed not by Mr dos Santos but by Dr Manuel. The sub-paragraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for 6 months, amounting to $264 million. That would indeed have been breathtaking, to use the epithet applied to fees in the Claimants' skeleton argument, but was wrong: the fees were $44,000 monthly, giving a total of $264,000 for 6 months.

60. It was also misleading to characterise the process in the skeleton argument as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as "the extent of the selection process". Again, this ignores the selection process in 2012 which involved detailed presentations from Quantum. The false impression is reinforced by the assertion at para 31 of the E&Y report that no proposals were requested from any of the four potential managers, i.e. including Quantum, which implied that there had never been a formal proposal from Quantum.

61. Moreover, Mr dos Santos gave a fairly lengthy account of the selection process and the rationale for appointing Quantum in a letter of 27 September 2013 addressed to Jersey trustees who were then contemplated as being involved in the management of the fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not put in evidence before the Judge and its existence and contents were not referred to.

62. These were important matters. One of the central elements of the case against the Defendants was that it was Mr dos Santos as Chairman of FSDEA who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a significantly different complexion on the selection.

63. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However it seems likely that the existence of the prior appointment, the 2012 IMA other appointments, and the 2012 proposals were known to those at FSDEA with conduct of the case; and to Mr Gonçalves who was on the Board throughout the period, remains an adviser to FSDEA and who provided a witness statement subsequently; I say he was on the board throughout the relevant period because although in his own statement he describes himself as being on the board from October 2012, Mr Morris in his fifth affidavit says he was on the board from March 2012; and Mr Gonçalves refers to seeing one of the presentations in May 2012 at paragraph 26 of his subsequent witness statement; it seems likely that the circumstances of the 2012 appointment and presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013 and on the board from 2016, from whom Mr Morris did take instructions at the time of the without notice application; I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Gonçalves and gives

evidence about it. At the least, the circumstances of the 2012 presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

(2) Quantum's track record and suitability

64. Mr Morris described Quantum in his first affidavit as "an unknown and untested entity". In paragraph 14 of the skeleton Quantum was described as having a "limited track record" with a capitalisation of only 100,000CHF and contrasted with other candidates of the calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the Judge that:

(1) Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, in which Quantum had identified in its 2012 proposals the apparently well qualified staff with extensive relevant asset management experience who were employed by Quantum, and the independent board members apart from Mr Bastos who were of apparent eminence and experience.

(2) Quantum had had a capitalisation of CHF 1 million since 2007, as the detail in the E&Y Report accurately recorded.

(3) Quantum had managed assets for the Banco Nacional de Angola, the Angolan state bank, of $2.3 billion in liquid assets and a further $1billion in private equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at para 39 of his first affidavit by saying that "It appears from the documentation generated for the purposes of Project Rainbow…that Quantum Global at least at one point managed several hundred US$ (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA".

65. Again, these were important matters which were known to the Claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or absence of it, was at the heart of the allegations on which the Claimants' case is founded.

66. There was, additionally, an unfortunate mischaracterisation in relation to Mr. Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence; whereas, as was apparent from the material available to Mr Morris, the sanction was a suspended sentence ***of*** a fine, i.e. a fine payment of which was suspended and which in the event Mr Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended).

(3) Transparency and supervision

67. The appointment of Quantum, and its activities in carrying out the investment management, were transparent and regularly reported on to an audience within FSDEA beyond Mr dos Santos. The Claimants did not disclose or draw to the Judge's attention, as they should have done, the following.

68. The Board of FSDEA was by Presidential Decree overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA's policy and investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development, and the Governor of the National bank of Angola. Its role was not specifically addressed in the evidence or argument before Phillips J apart from an inaccurate reference in the E&Y report suggesting that the body never met, inaccurate because Mr Gonçalves' later evidence is that it met at least once. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example, it had detailed reports on the Illiquid Portfolio from Deloitte.

69. Moreover, FSDEA's accounts were audited on an annual basis by Deloitte.

70. Quantum also provided regular reports on the investments to FSDEA, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid Portfolio which contained the sort of detailed information one would expect from investment managers.

71. None of this was addressed in the Claimants' evidence or argument or drawn to the Judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable inquiries. Again, it was of importance to the case being advanced.

(4) The limited partnership model

72. Fourthly there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The Judge's attention was not drawn to the fact that the E&Y report described the structures used for the Illiquid Portfolio as based on a standard model and that "such models are commonly used in P[rivate] E[quity] and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

73. In argument before me, the thrust of the complaint changed to one that limited partnerships were only suitable vehicles for collective investment schemes, i.e. where there was more than one investor. But this was not the position taken by Deloitte in its audit reports which made no criticism of the structure, nor that of the Mauritian authorities in relation to 5 of the 7 Limited Partnerships. The Judge should have been told that both E&Y and Deloitte had not treated the structures used as inappropriate and

that they were a commonly used model. This was obviously important given the criticisms which were being made of the structure.

(5) Conflicts of interest

74. There was non-disclosure in relation to the allegation of conflicts of interest in the projects in the Illiquid Portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016 Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy, and expressly disclosing transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and conflicts dealt with in accordance with the policy. The disclosure included a hotel project in Luanda in which $157m had been invested which was the subject matter of particular criticism by Mr Morris in his first affidavit. The letter and waiver were signed not only by Mr dos Santos but also by Mr Fortunato, against whom no allegations of impropriety are made.

75. The 17 August 2016 letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris says that he and the team preparing the application were unaware of it because it was part of a set of over 750 documents which his firm held as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Mr Morris to have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the documents it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it all unless constraints of time or expense made this impossible. Neither applies in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum: if it was interrogated for that purpose it should have been fully interrogated. In any event Mr Fortunato was obviously aware of the letter, as a countersignatory, and reasonable inquiries would have extended to all the board members in place at the relevant times, including Mr Fortunato, who it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application.

(6) Fees

76. There was non-disclosure and an unfair presentation in respect of the fees charged on the Illiquid Portfolio. The fees as a whole (then put at $515 million) were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio, there was further criticism that the fees were charged on the full amount of the portfolio of $3 billion, when the amount invested in the projects was only a small part of that, some $2.2 billion remaining uninvested and held in liquid funds at the date of the WFO. There are several elements to what the Judge was not told, as he should have been.

    (1) As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as E&Y noted at paragraph 54 of

the report (to which the Judge's attention was not specifically drawn). In the course of the hearing before me Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the Claimants thereby lost visibility and control. But this was not how the matter was presented to Phillips J, which did not confine the criticism to this aspect. On the contrary it was suggested that at least one of the improper purposes of the drawdown into the partnership accounts was "to extract management fees by reference to the entirety of the US$3 billion, even though most of it has been sitting in cash (or cash like securities)": see the skeleton at para 16(5)(b), and see para 16(7) which made this criticism as a matter of "the structure by which the fees were calculated".

(2) Further, the Judge was not told what appears in paragraph 23 of Mr Gonçalves's subsequent witness statement, namely that he was aware of the reasons given at the time for the funds going into the partnership accounts, having been told by Mr dos Santos in 2013 that "the Fund was going to face increasing pressure in the economy and pressure to access its funds, so he wanted to use the funds now and put them into the private equity fund, so as not to give appetite to the state to come and use the funds." Mr Gonçalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

(3) Moreover, on the Illiquid Portfolio the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio (which accounted for over $100m of the fees on the figures then presented) and 2.5% plus 20% in relation to the hotel and other illiquid portfolios (which accounted for the balance). The Judge did not have specifically drawn to his attention paragraph 53 of the E&Y report which described 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to FSDEA in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again a matter not drawn to the Judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on ($263.4m out of $515.84m).

77. The level of fees charged was another of the central elements of the case against the Defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

(7) The stance of Northern Trust

78. There was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February 2018 and 4 March 2018, Northern Trust made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instructions from both FSDEA and Quantum and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, largely addressed to requests for disclosure, Northern Trust reiterated that there would be no change of position without prior notification. The first two letters were referred to in a narrative section of Mr Morris' Affidavit but were not identified in the section on risk of dissipation, were not

referred to in the skeleton argument and were not drawn to the judge's attention. The latter was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but was referred to at paragraph 190 of Mr Morris' first affidavit and in the Claimants' skeleton at 109(3) in sections addressing the risk of dissipation. In each case the letter was referred to by treating Northern Trust's statement that it would give prior notice as no more than a then current intention which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. This was to mischaracterise the correspondence as a whole, which suggested that Northern Trust were caught between conflicting claims and would not take steps without the agreement of both parties. Had the Judge been shown the correspondence, or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the Claimants being given sufficient advance notification to afford an opportunity to come before the Court again in those changed circumstances if necessary. That is my view, with the result that in respect of this aspect of non-disclosure, the Claimants have not made out a case of risk of dissipation in respect of over two thirds of the amount covered by the Freezing Order.

79. This last paragraph reflects what I said on this issue when giving judgment on the non-disclosure points at the conclusion of the hearing. Since then, on 9 August 2018 Mr Morris wrote to the court enclosing a seventh affidavit in which he explains that there were without prejudice communications with Northern Trust in March 2018. He had not consulted his notes when making his first affidavit, but had gone back to them in the light of the non-disclosure arguments at the hearing before me, and was now able to tell the court, having secured a limited waiver of privilege for this purpose, that in those discussions Northern Trust had "made observations with regard to the prospect, at or around the time of preparation of [Mr Morris' first affidavit] of [Northern Trust] making a stakeholder application under Part 86 of the Civil Procedure Rules" (which it is now known was an application which was in fact prepared and about to be issued at the time of the WFO, which overtook it). As Mr Morris fairly accepts, this confirms that what he said about Northern Trust's stance in paragraph 190 misled the Court as to the level of risk that Northern Trust might pay out from the Limited Partnership accounts without notice. It is regrettable, to say the least, that this matter was only drawn to the court's attention after the hearing and after I had announced my decision in relation to non-disclosure.

(8) Other non-disclosures

80. The Defendants advanced a number of arguments that there had been non-disclosure in other more minor respects. None are of sufficient significance to warrant separate consideration, save one. In the skeleton argument put before Phillips J on the without notice application, it was said that no proprietary injunction was sought against Mr dos Santos or Mr Bastos. In fact such an order was sought in paragraph 5(5) of the draft order put before the Judge, and such an order was made by him. Mr McGrath has apologised for this mistake (the mistake being in the skeleton, not in the order sought), and submitted that because the Judge had clearly read the order with care he was not misled and appreciated that such an order was in fact being sought against Mr dos Santos and Mr Bastos. Had there been no room for argument that a proprietary order was justified against Mr dos Santos and Mr Bastos personally this error might have assumed less significance. However there clearly was room for argument on the point,

not merely because there was a question whether there was a serious issue to be tried/good arguable case for a proprietary claim, but also because there was and is no evidence of receipt of any of the money or its traceable proceeds by Mr dos Santos. The vice of the mistake lay in these issues being ignored in the written and oral presentation to the Judge. This is a further significant failure to make a fair presentation of the application.

The consequences of the non-disclosure

81. I was referred to a number of authorities which contain summaries of the factors relevant to determining the consequences of material non-disclosure, including ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [61] to [64] (Flaux J); ***In re OJSC ANK Yugraneft; Millhouse Capital UK Ltd v Sibir Energy Plc*** [2008] EWHC 2614 (Ch) at [102] to [106] (Christopher Clarke J); and ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [68] to [77] (Mann J); and ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) (Males J).

82. Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In ***Banca Turco Romana v Cortuk*** [2018] EWHC 662 (Comm), I expressed it in this way:

> "….It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

83. In this case the breaches taken cumulatively are serious and substantial. They do not relate to a few, merely peripheral, matters, but to numerous matters at the heart of the Claimants' case. The Court was being asked to infer a dishonest conspiracy by which Mr dos Santos sought improperly to benefit his friend and associate Mr Bastos, and a consequent risk of dissipation, from four central allegations, namely (1) that Mr dos Santos was solely responsible for appointing Quantum without any proper selection process; (2) that Quantum was not properly qualified for the task; (3) the extraordinarily high and unjustified level of fees charged; and (4) the funds being used to benefit entities owned by or associated with Mr Bastos involving an undisclosed and

inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the Claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the Claimants to say that the subsequent evidence put before the court to deal with them raises disputes which are sufficient to surmount the merits hurdle of a good arguable case. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood. But the unfair presentation in this case in the respects I have identified goes far beyond the odd accidental slip, and goes to the central elements of the case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds. The matter had obviously been under consideration for many months, at least since the E&Y Report in December 2017 and Mr dos Santos' dismissal in January 2018. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use a large team to make the necessary inquiries and to consider all the documents available. Given the size of the freezing order sought, and the allegations of dishonesty being made, it was incumbent on the Claimants and their legal advisers to make the fullest inquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris emphasised in his first affidavit the limits on the inquiries which had been made by his firm, that does not excuse a failure to make the necessary inquiries or the presentation of incomplete material in an unfairly one-sided way.

84. The Claimants' legal team were at pains to make clear on the without notice application that they were aware of the duty of full and frank disclosure and were purporting to fulfil it. I do not find that there was any deliberate breach on the part of the Claimants' legal team. It is less clear whether that is so of the personnel at FSDEA itself. Some, at least, of the material would have been readily available to anyone in a senior position and the necessity to disclose it obvious to anyone aware of the duty of disclosure. Because privilege attaches to communications between Norton Rose Fulbright and their clients, it is impossible to identify whether any individual was aware of the duty and deliberately failed to comply with it. What can be said, however, is that the failures were serious and should not have occurred had the duty been properly understood and complied with by the Claimants themselves. There was therefore a high degree of culpability in the failures, even though I do not find that anyone deliberately set out to abuse the court's process.

85. This is not a case in which there are any strong reasons for departing from the usual sanction for serious and culpable non-disclosure. I have concluded that for the reasons given below, the Claimants have not established by solid evidence that there is a sufficient risk of dissipation to justify a freezing order, or that the balance of convenience would justify a proprietary injunction, so that there is in fact no prejudice to the Claimants in discharging the injunction and refusing to grant a fresh one as a result of the non-disclosure. I should make clear, however, that I would reach the same conclusion even if satisfied of a risk of dissipation, as was implicit in my decision announced at the conclusion of the hearing. The breaches of duty are sufficiently serious and culpable to warrant discharging the WFO and not granting fresh relief, irrespective of the other grounds of challenge.

WFO: No risk of dissipation

86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; ***Holyoake v Candy*** [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and ***Petroceltic Resources v Archer*** [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

(1) 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.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) 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 are likely to 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.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Risk of dissipation: Mr dos Santos

87. There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence. There was some suggestion in Mr Morris' evidence that his asset disclosure pursuant to the WFO was incomplete so as to support such an inference, but his solicitor's letter of 10 July 2018 adequately addresses the points made and leaves no evidence on which the court could conclude that his asset disclosure is incomplete or inadequate.

Risk of dissipation: Mr Bastos and the Quantum defendants

88. In my view the same is true of the different circumstances of Mr Bastos and the Quantum Defendants. Again, the accepted good arguable case of dishonesty does not support an inference of a sufficient risk of dissipation: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. The particular facts of Mr Bastos' criminal conviction many years ago, for which he ultimately was fined CHF4,500, do not support the inference of a current risk of dissipation. There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. There is no evidence to suggest that the fact or threat of either the claim itself, or the freezing order, has caused or would cause any of them to act in a way which differed from their previous practice so as to make any adverse effect on the claimants' ability to enforce a judgment something which could properly be characterised as "unjustified". This applies with equal force to the Mauritian Limited Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations; and that the drawing down of the full committed amounts into the accounts in the names of the Limited Partnerships so as to put them beyond the control of FSDEA was for a legitimate political objective explained at the time by Mr dos Santos to Mr Gonçalves (see above). The Liquid Portfolio and the majority of the Illiquid Portfolio are secured without the need for a freezing order. There is no evidential basis for suggesting that Mr Bastos or the relevant Quantum Defendants intend to deal with the monies invested in the projects or the projects themselves otherwise than by way of promotion of the success of those projects. There is no

suggestion that Mr Bastos or the Quantum Defendants have taken any sums other than those to which there is a contractual entitlement; nor that they have dealt with them otherwise than in accordance with those contractual arrangements. The complaint about the execution of those contractual arrangements does not support a risk of dissipation. As the Claimants' skeleton argument itself put it, this is not a routine case of "hands in the till" type fraud.

89. Although this was not put in the forefront of the argument on this point, complaint was also made about the history and nature of the asset disclosure by Mr Bastos and the Quantum Defendants pursuant to the WFO; it was said that the failure to make proper disclosure was a continuing effort to hide assets in order to protect them from a judgment. Whilst the dilatory nature of that disclosure is properly the subject of criticism, full purported compliance has taken place, and there is a hotly contested issue whether there has been any failure to give a full and accurate account of the defendants' assets. It is not clear from the evidence ultimately put before me on the point that there has been any failure to attempt full compliance in a way which would provide any support for a finding of a risk of dissipation.

Proprietary injunction: balance of convenience

90. For similar reasons the balance of convenience would not lie in favour of granting a proprietary injunction. There is no evidence to suggest that Mr dos Santos has, or has ever had, any sums to which a proprietary claim could attach. So far as Mr Bastos and the Quantum Defendants are concerned, I have said that I am prepared to assume, without deciding, that the Claimants have established a serious issue to be tried, but the contrary is plainly arguable and a proprietary claim may well not be capable of being established. There is no real evidential basis for concluding that the funds in the Illiquid Portfolio which have been invested in projects have not been well invested, or that in the absence of an injunction they would not continue to be managed so as to promote their profitability. The adverse effects of the proprietary order on Mr Bastos himself appear to have been serious: he has been unable to say with certainty that any of his assets can be divorced from those received ultimately from FSDEA because his modus operandi has always been to take income through his corporate vehicles from the Quantum group as dividends so that funds have inevitably become mixed. The effect of the proprietary injunction is therefore effectively to prevent Mr Bastos having access to any funds other than the permitted living allowance.

WFO: No justification for US$ 3 billion or any amount

91. Mr Edey submitted, correctly in my view, that the quantum of any loss suffered by FSDEA could not be put at US$3 billion or anything like it. Leaving aside the payment of fees, the investment of those funds was for the benefit of the Claimants who retain their equitable interest in the assets, as is and has always been common ground. In fact, over $2.2 billion remains uninvested in accounts at Northern Trust which are sufficiently secured for the time being. Accordingly, any present quantification of the loss is limited to (1) the fees taken by the Quantum Defendants and other Bastos related companies and (2) such loss as could be established by reference to the value of the projects in which investments have been made. In relation to the fees there is an argument that the amount of loss is not the full amount of the fees but only the amount by which they exceeded what would have been charged by another investment manager or service provider in any event. I have already dealt under the heading of non-

disclosure with the failure fairly to address the position of Northern Trust, which itself meant that a freezing order could not be justified in the sum of US$3 billion or anything like it. In the light of my other conclusions, it is not necessary for me to determine what, if anything, had been established as a sufficiently arguable quantum of loss for the purposes of identifying the proper amount of any freezing order or proprietary injuntion.

Conclusion

92. The WFO must be set aside and no fresh freezing order will be granted. I will hear the parties on the case management stay issues which are outstanding and the form of the order.

Neutral Citation Number: [2018] EWHC 2199 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Claimants

(1) FUNDO SOBERANO DE ANGOLA
(2) FSDEA HOTEL INVESTMENT LIMITED
(3) FSDEA AFRICA AGRICULTURE (LP) LIMITED
(4) FSDEA AFRICA INVESTMENT (LP) LIMITED
(5) FSDEA AFRICA HEALTHCARE (LP) LIMITED
(6) FSDEA AFRICA MEZZANINE (LP) LIMITED
(7) FSDEA AFRICAN MINING (LP) LIMITED
(8) FSDEA AFRICA TIMBER (LP) LIMITED

- and -

Defendants

(1) JOSÉ FILOMENO DOS SANTOS
(2) JEAN-CLAUDE BASTOS DE MORAIS
(3) QUANTUM GLOBAL INVESTMENT MANAGEMENT AG
(4) QG INVESTMENTS AFRICA MANAGEMENT LIMITED
(5) QG INVESTMENTS LIMITED
(6) QUANTUM GLOBAL ALTERNATIVE INVESTMENTS AG
(7) INFRASTRUCTURE AFRICA (GP) LTD
(8) HOTEL AFRICA (GP) LTD
(9) AGRICULTURE AFRICA (GP) LTD
(10) HEALTHCARE AFRICA (GP) LTD
(11) MEZZANINE AFRICA (GP) LTD
(12) MINING AFRICA (GP) LTD
(13) TIMBER AFRICA (GP) LTD
(14) QG AFRICAN INFRASTRUCTURE 1 LP
(15) QG AFRICA HOTEL LP
(16) QG AFRICA AGRICULTURE LP
(17) QG AFRICA HEALTHCARE LP

(18) QG AFRICA MEZZANINE LP
(19) QG AFRICA MINING LP
(20) QG AFRICA TIMBER LP
(21) THE NORTHERN TRUST COMPANY

- -
- -

Paul McGrath QC, Nik Yeo, Alexander Milner, Samuel Ritchie and Joseph Farmer (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **First Defendant**
Stephen Auld QC and Alexander Brown (instructed by **Grosvenor Law LLP**) for the **Second Defendant**
Philip Edey QC, Andrew Fulton and Sam Goodman (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third to Twentieth Defendants**

Hearing dates: 24-27 and 30 July 2018
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimants in this action are the sovereign wealth fund of the Republic of Angola ("FSDEA") and seven of its subsidiaries. On 27 April 2018 Phillips J granted a worldwide freezing order and proprietary injunction ("the WFO") against the First to Twentieth Defendants restraining them from disposing of or dealing with assets up to the value of US$3 billion.

2. At the adjourned return date hearing before me, the Claimants sought an order that the WFO, as amended, be continued until trial or further order. The Defendants sought to set aside the WFO on a number of grounds, including material non-disclosure, and raised various jurisdiction challenges. At the conclusion of the hearing I announced my decision that the WFO should be discharged for non-disclosure, and no fresh order granted, and gave reasons. I reserved judgment in relation to all the issues which I did not address. This is my full judgment, including amplified reasons in relation to non-disclosure.

3. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between the First Defendant, Mr dos Santos, the former Chairman of FSDEA, and his friend and business partner, the Second Defendant, Mr Bastos, who is the 95% beneficial owner of the Quantum group of companies which include the Third to Twentieth Defendants. It is the Claimants' case that, pursuant to this conspiracy, Mr dos Santos placed some US$5 billion at the disposal of the Quantum group to manage and invest on FSDEA's behalf, when the Quantum group manifestly lacked the appropriate or any qualifications and experience for such a mandate; that in the event, most of the US$5 billion has not been invested at all and has simply been used by the Quantum group to extract what were described as an extraordinary levels of fees (amounting to some US$406 million); that of the limited proportion which has been invested, the investments have not been made in the interests of the Claimants but have mostly been channelled into other projects belonging to Mr Bastos; and that in addition, as part of the same conspiracy, Mr dos Santos committed FSDEA to pay around US$153 million to the Quantum and other companies controlled by Mr Bastos, under contracts for various purported services, which contracts, if genuine at all, were manifestly uncommercial and were intended mainly to divert money from FSDEA into the pockets of Mr Bastos without FSDEA receiving anything of remotely commensurate value in return. The Defendants' case is that they are the victims of political change in Angola and a desire on the part of those now in power to get their hands on money which the previous regime sensibly and appropriately invested on a long-term basis for the people of Angola; and that the allegations are a spurious and flawed attempt to achieve this political objective.

Narrative

4. Mr dos Santos' father was the President of Angola from 1979 until 26 September 2017, when he was replaced by President Lourenço, who was elected on 23 August 2017 following President dos Santos' decision to step down.

5. FSDEA was established by a Decree of President dos Santos of 9 March 2011. It was then called the Petroleum Fund. It was renamed FSDEA by a Decree of 19 June 2013.

By a further Presidential Decree of 28 June 2013 FSDEA was allocated a capital endowment of US$5 billion for investment. Its Chairman from 2012 to May 2013 was Dr Armando Manuel, who had been the Economic Adviser to President dos Santos. In 2012 its other directors were Mr dos Santos and Mr Gonçalves. In May 2013 Dr Manuel became the Minister of Finance of Angola, and shortly after FSDEA was renamed in June 2013, Mr dos Santos was appointed Chairman. Mr Fortunato was at that time appointed a director. Mr dos Santos remained Chairman until his removal in January 2018. His fellow directors were Mr Gonçalves and Mr Fortunato until the autumn of 2016, when Mr Gago replaced Mr Fortunato. Mr Gago had before that acted as Director of the Office of the Chairman of the Board of Directors from 2013 until 2015. He remains a director of FSDEA. Mr Gonçalves remained a director of FSDEA until January 2018, since when he has acted as a consultant to it. There is a dispute as to the degree of involvement that the other directors had in the running of the fund.

6. On 29 November 2013, Mr dos Santos on behalf of the FSDEA signed an Investment Management Agreement ("the IMA") with the Third Defendant ("QGIM"), acting by Mr Bastos, whereby QGIM was appointed to act as investment manager for FSDEA *"with respect to such monies and properties as are designated to it from time to time"*. QGIM is part of the Quantum group of companies which are 95% owned and controlled by Mr Bastos. Mr Bastos, who has dual Swiss and Angolan citizenship, is a long-standing business associate of Mr dos Santos. They were jointly involved in the founding and management of an Angolan Bank, Banco Kwanza Invest, which was launched in 2008, and they jointly owned several other companies in Angola. Mr Bastos' evidence is that Mr dos Santos relinquished his shareholdings in these companies prior to the IMA but that is not accepted by FSDEA.

7. The IMA is governed by English law and contains an arbitration clause providing for disputes to be resolved by arbitration in accordance with UNCITRAL Rules in Lisbon and in the Portuguese language. There is a dispute as to whether the seat of the arbitration is England (as FSDEA contends) or Portugal (as QGIM contends). The fee payable under the IMA was a base fee of 1% of the average value of the fund plus a performance fee of 20% above a hurdle rate equivalent to the Benchmark Bank of America/Merrill Lynch 3-month Treasury Bill Index.

8. The IMA provided for there to be a custodian of the assets other than QGIM. On the same day as the IMA, 29 November 2013, FSDEA entered into a Master Custody Agreement with the Twenty First Defendant ("Northern Trust"), a US bank established under the laws of Illinois with a London branch in Canary Wharf. It provided for cash and security accounts to be held in FSDEA's name. It did not in terms require the accounts to be at the London branch, although references to the London branch address and UK regulatory standards suggests that that was what was envisaged, and the accounts were in fact established at the London branch.

9. The US$5 billion was to be invested in two conceptually different portfolios. US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities etc) which were to be sufficiently liquid to be realisable within no more than 3 months ("the Liquid Portfolio"). The balance of US$3 billion was to be invested as private equity capital in longer term projects in sectors such as infrastructure, hotels, timber, agriculture, mining and healthcare, especially in Angola and elsewhere in Africa ("the Illiquid Portfolio"). It is FSDEA's case that the IMA appointed QGIM as investment manager in respect of the entire $5 billion, both the Liquid and Illiquid Portfolios. It is Mr Bastos' and the

Quantum group's case that the IMA was confined to the Liquid Portfolio, and that the Illiquid Portfolio was governed by separate contractual arrangements. These involved the establishment of seven limited partnerships governed by Mauritian law ("the Limited Partnership Agreements"), who are the Fourteenth to Twentieth Defendants ("the Limited Partnerships"). Each had a Mauritian limited partner, a subsidiary of FSDEA, who are the Second to Eighth Claimants, ("the Limited Partners") and a Mauritian General Partner owned and controlled by the Quantum group who are the Seventh to Thirteenth Defendants ("the General Partners").

10. The Limited Partnerships were established pursuant to seven agreements signed on FSDEA's side by Mr dos Santos in April 2014. Five Incorporation Service Agreements ("the ISAs") were made with the Fifth Defendant ("QGI Ltd"), to establish five funds to invest in various sectors in Africa. The ISAs were governed by Angolan law and provided for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language. Two Consultancy Agreements ("the CAs") were made with the Sixth Defendant ("QGAI") in relation to the establishment of two further funds to invest in the hotel sector and in infrastructure projects. Each of the Limited Partnerships had a management agreement with the Fourth Defendant ("QGIAM") under which the latter was entitled to an annual management fee of 2% (infrastructure) or 2.5% (other funds) plus in each case 20% above a rate of return of 8%.

11. The US$5 billion was paid to Northern Trust over a period concluding in December 2014. The Liquid Portfolio was held in accounts in FSDEA's name. QGIM was the asset manager which exercised the investment decision making and discretion from its base in Switzerland; Northern Trust's role was executory and as custodian of the investments. FSDEA had visibility over the Liquid Portfolio held in accounts in its name, and received regular investment reports in relation to the portfolio from QGIM.

12. The US$3 billion in the Illiquid Portfolio was transferred to accounts in the name of the Limited Partnerships at Northern Trust. Part of FSDEA's complaint is that it and the Limited Partners had no visibility or control over the monies in those accounts, which were under the control of the General Partners exercising their powers of management in relation to the Limited Partnerships. Only part of this had been invested by the time of the freezing order. Approximately US$2.27 billion remained at Northern Trust in liquid form at the time of the WFO, and has been secured. The balance, apart from deduction of fees, was paid into a number of investment projects of the kind envisaged, including projects controlled by Mr Bastos. For example, it is said that the hotel partnership (the Eighth and Fifteenth Defendants) invested US$157 million in a hotel project in Angola in which Mr Bastos had an interest (although this figure is difficult to reconcile with Table 4 of the EY Report – defined in paragraph 14 below); and the infrastructure partnership (the Seventh and Fourteenth Defendants) invested US$180 million into the Port of Caio in Angola, which Mr Bastos had a concession to develop. These are said to be stark examples of the conflicts inherent in the appointment of Quantum to manage FSDEA's funds with Mr Bastos able to dictate the terms of major transactions from both sides of the table.

13. In addition to the IMA and the agreements relating to the Mauritius funds, Mr dos Santos additionally committed FSDEA to some 49 other contracts with companies connected to Mr Bastos for the provision of various kinds of services (the "Service Contracts"). There is a dispute about whether services were provided to the value of what was charged by the relevant counterparties; FSDEA's case is that they were not

and that the Service Contracts were another element of the conspiracy whereby Mr dos Santos permitted Mr Bastos to extract large fees from the Claimants without any proper justification. These counterparties are not Defendants and no claim is brought against them in these proceedings. The Service Contracts have not been avoided or rescinded.

14. In November 2017 details of the arrangements between the Claimants and Quantum were publicly leaked and discussed in the so-called "Paradise Papers". The Angolan government commissioned a report from Ernst & Young ("E&Y") regarding the operation of the FSDEA, which was produced on 15 December 2017 ("the E&Y Report"). Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018. Notice of termination of the IMA was given on 16 February 2018 and took effect two months later, on 17 April 2018. The Liquid Portfolio was put into the hands of a replacement investment manager. The Claimants brought these proceedings and applied for the WFO on 27 April 2018. In the light of some of the asset disclosure given by the Defendants pursuant to the WFO, E&Y updated their report on 9 July 2018 ("the Updated E&Y Report").

15. There is no evidence that Mr dos Santos benefited at all from any of the arrangements complained of. Following the termination of the IMA, the Liquid Portfolio has remained within FSDEA's control. Although FSDEA's case is that Quantum was manifestly ill qualified to undertake the investment management role of the Liquid Portfolio, there is not in fact any particularised allegation that QGIM acted negligently in the choice of investments or otherwise in the handling of the Liquid Portfolio during its time as investment manager. The complaint is not about the performance of the Liquid Portfolio investment, but about the level of fees set contractually under the IMA at 1% plus 20% above the benchmark hurdle, which EY describe in their report as "high given the size of the portfolio", a relatively slight basis for an allegation of fraud. The total of such fees over the life of the IMA was US$81.83m according to the Updated E&Y Report.

16. Accordingly the argument in respect of the WFO has focussed on the Illiquid Portfolio. The amount of the Illiquid Portfolio was US$3 billion, but at the time of the WFO some US$2.27 billion remained in the accounts in the names of the Limited Partnerships at Northern Trust in London. By letters in March 2018 Northern Trust and their solicitors had made clear to the Claimants that they would not deal with those funds without the written instructions of both sides, and would not change their position without giving the Claimants prior notification. In my view those assurances removed any risk of dissipation in justifying an order freezing that sum, which was more than two thirds of the amount frozen by the WFO. This was the subject matter of material non-disclosure on the without notice application to Phillips J, to which I return below. The Updated E&Y Report suggests that a total of US$454m was invested in projects in the seven Mauritian funds, with the balance presumably being accounted for by fees.

17. The fees alleged to have been paid to Quantum or to other Bastos related companies are set out in the Updated E&Y Report as follows (with figures in brackets being those identified in the E&Y Report which formed the basis for the without notice WFO application, where they differ):

    (1) QGIM was paid US$81.83m (US$82.965m per Table 1 or $92.48m per Table 5), under the IMA for managing the Liquid Portfolio.

(2) Under the five ISAs QGI Ltd was paid US$26.39m in respect of the establishment of the Illiquid Portfolio funds.

(3) A further sum of US$10m was due to QGAI for the setting up of the infrastructure and hotel funds under the two CAs, but it does not appear from the E&Y Reports that such sum was paid, although Mr Morris deposes that it was at paragraph 62 of his first affidavit, apparently on the basis that there were two earlier invoices from December 2012 from Quantum Global Wealth Management to the Petroleum Fund requesting payment of $5 million each; he does not exhibit any evidence of payment.

(4) Under the management agreements for the Illiquid Portfolio, QGIAM received by way of annual management fees a total of US$298.13m (US$263m).

(5) Under the Service Contracts the following companies received the following fees totalling $153m.

Stampa QG:	US$58.06m
Tome International AG:	US$40.04m
Djembe Communications:	US$9.91m (US$ 0)
African Innovation Foundation:	US$36.29m
Uniqua Consulting GmbH:	US$8.7m

18. The total fees taken by Bastos related entities are therefore put at US$559.35m (US$515m). It is worth emphasising that all these fees were in accordance with the contracts signed between the parties, and none of the contracts had been rescinded or avoided at the date of the WFO. This is not a case in which any of the Defendants are accused of extracting sums to which there was no contractual entitlement. The thrust of the complaint is the creation by Mr dos Santos of that contractual entitlement.

Jurisdiction

19. The following causes of action are asserted against the following Defendants:

(1) against Mr dos Santos:

(a) breach of duty under the Public Probity Law of Angola;

(b) conspiracy to injure by lawful and unlawful means;

(c) procuring breach of contract by QGIM (see below for the breaches of contract alleged against QGIM);

(d) constructive trust: dishonest assistance of breaches of fiduciary duty by QGIM (see below for the breaches of fiduciary duty alleged against QGIM);

(2) against Mr Bastos:

(a) conspiracy to injure by lawful and unlawful means;

(b) procuring breach of contract by QGIM;

(c) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM (I take this to be the intended reference in para 12(e)(ii) of the Claim Form which in fact refers to "QGIM Ltd").

(d) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds;

(3) against QGIM:

(a) breach of clause 4 of the IMA in failing to carry out the services under the IMA with due skill and care and/or in good faith;

(b) breach of clause 14 of the IMA in failing to disclose conflicts of interest and/or procuring contracts which involved a conflict of interest, including the Luanda Hotel and Port of Caio projects;

(c) breach of the IMA in failing to invest the Liquid Portfolio "properly or at all"; although this is a pleaded head of claim, it is not supported by any evidence on these applications of any particularised negligent management or investment of the Liquid Portfolio;

(d) breaches of fiduciary duty in the respects alleged to be breaches of contract under (a), (b) and (c) above;

(e) conspiracy to injure by lawful and unlawful means;

(f) constructive trust: dishonest assistance of breaches of fiduciary duty by Mr dos Santos (in breaching the Public Probity Law);

(g) constructive trust: unconscionable receipt of any part of the US$5 billion its traceable proceeds;

(4) Against QGIAM Ltd (D4), QGI Ltd (D5), QGAI (D6) the General Partners (D7-13) and the Limited Partnerships (D14-20):

(a) conspiracy to injure by lawful and unlawful means;

(b) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM

(c) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds.

20. In addition, there is a proprietary claim against each Defendant in respect of any part of the US$5 billion received by them or its traceable proceeds. The basis put forward for the proprietary claim was initially the claim based in constructive trust. In the course of argument, Mr McGrath sought to support it also on the basis that FSDEA at all material times retained a proprietary interest in the funds.

21. Mr dos Santos is resident and domiciled in Angola. There is a dispute whether Mr Bastos is domiciled in Switzerland or Dubai. QGIM (D3) and QGAI (D6) are incorporated in Switzerland. QGIAM (D4) is incorporated in Mauritius and is the manager of the Limited Partnerships, which are domiciled in Mauritius as are the General Partners. QGI Ltd (D5) is a company incorporated in the British Virgin Islands.

22. The challenges to jurisdiction involve the following submissions on behalf of the Defendants:

    (1) The claims against the Swiss companies, QGIM (D3) and QGAI (D6), are governed by the Lugano Convention, and those companies must be sued at their place of domicile which is Switzerland. The Claimants assert that under the Lugano Convention these claims may be brought in England. The Claimants also contend that the claims against Mr Bastos may be brought in England pursuant to the Lugano Convention on the grounds that he is domiciled in Switzerland. Mr Bastos disputes that he is domiciled in Switzerland and that jurisdiction over him is governed by the Lugano Convention.

    (2) Certain of the claims do not pass the merits threshold of a serious issue to be tried.

    (3) England is not the appropriate forum for the claims against the non-Lugano Defendants.

    (4) Insofar as any claims would otherwise remain to be tried in England, certain of the claims are within arbitration agreements and are subject to a mandatory stay under s. 9 of the Arbitration Act 1996; and there should be a case management stay of any remaining claims pending the determination of proceedings in arbitration and/or elsewhere abroad.

Jurisdiction: the Lugano Defendants (QGIM and QGAI and query Mr Bastos)

The claims against Mr Bastos

23. The Claimants submitted that jurisdiction could be established under the Lugano Convention against Mr Bastos because he was domiciled in Switzerland. The evidence of his residence is exiguous and there is no Swiss law evidence on domicile. The weight of the evidence is that he left Switzerland to go and live in Dubai in May 2017 and has resided in Dubai since then. Accordingly the Claimants have failed to establish that at the relevant time he was domiciled in Switzerland, and jurisdiction over him falls to be established under the common law, not the Lugano Convention.

FSDEA's breach of contract claim against QGIM (D3)

24. FSDEA invokes Article 5(1) of the Lugano Convention to establish jurisdiction for this claim, which provides that contractual claims may be brought in respect of a contract for services at the place where the services were or should have been provided. The question therefore is where the services were, and were to be, provided by QGIM under the IMA. FSDEA contends that this is London where the Northern Trust accounts were held. I am unable to accept this submission. The services to be provided by QGIM under the IMA were investment management services which involved determining how the Liquid Portfolio was to be invested in various short-term investments. That management function was to be, and was, carried out in Switzerland where Quantum had its place of business. That aspect of its business was regulated and supervised by the Swiss financial authorities, as the preamble to the IMA recorded at paragraph C. QGIM had no custody of the assets, in London or elsewhere. The IMA did not identify any place for the receipt of those instructions, which only became London as a result of FSDEA's choice of custodianship, which might originally have been elsewhere than London and could at any time have been changed to a different location. On any view, therefore, it cannot be said that the IMA provided for any part of the services to be performed in London. It is true that QGIM's investment management in Switzerland in the event resulted in instructions from Switzerland to London to the custodian of the funds in London, but that does not make London the place of performance of the services to be provided under the IMA. Those services do not consist solely or even primarily of the investment instructions, but rather the investment management activity in determining what investments to make, which took place in Switzerland, as envisaged by the IMA.

FSDEA's breach of fiduciary duty claim against QGIM (D3)

25. FSDEA seeks to found jurisdiction under Article 5(3) of the Lugano Convention, which provides that a party may be sued in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred, which is said to be in London where the payments out of the Northern Trust accounts occurred. However I accept Mr Edey QC's submission that the breach of fiduciary duty claim is properly characterised as being in a "matter relating to contract" so that allocation of jurisdiction falls to be determined in accordance with Article 5(1), not Article 5(3); and that accordingly Switzerland is the allocated jurisdiction for the same reason as for the contractual claims under the IMA. This is because the equitable claim for breach of fiduciary duties depends upon the existence of the IMA: the duties are said to arise by virtue of the relationship created by the IMA. The Claim Form describes them as "arising by virtue of the IMA and/or the authority thereby vested in QGIM to…handle and otherwise deal with assets belonging to the FSDEA". The position is accurately described in Briggs on Civil Jurisdiction and Judgments 6th Edn at paragraph 2.196:

> "The answer is to be found by deciding whether the obligation which lies at the heart of the claim is rooted in an agreement between the parties, or on an allegation of wrongful behaviour which has caused loss to another. If the obligation arises from the unconscionable disregard of the duties of an agreement, such as those imposed upon a person who has with the agreement of the other party placed himself in a fiduciary relationship with that other, such as an agent to his principal, the matter should be seen as one relating to a contract and the fiduciary aspect of the claim as going only to define or augment the remedies available to the claimant."

FSDEA's proprietary claim against QGIM (D3)

26. A proprietary claim only exists "against" a person to the extent that that person holds property in which the Claimant is entitled to a legal or equitable interest. It is a claim to the property itself, and is only asserted against the holder of the property or one who is in a position to give effect to the proprietary interest. Accordingly, in the current context the question is whether, assuming that there is a sufficiently arguable case that QGIM holds such property, the claim to enforce the proprietary interest in respect of the property against QGIM falls within Article 5(3). Mr McGrath QC submitted that the proprietary claim fell within Article 5(3) as being in a matter relating to tort, delict or quasi delict. Mr Edey submitted that if the proprietary claim passed the threshold merits test of raising a serious issue to be tried, it did not fall within Article 5(3). He submitted that it was clear from ***Kalfelis v Bankhaus Schröder*** 189/87 [1988] ECR 5565 and ***Kleinwort Benson Ltd v Glasgow City Council*** [1999] 1 AC 153 that Article 5(3) only covered claims which gave rise to a personal liability. This submission is in my view well founded. The proprietary claim has nothing to do with any personal liability on the part of QGIM; it is a claim to property insofar as it remains in the hands of QGIM irrespective of fault; it is not based on a constructive trust (which would give rise to a claim falling within Art 5(3): see ***Casio Computer Co Ltd v S*** [2001] EWCA Civ 661 and ***Dexter v Harley*** [2001] All ER (D) 79) because dishonest assistance constructive trust claims are not proprietary: see per Lord Millett in ***Paragon Finance Plc v D B Thackerar & Co*** [1999] 1 All ER 400 at p. 409e-g.

Proprietary claim against QGAI (D6)

27. For the same reasons as apply in relation to QGIM, the proprietary claim against QGAI does not fall within Article 5(3) of the Lugano Convention and can only be brought at its place of domicile which is Switzerland.

Jurisdiction: serious issue to be tried

28. The Defendants argued that the Claimants had failed to establish a serious issue to be tried in respect of the following causes of action:

    (1) the proprietary claim;

    (2) the claim for lawful means conspiracy;

    (3) the claims against Mr dos Santos in unlawful means conspiracy and dishonest assistance constructive trust;

    (4) the claims by FSDEA against QGIM (D3) for breach of contract and breach of fiduciary duty;

    (5) the claims by FSDEA against the general Partners and Limited Partnerships;

    (6) the "cross claims" between the Partnerships, i.e. the claims by the Limited Partners against General Partners of other Partnerships, and against those other Partnerships; and

    (7) some of the knowing receipt claims.

The proprietary claim

29. The Liquid Portfolio was held in FSDEA's name by Northern Trust. The proprietary claim in respect of those funds, which have been returned to FSDEA's control, is limited to the fees taken by QGIM and their traceable proceeds. So far as the Illiquid Portfolio is concerned, the funds were initially in accounts under QGIM's control at FSDEA and were transferred to accounts at Northern Trust in the names of the Limited Partnerships pursuant to written instructions from FSDEA to QGIM dated 30 June 2015 signed by Mr dos Santos which stated "The transfers doesn't [sic] cause a change in the ultimate beneficial ownership". Mr Edey submitted that there could be no proprietary claim for property which was transferred pursuant to contracts where those contracts had not been avoided or rescinded. He accepted that the Claimants retained a beneficial interest in the investments in the Illiquid Portfolio, but submitted that those interests were held on the terms of the Limited Partnership Agreements which were long term contracts (of 10 or 15 years), such that there was no immediate entitlement to possession. He submitted that property passed in full under the contracts (the IMA and the Limited Partnership Agreements), and unless and until they were avoided there could be no vesting of any equitable interest in the transferor. Until very shortly before the hearing before me the Claimants had not suggested that the agreements were invalid or had been avoided, and indeed had proceeded on the basis that they remained validly in place. Mr McGrath sought to argue before me that they were void, alternatively voidable and had been rescinded. In my view Mr Edey was correct to submit that it was too late to run such an argument, which gave rise to issues of election and affirmation, and to allow the Claimants to do so would have been unfairly prejudicial to the Quantum Defendants, who would have been able to deploy arguments of election and affirmation. Accordingly the question whether there is a serious issue to be tried that the Claimants have a proprietary claim falls to be addressed on the footing that the sums transferred were paid in accordance with contracts which are not void and have not been rescinded.

30. On that footing, Mr McGrath submitted that where a contract split the legal and equitable interests so as to confer a legal title whilst retaining an equitable title, there is no need to rescind or avoid the contract in order for the transferor to assert the equitable proprietary right to the property. That was, he submitted, the effect of the contractual arrangements in this case because the funds were always invested for benefit of the Claimants who retained an equitable interest throughout; the Liquid Portfolio was held in accounts in the name of FSDEA and funds for the Illiquid Portfolio were transferred into the Limited Partnership accounts by instructions from FSDEA to QGIM which expressly purported to retain "ultimate beneficial ownership" in the funds. This argument does not work for the fees in respect of the Liquid Portfolio, where it was intended by the IMA that legal and beneficial interest in the fees should pass to QGIM. However, the main issue on this point was whether there was a sufficiently arguable proprietary claim to the sums transferred in the Illiquid Portfolio because the challenge is aimed at the proprietary element of the WFO, which is confined in amount to $3 billion to reflect such transfer. So far as that is concerned I was referred to a number of authorities on each side. This is an issue which raises difficult questions of law which will have to be applied to the facts once established. I am inclined to the view that the Claimants have met the relatively low merits threshold of a serious issue to be tried. However I do not propose to explore the legal issues in this judgment which would fall to be addressed in the light of the fact specific circumstances once established, nor to

express a concluded view, because in the event this issue is not determinative of the outcome of the applications which I have to decide. I shall assume, without deciding, that there is a serious issue to be tried for the proprietary claim advanced.

Lawful means conspiracy

31. The Claimants submitted that it was sufficient to establish the necessary predominant intention to injure that the predominant intention of the Defendants was to benefit themselves in circumstances in which the benefit could only be at the expense of the Claimants, relying on what was said by the Court of Appeal in ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174 at [34]. The passage relied upon does not support the suggested principle, and the suggested principle is inconsistent with the essence of the tort which is that if lawful means are deployed a conspiracy can only be unlawful if it involves a predominant intention to injure the claimant. If the predominant intention is to benefit the conspirators, by definition the predominant intention cannot be to injure the claimant, even if such injury is the inevitable result and even if it is intended. The lawful means conspiracy does not surmount the merits threshold of raising a serious issue to be tried on the facts alleged by the Claimants in this case, which clearly involve an allegation that the alleged conspirators were motivated by a desire to benefit themselves without any animus against the Claimants.

Claims against Mr dos Santos in conspiracy and dishonest assistance

32. Mr Anderson QC accepted that there was a serious issue to be tried (and a good arguable case) that Mr dos Santos was in breach of the Public Probity law of Angola, but contended that the merits threshold was not met for the claims in conspiracy and dishonest assistance. He submitted that under Article 4 of the Rome II Convention the question was governed by Angolan Law; and that there was no evidence that Angolan law recognised such causes of action. The difficulty with this submission is that the evidence before me simply did not purport to address the question whether Angolan law recognised a liability based on facts which would in English law establish liability for unlawful means conspiracy or dishonest assistance constructive trust. Accordingly, even if the appropriate law is Angolan law, the Court proceeds on the evidential assumption that Angolan law does not differ from English law in the absence of evidence to the contrary. I therefore reject Mr Anderson's submission on this point.

FSDEA claims against QGIM (D3)

33. This argument is of no consequence to the current application because jurisdiction for these claims is governed by the Lugano Convention, which involves no merits threshold, and in any event if there were otherwise jurisdiction, they are governed by the arbitration clause in the IMA (and Mr McGrath confirmed that he was not seeking to maintain any aspect of the WFO under the jurisdiction conferred by s. 44 of the Arbitration Act 1996). Since any such claims are a matter for arbitrators to decide, I decline to express any views on their merits.

FSDEA claims against the Limited Partnerships and the General Partners

34. The argument in respect of these claims was that any loss had been suffered by the Limited Partners, not FSDEA, and that a claim by FSDEA fell foul of the principles

that a shareholder may not sue for reflective loss. Mr McGrath countered that the principles were not applicable to the facts of this case, in part at least because FSDEA's claim was in its capacity as the source of the funds and transferor to the Limited Partners, not merely as shareholder in the Limited Partners. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

The cross claims

35. Mr Edey's argument was that there is no evidence that any of the Limited Partnerships or General Partners said or did anything in relation to the project outside its own partnership, and that the Limited Partner of one partnership could not have been caused a loss by anything done by the General Partner or the Limited Partnership itself in another partnership. Mr McGrath's response was that if there was as alleged, a single conspiracy which the General Partners and Limited Partnerships joined, they became liable as conspirators for the losses suffered by any of the victims of the conspiracy, irrespective of their own acts of participation. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

Knowing receipt claims

36. Mr Edey's argument was that the only receipts which could found a knowing receipt constructive trust claim were for the Liquid Portfolio such fees as QGIM received from the US$2 billion Liquid Portfolio; and in respect of the Illiquid Portfolio, the only relevant receipts were by the General Partners of their US$1,000 per annum in fees, and by QGAIM of its fees under the management fees due under the Limited Partnership Agreement; and that there was no wider knowing receipt claim in respect of the US$3 billion because although the Limited Partnerships did receive the US$3 billion, they did not do so beneficially: they held the funds for the Limited Partners on the terms of the Limited Partnership Agreements. The contrary is plainly arguable and on this aspect the Claimants have established a serious issue to be tried.

Jurisdiction: the arbitration agreements

37. By the conclusion of the hearing it was common ground that insofar as there would otherwise be jurisdiction, the following claims must be stayed in favour of arbitration under the mandatory provisions of s. 9 Arbitration Act 1996:

    (1) All FSDEA's claims against QGIM (D3) are governed by the arbitration clause in the IMA, which provides for arbitration to take place in Portugal. QGIM commenced an arbitration by a Request dated 18 June 2018. It is common ground that those claims must be the subject matter of a mandatory stay under s. 9 of the Arbitration Act 1996 to the extent that there is otherwise jurisdiction over them. On my findings this catches the claims in conspiracy, dishonest assistance and knowing receipt, the others being claims in respect of which the Claimants have failed to establish jurisdiction under the Lugano Convention in

any event. I am inclined to think that the seat of the arbitration is Portugal, not England, but since this does not affect the outcome of anything I have to decide I prefer to express no concluded view.

(2) All FSDEA's claims against QGI Ltd, which are governed by the arbitration agreements in the ISAs which provide for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language.

(3) All the claims by the Limited Partners against their General Partners are governed by the arbitration agreement in the Limited Partnership deeds which provide for arbitration in Mauritius. The General Partners and Limited Partnerships commenced arbitrations against the respective Limited Partners in Mauritius on 8 May 2018. The Limited Partners have disputed whether the Partnerships are entitled to invoke the arbitration clause. In the light of my earlier conclusions, I do not need to resolve that question.

Jurisdiction: Forum conveniens

38. This is not a case where fragmentation can be avoided. The starting point is that there are arbitrations in Mauritius which involve the disputes between the Limited Partners and the General Partners in relation to the Illiquid Portfolio, to which the Limited Partnerships are arguably properly joined parties. There are also winding up proceedings commenced by the Limited Partners in Mauritius which will raise some of the issues which arise in these proceedings. There is no jurisdiction under the Lugano Convention over certain of the claims against QGIM (D3) and over the proprietary claim against QGAI (D6), who must be sued in Switzerland; and in any event, even were jurisdiction otherwise to be established, any claims by FSDEA against QGIM would have to be stayed in favour of arbitration in Portugal. It is FSDEA's case that the IMA (and therefore its arbitration clause) governs the Illiquid as well as the Liquid Portfolio. Accordingly, on the Claimants' case, all the tortious and contractual claims by FSDEA against QGIM will have to be dealt with in that arbitration. On any view, and even if the arbitration is confined to the issues in relation to the Liquid Portfolio, that will involve an examination of the circumstances in which the Quantum group came to be appointed, which raises many of the issues at the heart of the dispute in these proceedings.

39. It is against that background that the Claimants bear the burden of establishing that England is clearly and distinctly the appropriate forum: ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460.

40. There are weighty factors in favour of Angola as the appropriate forum:

(1) The claim is brought by the sovereign wealth fund of Angola and its special purpose subsidiaries. Of the two personal Defendants, Mr dos Santos is resident in Angola, and Mr Bastos, although resident in Dubai, is currently confined to Angola because his passport has been confiscated. These are the protagonists whose conduct is at the heart of the issues between the parties.

(2) The central ingredient in most of the causes of action against most defendants is the allegation that Mr dos Santos was in breach of the Public Probity Law in granting the contracts to the Quantum Defendants and Bastos-related entities.

This is the foundation for the claims in unlawful means conspiracy, dishonest assistance, knowing receipt and the proprietary claims. These allegations of breach are of what occurred in Angola and are clearly more suitably tried in Angola, not only because they are governed by Angolan law, but also because the Public Probity Law imposes duties expressed in terms of generality which take their content from their Angolan context. Article 3 provides: that "*Public agents should, in performance of their duties, be guided by the following principles: (a) principle of legality (b) principle of public probity (c) principle of competence (d) principle of respect for public property (e) principle of impartiality (f) principle of the pursuit of public interest….(j) principle of prudence (k) principle of loyalty to public institutions and entities and to the higher interests of the State.*" The subsequent articles develop these principles, again using language of some generality (e.g. "*the highest criteria for public professionalism*"). These duties are properly to be interpreted in accordance with the cultural standards and norms of Angolan public life at the time, which is clearly a matter on which the Angolan court is better equipped than the English Court.

(3) The projects of which complaint is made include major projects in Angola, including in particular the hotel project in Luanda and the Port of Caio project.

(4) The witnesses or potential witnesses likely to be of central importance, apart from Mr Bastos and Mr dos Santos, will be those involved in the appointment of Quantum and supervision in Angola of its activities, including Dr Manuel, Mr Gonçalves, Mr Fortunato and Mr Gago, who are to be found in Angola.

(5) Similarly, the predominance of the documentary evidence is likely to be found in Angola, and some will be in Portuguese.

41. There are also factors in favour of Mauritius. In particular the claims are in part governed by Mauritian law, and the evidence will have to be gathered and deployed in Mauritius for the purposes of the Mauritian arbitrations and the winding up proceedings.

(1) The Limited Partnership Agreements contain a Mauritian governing law term which is of very wide ambit, such that it will govern both contractual and non-contractual claims between the Limited Partners and the General Partners.

(2) The Limited Partnership Agreements contain Mauritian arbitration clauses and arbitrations have been commenced in Mauritius. The arbitrations will cover much of the ground which is in issue in these proceedings, although Mr dos Santos and Mr Bastos will not be parties.

(3) The winding up proceedings commenced by the Limited Partners in the Mauritian courts involve allegations covering almost exactly the same ground as the allegations in relation to the Illiquid Portfolio in the current proceedings. Such winding up proceedings were foreshadowed at the time of the without notice application and have subsequently been commenced.

(4) The Claim Form in these proceedings does not contain a claim by the Limited Partners against Mr dos Santos for breach of duty, but the Claimants' skeleton argument asserts that such a claim clearly exists for breach by Mr dos Santos of his duties under Mauritian law, and states that the Claimants will seek to amend the Claim Form to include such a claim by the Limited Partners, and ancillary claims for dishonest assistance in relation to such breaches.

42. Some factors also point towards Switzerland. QGIM, the Third Defendant and party to the IMA under which, on FSDEA's case, the entirety of the management took place, is a Swiss company. QGIM is based in and operating from Switzerland. Indeed this is the centre of gravity of all the Quantum group and its activity. The investment management took place from Quantum's offices in Switzerland.

43. Against this there is relatively little which points to England as an appropriate forum.

(1) None of the parties is resident or incorporated in England or carries on business here, other than Northern Trust whose stance is essentially neutral. At the heart of the case against all the Defendants is the personal relationship between an Angolan individual, Mr dos Santos, and a Swiss/Angolan individual, Mr Bastos; breach of Angolan duties owed by the Angolan individual; and Mr Bastos' alleged knowledge of or collusion in that breach (which is relied on as that of all the corporate Quantum Defendants).

(2) None of the relevant witnesses or documents are located in London. (save to the extent brought there for the purpose of these proceedings, and save possibly for a few Northern Trust documents). Much of the relevant evidence, both of witnesses and in documents will originate from Angola and Switzerland. Most of the evidence will have to be collected and deployed abroad: in Portugal in any arbitration with QGIM; and in Mauritius in relation to the partnership arbitrations and the winding up proceedings.

(3) The fact that the Liquid Portfolio and Limited Partnerships bank accounts were held at the London branch of Northern Trust provides only a slight connection with England for the purposes of determining the appropriate forum. The location of the accounts under the Master Custody Agreement was a matter of choice for FSDEA, not a matter of contractual agreement with Mr Bastos or the Quantum group. Under the IMA, FSDEA could have chosen to establish the custodian accounts at any bank anywhere, for example in New York. The funds were dollar denominated and the Liquid Portfolio was invested in a range of international securities in the usual way. The centre of gravity for the allegations in relation to investment of the Illiquid Portfolio is not in London, from where the funds were to be transferred to be invested in projects, but in the places where the events giving rise to the complaints arises: Switzerland for the decision to set up Mauritian limited partnerships and Angola or elsewhere in Africa in relation to investment in projects where a conflict of interest is complained of. The fact that a London branch of a US Bank was chosen by FSDEA as the place of custody is of no significance to the issues in the case. Nothing turns on the place at which the funds or securities were held.

(4) Some of the issues in the case are, at least arguably, governed by English law. Others, however, are not. Angolan law governs the breach of duty allegation by

FSDEA against Mr dos Santos which is at the heart of the complaint. Mauritian law governs the claim intended to be added by amendment by the Limited Partners against Mr dos Santos for breach of duties owed under Mauritian law. Mauritian law governs the Limited Partnership Agreements. The fact that English law governs the IMA is of no significance because there is no jurisdiction over the contractual claims against QGIM which will in any event have to be determined in arbitration in Portugal.

44. For these reasons I conclude that the Claimants have failed to establish that England is clearly or distinctly the appropriate forum. Accordingly, the Court should not exercise jurisdiction over any of the Defendants in relation to any of the causes of action, save those governed by the Lugano Convention (D3 and D6).

Conclusion on jurisdiction

45. The upshot of my conclusions is that there is only a small rump of causes of action in respect of which jurisdiction is established and which do not fall to be stayed for arbitration, namely some, but not all, of the claims against the Lugano Convention Defendants, QGIM (D3) and QGAI (D6). What remains are the claims against QGIM by the Limited Partners in unlawful means conspiracy, dishonest assistance and knowing receipt, (but not any of the claims by FSDEA against QGIM, for which jurisdiction under the Lugano Convention is not established and which are governed by the arbitration clause in the IMA); and the claims by the Limited Partners and FSDEA against QGAI (D6) in those causes of action.

46. The Defendants submitted that there should be a case management stay in respect of any claims which fell into this category. It was agreed at the hearing that arguments in respect of a case management stay should be deferred until after I had given judgment identifying which of the claims might be affected.

The WFO

47. There were essentially four grounds on which the Defendants sought to have the WFO set aside and not continued:

(1) There was no jurisdiction over the claims. FSDEA did not seek to support the relief as appropriate in aid of foreign proceedings. Nor was the application made under s. 44 Arbitration Act 1996. At one stage Mr McGrath did seek to invoke this latter jurisdiction and a s. 44 application was belatedly issued on 25 July 2018, the second day of the hearing. Mr Edey submitted that such an application was made far too late for it fairly to be addressed, correctly in my view, and it was not ultimately pursued by Mr McGrath.

(2) There is no good arguable case in respect of some of the causes of action, including, most relevantly for present purposes, the proprietary claim.

(3) There was a breach of the duty of full and frank disclosure.

(4) FSDEA has not established a sufficient risk of dissipation.

(5) In addition, the Defendants submitted that none of the arguable causes of action raised a good arguable case of a claim to $3 billion or any identified sum.

WFO: No Jurisdiction

48. I have held that the court has no jurisdiction over the claims save for a small rump of some of the claims against QGIM (D3) and QGAI (D6), in respect of which there is an as yet undetermined application for a case management stay. I shall reserve questions of whether this would be a sufficient ground to discharge the WFO or to refuse to continue it, if necessary, until after determination of the question whether there should be a case management stay.

WFO: No good arguable case

49. Although there is a distinction between the merits threshold of a serious issue to be tried, for the purposes of jurisdiction, and that of a good arguable case which is required for the purposes of a freezing order, the Defendants submitted that it made no difference on the facts of this case, and asked me to treat the causes of action as standing or falling together under both tests. Accordingly, my earlier conclusions on the question whether there is a serious issue to be tried in relation to the various impugned causes of action should be treated as conclusions to the same effect in relation to whether the Claimants have established a good arguable case for the purposes of the WFO, including the conclusion that I will assume, without deciding, that the merits threshold is reached in respect of the proprietary claim.

WFO: Non-Disclosure

50. The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in ***Brink's Mat Ltd v Elcombe*** [1998] 1WLR 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:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

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

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

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

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was 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.

> "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could

> properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp.1343H-1344A."

51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in ***Memory Corporation v Sidhu*** (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in ***Bank Mellat v Nikpour*** [1985] FSR 87, 92, Bingham J in ***Siporex Trade v Comdel Commodities*** [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in ***Marc Rich & Co Holding v Krasner*** (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to

disclosure of documents (see CPR PD31A and ***Hedrich v Standard Bank London Ltd*** [2008] EWCA Civ 905).

54. In this case I have concluded that there has been a breach of the duty to make a fair presentation of the case in eight material respects.

(1) The selection of Quantum

55. There was non-disclosure and an unfair presentation in respect of the Quantum selection process in a number of ways.

56. The Claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr dos Santos being chairman of that organisation (which subsequently became FSDEA), and at a time when Dr Manuel was Chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered into an Investment Management Agreement with Quantum on 13 July 2012, signed by Dr Manuel. Further, Quantum entities had been engaged as managers in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, each signed by Dr Manuel.

57. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments and two in respect of equity investments, in infrastructure and hotel projects respectively. None were by Mr Bastos. The presentation in relation to the Liquid Portfolio was by Gareth Fielding, QGIM's Chief Investment Officer since 2008, with 25 years' experience in asset management including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, Ulrich Otto, who had more than 10 years' experience of private equity investments involving assets which reached more than $2 billion in value, and sat on the supervisory board of a company with revenues of US$ 1 billion. It contained a detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by Mr Antoine Castro, Quantum's managing director of Real estate, with extensive prior experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages.

58. There was no attempt to put those presentations before the Judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA or other appointments, nor to address whether that selection was made otherwise than on merit. Instead Mr Morris' first affidavit and the skeleton argument before Phillips J gave the misleading impression that the selection had been entirely that of Mr dos Santos and made in 2013 when he was Chairman.

59. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of Mr Morris' first affidavit he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and

that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, and before any selection process; whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and December 2012 addendum were each signed not by Mr dos Santos but by Dr Manuel. The sub-paragraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for 6 months, amounting to $264 million. That would indeed have been breathtaking, to use the epithet applied to fees in the Claimants' skeleton argument, but was wrong: the fees were $44,000 monthly, giving a total of $264,000 for 6 months.

60. It was also misleading to characterise the process in the skeleton argument as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as "the extent of the selection process". Again, this ignores the selection process in 2012 which involved detailed presentations from Quantum. The false impression is reinforced by the assertion at para 31 of the E&Y report that no proposals were requested from any of the four potential managers, i.e. including Quantum, which implied that there had never been a formal proposal from Quantum.

61. Moreover, Mr dos Santos gave a fairly lengthy account of the selection process and the rationale for appointing Quantum in a letter of 27 September 2013 addressed to Jersey trustees who were then contemplated as being involved in the management of the fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not put in evidence before the Judge and its existence and contents were not referred to.

62. These were important matters. One of the central elements of the case against the Defendants was that it was Mr dos Santos as Chairman of FSDEA who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a significantly different complexion on the selection.

63. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However it seems likely that the existence of the prior appointment, the 2012 IMA other appointments, and the 2012 proposals were known to those at FSDEA with conduct of the case; and to Mr Gonçalves who was on the Board throughout the period, remains an adviser to FSDEA and who provided a witness statement subsequently; I say he was on the board throughout the relevant period because although in his own statement he describes himself as being on the board from October 2012, Mr Morris in his fifth affidavit says he was on the board from March 2012; and Mr Gonçalves refers to seeing one of the presentations in May 2012 at paragraph 26 of his subsequent witness statement; it seems likely that the circumstances of the 2012 appointment and presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013 and on the board from 2016, from whom Mr Morris did take instructions at the time of the without notice application; I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Gonçalves and gives

evidence about it. At the least, the circumstances of the 2012 presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

(2) Quantum's track record and suitability

64. Mr Morris described Quantum in his first affidavit as "an unknown and untested entity". In paragraph 14 of the skeleton Quantum was described as having a "limited track record" with a capitalisation of only 100,000CHF and contrasted with other candidates of the calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the Judge that:

(1) Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, in which Quantum had identified in its 2012 proposals the apparently well qualified staff with extensive relevant asset management experience who were employed by Quantum, and the independent board members apart from Mr Bastos who were of apparent eminence and experience.

(2) Quantum had had a capitalisation of CHF 1 million since 2007, as the detail in the E&Y Report accurately recorded.

(3) Quantum had managed assets for the Banco Nacional de Angola, the Angolan state bank, of $2.3 billion in liquid assets and a further $1billion in private equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at para 39 of his first affidavit by saying that "It appears from the documentation generated for the purposes of Project Rainbow…that Quantum Global at least at one point managed several hundred US$ (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA".

65. Again, these were important matters which were known to the Claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or absence of it, was at the heart of the allegations on which the Claimants' case is founded.

66. There was, additionally, an unfortunate mischaracterisation in relation to Mr. Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence; whereas, as was apparent from the material available to Mr Morris, the sanction was a suspended sentence ***of*** a fine, i.e. a fine payment of which was suspended and which in the event Mr Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended).

(3) Transparency and supervision

67. The appointment of Quantum, and its activities in carrying out the investment management, were transparent and regularly reported on to an audience within FSDEA beyond Mr dos Santos. The Claimants did not disclose or draw to the Judge's attention, as they should have done, the following.

68. The Board of FSDEA was by Presidential Decree overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA's policy and investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development, and the Governor of the National bank of Angola. Its role was not specifically addressed in the evidence or argument before Phillips J apart from an inaccurate reference in the E&Y report suggesting that the body never met, inaccurate because Mr Gonçalves' later evidence is that it met at least once. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example, it had detailed reports on the Illiquid Portfolio from Deloitte.

69. Moreover, FSDEA's accounts were audited on an annual basis by Deloitte.

70. Quantum also provided regular reports on the investments to FSDEA, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid Portfolio which contained the sort of detailed information one would expect from investment managers.

71. None of this was addressed in the Claimants' evidence or argument or drawn to the Judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable inquiries. Again, it was of importance to the case being advanced.

(4) The limited partnership model

72. Fourthly there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The Judge's attention was not drawn to the fact that the E&Y report described the structures used for the Illiquid Portfolio as based on a standard model and that "such models are commonly used in P[rivate] E[quity] and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

73. In argument before me, the thrust of the complaint changed to one that limited partnerships were only suitable vehicles for collective investment schemes, i.e. where there was more than one investor. But this was not the position taken by Deloitte in its audit reports which made no criticism of the structure, nor that of the Mauritian authorities in relation to 5 of the 7 Limited Partnerships. The Judge should have been told that both E&Y and Deloitte had not treated the structures used as inappropriate and

that they were a commonly used model. This was obviously important given the criticisms which were being made of the structure.

(5) Conflicts of interest

74. There was non-disclosure in relation to the allegation of conflicts of interest in the projects in the Illiquid Portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016 Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy, and expressly disclosing transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and conflicts dealt with in accordance with the policy. The disclosure included a hotel project in Luanda in which $157m had been invested which was the subject matter of particular criticism by Mr Morris in his first affidavit. The letter and waiver were signed not only by Mr dos Santos but also by Mr Fortunato, against whom no allegations of impropriety are made.

75. The 17 August 2016 letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris says that he and the team preparing the application were unaware of it because it was part of a set of over 750 documents which his firm held as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Mr Morris to have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the documents it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it all unless constraints of time or expense made this impossible. Neither applies in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum: if it was interrogated for that purpose it should have been fully interrogated. In any event Mr Fortunato was obviously aware of the letter, as a countersignatory, and reasonable inquiries would have extended to all the board members in place at the relevant times, including Mr Fortunato, who it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application.

(6) Fees

76. There was non-disclosure and an unfair presentation in respect of the fees charged on the Illiquid Portfolio. The fees as a whole (then put at $515 million) were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio, there was further criticism that the fees were charged on the full amount of the portfolio of $3 billion, when the amount invested in the projects was only a small part of that, some $2.2 billion remaining uninvested and held in liquid funds at the date of the WFO. There are several elements to what the Judge was not told, as he should have been.

    (1) As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as E&Y noted at paragraph 54 of

the report (to which the Judge's attention was not specifically drawn). In the course of the hearing before me Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the Claimants thereby lost visibility and control. But this was not how the matter was presented to Phillips J, which did not confine the criticism to this aspect. On the contrary it was suggested that at least one of the improper purposes of the drawdown into the partnership accounts was "to extract management fees by reference to the entirety of the US$3 billion, even though most of it has been sitting in cash (or cash like securities)": see the skeleton at para 16(5)(b), and see para 16(7) which made this criticism as a matter of "the structure by which the fees were calculated".

(2) Further, the Judge was not told what appears in paragraph 23 of Mr Gonçalves's subsequent witness statement, namely that he was aware of the reasons given at the time for the funds going into the partnership accounts, having been told by Mr dos Santos in 2013 that "the Fund was going to face increasing pressure in the economy and pressure to access its funds, so he wanted to use the funds now and put them into the private equity fund, so as not to give appetite to the state to come and use the funds." Mr Gonçalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

(3) Moreover, on the Illiquid Portfolio the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio (which accounted for over $100m of the fees on the figures then presented) and 2.5% plus 20% in relation to the hotel and other illiquid portfolios (which accounted for the balance). The Judge did not have specifically drawn to his attention paragraph 53 of the E&Y report which described 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to FSDEA in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again a matter not drawn to the Judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on ($263.4m out of $515.84m).

77. The level of fees charged was another of the central elements of the case against the Defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

(7) The stance of Northern Trust

78. There was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February 2018 and 4 March 2018, Northern Trust made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instructions from both FSDEA and Quantum and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, largely addressed to requests for disclosure, Northern Trust reiterated that there would be no change of position without prior notification. The first two letters were referred to in a narrative section of Mr Morris' Affidavit but were not identified in the section on risk of dissipation, were not

referred to in the skeleton argument and were not drawn to the judge's attention. The latter was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but was referred to at paragraph 190 of Mr Morris' first affidavit and in the Claimants' skeleton at 109(3) in sections addressing the risk of dissipation. In each case the letter was referred to by treating Northern Trust's statement that it would give prior notice as no more than a then current intention which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. This was to mischaracterise the correspondence as a whole, which suggested that Northern Trust were caught between conflicting claims and would not take steps without the agreement of both parties. Had the Judge been shown the correspondence, or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the Claimants being given sufficient advance notification to afford an opportunity to come before the Court again in those changed circumstances if necessary. That is my view, with the result that in respect of this aspect of non-disclosure, the Claimants have not made out a case of risk of dissipation in respect of over two thirds of the amount covered by the Freezing Order.

79. This last paragraph reflects what I said on this issue when giving judgment on the non-disclosure points at the conclusion of the hearing. Since then, on 9 August 2018 Mr Morris wrote to the court enclosing a seventh affidavit in which he explains that there were without prejudice communications with Northern Trust in March 2018. He had not consulted his notes when making his first affidavit, but had gone back to them in the light of the non-disclosure arguments at the hearing before me, and was now able to tell the court, having secured a limited waiver of privilege for this purpose, that in those discussions Northern Trust had "made observations with regard to the prospect, at or around the time of preparation of [Mr Morris' first affidavit] of [Northern Trust] making a stakeholder application under Part 86 of the Civil Procedure Rules" (which it is now known was an application which was in fact prepared and about to be issued at the time of the WFO, which overtook it). As Mr Morris fairly accepts, this confirms that what he said about Northern Trust's stance in paragraph 190 misled the Court as to the level of risk that Northern Trust might pay out from the Limited Partnership accounts without notice. It is regrettable, to say the least, that this matter was only drawn to the court's attention after the hearing and after I had announced my decision in relation to non-disclosure.

(8) Other non-disclosures

80. The Defendants advanced a number of arguments that there had been non-disclosure in other more minor respects. None are of sufficient significance to warrant separate consideration, save one. In the skeleton argument put before Phillips J on the without notice application, it was said that no proprietary injunction was sought against Mr dos Santos or Mr Bastos. In fact such an order was sought in paragraph 5(5) of the draft order put before the Judge, and such an order was made by him. Mr McGrath has apologised for this mistake (the mistake being in the skeleton, not in the order sought), and submitted that because the Judge had clearly read the order with care he was not misled and appreciated that such an order was in fact being sought against Mr dos Santos and Mr Bastos. Had there been no room for argument that a proprietary order was justified against Mr dos Santos and Mr Bastos personally this error might have assumed less significance. However there clearly was room for argument on the point,

not merely because there was a question whether there was a serious issue to be tried/good arguable case for a proprietary claim, but also because there was and is no evidence of receipt of any of the money or its traceable proceeds by Mr dos Santos. The vice of the mistake lay in these issues being ignored in the written and oral presentation to the Judge. This is a further significant failure to make a fair presentation of the application.

The consequences of the non-disclosure

81. I was referred to a number of authorities which contain summaries of the factors relevant to determining the consequences of material non-disclosure, including ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [61] to [64] (Flaux J); ***In re OJSC ANK Yugraneft; Millhouse Capital UK Ltd v Sibir Energy Plc*** [2008] EWHC 2614 (Ch) at [102] to [106] (Christopher Clarke J); and ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [68] to [77] (Mann J); and ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) (Males J).

82. Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In ***Banca Turco Romana v Cortuk*** [2018] EWHC 662 (Comm), I expressed it in this way:

> "….It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

83. In this case the breaches taken cumulatively are serious and substantial. They do not relate to a few, merely peripheral, matters, but to numerous matters at the heart of the Claimants' case. The Court was being asked to infer a dishonest conspiracy by which Mr dos Santos sought improperly to benefit his friend and associate Mr Bastos, and a consequent risk of dissipation, from four central allegations, namely (1) that Mr dos Santos was solely responsible for appointing Quantum without any proper selection process; (2) that Quantum was not properly qualified for the task; (3) the extraordinarily high and unjustified level of fees charged; and (4) the funds being used to benefit entities owned by or associated with Mr Bastos involving an undisclosed and

inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the Claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the Claimants to say that the subsequent evidence put before the court to deal with them raises disputes which are sufficient to surmount the merits hurdle of a good arguable case. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood. But the unfair presentation in this case in the respects I have identified goes far beyond the odd accidental slip, and goes to the central elements of the case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds. The matter had obviously been under consideration for many months, at least since the E&Y Report in December 2017 and Mr dos Santos' dismissal in January 2018. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use a large team to make the necessary inquiries and to consider all the documents available. Given the size of the freezing order sought, and the allegations of dishonesty being made, it was incumbent on the Claimants and their legal advisers to make the fullest inquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris emphasised in his first affidavit the limits on the inquiries which had been made by his firm, that does not excuse a failure to make the necessary inquiries or the presentation of incomplete material in an unfairly one-sided way.

84. The Claimants' legal team were at pains to make clear on the without notice application that they were aware of the duty of full and frank disclosure and were purporting to fulfil it. I do not find that there was any deliberate breach on the part of the Claimants' legal team. It is less clear whether that is so of the personnel at FSDEA itself. Some, at least, of the material would have been readily available to anyone in a senior position and the necessity to disclose it obvious to anyone aware of the duty of disclosure. Because privilege attaches to communications between Norton Rose Fulbright and their clients, it is impossible to identify whether any individual was aware of the duty and deliberately failed to comply with it. What can be said, however, is that the failures were serious and should not have occurred had the duty been properly understood and complied with by the Claimants themselves. There was therefore a high degree of culpability in the failures, even though I do not find that anyone deliberately set out to abuse the court's process.

85. This is not a case in which there are any strong reasons for departing from the usual sanction for serious and culpable non-disclosure. I have concluded that for the reasons given below, the Claimants have not established by solid evidence that there is a sufficient risk of dissipation to justify a freezing order, or that the balance of convenience would justify a proprietary injunction, so that there is in fact no prejudice to the Claimants in discharging the injunction and refusing to grant a fresh one as a result of the non-disclosure. I should make clear, however, that I would reach the same conclusion even if satisfied of a risk of dissipation, as was implicit in my decision announced at the conclusion of the hearing. The breaches of duty are sufficiently serious and culpable to warrant discharging the WFO and not granting fresh relief, irrespective of the other grounds of challenge.

WFO: No risk of dissipation

86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; ***Holyoake v Candy*** [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and ***Petroceltic Resources v Archer*** [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

(1) 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.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) 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 are likely to 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.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Risk of dissipation: Mr dos Santos

87. There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence. There was some suggestion in Mr Morris' evidence that his asset disclosure pursuant to the WFO was incomplete so as to support such an inference, but his solicitor's letter of 10 July 2018 adequately addresses the points made and leaves no evidence on which the court could conclude that his asset disclosure is incomplete or inadequate.

Risk of dissipation: Mr Bastos and the Quantum defendants

88. In my view the same is true of the different circumstances of Mr Bastos and the Quantum Defendants. Again, the accepted good arguable case of dishonesty does not support an inference of a sufficient risk of dissipation: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. The particular facts of Mr Bastos' criminal conviction many years ago, for which he ultimately was fined CHF4,500, do not support the inference of a current risk of dissipation. There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. There is no evidence to suggest that the fact or threat of either the claim itself, or the freezing order, has caused or would cause any of them to act in a way which differed from their previous practice so as to make any adverse effect on the claimants' ability to enforce a judgment something which could properly be characterised as "unjustified". This applies with equal force to the Mauritian Limited Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations; and that the drawing down of the full committed amounts into the accounts in the names of the Limited Partnerships so as to put them beyond the control of FSDEA was for a legitimate political objective explained at the time by Mr dos Santos to Mr Gonçalves (see above). The Liquid Portfolio and the majority of the Illiquid Portfolio are secured without the need for a freezing order. There is no evidential basis for suggesting that Mr Bastos or the relevant Quantum Defendants intend to deal with the monies invested in the projects or the projects themselves otherwise than by way of promotion of the success of those projects. There is no

suggestion that Mr Bastos or the Quantum Defendants have taken any sums other than those to which there is a contractual entitlement; nor that they have dealt with them otherwise than in accordance with those contractual arrangements. The complaint about the execution of those contractual arrangements does not support a risk of dissipation. As the Claimants' skeleton argument itself put it, this is not a routine case of "hands in the till" type fraud.

89. Although this was not put in the forefront of the argument on this point, complaint was also made about the history and nature of the asset disclosure by Mr Bastos and the Quantum Defendants pursuant to the WFO; it was said that the failure to make proper disclosure was a continuing effort to hide assets in order to protect them from a judgment. Whilst the dilatory nature of that disclosure is properly the subject of criticism, full purported compliance has taken place, and there is a hotly contested issue whether there has been any failure to give a full and accurate account of the defendants' assets. It is not clear from the evidence ultimately put before me on the point that there has been any failure to attempt full compliance in a way which would provide any support for a finding of a risk of dissipation.

Proprietary injunction: balance of convenience

90. For similar reasons the balance of convenience would not lie in favour of granting a proprietary injunction. There is no evidence to suggest that Mr dos Santos has, or has ever had, any sums to which a proprietary claim could attach. So far as Mr Bastos and the Quantum Defendants are concerned, I have said that I am prepared to assume, without deciding, that the Claimants have established a serious issue to be tried, but the contrary is plainly arguable and a proprietary claim may well not be capable of being established. There is no real evidential basis for concluding that the funds in the Illiquid Portfolio which have been invested in projects have not been well invested, or that in the absence of an injunction they would not continue to be managed so as to promote their profitability. The adverse effects of the proprietary order on Mr Bastos himself appear to have been serious: he has been unable to say with certainty that any of his assets can be divorced from those received ultimately from FSDEA because his modus operandi has always been to take income through his corporate vehicles from the Quantum group as dividends so that funds have inevitably become mixed. The effect of the proprietary injunction is therefore effectively to prevent Mr Bastos having access to any funds other than the permitted living allowance.

WFO: No justification for US$ 3 billion or any amount

91. Mr Edey submitted, correctly in my view, that the quantum of any loss suffered by FSDEA could not be put at US$3 billion or anything like it. Leaving aside the payment of fees, the investment of those funds was for the benefit of the Claimants who retain their equitable interest in the assets, as is and has always been common ground. In fact, over $2.2 billion remains uninvested in accounts at Northern Trust which are sufficiently secured for the time being. Accordingly, any present quantification of the loss is limited to (1) the fees taken by the Quantum Defendants and other Bastos related companies and (2) such loss as could be established by reference to the value of the projects in which investments have been made. In relation to the fees there is an argument that the amount of loss is not the full amount of the fees but only the amount by which they exceeded what would have been charged by another investment manager or service provider in any event. I have already dealt under the heading of non-

disclosure with the failure fairly to address the position of Northern Trust, which itself meant that a freezing order could not be justified in the sum of US$3 billion or anything like it. In the light of my other conclusions, it is not necessary for me to determine what, if anything, had been established as a sufficiently arguable quantum of loss for the purposes of identifying the proper amount of any freezing order or proprietary injuntion.

Conclusion

92. The WFO must be set aside and no fresh freezing order will be granted. I will hear the parties on the case management stay issues which are outstanding and the form of the order.

Neutral Citation Number: [2018] EWHC 2199 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Claimants

(1) FUNDO SOBERANO DE ANGOLA
(2) FSDEA HOTEL INVESTMENT LIMITED
(3) FSDEA AFRICA AGRICULTURE (LP) LIMITED
(4) FSDEA AFRICA INVESTMENT (LP) LIMITED
(5) FSDEA AFRICA HEALTHCARE (LP) LIMITED
(6) FSDEA AFRICA MEZZANINE (LP) LIMITED
(7) FSDEA AFRICAN MINING (LP) LIMITED
(8) FSDEA AFRICA TIMBER (LP) LIMITED

- and -

Defendants

(1) JOSÉ FILOMENO DOS SANTOS
(2) JEAN-CLAUDE BASTOS DE MORAIS
(3) QUANTUM GLOBAL INVESTMENT MANAGEMENT AG
(4) QG INVESTMENTS AFRICA MANAGEMENT LIMITED
(5) QG INVESTMENTS LIMITED
(6) QUANTUM GLOBAL ALTERNATIVE INVESTMENTS AG
(7) INFRASTRUCTURE AFRICA (GP) LTD
(8) HOTEL AFRICA (GP) LTD
(9) AGRICULTURE AFRICA (GP) LTD
(10) HEALTHCARE AFRICA (GP) LTD
(11) MEZZANINE AFRICA (GP) LTD
(12) MINING AFRICA (GP) LTD
(13) TIMBER AFRICA (GP) LTD
(14) QG AFRICAN INFRASTRUCTURE 1 LP
(15) QG AFRICA HOTEL LP
(16) QG AFRICA AGRICULTURE LP
(17) QG AFRICA HEALTHCARE LP

(18) QG AFRICA MEZZANINE LP
(19) QG AFRICA MINING LP
(20) QG AFRICA TIMBER LP
(21) THE NORTHERN TRUST COMPANY

- -
- -

Paul McGrath QC, Nik Yeo, Alexander Milner, Samuel Ritchie and Joseph Farmer (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **First Defendant**
Stephen Auld QC and Alexander Brown (instructed by **Grosvenor Law LLP**) for the **Second Defendant**
Philip Edey QC, Andrew Fulton and Sam Goodman (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third to Twentieth Defendants**

Hearing dates: 24-27 and 30 July 2018
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimants in this action are the sovereign wealth fund of the Republic of Angola ("FSDEA") and seven of its subsidiaries. On 27 April 2018 Phillips J granted a worldwide freezing order and proprietary injunction ("the WFO") against the First to Twentieth Defendants restraining them from disposing of or dealing with assets up to the value of US$3 billion.

2. At the adjourned return date hearing before me, the Claimants sought an order that the WFO, as amended, be continued until trial or further order. The Defendants sought to set aside the WFO on a number of grounds, including material non-disclosure, and raised various jurisdiction challenges. At the conclusion of the hearing I announced my decision that the WFO should be discharged for non-disclosure, and no fresh order granted, and gave reasons. I reserved judgment in relation to all the issues which I did not address. This is my full judgment, including amplified reasons in relation to non-disclosure.

3. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between the First Defendant, Mr dos Santos, the former Chairman of FSDEA, and his friend and business partner, the Second Defendant, Mr Bastos, who is the 95% beneficial owner of the Quantum group of companies which include the Third to Twentieth Defendants. It is the Claimants' case that, pursuant to this conspiracy, Mr dos Santos placed some US$5 billion at the disposal of the Quantum group to manage and invest on FSDEA's behalf, when the Quantum group manifestly lacked the appropriate or any qualifications and experience for such a mandate; that in the event, most of the US$5 billion has not been invested at all and has simply been used by the Quantum group to extract what were described as an extraordinary levels of fees (amounting to some US$406 million); that of the limited proportion which has been invested, the investments have not been made in the interests of the Claimants but have mostly been channelled into other projects belonging to Mr Bastos; and that in addition, as part of the same conspiracy, Mr dos Santos committed FSDEA to pay around US$153 million to the Quantum and other companies controlled by Mr Bastos, under contracts for various purported services, which contracts, if genuine at all, were manifestly uncommercial and were intended mainly to divert money from FSDEA into the pockets of Mr Bastos without FSDEA receiving anything of remotely commensurate value in return. The Defendants' case is that they are the victims of political change in Angola and a desire on the part of those now in power to get their hands on money which the previous regime sensibly and appropriately invested on a long-term basis for the people of Angola; and that the allegations are a spurious and flawed attempt to achieve this political objective.

Narrative

4. Mr dos Santos' father was the President of Angola from 1979 until 26 September 2017, when he was replaced by President Lourenço, who was elected on 23 August 2017 following President dos Santos' decision to step down.

5. FSDEA was established by a Decree of President dos Santos of 9 March 2011. It was then called the Petroleum Fund. It was renamed FSDEA by a Decree of 19 June 2013.

By a further Presidential Decree of 28 June 2013 FSDEA was allocated a capital endowment of US$5 billion for investment. Its Chairman from 2012 to May 2013 was Dr Armando Manuel, who had been the Economic Adviser to President dos Santos. In 2012 its other directors were Mr dos Santos and Mr Gonçalves. In May 2013 Dr Manuel became the Minister of Finance of Angola, and shortly after FSDEA was renamed in June 2013, Mr dos Santos was appointed Chairman. Mr Fortunato was at that time appointed a director. Mr dos Santos remained Chairman until his removal in January 2018. His fellow directors were Mr Gonçalves and Mr Fortunato until the autumn of 2016, when Mr Gago replaced Mr Fortunato. Mr Gago had before that acted as Director of the Office of the Chairman of the Board of Directors from 2013 until 2015. He remains a director of FSDEA. Mr Gonçalves remained a director of FSDEA until January 2018, since when he has acted as a consultant to it. There is a dispute as to the degree of involvement that the other directors had in the running of the fund.

6. On 29 November 2013, Mr dos Santos on behalf of the FSDEA signed an Investment Management Agreement ("the IMA") with the Third Defendant ("QGIM"), acting by Mr Bastos, whereby QGIM was appointed to act as investment manager for FSDEA *"with respect to such monies and properties as are designated to it from time to time"*. QGIM is part of the Quantum group of companies which are 95% owned and controlled by Mr Bastos. Mr Bastos, who has dual Swiss and Angolan citizenship, is a long-standing business associate of Mr dos Santos. They were jointly involved in the founding and management of an Angolan Bank, Banco Kwanza Invest, which was launched in 2008, and they jointly owned several other companies in Angola. Mr Bastos' evidence is that Mr dos Santos relinquished his shareholdings in these companies prior to the IMA but that is not accepted by FSDEA.

7. The IMA is governed by English law and contains an arbitration clause providing for disputes to be resolved by arbitration in accordance with UNCITRAL Rules in Lisbon and in the Portuguese language. There is a dispute as to whether the seat of the arbitration is England (as FSDEA contends) or Portugal (as QGIM contends). The fee payable under the IMA was a base fee of 1% of the average value of the fund plus a performance fee of 20% above a hurdle rate equivalent to the Benchmark Bank of America/Merrill Lynch 3-month Treasury Bill Index.

8. The IMA provided for there to be a custodian of the assets other than QGIM. On the same day as the IMA, 29 November 2013, FSDEA entered into a Master Custody Agreement with the Twenty First Defendant ("Northern Trust"), a US bank established under the laws of Illinois with a London branch in Canary Wharf. It provided for cash and security accounts to be held in FSDEA's name. It did not in terms require the accounts to be at the London branch, although references to the London branch address and UK regulatory standards suggests that that was what was envisaged, and the accounts were in fact established at the London branch.

9. The US$5 billion was to be invested in two conceptually different portfolios. US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities etc) which were to be sufficiently liquid to be realisable within no more than 3 months ("the Liquid Portfolio"). The balance of US$3 billion was to be invested as private equity capital in longer term projects in sectors such as infrastructure, hotels, timber, agriculture, mining and healthcare, especially in Angola and elsewhere in Africa ("the Illiquid Portfolio"). It is FSDEA's case that the IMA appointed QGIM as investment manager in respect of the entire $5 billion, both the Liquid and Illiquid Portfolios. It is Mr Bastos' and the

Quantum group's case that the IMA was confined to the Liquid Portfolio, and that the Illiquid Portfolio was governed by separate contractual arrangements. These involved the establishment of seven limited partnerships governed by Mauritian law ("the Limited Partnership Agreements"), who are the Fourteenth to Twentieth Defendants ("the Limited Partnerships"). Each had a Mauritian limited partner, a subsidiary of FSDEA, who are the Second to Eighth Claimants, ("the Limited Partners") and a Mauritian General Partner owned and controlled by the Quantum group who are the Seventh to Thirteenth Defendants ("the General Partners").

10. The Limited Partnerships were established pursuant to seven agreements signed on FSDEA's side by Mr dos Santos in April 2014. Five Incorporation Service Agreements ("the ISAs") were made with the Fifth Defendant ("QGI Ltd"), to establish five funds to invest in various sectors in Africa. The ISAs were governed by Angolan law and provided for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language. Two Consultancy Agreements ("the CAs") were made with the Sixth Defendant ("QGAI") in relation to the establishment of two further funds to invest in the hotel sector and in infrastructure projects. Each of the Limited Partnerships had a management agreement with the Fourth Defendant ("QGIAM") under which the latter was entitled to an annual management fee of 2% (infrastructure) or 2.5% (other funds) plus in each case 20% above a rate of return of 8%.

11. The US$5 billion was paid to Northern Trust over a period concluding in December 2014. The Liquid Portfolio was held in accounts in FSDEA's name. QGIM was the asset manager which exercised the investment decision making and discretion from its base in Switzerland; Northern Trust's role was executory and as custodian of the investments. FSDEA had visibility over the Liquid Portfolio held in accounts in its name, and received regular investment reports in relation to the portfolio from QGIM.

12. The US$3 billion in the Illiquid Portfolio was transferred to accounts in the name of the Limited Partnerships at Northern Trust. Part of FSDEA's complaint is that it and the Limited Partners had no visibility or control over the monies in those accounts, which were under the control of the General Partners exercising their powers of management in relation to the Limited Partnerships. Only part of this had been invested by the time of the freezing order. Approximately US$2.27 billion remained at Northern Trust in liquid form at the time of the WFO, and has been secured. The balance, apart from deduction of fees, was paid into a number of investment projects of the kind envisaged, including projects controlled by Mr Bastos. For example, it is said that the hotel partnership (the Eighth and Fifteenth Defendants) invested US$157 million in a hotel project in Angola in which Mr Bastos had an interest (although this figure is difficult to reconcile with Table 4 of the EY Report – defined in paragraph 14 below); and the infrastructure partnership (the Seventh and Fourteenth Defendants) invested US$180 million into the Port of Caio in Angola, which Mr Bastos had a concession to develop. These are said to be stark examples of the conflicts inherent in the appointment of Quantum to manage FSDEA's funds with Mr Bastos able to dictate the terms of major transactions from both sides of the table.

13. In addition to the IMA and the agreements relating to the Mauritius funds, Mr dos Santos additionally committed FSDEA to some 49 other contracts with companies connected to Mr Bastos for the provision of various kinds of services (the "Service Contracts"). There is a dispute about whether services were provided to the value of what was charged by the relevant counterparties; FSDEA's case is that they were not

and that the Service Contracts were another element of the conspiracy whereby Mr dos Santos permitted Mr Bastos to extract large fees from the Claimants without any proper justification. These counterparties are not Defendants and no claim is brought against them in these proceedings. The Service Contracts have not been avoided or rescinded.

14. In November 2017 details of the arrangements between the Claimants and Quantum were publicly leaked and discussed in the so-called "Paradise Papers". The Angolan government commissioned a report from Ernst & Young ("E&Y") regarding the operation of the FSDEA, which was produced on 15 December 2017 ("the E&Y Report"). Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018. Notice of termination of the IMA was given on 16 February 2018 and took effect two months later, on 17 April 2018. The Liquid Portfolio was put into the hands of a replacement investment manager. The Claimants brought these proceedings and applied for the WFO on 27 April 2018. In the light of some of the asset disclosure given by the Defendants pursuant to the WFO, E&Y updated their report on 9 July 2018 ("the Updated E&Y Report").

15. There is no evidence that Mr dos Santos benefited at all from any of the arrangements complained of. Following the termination of the IMA, the Liquid Portfolio has remained within FSDEA's control. Although FSDEA's case is that Quantum was manifestly ill qualified to undertake the investment management role of the Liquid Portfolio, there is not in fact any particularised allegation that QGIM acted negligently in the choice of investments or otherwise in the handling of the Liquid Portfolio during its time as investment manager. The complaint is not about the performance of the Liquid Portfolio investment, but about the level of fees set contractually under the IMA at 1% plus 20% above the benchmark hurdle, which EY describe in their report as "high given the size of the portfolio", a relatively slight basis for an allegation of fraud. The total of such fees over the life of the IMA was US$81.83m according to the Updated E&Y Report.

16. Accordingly the argument in respect of the WFO has focussed on the Illiquid Portfolio. The amount of the Illiquid Portfolio was US$3 billion, but at the time of the WFO some US$2.27 billion remained in the accounts in the names of the Limited Partnerships at Northern Trust in London. By letters in March 2018 Northern Trust and their solicitors had made clear to the Claimants that they would not deal with those funds without the written instructions of both sides, and would not change their position without giving the Claimants prior notification. In my view those assurances removed any risk of dissipation in justifying an order freezing that sum, which was more than two thirds of the amount frozen by the WFO. This was the subject matter of material non-disclosure on the without notice application to Phillips J, to which I return below. The Updated E&Y Report suggests that a total of US$454m was invested in projects in the seven Mauritian funds, with the balance presumably being accounted for by fees.

17. The fees alleged to have been paid to Quantum or to other Bastos related companies are set out in the Updated E&Y Report as follows (with figures in brackets being those identified in the E&Y Report which formed the basis for the without notice WFO application, where they differ):

    (1) QGIM was paid US$81.83m (US$82.965m per Table 1 or $92.48m per Table 5), under the IMA for managing the Liquid Portfolio.

(2) Under the five ISAs QGI Ltd was paid US$26.39m in respect of the establishment of the Illiquid Portfolio funds.

(3) A further sum of US$10m was due to QGAI for the setting up of the infrastructure and hotel funds under the two CAs, but it does not appear from the E&Y Reports that such sum was paid, although Mr Morris deposes that it was at paragraph 62 of his first affidavit, apparently on the basis that there were two earlier invoices from December 2012 from Quantum Global Wealth Management to the Petroleum Fund requesting payment of $5 million each; he does not exhibit any evidence of payment.

(4) Under the management agreements for the Illiquid Portfolio, QGIAM received by way of annual management fees a total of US$298.13m (US$263m).

(5) Under the Service Contracts the following companies received the following fees totalling $153m.

Stampa QG:	US$58.06m
Tome International AG:	US$40.04m
Djembe Communications:	US$9.91m (US$ 0)
African Innovation Foundation:	US$36.29m
Uniqua Consulting GmbH:	US$8.7m

18. The total fees taken by Bastos related entities are therefore put at US$559.35m (US$515m). It is worth emphasising that all these fees were in accordance with the contracts signed between the parties, and none of the contracts had been rescinded or avoided at the date of the WFO. This is not a case in which any of the Defendants are accused of extracting sums to which there was no contractual entitlement. The thrust of the complaint is the creation by Mr dos Santos of that contractual entitlement.

Jurisdiction

19. The following causes of action are asserted against the following Defendants:

(1) against Mr dos Santos:

(a) breach of duty under the Public Probity Law of Angola;

(b) conspiracy to injure by lawful and unlawful means;

(c) procuring breach of contract by QGIM (see below for the breaches of contract alleged against QGIM);

(d) constructive trust: dishonest assistance of breaches of fiduciary duty by QGIM (see below for the breaches of fiduciary duty alleged against QGIM);

(2) against Mr Bastos:

(a) conspiracy to injure by lawful and unlawful means;

(b) procuring breach of contract by QGIM;

(c) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM (I take this to be the intended reference in para 12(e)(ii) of the Claim Form which in fact refers to "QGIM Ltd").

(d) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds;

(3) against QGIM:

(a) breach of clause 4 of the IMA in failing to carry out the services under the IMA with due skill and care and/or in good faith;

(b) breach of clause 14 of the IMA in failing to disclose conflicts of interest and/or procuring contracts which involved a conflict of interest, including the Luanda Hotel and Port of Caio projects;

(c) breach of the IMA in failing to invest the Liquid Portfolio "properly or at all"; although this is a pleaded head of claim, it is not supported by any evidence on these applications of any particularised negligent management or investment of the Liquid Portfolio;

(d) breaches of fiduciary duty in the respects alleged to be breaches of contract under (a), (b) and (c) above;

(e) conspiracy to injure by lawful and unlawful means;

(f) constructive trust: dishonest assistance of breaches of fiduciary duty by Mr dos Santos (in breaching the Public Probity Law);

(g) constructive trust: unconscionable receipt of any part of the US$5 billion its traceable proceeds;

(4) Against QGIAM Ltd (D4), QGI Ltd (D5), QGAI (D6) the General Partners (D7-13) and the Limited Partnerships (D14-20):

(a) conspiracy to injure by lawful and unlawful means;

(b) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM

(c) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds.

20. In addition, there is a proprietary claim against each Defendant in respect of any part of the US$5 billion received by them or its traceable proceeds. The basis put forward for the proprietary claim was initially the claim based in constructive trust. In the course of argument, Mr McGrath sought to support it also on the basis that FSDEA at all material times retained a proprietary interest in the funds.

21. Mr dos Santos is resident and domiciled in Angola. There is a dispute whether Mr Bastos is domiciled in Switzerland or Dubai. QGIM (D3) and QGAI (D6) are incorporated in Switzerland. QGIAM (D4) is incorporated in Mauritius and is the manager of the Limited Partnerships, which are domiciled in Mauritius as are the General Partners. QGI Ltd (D5) is a company incorporated in the British Virgin Islands.

22. The challenges to jurisdiction involve the following submissions on behalf of the Defendants:

    (1) The claims against the Swiss companies, QGIM (D3) and QGAI (D6), are governed by the Lugano Convention, and those companies must be sued at their place of domicile which is Switzerland. The Claimants assert that under the Lugano Convention these claims may be brought in England. The Claimants also contend that the claims against Mr Bastos may be brought in England pursuant to the Lugano Convention on the grounds that he is domiciled in Switzerland. Mr Bastos disputes that he is domiciled in Switzerland and that jurisdiction over him is governed by the Lugano Convention.

    (2) Certain of the claims do not pass the merits threshold of a serious issue to be tried.

    (3) England is not the appropriate forum for the claims against the non-Lugano Defendants.

    (4) Insofar as any claims would otherwise remain to be tried in England, certain of the claims are within arbitration agreements and are subject to a mandatory stay under s. 9 of the Arbitration Act 1996; and there should be a case management stay of any remaining claims pending the determination of proceedings in arbitration and/or elsewhere abroad.

Jurisdiction: the Lugano Defendants (QGIM and QGAI and query Mr Bastos)

The claims against Mr Bastos

23. The Claimants submitted that jurisdiction could be established under the Lugano Convention against Mr Bastos because he was domiciled in Switzerland. The evidence of his residence is exiguous and there is no Swiss law evidence on domicile. The weight of the evidence is that he left Switzerland to go and live in Dubai in May 2017 and has resided in Dubai since then. Accordingly the Claimants have failed to establish that at the relevant time he was domiciled in Switzerland, and jurisdiction over him falls to be established under the common law, not the Lugano Convention.

FSDEA's breach of contract claim against QGIM (D3)

24. FSDEA invokes Article 5(1) of the Lugano Convention to establish jurisdiction for this claim, which provides that contractual claims may be brought in respect of a contract for services at the place where the services were or should have been provided. The question therefore is where the services were, and were to be, provided by QGIM under the IMA. FSDEA contends that this is London where the Northern Trust accounts were held. I am unable to accept this submission. The services to be provided by QGIM under the IMA were investment management services which involved determining how the Liquid Portfolio was to be invested in various short-term investments. That management function was to be, and was, carried out in Switzerland where Quantum had its place of business. That aspect of its business was regulated and supervised by the Swiss financial authorities, as the preamble to the IMA recorded at paragraph C. QGIM had no custody of the assets, in London or elsewhere. The IMA did not identify any place for the receipt of those instructions, which only became London as a result of FSDEA's choice of custodianship, which might originally have been elsewhere than London and could at any time have been changed to a different location. On any view, therefore, it cannot be said that the IMA provided for any part of the services to be performed in London. It is true that QGIM's investment management in Switzerland in the event resulted in instructions from Switzerland to London to the custodian of the funds in London, but that does not make London the place of performance of the services to be provided under the IMA. Those services do not consist solely or even primarily of the investment instructions, but rather the investment management activity in determining what investments to make, which took place in Switzerland, as envisaged by the IMA.

FSDEA's breach of fiduciary duty claim against QGIM (D3)

25. FSDEA seeks to found jurisdiction under Article 5(3) of the Lugano Convention, which provides that a party may be sued in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred, which is said to be in London where the payments out of the Northern Trust accounts occurred. However I accept Mr Edey QC's submission that the breach of fiduciary duty claim is properly characterised as being in a "matter relating to contract" so that allocation of jurisdiction falls to be determined in accordance with Article 5(1), not Article 5(3); and that accordingly Switzerland is the allocated jurisdiction for the same reason as for the contractual claims under the IMA. This is because the equitable claim for breach of fiduciary duties depends upon the existence of the IMA: the duties are said to arise by virtue of the relationship created by the IMA. The Claim Form describes them as "arising by virtue of the IMA and/or the authority thereby vested in QGIM to…handle and otherwise deal with assets belonging to the FSDEA". The position is accurately described in Briggs on Civil Jurisdiction and Judgments 6th Edn at paragraph 2.196:

> "The answer is to be found by deciding whether the obligation which lies at the heart of the claim is rooted in an agreement between the parties, or on an allegation of wrongful behaviour which has caused loss to another. If the obligation arises from the unconscionable disregard of the duties of an agreement, such as those imposed upon a person who has with the agreement of the other party placed himself in a fiduciary relationship with that other, such as an agent to his principal, the matter should be seen as one relating to a contract and the fiduciary aspect of the claim as going only to define or augment the remedies available to the claimant."

FSDEA's proprietary claim against QGIM (D3)

26. A proprietary claim only exists "against" a person to the extent that that person holds property in which the Claimant is entitled to a legal or equitable interest. It is a claim to the property itself, and is only asserted against the holder of the property or one who is in a position to give effect to the proprietary interest. Accordingly, in the current context the question is whether, assuming that there is a sufficiently arguable case that QGIM holds such property, the claim to enforce the proprietary interest in respect of the property against QGIM falls within Article 5(3). Mr McGrath QC submitted that the proprietary claim fell within Article 5(3) as being in a matter relating to tort, delict or quasi delict. Mr Edey submitted that if the proprietary claim passed the threshold merits test of raising a serious issue to be tried, it did not fall within Article 5(3). He submitted that it was clear from ***Kalfelis v Bankhaus Schröder*** 189/87 [1988] ECR 5565 and ***Kleinwort Benson Ltd v Glasgow City Council*** [1999] 1 AC 153 that Article 5(3) only covered claims which gave rise to a personal liability. This submission is in my view well founded. The proprietary claim has nothing to do with any personal liability on the part of QGIM; it is a claim to property insofar as it remains in the hands of QGIM irrespective of fault; it is not based on a constructive trust (which would give rise to a claim falling within Art 5(3): see ***Casio Computer Co Ltd v S*** [2001] EWCA Civ 661 and ***Dexter v Harley*** [2001] All ER (D) 79) because dishonest assistance constructive trust claims are not proprietary: see per Lord Millett in ***Paragon Finance Plc v D B Thackerar & Co*** [1999] 1 All ER 400 at p. 409e-g.

Proprietary claim against QGAI (D6)

27. For the same reasons as apply in relation to QGIM, the proprietary claim against QGAI does not fall within Article 5(3) of the Lugano Convention and can only be brought at its place of domicile which is Switzerland.

Jurisdiction: serious issue to be tried

28. The Defendants argued that the Claimants had failed to establish a serious issue to be tried in respect of the following causes of action:

    (1) the proprietary claim;

    (2) the claim for lawful means conspiracy;

    (3) the claims against Mr dos Santos in unlawful means conspiracy and dishonest assistance constructive trust;

    (4) the claims by FSDEA against QGIM (D3) for breach of contract and breach of fiduciary duty;

    (5) the claims by FSDEA against the general Partners and Limited Partnerships;

    (6) the "cross claims" between the Partnerships, i.e. the claims by the Limited Partners against General Partners of other Partnerships, and against those other Partnerships; and

    (7) some of the knowing receipt claims.

The proprietary claim

29. The Liquid Portfolio was held in FSDEA's name by Northern Trust. The proprietary claim in respect of those funds, which have been returned to FSDEA's control, is limited to the fees taken by QGIM and their traceable proceeds. So far as the Illiquid Portfolio is concerned, the funds were initially in accounts under QGIM's control at FSDEA and were transferred to accounts at Northern Trust in the names of the Limited Partnerships pursuant to written instructions from FSDEA to QGIM dated 30 June 2015 signed by Mr dos Santos which stated "The transfers doesn't [sic] cause a change in the ultimate beneficial ownership". Mr Edey submitted that there could be no proprietary claim for property which was transferred pursuant to contracts where those contracts had not been avoided or rescinded. He accepted that the Claimants retained a beneficial interest in the investments in the Illiquid Portfolio, but submitted that those interests were held on the terms of the Limited Partnership Agreements which were long term contracts (of 10 or 15 years), such that there was no immediate entitlement to possession. He submitted that property passed in full under the contracts (the IMA and the Limited Partnership Agreements), and unless and until they were avoided there could be no vesting of any equitable interest in the transferor. Until very shortly before the hearing before me the Claimants had not suggested that the agreements were invalid or had been avoided, and indeed had proceeded on the basis that they remained validly in place. Mr McGrath sought to argue before me that they were void, alternatively voidable and had been rescinded. In my view Mr Edey was correct to submit that it was too late to run such an argument, which gave rise to issues of election and affirmation, and to allow the Claimants to do so would have been unfairly prejudicial to the Quantum Defendants, who would have been able to deploy arguments of election and affirmation. Accordingly the question whether there is a serious issue to be tried that the Claimants have a proprietary claim falls to be addressed on the footing that the sums transferred were paid in accordance with contracts which are not void and have not been rescinded.

30. On that footing, Mr McGrath submitted that where a contract split the legal and equitable interests so as to confer a legal title whilst retaining an equitable title, there is no need to rescind or avoid the contract in order for the transferor to assert the equitable proprietary right to the property. That was, he submitted, the effect of the contractual arrangements in this case because the funds were always invested for benefit of the Claimants who retained an equitable interest throughout; the Liquid Portfolio was held in accounts in the name of FSDEA and funds for the Illiquid Portfolio were transferred into the Limited Partnership accounts by instructions from FSDEA to QGIM which expressly purported to retain "ultimate beneficial ownership" in the funds. This argument does not work for the fees in respect of the Liquid Portfolio, where it was intended by the IMA that legal and beneficial interest in the fees should pass to QGIM. However, the main issue on this point was whether there was a sufficiently arguable proprietary claim to the sums transferred in the Illiquid Portfolio because the challenge is aimed at the proprietary element of the WFO, which is confined in amount to $3 billion to reflect such transfer. So far as that is concerned I was referred to a number of authorities on each side. This is an issue which raises difficult questions of law which will have to be applied to the facts once established. I am inclined to the view that the Claimants have met the relatively low merits threshold of a serious issue to be tried. However I do not propose to explore the legal issues in this judgment which would fall to be addressed in the light of the fact specific circumstances once established, nor to

express a concluded view, because in the event this issue is not determinative of the outcome of the applications which I have to decide. I shall assume, without deciding, that there is a serious issue to be tried for the proprietary claim advanced.

Lawful means conspiracy

31. The Claimants submitted that it was sufficient to establish the necessary predominant intention to injure that the predominant intention of the Defendants was to benefit themselves in circumstances in which the benefit could only be at the expense of the Claimants, relying on what was said by the Court of Appeal in ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174 at [34]. The passage relied upon does not support the suggested principle, and the suggested principle is inconsistent with the essence of the tort which is that if lawful means are deployed a conspiracy can only be unlawful if it involves a predominant intention to injure the claimant. If the predominant intention is to benefit the conspirators, by definition the predominant intention cannot be to injure the claimant, even if such injury is the inevitable result and even if it is intended. The lawful means conspiracy does not surmount the merits threshold of raising a serious issue to be tried on the facts alleged by the Claimants in this case, which clearly involve an allegation that the alleged conspirators were motivated by a desire to benefit themselves without any animus against the Claimants.

Claims against Mr dos Santos in conspiracy and dishonest assistance

32. Mr Anderson QC accepted that there was a serious issue to be tried (and a good arguable case) that Mr dos Santos was in breach of the Public Probity law of Angola, but contended that the merits threshold was not met for the claims in conspiracy and dishonest assistance. He submitted that under Article 4 of the Rome II Convention the question was governed by Angolan Law; and that there was no evidence that Angolan law recognised such causes of action. The difficulty with this submission is that the evidence before me simply did not purport to address the question whether Angolan law recognised a liability based on facts which would in English law establish liability for unlawful means conspiracy or dishonest assistance constructive trust. Accordingly, even if the appropriate law is Angolan law, the Court proceeds on the evidential assumption that Angolan law does not differ from English law in the absence of evidence to the contrary. I therefore reject Mr Anderson's submission on this point.

FSDEA claims against QGIM (D3)

33. This argument is of no consequence to the current application because jurisdiction for these claims is governed by the Lugano Convention, which involves no merits threshold, and in any event if there were otherwise jurisdiction, they are governed by the arbitration clause in the IMA (and Mr McGrath confirmed that he was not seeking to maintain any aspect of the WFO under the jurisdiction conferred by s. 44 of the Arbitration Act 1996). Since any such claims are a matter for arbitrators to decide, I decline to express any views on their merits.

FSDEA claims against the Limited Partnerships and the General Partners

34. The argument in respect of these claims was that any loss had been suffered by the Limited Partners, not FSDEA, and that a claim by FSDEA fell foul of the principles

that a shareholder may not sue for reflective loss. Mr McGrath countered that the principles were not applicable to the facts of this case, in part at least because FSDEA's claim was in its capacity as the source of the funds and transferor to the Limited Partners, not merely as shareholder in the Limited Partners. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

The cross claims

35. Mr Edey's argument was that there is no evidence that any of the Limited Partnerships or General Partners said or did anything in relation to the project outside its own partnership, and that the Limited Partner of one partnership could not have been caused a loss by anything done by the General Partner or the Limited Partnership itself in another partnership. Mr McGrath's response was that if there was as alleged, a single conspiracy which the General Partners and Limited Partnerships joined, they became liable as conspirators for the losses suffered by any of the victims of the conspiracy, irrespective of their own acts of participation. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

Knowing receipt claims

36. Mr Edey's argument was that the only receipts which could found a knowing receipt constructive trust claim were for the Liquid Portfolio such fees as QGIM received from the US$2 billion Liquid Portfolio; and in respect of the Illiquid Portfolio, the only relevant receipts were by the General Partners of their US$1,000 per annum in fees, and by QGAIM of its fees under the management fees due under the Limited Partnership Agreement; and that there was no wider knowing receipt claim in respect of the US$3 billion because although the Limited Partnerships did receive the US$3 billion, they did not do so beneficially: they held the funds for the Limited Partners on the terms of the Limited Partnership Agreements. The contrary is plainly arguable and on this aspect the Claimants have established a serious issue to be tried.

Jurisdiction: the arbitration agreements

37. By the conclusion of the hearing it was common ground that insofar as there would otherwise be jurisdiction, the following claims must be stayed in favour of arbitration under the mandatory provisions of s. 9 Arbitration Act 1996:

    (1) All FSDEA's claims against QGIM (D3) are governed by the arbitration clause in the IMA, which provides for arbitration to take place in Portugal. QGIM commenced an arbitration by a Request dated 18 June 2018. It is common ground that those claims must be the subject matter of a mandatory stay under s. 9 of the Arbitration Act 1996 to the extent that there is otherwise jurisdiction over them. On my findings this catches the claims in conspiracy, dishonest assistance and knowing receipt, the others being claims in respect of which the Claimants have failed to establish jurisdiction under the Lugano Convention in

any event. I am inclined to think that the seat of the arbitration is Portugal, not England, but since this does not affect the outcome of anything I have to decide I prefer to express no concluded view.

(2) All FSDEA's claims against QGI Ltd, which are governed by the arbitration agreements in the ISAs which provide for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language.

(3) All the claims by the Limited Partners against their General Partners are governed by the arbitration agreement in the Limited Partnership deeds which provide for arbitration in Mauritius. The General Partners and Limited Partnerships commenced arbitrations against the respective Limited Partners in Mauritius on 8 May 2018. The Limited Partners have disputed whether the Partnerships are entitled to invoke the arbitration clause. In the light of my earlier conclusions, I do not need to resolve that question.

Jurisdiction: Forum conveniens

38. This is not a case where fragmentation can be avoided. The starting point is that there are arbitrations in Mauritius which involve the disputes between the Limited Partners and the General Partners in relation to the Illiquid Portfolio, to which the Limited Partnerships are arguably properly joined parties. There are also winding up proceedings commenced by the Limited Partners in Mauritius which will raise some of the issues which arise in these proceedings. There is no jurisdiction under the Lugano Convention over certain of the claims against QGIM (D3) and over the proprietary claim against QGAI (D6), who must be sued in Switzerland; and in any event, even were jurisdiction otherwise to be established, any claims by FSDEA against QGIM would have to be stayed in favour of arbitration in Portugal. It is FSDEA's case that the IMA (and therefore its arbitration clause) governs the Illiquid as well as the Liquid Portfolio. Accordingly, on the Claimants' case, all the tortious and contractual claims by FSDEA against QGIM will have to be dealt with in that arbitration. On any view, and even if the arbitration is confined to the issues in relation to the Liquid Portfolio, that will involve an examination of the circumstances in which the Quantum group came to be appointed, which raises many of the issues at the heart of the dispute in these proceedings.

39. It is against that background that the Claimants bear the burden of establishing that England is clearly and distinctly the appropriate forum: ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460.

40. There are weighty factors in favour of Angola as the appropriate forum:

(1) The claim is brought by the sovereign wealth fund of Angola and its special purpose subsidiaries. Of the two personal Defendants, Mr dos Santos is resident in Angola, and Mr Bastos, although resident in Dubai, is currently confined to Angola because his passport has been confiscated. These are the protagonists whose conduct is at the heart of the issues between the parties.

(2) The central ingredient in most of the causes of action against most defendants is the allegation that Mr dos Santos was in breach of the Public Probity Law in granting the contracts to the Quantum Defendants and Bastos-related entities.

This is the foundation for the claims in unlawful means conspiracy, dishonest assistance, knowing receipt and the proprietary claims. These allegations of breach are of what occurred in Angola and are clearly more suitably tried in Angola, not only because they are governed by Angolan law, but also because the Public Probity Law imposes duties expressed in terms of generality which take their content from their Angolan context. Article 3 provides: that "*Public agents should, in performance of their duties, be guided by the following principles: (a) principle of legality (b) principle of public probity (c) principle of competence (d) principle of respect for public property (e) principle of impartiality (f) principle of the pursuit of public interest….(j) principle of prudence (k) principle of loyalty to public institutions and entities and to the higher interests of the State.*" The subsequent articles develop these principles, again using language of some generality (e.g. "*the highest criteria for public professionalism*"). These duties are properly to be interpreted in accordance with the cultural standards and norms of Angolan public life at the time, which is clearly a matter on which the Angolan court is better equipped than the English Court.

(3) The projects of which complaint is made include major projects in Angola, including in particular the hotel project in Luanda and the Port of Caio project.

(4) The witnesses or potential witnesses likely to be of central importance, apart from Mr Bastos and Mr dos Santos, will be those involved in the appointment of Quantum and supervision in Angola of its activities, including Dr Manuel, Mr Gonçalves, Mr Fortunato and Mr Gago, who are to be found in Angola.

(5) Similarly, the predominance of the documentary evidence is likely to be found in Angola, and some will be in Portuguese.

41. There are also factors in favour of Mauritius. In particular the claims are in part governed by Mauritian law, and the evidence will have to be gathered and deployed in Mauritius for the purposes of the Mauritian arbitrations and the winding up proceedings.

(1) The Limited Partnership Agreements contain a Mauritian governing law term which is of very wide ambit, such that it will govern both contractual and non-contractual claims between the Limited Partners and the General Partners.

(2) The Limited Partnership Agreements contain Mauritian arbitration clauses and arbitrations have been commenced in Mauritius. The arbitrations will cover much of the ground which is in issue in these proceedings, although Mr dos Santos and Mr Bastos will not be parties.

(3) The winding up proceedings commenced by the Limited Partners in the Mauritian courts involve allegations covering almost exactly the same ground as the allegations in relation to the Illiquid Portfolio in the current proceedings. Such winding up proceedings were foreshadowed at the time of the without notice application and have subsequently been commenced.

(4) The Claim Form in these proceedings does not contain a claim by the Limited Partners against Mr dos Santos for breach of duty, but the Claimants' skeleton argument asserts that such a claim clearly exists for breach by Mr dos Santos of his duties under Mauritian law, and states that the Claimants will seek to amend the Claim Form to include such a claim by the Limited Partners, and ancillary claims for dishonest assistance in relation to such breaches.

42. Some factors also point towards Switzerland. QGIM, the Third Defendant and party to the IMA under which, on FSDEA's case, the entirety of the management took place, is a Swiss company. QGIM is based in and operating from Switzerland. Indeed this is the centre of gravity of all the Quantum group and its activity. The investment management took place from Quantum's offices in Switzerland.

43. Against this there is relatively little which points to England as an appropriate forum.

(1) None of the parties is resident or incorporated in England or carries on business here, other than Northern Trust whose stance is essentially neutral. At the heart of the case against all the Defendants is the personal relationship between an Angolan individual, Mr dos Santos, and a Swiss/Angolan individual, Mr Bastos; breach of Angolan duties owed by the Angolan individual; and Mr Bastos' alleged knowledge of or collusion in that breach (which is relied on as that of all the corporate Quantum Defendants).

(2) None of the relevant witnesses or documents are located in London. (save to the extent brought there for the purpose of these proceedings, and save possibly for a few Northern Trust documents). Much of the relevant evidence, both of witnesses and in documents will originate from Angola and Switzerland. Most of the evidence will have to be collected and deployed abroad: in Portugal in any arbitration with QGIM; and in Mauritius in relation to the partnership arbitrations and the winding up proceedings.

(3) The fact that the Liquid Portfolio and Limited Partnerships bank accounts were held at the London branch of Northern Trust provides only a slight connection with England for the purposes of determining the appropriate forum. The location of the accounts under the Master Custody Agreement was a matter of choice for FSDEA, not a matter of contractual agreement with Mr Bastos or the Quantum group. Under the IMA, FSDEA could have chosen to establish the custodian accounts at any bank anywhere, for example in New York. The funds were dollar denominated and the Liquid Portfolio was invested in a range of international securities in the usual way. The centre of gravity for the allegations in relation to investment of the Illiquid Portfolio is not in London, from where the funds were to be transferred to be invested in projects, but in the places where the events giving rise to the complaints arises: Switzerland for the decision to set up Mauritian limited partnerships and Angola or elsewhere in Africa in relation to investment in projects where a conflict of interest is complained of. The fact that a London branch of a US Bank was chosen by FSDEA as the place of custody is of no significance to the issues in the case. Nothing turns on the place at which the funds or securities were held.

(4) Some of the issues in the case are, at least arguably, governed by English law. Others, however, are not. Angolan law governs the breach of duty allegation by

FSDEA against Mr dos Santos which is at the heart of the complaint. Mauritian law governs the claim intended to be added by amendment by the Limited Partners against Mr dos Santos for breach of duties owed under Mauritian law. Mauritian law governs the Limited Partnership Agreements. The fact that English law governs the IMA is of no significance because there is no jurisdiction over the contractual claims against QGIM which will in any event have to be determined in arbitration in Portugal.

44. For these reasons I conclude that the Claimants have failed to establish that England is clearly or distinctly the appropriate forum. Accordingly, the Court should not exercise jurisdiction over any of the Defendants in relation to any of the causes of action, save those governed by the Lugano Convention (D3 and D6).

Conclusion on jurisdiction

45. The upshot of my conclusions is that there is only a small rump of causes of action in respect of which jurisdiction is established and which do not fall to be stayed for arbitration, namely some, but not all, of the claims against the Lugano Convention Defendants, QGIM (D3) and QGAI (D6). What remains are the claims against QGIM by the Limited Partners in unlawful means conspiracy, dishonest assistance and knowing receipt, (but not any of the claims by FSDEA against QGIM, for which jurisdiction under the Lugano Convention is not established and which are governed by the arbitration clause in the IMA); and the claims by the Limited Partners and FSDEA against QGAI (D6) in those causes of action.

46. The Defendants submitted that there should be a case management stay in respect of any claims which fell into this category. It was agreed at the hearing that arguments in respect of a case management stay should be deferred until after I had given judgment identifying which of the claims might be affected.

The WFO

47. There were essentially four grounds on which the Defendants sought to have the WFO set aside and not continued:

(1) There was no jurisdiction over the claims. FSDEA did not seek to support the relief as appropriate in aid of foreign proceedings. Nor was the application made under s. 44 Arbitration Act 1996. At one stage Mr McGrath did seek to invoke this latter jurisdiction and a s. 44 application was belatedly issued on 25 July 2018, the second day of the hearing. Mr Edey submitted that such an application was made far too late for it fairly to be addressed, correctly in my view, and it was not ultimately pursued by Mr McGrath.

(2) There is no good arguable case in respect of some of the causes of action, including, most relevantly for present purposes, the proprietary claim.

(3) There was a breach of the duty of full and frank disclosure.

(4) FSDEA has not established a sufficient risk of dissipation.

(5) In addition, the Defendants submitted that none of the arguable causes of action raised a good arguable case of a claim to $3 billion or any identified sum.

WFO: No Jurisdiction

48. I have held that the court has no jurisdiction over the claims save for a small rump of some of the claims against QGIM (D3) and QGAI (D6), in respect of which there is an as yet undetermined application for a case management stay. I shall reserve questions of whether this would be a sufficient ground to discharge the WFO or to refuse to continue it, if necessary, until after determination of the question whether there should be a case management stay.

WFO: No good arguable case

49. Although there is a distinction between the merits threshold of a serious issue to be tried, for the purposes of jurisdiction, and that of a good arguable case which is required for the purposes of a freezing order, the Defendants submitted that it made no difference on the facts of this case, and asked me to treat the causes of action as standing or falling together under both tests. Accordingly, my earlier conclusions on the question whether there is a serious issue to be tried in relation to the various impugned causes of action should be treated as conclusions to the same effect in relation to whether the Claimants have established a good arguable case for the purposes of the WFO, including the conclusion that I will assume, without deciding, that the merits threshold is reached in respect of the proprietary claim.

WFO: Non-Disclosure

50. The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in ***Brink's Mat Ltd v Elcombe*** [1998] 1WLR 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:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

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

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

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

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was 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.

> "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could

> properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp.1343H-1344A."

51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in ***Memory Corporation v Sidhu*** (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in ***Bank Mellat v Nikpour*** [1985] FSR 87, 92, Bingham J in ***Siporex Trade v Comdel Commodities*** [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in ***Marc Rich & Co Holding v Krasner*** (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to

disclosure of documents (see CPR PD31A and ***Hedrich v Standard Bank London Ltd*** [2008] EWCA Civ 905).

54. In this case I have concluded that there has been a breach of the duty to make a fair presentation of the case in eight material respects.

(1) The selection of Quantum

55. There was non-disclosure and an unfair presentation in respect of the Quantum selection process in a number of ways.

56. The Claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr dos Santos being chairman of that organisation (which subsequently became FSDEA), and at a time when Dr Manuel was Chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered into an Investment Management Agreement with Quantum on 13 July 2012, signed by Dr Manuel. Further, Quantum entities had been engaged as managers in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, each signed by Dr Manuel.

57. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments and two in respect of equity investments, in infrastructure and hotel projects respectively. None were by Mr Bastos. The presentation in relation to the Liquid Portfolio was by Gareth Fielding, QGIM's Chief Investment Officer since 2008, with 25 years' experience in asset management including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, Ulrich Otto, who had more than 10 years' experience of private equity investments involving assets which reached more than $2 billion in value, and sat on the supervisory board of a company with revenues of US$ 1 billion. It contained a detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by Mr Antoine Castro, Quantum's managing director of Real estate, with extensive prior experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages.

58. There was no attempt to put those presentations before the Judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA or other appointments, nor to address whether that selection was made otherwise than on merit. Instead Mr Morris' first affidavit and the skeleton argument before Phillips J gave the misleading impression that the selection had been entirely that of Mr dos Santos and made in 2013 when he was Chairman.

59. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of Mr Morris' first affidavit he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and

that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, and before any selection process; whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and December 2012 addendum were each signed not by Mr dos Santos but by Dr Manuel. The sub-paragraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for 6 months, amounting to $264 million. That would indeed have been breathtaking, to use the epithet applied to fees in the Claimants' skeleton argument, but was wrong: the fees were $44,000 monthly, giving a total of $264,000 for 6 months.

60. It was also misleading to characterise the process in the skeleton argument as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as "the extent of the selection process". Again, this ignores the selection process in 2012 which involved detailed presentations from Quantum. The false impression is reinforced by the assertion at para 31 of the E&Y report that no proposals were requested from any of the four potential managers, i.e. including Quantum, which implied that there had never been a formal proposal from Quantum.

61. Moreover, Mr dos Santos gave a fairly lengthy account of the selection process and the rationale for appointing Quantum in a letter of 27 September 2013 addressed to Jersey trustees who were then contemplated as being involved in the management of the fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not put in evidence before the Judge and its existence and contents were not referred to.

62. These were important matters. One of the central elements of the case against the Defendants was that it was Mr dos Santos as Chairman of FSDEA who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a significantly different complexion on the selection.

63. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However it seems likely that the existence of the prior appointment, the 2012 IMA other appointments, and the 2012 proposals were known to those at FSDEA with conduct of the case; and to Mr Gonçalves who was on the Board throughout the period, remains an adviser to FSDEA and who provided a witness statement subsequently; I say he was on the board throughout the relevant period because although in his own statement he describes himself as being on the board from October 2012, Mr Morris in his fifth affidavit says he was on the board from March 2012; and Mr Gonçalves refers to seeing one of the presentations in May 2012 at paragraph 26 of his subsequent witness statement; it seems likely that the circumstances of the 2012 appointment and presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013 and on the board from 2016, from whom Mr Morris did take instructions at the time of the without notice application; I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Gonçalves and gives

evidence about it. At the least, the circumstances of the 2012 presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

(2) Quantum's track record and suitability

64. Mr Morris described Quantum in his first affidavit as "an unknown and untested entity". In paragraph 14 of the skeleton Quantum was described as having a "limited track record" with a capitalisation of only 100,000CHF and contrasted with other candidates of the calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the Judge that:

(1) Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, in which Quantum had identified in its 2012 proposals the apparently well qualified staff with extensive relevant asset management experience who were employed by Quantum, and the independent board members apart from Mr Bastos who were of apparent eminence and experience.

(2) Quantum had had a capitalisation of CHF 1 million since 2007, as the detail in the E&Y Report accurately recorded.

(3) Quantum had managed assets for the Banco Nacional de Angola, the Angolan state bank, of $2.3 billion in liquid assets and a further $1billion in private equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at para 39 of his first affidavit by saying that "It appears from the documentation generated for the purposes of Project Rainbow…that Quantum Global at least at one point managed several hundred US$ (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA".

65. Again, these were important matters which were known to the Claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or absence of it, was at the heart of the allegations on which the Claimants' case is founded.

66. There was, additionally, an unfortunate mischaracterisation in relation to Mr. Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence; whereas, as was apparent from the material available to Mr Morris, the sanction was a suspended sentence ***of*** a fine, i.e. a fine payment of which was suspended and which in the event Mr Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended).

(3) Transparency and supervision

67. The appointment of Quantum, and its activities in carrying out the investment management, were transparent and regularly reported on to an audience within FSDEA beyond Mr dos Santos. The Claimants did not disclose or draw to the Judge's attention, as they should have done, the following.

68. The Board of FSDEA was by Presidential Decree overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA's policy and investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development, and the Governor of the National bank of Angola. Its role was not specifically addressed in the evidence or argument before Phillips J apart from an inaccurate reference in the E&Y report suggesting that the body never met, inaccurate because Mr Gonçalves' later evidence is that it met at least once. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example, it had detailed reports on the Illiquid Portfolio from Deloitte.

69. Moreover, FSDEA's accounts were audited on an annual basis by Deloitte.

70. Quantum also provided regular reports on the investments to FSDEA, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid Portfolio which contained the sort of detailed information one would expect from investment managers.

71. None of this was addressed in the Claimants' evidence or argument or drawn to the Judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable inquiries. Again, it was of importance to the case being advanced.

(4) The limited partnership model

72. Fourthly there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The Judge's attention was not drawn to the fact that the E&Y report described the structures used for the Illiquid Portfolio as based on a standard model and that "such models are commonly used in P[rivate] E[quity] and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

73. In argument before me, the thrust of the complaint changed to one that limited partnerships were only suitable vehicles for collective investment schemes, i.e. where there was more than one investor. But this was not the position taken by Deloitte in its audit reports which made no criticism of the structure, nor that of the Mauritian authorities in relation to 5 of the 7 Limited Partnerships. The Judge should have been told that both E&Y and Deloitte had not treated the structures used as inappropriate and

that they were a commonly used model. This was obviously important given the criticisms which were being made of the structure.

(5) Conflicts of interest

74. There was non-disclosure in relation to the allegation of conflicts of interest in the projects in the Illiquid Portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016 Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy, and expressly disclosing transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and conflicts dealt with in accordance with the policy. The disclosure included a hotel project in Luanda in which $157m had been invested which was the subject matter of particular criticism by Mr Morris in his first affidavit. The letter and waiver were signed not only by Mr dos Santos but also by Mr Fortunato, against whom no allegations of impropriety are made.

75. The 17 August 2016 letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris says that he and the team preparing the application were unaware of it because it was part of a set of over 750 documents which his firm held as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Mr Morris to have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the documents it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it all unless constraints of time or expense made this impossible. Neither applies in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum: if it was interrogated for that purpose it should have been fully interrogated. In any event Mr Fortunato was obviously aware of the letter, as a countersignatory, and reasonable inquiries would have extended to all the board members in place at the relevant times, including Mr Fortunato, who it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application.

(6) Fees

76. There was non-disclosure and an unfair presentation in respect of the fees charged on the Illiquid Portfolio. The fees as a whole (then put at $515 million) were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio, there was further criticism that the fees were charged on the full amount of the portfolio of $3 billion, when the amount invested in the projects was only a small part of that, some $2.2 billion remaining uninvested and held in liquid funds at the date of the WFO. There are several elements to what the Judge was not told, as he should have been.

    (1) As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as E&Y noted at paragraph 54 of

the report (to which the Judge's attention was not specifically drawn). In the course of the hearing before me Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the Claimants thereby lost visibility and control. But this was not how the matter was presented to Phillips J, which did not confine the criticism to this aspect. On the contrary it was suggested that at least one of the improper purposes of the drawdown into the partnership accounts was "to extract management fees by reference to the entirety of the US$3 billion, even though most of it has been sitting in cash (or cash like securities)": see the skeleton at para 16(5)(b), and see para 16(7) which made this criticism as a matter of "the structure by which the fees were calculated".

(2) Further, the Judge was not told what appears in paragraph 23 of Mr Gonçalves's subsequent witness statement, namely that he was aware of the reasons given at the time for the funds going into the partnership accounts, having been told by Mr dos Santos in 2013 that "the Fund was going to face increasing pressure in the economy and pressure to access its funds, so he wanted to use the funds now and put them into the private equity fund, so as not to give appetite to the state to come and use the funds." Mr Gonçalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

(3) Moreover, on the Illiquid Portfolio the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio (which accounted for over $100m of the fees on the figures then presented) and 2.5% plus 20% in relation to the hotel and other illiquid portfolios (which accounted for the balance). The Judge did not have specifically drawn to his attention paragraph 53 of the E&Y report which described 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to FSDEA in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again a matter not drawn to the Judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on ($263.4m out of $515.84m).

77. The level of fees charged was another of the central elements of the case against the Defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

(7) The stance of Northern Trust

78. There was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February 2018 and 4 March 2018, Northern Trust made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instructions from both FSDEA and Quantum and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, largely addressed to requests for disclosure, Northern Trust reiterated that there would be no change of position without prior notification. The first two letters were referred to in a narrative section of Mr Morris' Affidavit but were not identified in the section on risk of dissipation, were not

referred to in the skeleton argument and were not drawn to the judge's attention. The latter was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but was referred to at paragraph 190 of Mr Morris' first affidavit and in the Claimants' skeleton at 109(3) in sections addressing the risk of dissipation. In each case the letter was referred to by treating Northern Trust's statement that it would give prior notice as no more than a then current intention which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. This was to mischaracterise the correspondence as a whole, which suggested that Northern Trust were caught between conflicting claims and would not take steps without the agreement of both parties. Had the Judge been shown the correspondence, or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the Claimants being given sufficient advance notification to afford an opportunity to come before the Court again in those changed circumstances if necessary. That is my view, with the result that in respect of this aspect of non-disclosure, the Claimants have not made out a case of risk of dissipation in respect of over two thirds of the amount covered by the Freezing Order.

79. This last paragraph reflects what I said on this issue when giving judgment on the non-disclosure points at the conclusion of the hearing. Since then, on 9 August 2018 Mr Morris wrote to the court enclosing a seventh affidavit in which he explains that there were without prejudice communications with Northern Trust in March 2018. He had not consulted his notes when making his first affidavit, but had gone back to them in the light of the non-disclosure arguments at the hearing before me, and was now able to tell the court, having secured a limited waiver of privilege for this purpose, that in those discussions Northern Trust had "made observations with regard to the prospect, at or around the time of preparation of [Mr Morris' first affidavit] of [Northern Trust] making a stakeholder application under Part 86 of the Civil Procedure Rules" (which it is now known was an application which was in fact prepared and about to be issued at the time of the WFO, which overtook it). As Mr Morris fairly accepts, this confirms that what he said about Northern Trust's stance in paragraph 190 misled the Court as to the level of risk that Northern Trust might pay out from the Limited Partnership accounts without notice. It is regrettable, to say the least, that this matter was only drawn to the court's attention after the hearing and after I had announced my decision in relation to non-disclosure.

(8) Other non-disclosures

80. The Defendants advanced a number of arguments that there had been non-disclosure in other more minor respects. None are of sufficient significance to warrant separate consideration, save one. In the skeleton argument put before Phillips J on the without notice application, it was said that no proprietary injunction was sought against Mr dos Santos or Mr Bastos. In fact such an order was sought in paragraph 5(5) of the draft order put before the Judge, and such an order was made by him. Mr McGrath has apologised for this mistake (the mistake being in the skeleton, not in the order sought), and submitted that because the Judge had clearly read the order with care he was not misled and appreciated that such an order was in fact being sought against Mr dos Santos and Mr Bastos. Had there been no room for argument that a proprietary order was justified against Mr dos Santos and Mr Bastos personally this error might have assumed less significance. However there clearly was room for argument on the point,

not merely because there was a question whether there was a serious issue to be tried/good arguable case for a proprietary claim, but also because there was and is no evidence of receipt of any of the money or its traceable proceeds by Mr dos Santos. The vice of the mistake lay in these issues being ignored in the written and oral presentation to the Judge. This is a further significant failure to make a fair presentation of the application.

The consequences of the non-disclosure

81. I was referred to a number of authorities which contain summaries of the factors relevant to determining the consequences of material non-disclosure, including ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [61] to [64] (Flaux J); ***In re OJSC ANK Yugraneft; Millhouse Capital UK Ltd v Sibir Energy Plc*** [2008] EWHC 2614 (Ch) at [102] to [106] (Christopher Clarke J); and ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [68] to [77] (Mann J); and ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) (Males J).

82. Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In ***Banca Turco Romana v Cortuk*** [2018] EWHC 662 (Comm), I expressed it in this way:

> "….It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

83. In this case the breaches taken cumulatively are serious and substantial. They do not relate to a few, merely peripheral, matters, but to numerous matters at the heart of the Claimants' case. The Court was being asked to infer a dishonest conspiracy by which Mr dos Santos sought improperly to benefit his friend and associate Mr Bastos, and a consequent risk of dissipation, from four central allegations, namely (1) that Mr dos Santos was solely responsible for appointing Quantum without any proper selection process; (2) that Quantum was not properly qualified for the task; (3) the extraordinarily high and unjustified level of fees charged; and (4) the funds being used to benefit entities owned by or associated with Mr Bastos involving an undisclosed and

inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the Claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the Claimants to say that the subsequent evidence put before the court to deal with them raises disputes which are sufficient to surmount the merits hurdle of a good arguable case. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood. But the unfair presentation in this case in the respects I have identified goes far beyond the odd accidental slip, and goes to the central elements of the case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds. The matter had obviously been under consideration for many months, at least since the E&Y Report in December 2017 and Mr dos Santos' dismissal in January 2018. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use a large team to make the necessary inquiries and to consider all the documents available. Given the size of the freezing order sought, and the allegations of dishonesty being made, it was incumbent on the Claimants and their legal advisers to make the fullest inquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris emphasised in his first affidavit the limits on the inquiries which had been made by his firm, that does not excuse a failure to make the necessary inquiries or the presentation of incomplete material in an unfairly one-sided way.

84. The Claimants' legal team were at pains to make clear on the without notice application that they were aware of the duty of full and frank disclosure and were purporting to fulfil it. I do not find that there was any deliberate breach on the part of the Claimants' legal team. It is less clear whether that is so of the personnel at FSDEA itself. Some, at least, of the material would have been readily available to anyone in a senior position and the necessity to disclose it obvious to anyone aware of the duty of disclosure. Because privilege attaches to communications between Norton Rose Fulbright and their clients, it is impossible to identify whether any individual was aware of the duty and deliberately failed to comply with it. What can be said, however, is that the failures were serious and should not have occurred had the duty been properly understood and complied with by the Claimants themselves. There was therefore a high degree of culpability in the failures, even though I do not find that anyone deliberately set out to abuse the court's process.

85. This is not a case in which there are any strong reasons for departing from the usual sanction for serious and culpable non-disclosure. I have concluded that for the reasons given below, the Claimants have not established by solid evidence that there is a sufficient risk of dissipation to justify a freezing order, or that the balance of convenience would justify a proprietary injunction, so that there is in fact no prejudice to the Claimants in discharging the injunction and refusing to grant a fresh one as a result of the non-disclosure. I should make clear, however, that I would reach the same conclusion even if satisfied of a risk of dissipation, as was implicit in my decision announced at the conclusion of the hearing. The breaches of duty are sufficiently serious and culpable to warrant discharging the WFO and not granting fresh relief, irrespective of the other grounds of challenge.

WFO: No risk of dissipation

86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; ***Holyoake v Candy*** [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and ***Petroceltic Resources v Archer*** [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

(1) 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.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) 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 are likely to 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.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Risk of dissipation: Mr dos Santos

87. There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence. There was some suggestion in Mr Morris' evidence that his asset disclosure pursuant to the WFO was incomplete so as to support such an inference, but his solicitor's letter of 10 July 2018 adequately addresses the points made and leaves no evidence on which the court could conclude that his asset disclosure is incomplete or inadequate.

Risk of dissipation: Mr Bastos and the Quantum defendants

88. In my view the same is true of the different circumstances of Mr Bastos and the Quantum Defendants. Again, the accepted good arguable case of dishonesty does not support an inference of a sufficient risk of dissipation: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. The particular facts of Mr Bastos' criminal conviction many years ago, for which he ultimately was fined CHF4,500, do not support the inference of a current risk of dissipation. There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. There is no evidence to suggest that the fact or threat of either the claim itself, or the freezing order, has caused or would cause any of them to act in a way which differed from their previous practice so as to make any adverse effect on the claimants' ability to enforce a judgment something which could properly be characterised as "unjustified". This applies with equal force to the Mauritian Limited Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations; and that the drawing down of the full committed amounts into the accounts in the names of the Limited Partnerships so as to put them beyond the control of FSDEA was for a legitimate political objective explained at the time by Mr dos Santos to Mr Gonçalves (see above). The Liquid Portfolio and the majority of the Illiquid Portfolio are secured without the need for a freezing order. There is no evidential basis for suggesting that Mr Bastos or the relevant Quantum Defendants intend to deal with the monies invested in the projects or the projects themselves otherwise than by way of promotion of the success of those projects. There is no

suggestion that Mr Bastos or the Quantum Defendants have taken any sums other than those to which there is a contractual entitlement; nor that they have dealt with them otherwise than in accordance with those contractual arrangements. The complaint about the execution of those contractual arrangements does not support a risk of dissipation. As the Claimants' skeleton argument itself put it, this is not a routine case of "hands in the till" type fraud.

89. Although this was not put in the forefront of the argument on this point, complaint was also made about the history and nature of the asset disclosure by Mr Bastos and the Quantum Defendants pursuant to the WFO; it was said that the failure to make proper disclosure was a continuing effort to hide assets in order to protect them from a judgment. Whilst the dilatory nature of that disclosure is properly the subject of criticism, full purported compliance has taken place, and there is a hotly contested issue whether there has been any failure to give a full and accurate account of the defendants' assets. It is not clear from the evidence ultimately put before me on the point that there has been any failure to attempt full compliance in a way which would provide any support for a finding of a risk of dissipation.

Proprietary injunction: balance of convenience

90. For similar reasons the balance of convenience would not lie in favour of granting a proprietary injunction. There is no evidence to suggest that Mr dos Santos has, or has ever had, any sums to which a proprietary claim could attach. So far as Mr Bastos and the Quantum Defendants are concerned, I have said that I am prepared to assume, without deciding, that the Claimants have established a serious issue to be tried, but the contrary is plainly arguable and a proprietary claim may well not be capable of being established. There is no real evidential basis for concluding that the funds in the Illiquid Portfolio which have been invested in projects have not been well invested, or that in the absence of an injunction they would not continue to be managed so as to promote their profitability. The adverse effects of the proprietary order on Mr Bastos himself appear to have been serious: he has been unable to say with certainty that any of his assets can be divorced from those received ultimately from FSDEA because his modus operandi has always been to take income through his corporate vehicles from the Quantum group as dividends so that funds have inevitably become mixed. The effect of the proprietary injunction is therefore effectively to prevent Mr Bastos having access to any funds other than the permitted living allowance.

WFO: No justification for US$ 3 billion or any amount

91. Mr Edey submitted, correctly in my view, that the quantum of any loss suffered by FSDEA could not be put at US$3 billion or anything like it. Leaving aside the payment of fees, the investment of those funds was for the benefit of the Claimants who retain their equitable interest in the assets, as is and has always been common ground. In fact, over $2.2 billion remains uninvested in accounts at Northern Trust which are sufficiently secured for the time being. Accordingly, any present quantification of the loss is limited to (1) the fees taken by the Quantum Defendants and other Bastos related companies and (2) such loss as could be established by reference to the value of the projects in which investments have been made. In relation to the fees there is an argument that the amount of loss is not the full amount of the fees but only the amount by which they exceeded what would have been charged by another investment manager or service provider in any event. I have already dealt under the heading of non-

disclosure with the failure fairly to address the position of Northern Trust, which itself meant that a freezing order could not be justified in the sum of US$3 billion or anything like it. In the light of my other conclusions, it is not necessary for me to determine what, if anything, had been established as a sufficiently arguable quantum of loss for the purposes of identifying the proper amount of any freezing order or proprietary injuntion.

Conclusion

92. The WFO must be set aside and no fresh freezing order will be granted. I will hear the parties on the case management stay issues which are outstanding and the form of the order.

Neutral Citation Number: [2018] EWHC 2199 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Claimants

(1) FUNDO SOBERANO DE ANGOLA
(2) FSDEA HOTEL INVESTMENT LIMITED
(3) FSDEA AFRICA AGRICULTURE (LP) LIMITED
(4) FSDEA AFRICA INVESTMENT (LP) LIMITED
(5) FSDEA AFRICA HEALTHCARE (LP) LIMITED
(6) FSDEA AFRICA MEZZANINE (LP) LIMITED
(7) FSDEA AFRICAN MINING (LP) LIMITED
(8) FSDEA AFRICA TIMBER (LP) LIMITED

- and -

Defendants

(1) JOSÉ FILOMENO DOS SANTOS
(2) JEAN-CLAUDE BASTOS DE MORAIS
(3) QUANTUM GLOBAL INVESTMENT MANAGEMENT AG
(4) QG INVESTMENTS AFRICA MANAGEMENT LIMITED
(5) QG INVESTMENTS LIMITED
(6) QUANTUM GLOBAL ALTERNATIVE INVESTMENTS AG
(7) INFRASTRUCTURE AFRICA (GP) LTD
(8) HOTEL AFRICA (GP) LTD
(9) AGRICULTURE AFRICA (GP) LTD
(10) HEALTHCARE AFRICA (GP) LTD
(11) MEZZANINE AFRICA (GP) LTD
(12) MINING AFRICA (GP) LTD
(13) TIMBER AFRICA (GP) LTD
(14) QG AFRICAN INFRASTRUCTURE 1 LP
(15) QG AFRICA HOTEL LP
(16) QG AFRICA AGRICULTURE LP
(17) QG AFRICA HEALTHCARE LP

(18) QG AFRICA MEZZANINE LP
(19) QG AFRICA MINING LP
(20) QG AFRICA TIMBER LP
(21) THE NORTHERN TRUST COMPANY

- -
- -

Paul McGrath QC, Nik Yeo, Alexander Milner, Samuel Ritchie and Joseph Farmer (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **First Defendant**
Stephen Auld QC and Alexander Brown (instructed by **Grosvenor Law LLP**) for the **Second Defendant**
Philip Edey QC, Andrew Fulton and Sam Goodman (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third to Twentieth Defendants**

Hearing dates: 24-27 and 30 July 2018
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimants in this action are the sovereign wealth fund of the Republic of Angola ("FSDEA") and seven of its subsidiaries. On 27 April 2018 Phillips J granted a worldwide freezing order and proprietary injunction ("the WFO") against the First to Twentieth Defendants restraining them from disposing of or dealing with assets up to the value of US$3 billion.

2. At the adjourned return date hearing before me, the Claimants sought an order that the WFO, as amended, be continued until trial or further order. The Defendants sought to set aside the WFO on a number of grounds, including material non-disclosure, and raised various jurisdiction challenges. At the conclusion of the hearing I announced my decision that the WFO should be discharged for non-disclosure, and no fresh order granted, and gave reasons. I reserved judgment in relation to all the issues which I did not address. This is my full judgment, including amplified reasons in relation to non-disclosure.

3. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between the First Defendant, Mr dos Santos, the former Chairman of FSDEA, and his friend and business partner, the Second Defendant, Mr Bastos, who is the 95% beneficial owner of the Quantum group of companies which include the Third to Twentieth Defendants. It is the Claimants' case that, pursuant to this conspiracy, Mr dos Santos placed some US$5 billion at the disposal of the Quantum group to manage and invest on FSDEA's behalf, when the Quantum group manifestly lacked the appropriate or any qualifications and experience for such a mandate; that in the event, most of the US$5 billion has not been invested at all and has simply been used by the Quantum group to extract what were described as an extraordinary levels of fees (amounting to some US$406 million); that of the limited proportion which has been invested, the investments have not been made in the interests of the Claimants but have mostly been channelled into other projects belonging to Mr Bastos; and that in addition, as part of the same conspiracy, Mr dos Santos committed FSDEA to pay around US$153 million to the Quantum and other companies controlled by Mr Bastos, under contracts for various purported services, which contracts, if genuine at all, were manifestly uncommercial and were intended mainly to divert money from FSDEA into the pockets of Mr Bastos without FSDEA receiving anything of remotely commensurate value in return. The Defendants' case is that they are the victims of political change in Angola and a desire on the part of those now in power to get their hands on money which the previous regime sensibly and appropriately invested on a long-term basis for the people of Angola; and that the allegations are a spurious and flawed attempt to achieve this political objective.

Narrative

4. Mr dos Santos' father was the President of Angola from 1979 until 26 September 2017, when he was replaced by President Lourenço, who was elected on 23 August 2017 following President dos Santos' decision to step down.

5. FSDEA was established by a Decree of President dos Santos of 9 March 2011. It was then called the Petroleum Fund. It was renamed FSDEA by a Decree of 19 June 2013.

By a further Presidential Decree of 28 June 2013 FSDEA was allocated a capital endowment of US$5 billion for investment. Its Chairman from 2012 to May 2013 was Dr Armando Manuel, who had been the Economic Adviser to President dos Santos. In 2012 its other directors were Mr dos Santos and Mr Gonçalves. In May 2013 Dr Manuel became the Minister of Finance of Angola, and shortly after FSDEA was renamed in June 2013, Mr dos Santos was appointed Chairman. Mr Fortunato was at that time appointed a director. Mr dos Santos remained Chairman until his removal in January 2018. His fellow directors were Mr Gonçalves and Mr Fortunato until the autumn of 2016, when Mr Gago replaced Mr Fortunato. Mr Gago had before that acted as Director of the Office of the Chairman of the Board of Directors from 2013 until 2015. He remains a director of FSDEA. Mr Gonçalves remained a director of FSDEA until January 2018, since when he has acted as a consultant to it. There is a dispute as to the degree of involvement that the other directors had in the running of the fund.

6. On 29 November 2013, Mr dos Santos on behalf of the FSDEA signed an Investment Management Agreement ("the IMA") with the Third Defendant ("QGIM"), acting by Mr Bastos, whereby QGIM was appointed to act as investment manager for FSDEA *"with respect to such monies and properties as are designated to it from time to time"*. QGIM is part of the Quantum group of companies which are 95% owned and controlled by Mr Bastos. Mr Bastos, who has dual Swiss and Angolan citizenship, is a long-standing business associate of Mr dos Santos. They were jointly involved in the founding and management of an Angolan Bank, Banco Kwanza Invest, which was launched in 2008, and they jointly owned several other companies in Angola. Mr Bastos' evidence is that Mr dos Santos relinquished his shareholdings in these companies prior to the IMA but that is not accepted by FSDEA.

7. The IMA is governed by English law and contains an arbitration clause providing for disputes to be resolved by arbitration in accordance with UNCITRAL Rules in Lisbon and in the Portuguese language. There is a dispute as to whether the seat of the arbitration is England (as FSDEA contends) or Portugal (as QGIM contends). The fee payable under the IMA was a base fee of 1% of the average value of the fund plus a performance fee of 20% above a hurdle rate equivalent to the Benchmark Bank of America/Merrill Lynch 3-month Treasury Bill Index.

8. The IMA provided for there to be a custodian of the assets other than QGIM. On the same day as the IMA, 29 November 2013, FSDEA entered into a Master Custody Agreement with the Twenty First Defendant ("Northern Trust"), a US bank established under the laws of Illinois with a London branch in Canary Wharf. It provided for cash and security accounts to be held in FSDEA's name. It did not in terms require the accounts to be at the London branch, although references to the London branch address and UK regulatory standards suggests that that was what was envisaged, and the accounts were in fact established at the London branch.

9. The US$5 billion was to be invested in two conceptually different portfolios. US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities etc) which were to be sufficiently liquid to be realisable within no more than 3 months ("the Liquid Portfolio"). The balance of US$3 billion was to be invested as private equity capital in longer term projects in sectors such as infrastructure, hotels, timber, agriculture, mining and healthcare, especially in Angola and elsewhere in Africa ("the Illiquid Portfolio"). It is FSDEA's case that the IMA appointed QGIM as investment manager in respect of the entire $5 billion, both the Liquid and Illiquid Portfolios. It is Mr Bastos' and the

Quantum group's case that the IMA was confined to the Liquid Portfolio, and that the Illiquid Portfolio was governed by separate contractual arrangements. These involved the establishment of seven limited partnerships governed by Mauritian law ("the Limited Partnership Agreements"), who are the Fourteenth to Twentieth Defendants ("the Limited Partnerships"). Each had a Mauritian limited partner, a subsidiary of FSDEA, who are the Second to Eighth Claimants, ("the Limited Partners") and a Mauritian General Partner owned and controlled by the Quantum group who are the Seventh to Thirteenth Defendants ("the General Partners").

10. The Limited Partnerships were established pursuant to seven agreements signed on FSDEA's side by Mr dos Santos in April 2014. Five Incorporation Service Agreements ("the ISAs") were made with the Fifth Defendant ("QGI Ltd"), to establish five funds to invest in various sectors in Africa. The ISAs were governed by Angolan law and provided for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language. Two Consultancy Agreements ("the CAs") were made with the Sixth Defendant ("QGAI") in relation to the establishment of two further funds to invest in the hotel sector and in infrastructure projects. Each of the Limited Partnerships had a management agreement with the Fourth Defendant ("QGIAM") under which the latter was entitled to an annual management fee of 2% (infrastructure) or 2.5% (other funds) plus in each case 20% above a rate of return of 8%.

11. The US$5 billion was paid to Northern Trust over a period concluding in December 2014. The Liquid Portfolio was held in accounts in FSDEA's name. QGIM was the asset manager which exercised the investment decision making and discretion from its base in Switzerland; Northern Trust's role was executory and as custodian of the investments. FSDEA had visibility over the Liquid Portfolio held in accounts in its name, and received regular investment reports in relation to the portfolio from QGIM.

12. The US$3 billion in the Illiquid Portfolio was transferred to accounts in the name of the Limited Partnerships at Northern Trust. Part of FSDEA's complaint is that it and the Limited Partners had no visibility or control over the monies in those accounts, which were under the control of the General Partners exercising their powers of management in relation to the Limited Partnerships. Only part of this had been invested by the time of the freezing order. Approximately US$2.27 billion remained at Northern Trust in liquid form at the time of the WFO, and has been secured. The balance, apart from deduction of fees, was paid into a number of investment projects of the kind envisaged, including projects controlled by Mr Bastos. For example, it is said that the hotel partnership (the Eighth and Fifteenth Defendants) invested US$157 million in a hotel project in Angola in which Mr Bastos had an interest (although this figure is difficult to reconcile with Table 4 of the EY Report – defined in paragraph 14 below); and the infrastructure partnership (the Seventh and Fourteenth Defendants) invested US$180 million into the Port of Caio in Angola, which Mr Bastos had a concession to develop. These are said to be stark examples of the conflicts inherent in the appointment of Quantum to manage FSDEA's funds with Mr Bastos able to dictate the terms of major transactions from both sides of the table.

13. In addition to the IMA and the agreements relating to the Mauritius funds, Mr dos Santos additionally committed FSDEA to some 49 other contracts with companies connected to Mr Bastos for the provision of various kinds of services (the "Service Contracts"). There is a dispute about whether services were provided to the value of what was charged by the relevant counterparties; FSDEA's case is that they were not

and that the Service Contracts were another element of the conspiracy whereby Mr dos Santos permitted Mr Bastos to extract large fees from the Claimants without any proper justification. These counterparties are not Defendants and no claim is brought against them in these proceedings. The Service Contracts have not been avoided or rescinded.

14. In November 2017 details of the arrangements between the Claimants and Quantum were publicly leaked and discussed in the so-called "Paradise Papers". The Angolan government commissioned a report from Ernst & Young ("E&Y") regarding the operation of the FSDEA, which was produced on 15 December 2017 ("the E&Y Report"). Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018. Notice of termination of the IMA was given on 16 February 2018 and took effect two months later, on 17 April 2018. The Liquid Portfolio was put into the hands of a replacement investment manager. The Claimants brought these proceedings and applied for the WFO on 27 April 2018. In the light of some of the asset disclosure given by the Defendants pursuant to the WFO, E&Y updated their report on 9 July 2018 ("the Updated E&Y Report").

15. There is no evidence that Mr dos Santos benefited at all from any of the arrangements complained of. Following the termination of the IMA, the Liquid Portfolio has remained within FSDEA's control. Although FSDEA's case is that Quantum was manifestly ill qualified to undertake the investment management role of the Liquid Portfolio, there is not in fact any particularised allegation that QGIM acted negligently in the choice of investments or otherwise in the handling of the Liquid Portfolio during its time as investment manager. The complaint is not about the performance of the Liquid Portfolio investment, but about the level of fees set contractually under the IMA at 1% plus 20% above the benchmark hurdle, which EY describe in their report as "high given the size of the portfolio", a relatively slight basis for an allegation of fraud. The total of such fees over the life of the IMA was US$81.83m according to the Updated E&Y Report.

16. Accordingly the argument in respect of the WFO has focussed on the Illiquid Portfolio. The amount of the Illiquid Portfolio was US$3 billion, but at the time of the WFO some US$2.27 billion remained in the accounts in the names of the Limited Partnerships at Northern Trust in London. By letters in March 2018 Northern Trust and their solicitors had made clear to the Claimants that they would not deal with those funds without the written instructions of both sides, and would not change their position without giving the Claimants prior notification. In my view those assurances removed any risk of dissipation in justifying an order freezing that sum, which was more than two thirds of the amount frozen by the WFO. This was the subject matter of material non-disclosure on the without notice application to Phillips J, to which I return below. The Updated E&Y Report suggests that a total of US$454m was invested in projects in the seven Mauritian funds, with the balance presumably being accounted for by fees.

17. The fees alleged to have been paid to Quantum or to other Bastos related companies are set out in the Updated E&Y Report as follows (with figures in brackets being those identified in the E&Y Report which formed the basis for the without notice WFO application, where they differ):

    (1) QGIM was paid US$81.83m (US$82.965m per Table 1 or $92.48m per Table 5), under the IMA for managing the Liquid Portfolio.

(2) Under the five ISAs QGI Ltd was paid US$26.39m in respect of the establishment of the Illiquid Portfolio funds.

(3) A further sum of US$10m was due to QGAI for the setting up of the infrastructure and hotel funds under the two CAs, but it does not appear from the E&Y Reports that such sum was paid, although Mr Morris deposes that it was at paragraph 62 of his first affidavit, apparently on the basis that there were two earlier invoices from December 2012 from Quantum Global Wealth Management to the Petroleum Fund requesting payment of $5 million each; he does not exhibit any evidence of payment.

(4) Under the management agreements for the Illiquid Portfolio, QGIAM received by way of annual management fees a total of US$298.13m (US$263m).

(5) Under the Service Contracts the following companies received the following fees totalling $153m.

Stampa QG:	US$58.06m
Tome International AG:	US$40.04m
Djembe Communications:	US$9.91m (US$ 0)
African Innovation Foundation:	US$36.29m
Uniqua Consulting GmbH:	US$8.7m

18. The total fees taken by Bastos related entities are therefore put at US$559.35m (US$515m). It is worth emphasising that all these fees were in accordance with the contracts signed between the parties, and none of the contracts had been rescinded or avoided at the date of the WFO. This is not a case in which any of the Defendants are accused of extracting sums to which there was no contractual entitlement. The thrust of the complaint is the creation by Mr dos Santos of that contractual entitlement.

Jurisdiction

19. The following causes of action are asserted against the following Defendants:

(1) against Mr dos Santos:

(a) breach of duty under the Public Probity Law of Angola;

(b) conspiracy to injure by lawful and unlawful means;

(c) procuring breach of contract by QGIM (see below for the breaches of contract alleged against QGIM);

(d) constructive trust: dishonest assistance of breaches of fiduciary duty by QGIM (see below for the breaches of fiduciary duty alleged against QGIM);

(2) against Mr Bastos:

(a) conspiracy to injure by lawful and unlawful means;

(b) procuring breach of contract by QGIM;

(c) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM (I take this to be the intended reference in para 12(e)(ii) of the Claim Form which in fact refers to "QGIM Ltd").

(d) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds;

(3) against QGIM:

(a) breach of clause 4 of the IMA in failing to carry out the services under the IMA with due skill and care and/or in good faith;

(b) breach of clause 14 of the IMA in failing to disclose conflicts of interest and/or procuring contracts which involved a conflict of interest, including the Luanda Hotel and Port of Caio projects;

(c) breach of the IMA in failing to invest the Liquid Portfolio "properly or at all"; although this is a pleaded head of claim, it is not supported by any evidence on these applications of any particularised negligent management or investment of the Liquid Portfolio;

(d) breaches of fiduciary duty in the respects alleged to be breaches of contract under (a), (b) and (c) above;

(e) conspiracy to injure by lawful and unlawful means;

(f) constructive trust: dishonest assistance of breaches of fiduciary duty by Mr dos Santos (in breaching the Public Probity Law);

(g) constructive trust: unconscionable receipt of any part of the US$5 billion its traceable proceeds;

(4) Against QGIAM Ltd (D4), QGI Ltd (D5), QGAI (D6) the General Partners (D7-13) and the Limited Partnerships (D14-20):

(a) conspiracy to injure by lawful and unlawful means;

(b) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM

(c) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds.

20. In addition, there is a proprietary claim against each Defendant in respect of any part of the US$5 billion received by them or its traceable proceeds. The basis put forward for the proprietary claim was initially the claim based in constructive trust. In the course of argument, Mr McGrath sought to support it also on the basis that FSDEA at all material times retained a proprietary interest in the funds.

21. Mr dos Santos is resident and domiciled in Angola. There is a dispute whether Mr Bastos is domiciled in Switzerland or Dubai. QGIM (D3) and QGAI (D6) are incorporated in Switzerland. QGIAM (D4) is incorporated in Mauritius and is the manager of the Limited Partnerships, which are domiciled in Mauritius as are the General Partners. QGI Ltd (D5) is a company incorporated in the British Virgin Islands.

22. The challenges to jurisdiction involve the following submissions on behalf of the Defendants:

    (1) The claims against the Swiss companies, QGIM (D3) and QGAI (D6), are governed by the Lugano Convention, and those companies must be sued at their place of domicile which is Switzerland. The Claimants assert that under the Lugano Convention these claims may be brought in England. The Claimants also contend that the claims against Mr Bastos may be brought in England pursuant to the Lugano Convention on the grounds that he is domiciled in Switzerland. Mr Bastos disputes that he is domiciled in Switzerland and that jurisdiction over him is governed by the Lugano Convention.

    (2) Certain of the claims do not pass the merits threshold of a serious issue to be tried.

    (3) England is not the appropriate forum for the claims against the non-Lugano Defendants.

    (4) Insofar as any claims would otherwise remain to be tried in England, certain of the claims are within arbitration agreements and are subject to a mandatory stay under s. 9 of the Arbitration Act 1996; and there should be a case management stay of any remaining claims pending the determination of proceedings in arbitration and/or elsewhere abroad.

Jurisdiction: the Lugano Defendants (QGIM and QGAI and query Mr Bastos)

The claims against Mr Bastos

23. The Claimants submitted that jurisdiction could be established under the Lugano Convention against Mr Bastos because he was domiciled in Switzerland. The evidence of his residence is exiguous and there is no Swiss law evidence on domicile. The weight of the evidence is that he left Switzerland to go and live in Dubai in May 2017 and has resided in Dubai since then. Accordingly the Claimants have failed to establish that at the relevant time he was domiciled in Switzerland, and jurisdiction over him falls to be established under the common law, not the Lugano Convention.

FSDEA's breach of contract claim against QGIM (D3)

24. FSDEA invokes Article 5(1) of the Lugano Convention to establish jurisdiction for this claim, which provides that contractual claims may be brought in respect of a contract for services at the place where the services were or should have been provided. The question therefore is where the services were, and were to be, provided by QGIM under the IMA. FSDEA contends that this is London where the Northern Trust accounts were held. I am unable to accept this submission. The services to be provided by QGIM under the IMA were investment management services which involved determining how the Liquid Portfolio was to be invested in various short-term investments. That management function was to be, and was, carried out in Switzerland where Quantum had its place of business. That aspect of its business was regulated and supervised by the Swiss financial authorities, as the preamble to the IMA recorded at paragraph C. QGIM had no custody of the assets, in London or elsewhere. The IMA did not identify any place for the receipt of those instructions, which only became London as a result of FSDEA's choice of custodianship, which might originally have been elsewhere than London and could at any time have been changed to a different location. On any view, therefore, it cannot be said that the IMA provided for any part of the services to be performed in London. It is true that QGIM's investment management in Switzerland in the event resulted in instructions from Switzerland to London to the custodian of the funds in London, but that does not make London the place of performance of the services to be provided under the IMA. Those services do not consist solely or even primarily of the investment instructions, but rather the investment management activity in determining what investments to make, which took place in Switzerland, as envisaged by the IMA.

FSDEA's breach of fiduciary duty claim against QGIM (D3)

25. FSDEA seeks to found jurisdiction under Article 5(3) of the Lugano Convention, which provides that a party may be sued in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred, which is said to be in London where the payments out of the Northern Trust accounts occurred. However I accept Mr Edey QC's submission that the breach of fiduciary duty claim is properly characterised as being in a "matter relating to contract" so that allocation of jurisdiction falls to be determined in accordance with Article 5(1), not Article 5(3); and that accordingly Switzerland is the allocated jurisdiction for the same reason as for the contractual claims under the IMA. This is because the equitable claim for breach of fiduciary duties depends upon the existence of the IMA: the duties are said to arise by virtue of the relationship created by the IMA. The Claim Form describes them as "arising by virtue of the IMA and/or the authority thereby vested in QGIM to…handle and otherwise deal with assets belonging to the FSDEA". The position is accurately described in Briggs on Civil Jurisdiction and Judgments 6th Edn at paragraph 2.196:

> "The answer is to be found by deciding whether the obligation which lies at the heart of the claim is rooted in an agreement between the parties, or on an allegation of wrongful behaviour which has caused loss to another. If the obligation arises from the unconscionable disregard of the duties of an agreement, such as those imposed upon a person who has with the agreement of the other party placed himself in a fiduciary relationship with that other, such as an agent to his principal, the matter should be seen as one relating to a contract and the fiduciary aspect of the claim as going only to define or augment the remedies available to the claimant."

FSDEA's proprietary claim against QGIM (D3)

26. A proprietary claim only exists "against" a person to the extent that that person holds property in which the Claimant is entitled to a legal or equitable interest. It is a claim to the property itself, and is only asserted against the holder of the property or one who is in a position to give effect to the proprietary interest. Accordingly, in the current context the question is whether, assuming that there is a sufficiently arguable case that QGIM holds such property, the claim to enforce the proprietary interest in respect of the property against QGIM falls within Article 5(3). Mr McGrath QC submitted that the proprietary claim fell within Article 5(3) as being in a matter relating to tort, delict or quasi delict. Mr Edey submitted that if the proprietary claim passed the threshold merits test of raising a serious issue to be tried, it did not fall within Article 5(3). He submitted that it was clear from ***Kalfelis v Bankhaus Schröder*** 189/87 [1988] ECR 5565 and ***Kleinwort Benson Ltd v Glasgow City Council*** [1999] 1 AC 153 that Article 5(3) only covered claims which gave rise to a personal liability. This submission is in my view well founded. The proprietary claim has nothing to do with any personal liability on the part of QGIM; it is a claim to property insofar as it remains in the hands of QGIM irrespective of fault; it is not based on a constructive trust (which would give rise to a claim falling within Art 5(3): see ***Casio Computer Co Ltd v S*** [2001] EWCA Civ 661 and ***Dexter v Harley*** [2001] All ER (D) 79) because dishonest assistance constructive trust claims are not proprietary: see per Lord Millett in ***Paragon Finance Plc v D B Thackerar & Co*** [1999] 1 All ER 400 at p. 409e-g.

Proprietary claim against QGAI (D6)

27. For the same reasons as apply in relation to QGIM, the proprietary claim against QGAI does not fall within Article 5(3) of the Lugano Convention and can only be brought at its place of domicile which is Switzerland.

Jurisdiction: serious issue to be tried

28. The Defendants argued that the Claimants had failed to establish a serious issue to be tried in respect of the following causes of action:

    (1) the proprietary claim;

    (2) the claim for lawful means conspiracy;

    (3) the claims against Mr dos Santos in unlawful means conspiracy and dishonest assistance constructive trust;

    (4) the claims by FSDEA against QGIM (D3) for breach of contract and breach of fiduciary duty;

    (5) the claims by FSDEA against the general Partners and Limited Partnerships;

    (6) the "cross claims" between the Partnerships, i.e. the claims by the Limited Partners against General Partners of other Partnerships, and against those other Partnerships; and

    (7) some of the knowing receipt claims.

The proprietary claim

29. The Liquid Portfolio was held in FSDEA's name by Northern Trust. The proprietary claim in respect of those funds, which have been returned to FSDEA's control, is limited to the fees taken by QGIM and their traceable proceeds. So far as the Illiquid Portfolio is concerned, the funds were initially in accounts under QGIM's control at FSDEA and were transferred to accounts at Northern Trust in the names of the Limited Partnerships pursuant to written instructions from FSDEA to QGIM dated 30 June 2015 signed by Mr dos Santos which stated "The transfers doesn't [sic] cause a change in the ultimate beneficial ownership". Mr Edey submitted that there could be no proprietary claim for property which was transferred pursuant to contracts where those contracts had not been avoided or rescinded. He accepted that the Claimants retained a beneficial interest in the investments in the Illiquid Portfolio, but submitted that those interests were held on the terms of the Limited Partnership Agreements which were long term contracts (of 10 or 15 years), such that there was no immediate entitlement to possession. He submitted that property passed in full under the contracts (the IMA and the Limited Partnership Agreements), and unless and until they were avoided there could be no vesting of any equitable interest in the transferor. Until very shortly before the hearing before me the Claimants had not suggested that the agreements were invalid or had been avoided, and indeed had proceeded on the basis that they remained validly in place. Mr McGrath sought to argue before me that they were void, alternatively voidable and had been rescinded. In my view Mr Edey was correct to submit that it was too late to run such an argument, which gave rise to issues of election and affirmation, and to allow the Claimants to do so would have been unfairly prejudicial to the Quantum Defendants, who would have been able to deploy arguments of election and affirmation. Accordingly the question whether there is a serious issue to be tried that the Claimants have a proprietary claim falls to be addressed on the footing that the sums transferred were paid in accordance with contracts which are not void and have not been rescinded.

30. On that footing, Mr McGrath submitted that where a contract split the legal and equitable interests so as to confer a legal title whilst retaining an equitable title, there is no need to rescind or avoid the contract in order for the transferor to assert the equitable proprietary right to the property. That was, he submitted, the effect of the contractual arrangements in this case because the funds were always invested for benefit of the Claimants who retained an equitable interest throughout; the Liquid Portfolio was held in accounts in the name of FSDEA and funds for the Illiquid Portfolio were transferred into the Limited Partnership accounts by instructions from FSDEA to QGIM which expressly purported to retain "ultimate beneficial ownership" in the funds. This argument does not work for the fees in respect of the Liquid Portfolio, where it was intended by the IMA that legal and beneficial interest in the fees should pass to QGIM. However, the main issue on this point was whether there was a sufficiently arguable proprietary claim to the sums transferred in the Illiquid Portfolio because the challenge is aimed at the proprietary element of the WFO, which is confined in amount to $3 billion to reflect such transfer. So far as that is concerned I was referred to a number of authorities on each side. This is an issue which raises difficult questions of law which will have to be applied to the facts once established. I am inclined to the view that the Claimants have met the relatively low merits threshold of a serious issue to be tried. However I do not propose to explore the legal issues in this judgment which would fall to be addressed in the light of the fact specific circumstances once established, nor to

express a concluded view, because in the event this issue is not determinative of the outcome of the applications which I have to decide. I shall assume, without deciding, that there is a serious issue to be tried for the proprietary claim advanced.

Lawful means conspiracy

31. The Claimants submitted that it was sufficient to establish the necessary predominant intention to injure that the predominant intention of the Defendants was to benefit themselves in circumstances in which the benefit could only be at the expense of the Claimants, relying on what was said by the Court of Appeal in ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174 at [34]. The passage relied upon does not support the suggested principle, and the suggested principle is inconsistent with the essence of the tort which is that if lawful means are deployed a conspiracy can only be unlawful if it involves a predominant intention to injure the claimant. If the predominant intention is to benefit the conspirators, by definition the predominant intention cannot be to injure the claimant, even if such injury is the inevitable result and even if it is intended. The lawful means conspiracy does not surmount the merits threshold of raising a serious issue to be tried on the facts alleged by the Claimants in this case, which clearly involve an allegation that the alleged conspirators were motivated by a desire to benefit themselves without any animus against the Claimants.

Claims against Mr dos Santos in conspiracy and dishonest assistance

32. Mr Anderson QC accepted that there was a serious issue to be tried (and a good arguable case) that Mr dos Santos was in breach of the Public Probity law of Angola, but contended that the merits threshold was not met for the claims in conspiracy and dishonest assistance. He submitted that under Article 4 of the Rome II Convention the question was governed by Angolan Law; and that there was no evidence that Angolan law recognised such causes of action. The difficulty with this submission is that the evidence before me simply did not purport to address the question whether Angolan law recognised a liability based on facts which would in English law establish liability for unlawful means conspiracy or dishonest assistance constructive trust. Accordingly, even if the appropriate law is Angolan law, the Court proceeds on the evidential assumption that Angolan law does not differ from English law in the absence of evidence to the contrary. I therefore reject Mr Anderson's submission on this point.

FSDEA claims against QGIM (D3)

33. This argument is of no consequence to the current application because jurisdiction for these claims is governed by the Lugano Convention, which involves no merits threshold, and in any event if there were otherwise jurisdiction, they are governed by the arbitration clause in the IMA (and Mr McGrath confirmed that he was not seeking to maintain any aspect of the WFO under the jurisdiction conferred by s. 44 of the Arbitration Act 1996). Since any such claims are a matter for arbitrators to decide, I decline to express any views on their merits.

FSDEA claims against the Limited Partnerships and the General Partners

34. The argument in respect of these claims was that any loss had been suffered by the Limited Partners, not FSDEA, and that a claim by FSDEA fell foul of the principles

that a shareholder may not sue for reflective loss. Mr McGrath countered that the principles were not applicable to the facts of this case, in part at least because FSDEA's claim was in its capacity as the source of the funds and transferor to the Limited Partners, not merely as shareholder in the Limited Partners. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

The cross claims

35. Mr Edey's argument was that there is no evidence that any of the Limited Partnerships or General Partners said or did anything in relation to the project outside its own partnership, and that the Limited Partner of one partnership could not have been caused a loss by anything done by the General Partner or the Limited Partnership itself in another partnership. Mr McGrath's response was that if there was as alleged, a single conspiracy which the General Partners and Limited Partnerships joined, they became liable as conspirators for the losses suffered by any of the victims of the conspiracy, irrespective of their own acts of participation. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

Knowing receipt claims

36. Mr Edey's argument was that the only receipts which could found a knowing receipt constructive trust claim were for the Liquid Portfolio such fees as QGIM received from the US$2 billion Liquid Portfolio; and in respect of the Illiquid Portfolio, the only relevant receipts were by the General Partners of their US$1,000 per annum in fees, and by QGAIM of its fees under the management fees due under the Limited Partnership Agreement; and that there was no wider knowing receipt claim in respect of the US$3 billion because although the Limited Partnerships did receive the US$3 billion, they did not do so beneficially: they held the funds for the Limited Partners on the terms of the Limited Partnership Agreements. The contrary is plainly arguable and on this aspect the Claimants have established a serious issue to be tried.

Jurisdiction: the arbitration agreements

37. By the conclusion of the hearing it was common ground that insofar as there would otherwise be jurisdiction, the following claims must be stayed in favour of arbitration under the mandatory provisions of s. 9 Arbitration Act 1996:

    (1) All FSDEA's claims against QGIM (D3) are governed by the arbitration clause in the IMA, which provides for arbitration to take place in Portugal. QGIM commenced an arbitration by a Request dated 18 June 2018. It is common ground that those claims must be the subject matter of a mandatory stay under s. 9 of the Arbitration Act 1996 to the extent that there is otherwise jurisdiction over them. On my findings this catches the claims in conspiracy, dishonest assistance and knowing receipt, the others being claims in respect of which the Claimants have failed to establish jurisdiction under the Lugano Convention in

any event. I am inclined to think that the seat of the arbitration is Portugal, not England, but since this does not affect the outcome of anything I have to decide I prefer to express no concluded view.

(2) All FSDEA's claims against QGI Ltd, which are governed by the arbitration agreements in the ISAs which provide for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language.

(3) All the claims by the Limited Partners against their General Partners are governed by the arbitration agreement in the Limited Partnership deeds which provide for arbitration in Mauritius. The General Partners and Limited Partnerships commenced arbitrations against the respective Limited Partners in Mauritius on 8 May 2018. The Limited Partners have disputed whether the Partnerships are entitled to invoke the arbitration clause. In the light of my earlier conclusions, I do not need to resolve that question.

Jurisdiction: Forum conveniens

38. This is not a case where fragmentation can be avoided. The starting point is that there are arbitrations in Mauritius which involve the disputes between the Limited Partners and the General Partners in relation to the Illiquid Portfolio, to which the Limited Partnerships are arguably properly joined parties. There are also winding up proceedings commenced by the Limited Partners in Mauritius which will raise some of the issues which arise in these proceedings. There is no jurisdiction under the Lugano Convention over certain of the claims against QGIM (D3) and over the proprietary claim against QGAI (D6), who must be sued in Switzerland; and in any event, even were jurisdiction otherwise to be established, any claims by FSDEA against QGIM would have to be stayed in favour of arbitration in Portugal. It is FSDEA's case that the IMA (and therefore its arbitration clause) governs the Illiquid as well as the Liquid Portfolio. Accordingly, on the Claimants' case, all the tortious and contractual claims by FSDEA against QGIM will have to be dealt with in that arbitration. On any view, and even if the arbitration is confined to the issues in relation to the Liquid Portfolio, that will involve an examination of the circumstances in which the Quantum group came to be appointed, which raises many of the issues at the heart of the dispute in these proceedings.

39. It is against that background that the Claimants bear the burden of establishing that England is clearly and distinctly the appropriate forum: ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460.

40. There are weighty factors in favour of Angola as the appropriate forum:

(1) The claim is brought by the sovereign wealth fund of Angola and its special purpose subsidiaries. Of the two personal Defendants, Mr dos Santos is resident in Angola, and Mr Bastos, although resident in Dubai, is currently confined to Angola because his passport has been confiscated. These are the protagonists whose conduct is at the heart of the issues between the parties.

(2) The central ingredient in most of the causes of action against most defendants is the allegation that Mr dos Santos was in breach of the Public Probity Law in granting the contracts to the Quantum Defendants and Bastos-related entities.

This is the foundation for the claims in unlawful means conspiracy, dishonest assistance, knowing receipt and the proprietary claims. These allegations of breach are of what occurred in Angola and are clearly more suitably tried in Angola, not only because they are governed by Angolan law, but also because the Public Probity Law imposes duties expressed in terms of generality which take their content from their Angolan context. Article 3 provides: that "*Public agents should, in performance of their duties, be guided by the following principles: (a) principle of legality (b) principle of public probity (c) principle of competence (d) principle of respect for public property (e) principle of impartiality (f) principle of the pursuit of public interest….(j) principle of prudence (k) principle of loyalty to public institutions and entities and to the higher interests of the State.*" The subsequent articles develop these principles, again using language of some generality (e.g. "*the highest criteria for public professionalism*"). These duties are properly to be interpreted in accordance with the cultural standards and norms of Angolan public life at the time, which is clearly a matter on which the Angolan court is better equipped than the English Court.

(3) The projects of which complaint is made include major projects in Angola, including in particular the hotel project in Luanda and the Port of Caio project.

(4) The witnesses or potential witnesses likely to be of central importance, apart from Mr Bastos and Mr dos Santos, will be those involved in the appointment of Quantum and supervision in Angola of its activities, including Dr Manuel, Mr Gonçalves, Mr Fortunato and Mr Gago, who are to be found in Angola.

(5) Similarly, the predominance of the documentary evidence is likely to be found in Angola, and some will be in Portuguese.

41. There are also factors in favour of Mauritius. In particular the claims are in part governed by Mauritian law, and the evidence will have to be gathered and deployed in Mauritius for the purposes of the Mauritian arbitrations and the winding up proceedings.

(1) The Limited Partnership Agreements contain a Mauritian governing law term which is of very wide ambit, such that it will govern both contractual and non-contractual claims between the Limited Partners and the General Partners.

(2) The Limited Partnership Agreements contain Mauritian arbitration clauses and arbitrations have been commenced in Mauritius. The arbitrations will cover much of the ground which is in issue in these proceedings, although Mr dos Santos and Mr Bastos will not be parties.

(3) The winding up proceedings commenced by the Limited Partners in the Mauritian courts involve allegations covering almost exactly the same ground as the allegations in relation to the Illiquid Portfolio in the current proceedings. Such winding up proceedings were foreshadowed at the time of the without notice application and have subsequently been commenced.

(4) The Claim Form in these proceedings does not contain a claim by the Limited Partners against Mr dos Santos for breach of duty, but the Claimants' skeleton argument asserts that such a claim clearly exists for breach by Mr dos Santos of his duties under Mauritian law, and states that the Claimants will seek to amend the Claim Form to include such a claim by the Limited Partners, and ancillary claims for dishonest assistance in relation to such breaches.

42. Some factors also point towards Switzerland. QGIM, the Third Defendant and party to the IMA under which, on FSDEA's case, the entirety of the management took place, is a Swiss company. QGIM is based in and operating from Switzerland. Indeed this is the centre of gravity of all the Quantum group and its activity. The investment management took place from Quantum's offices in Switzerland.

43. Against this there is relatively little which points to England as an appropriate forum.

(1) None of the parties is resident or incorporated in England or carries on business here, other than Northern Trust whose stance is essentially neutral. At the heart of the case against all the Defendants is the personal relationship between an Angolan individual, Mr dos Santos, and a Swiss/Angolan individual, Mr Bastos; breach of Angolan duties owed by the Angolan individual; and Mr Bastos' alleged knowledge of or collusion in that breach (which is relied on as that of all the corporate Quantum Defendants).

(2) None of the relevant witnesses or documents are located in London. (save to the extent brought there for the purpose of these proceedings, and save possibly for a few Northern Trust documents). Much of the relevant evidence, both of witnesses and in documents will originate from Angola and Switzerland. Most of the evidence will have to be collected and deployed abroad: in Portugal in any arbitration with QGIM; and in Mauritius in relation to the partnership arbitrations and the winding up proceedings.

(3) The fact that the Liquid Portfolio and Limited Partnerships bank accounts were held at the London branch of Northern Trust provides only a slight connection with England for the purposes of determining the appropriate forum. The location of the accounts under the Master Custody Agreement was a matter of choice for FSDEA, not a matter of contractual agreement with Mr Bastos or the Quantum group. Under the IMA, FSDEA could have chosen to establish the custodian accounts at any bank anywhere, for example in New York. The funds were dollar denominated and the Liquid Portfolio was invested in a range of international securities in the usual way. The centre of gravity for the allegations in relation to investment of the Illiquid Portfolio is not in London, from where the funds were to be transferred to be invested in projects, but in the places where the events giving rise to the complaints arises: Switzerland for the decision to set up Mauritian limited partnerships and Angola or elsewhere in Africa in relation to investment in projects where a conflict of interest is complained of. The fact that a London branch of a US Bank was chosen by FSDEA as the place of custody is of no significance to the issues in the case. Nothing turns on the place at which the funds or securities were held.

(4) Some of the issues in the case are, at least arguably, governed by English law. Others, however, are not. Angolan law governs the breach of duty allegation by

FSDEA against Mr dos Santos which is at the heart of the complaint. Mauritian law governs the claim intended to be added by amendment by the Limited Partners against Mr dos Santos for breach of duties owed under Mauritian law. Mauritian law governs the Limited Partnership Agreements. The fact that English law governs the IMA is of no significance because there is no jurisdiction over the contractual claims against QGIM which will in any event have to be determined in arbitration in Portugal.

44. For these reasons I conclude that the Claimants have failed to establish that England is clearly or distinctly the appropriate forum. Accordingly, the Court should not exercise jurisdiction over any of the Defendants in relation to any of the causes of action, save those governed by the Lugano Convention (D3 and D6).

Conclusion on jurisdiction

45. The upshot of my conclusions is that there is only a small rump of causes of action in respect of which jurisdiction is established and which do not fall to be stayed for arbitration, namely some, but not all, of the claims against the Lugano Convention Defendants, QGIM (D3) and QGAI (D6). What remains are the claims against QGIM by the Limited Partners in unlawful means conspiracy, dishonest assistance and knowing receipt, (but not any of the claims by FSDEA against QGIM, for which jurisdiction under the Lugano Convention is not established and which are governed by the arbitration clause in the IMA); and the claims by the Limited Partners and FSDEA against QGAI (D6) in those causes of action.

46. The Defendants submitted that there should be a case management stay in respect of any claims which fell into this category. It was agreed at the hearing that arguments in respect of a case management stay should be deferred until after I had given judgment identifying which of the claims might be affected.

The WFO

47. There were essentially four grounds on which the Defendants sought to have the WFO set aside and not continued:

(1) There was no jurisdiction over the claims. FSDEA did not seek to support the relief as appropriate in aid of foreign proceedings. Nor was the application made under s. 44 Arbitration Act 1996. At one stage Mr McGrath did seek to invoke this latter jurisdiction and a s. 44 application was belatedly issued on 25 July 2018, the second day of the hearing. Mr Edey submitted that such an application was made far too late for it fairly to be addressed, correctly in my view, and it was not ultimately pursued by Mr McGrath.

(2) There is no good arguable case in respect of some of the causes of action, including, most relevantly for present purposes, the proprietary claim.

(3) There was a breach of the duty of full and frank disclosure.

(4) FSDEA has not established a sufficient risk of dissipation.

(5) In addition, the Defendants submitted that none of the arguable causes of action raised a good arguable case of a claim to $3 billion or any identified sum.

WFO: No Jurisdiction

48. I have held that the court has no jurisdiction over the claims save for a small rump of some of the claims against QGIM (D3) and QGAI (D6), in respect of which there is an as yet undetermined application for a case management stay. I shall reserve questions of whether this would be a sufficient ground to discharge the WFO or to refuse to continue it, if necessary, until after determination of the question whether there should be a case management stay.

WFO: No good arguable case

49. Although there is a distinction between the merits threshold of a serious issue to be tried, for the purposes of jurisdiction, and that of a good arguable case which is required for the purposes of a freezing order, the Defendants submitted that it made no difference on the facts of this case, and asked me to treat the causes of action as standing or falling together under both tests. Accordingly, my earlier conclusions on the question whether there is a serious issue to be tried in relation to the various impugned causes of action should be treated as conclusions to the same effect in relation to whether the Claimants have established a good arguable case for the purposes of the WFO, including the conclusion that I will assume, without deciding, that the merits threshold is reached in respect of the proprietary claim.

WFO: Non-Disclosure

50. The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in ***Brink's Mat Ltd v Elcombe*** [1998] 1WLR 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:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

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

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

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

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was 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.

> "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could

> properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp.1343H-1344A."

51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in ***Memory Corporation v Sidhu*** (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in ***Bank Mellat v Nikpour*** [1985] FSR 87, 92, Bingham J in ***Siporex Trade v Comdel Commodities*** [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in ***Marc Rich & Co Holding v Krasner*** (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to

disclosure of documents (see CPR PD31A and ***Hedrich v Standard Bank London Ltd*** [2008] EWCA Civ 905).

54. In this case I have concluded that there has been a breach of the duty to make a fair presentation of the case in eight material respects.

(1) The selection of Quantum

55. There was non-disclosure and an unfair presentation in respect of the Quantum selection process in a number of ways.

56. The Claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr dos Santos being chairman of that organisation (which subsequently became FSDEA), and at a time when Dr Manuel was Chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered into an Investment Management Agreement with Quantum on 13 July 2012, signed by Dr Manuel. Further, Quantum entities had been engaged as managers in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, each signed by Dr Manuel.

57. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments and two in respect of equity investments, in infrastructure and hotel projects respectively. None were by Mr Bastos. The presentation in relation to the Liquid Portfolio was by Gareth Fielding, QGIM's Chief Investment Officer since 2008, with 25 years' experience in asset management including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, Ulrich Otto, who had more than 10 years' experience of private equity investments involving assets which reached more than $2 billion in value, and sat on the supervisory board of a company with revenues of US$ 1 billion. It contained a detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by Mr Antoine Castro, Quantum's managing director of Real estate, with extensive prior experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages.

58. There was no attempt to put those presentations before the Judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA or other appointments, nor to address whether that selection was made otherwise than on merit. Instead Mr Morris' first affidavit and the skeleton argument before Phillips J gave the misleading impression that the selection had been entirely that of Mr dos Santos and made in 2013 when he was Chairman.

59. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of Mr Morris' first affidavit he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and

that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, and before any selection process; whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and December 2012 addendum were each signed not by Mr dos Santos but by Dr Manuel. The sub-paragraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for 6 months, amounting to $264 million. That would indeed have been breathtaking, to use the epithet applied to fees in the Claimants' skeleton argument, but was wrong: the fees were $44,000 monthly, giving a total of $264,000 for 6 months.

60. It was also misleading to characterise the process in the skeleton argument as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as "the extent of the selection process". Again, this ignores the selection process in 2012 which involved detailed presentations from Quantum. The false impression is reinforced by the assertion at para 31 of the E&Y report that no proposals were requested from any of the four potential managers, i.e. including Quantum, which implied that there had never been a formal proposal from Quantum.

61. Moreover, Mr dos Santos gave a fairly lengthy account of the selection process and the rationale for appointing Quantum in a letter of 27 September 2013 addressed to Jersey trustees who were then contemplated as being involved in the management of the fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not put in evidence before the Judge and its existence and contents were not referred to.

62. These were important matters. One of the central elements of the case against the Defendants was that it was Mr dos Santos as Chairman of FSDEA who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a significantly different complexion on the selection.

63. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However it seems likely that the existence of the prior appointment, the 2012 IMA other appointments, and the 2012 proposals were known to those at FSDEA with conduct of the case; and to Mr Gonçalves who was on the Board throughout the period, remains an adviser to FSDEA and who provided a witness statement subsequently; I say he was on the board throughout the relevant period because although in his own statement he describes himself as being on the board from October 2012, Mr Morris in his fifth affidavit says he was on the board from March 2012; and Mr Gonçalves refers to seeing one of the presentations in May 2012 at paragraph 26 of his subsequent witness statement; it seems likely that the circumstances of the 2012 appointment and presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013 and on the board from 2016, from whom Mr Morris did take instructions at the time of the without notice application; I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Gonçalves and gives

evidence about it. At the least, the circumstances of the 2012 presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

(2) Quantum's track record and suitability

64. Mr Morris described Quantum in his first affidavit as "an unknown and untested entity". In paragraph 14 of the skeleton Quantum was described as having a "limited track record" with a capitalisation of only 100,000CHF and contrasted with other candidates of the calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the Judge that:

(1) Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, in which Quantum had identified in its 2012 proposals the apparently well qualified staff with extensive relevant asset management experience who were employed by Quantum, and the independent board members apart from Mr Bastos who were of apparent eminence and experience.

(2) Quantum had had a capitalisation of CHF 1 million since 2007, as the detail in the E&Y Report accurately recorded.

(3) Quantum had managed assets for the Banco Nacional de Angola, the Angolan state bank, of $2.3 billion in liquid assets and a further $1billion in private equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at para 39 of his first affidavit by saying that "It appears from the documentation generated for the purposes of Project Rainbow…that Quantum Global at least at one point managed several hundred US$ (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA".

65. Again, these were important matters which were known to the Claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or absence of it, was at the heart of the allegations on which the Claimants' case is founded.

66. There was, additionally, an unfortunate mischaracterisation in relation to Mr. Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence; whereas, as was apparent from the material available to Mr Morris, the sanction was a suspended sentence ***of*** a fine, i.e. a fine payment of which was suspended and which in the event Mr Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended).

(3) Transparency and supervision

67. The appointment of Quantum, and its activities in carrying out the investment management, were transparent and regularly reported on to an audience within FSDEA beyond Mr dos Santos. The Claimants did not disclose or draw to the Judge's attention, as they should have done, the following.

68. The Board of FSDEA was by Presidential Decree overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA's policy and investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development, and the Governor of the National bank of Angola. Its role was not specifically addressed in the evidence or argument before Phillips J apart from an inaccurate reference in the E&Y report suggesting that the body never met, inaccurate because Mr Gonçalves' later evidence is that it met at least once. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example, it had detailed reports on the Illiquid Portfolio from Deloitte.

69. Moreover, FSDEA's accounts were audited on an annual basis by Deloitte.

70. Quantum also provided regular reports on the investments to FSDEA, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid Portfolio which contained the sort of detailed information one would expect from investment managers.

71. None of this was addressed in the Claimants' evidence or argument or drawn to the Judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable inquiries. Again, it was of importance to the case being advanced.

(4) The limited partnership model

72. Fourthly there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The Judge's attention was not drawn to the fact that the E&Y report described the structures used for the Illiquid Portfolio as based on a standard model and that "such models are commonly used in P[rivate] E[quity] and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

73. In argument before me, the thrust of the complaint changed to one that limited partnerships were only suitable vehicles for collective investment schemes, i.e. where there was more than one investor. But this was not the position taken by Deloitte in its audit reports which made no criticism of the structure, nor that of the Mauritian authorities in relation to 5 of the 7 Limited Partnerships. The Judge should have been told that both E&Y and Deloitte had not treated the structures used as inappropriate and

that they were a commonly used model. This was obviously important given the criticisms which were being made of the structure.

(5) Conflicts of interest

74. There was non-disclosure in relation to the allegation of conflicts of interest in the projects in the Illiquid Portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016 Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy, and expressly disclosing transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and conflicts dealt with in accordance with the policy. The disclosure included a hotel project in Luanda in which $157m had been invested which was the subject matter of particular criticism by Mr Morris in his first affidavit. The letter and waiver were signed not only by Mr dos Santos but also by Mr Fortunato, against whom no allegations of impropriety are made.

75. The 17 August 2016 letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris says that he and the team preparing the application were unaware of it because it was part of a set of over 750 documents which his firm held as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Mr Morris to have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the documents it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it all unless constraints of time or expense made this impossible. Neither applies in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum: if it was interrogated for that purpose it should have been fully interrogated. In any event Mr Fortunato was obviously aware of the letter, as a countersignatory, and reasonable inquiries would have extended to all the board members in place at the relevant times, including Mr Fortunato, who it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application.

(6) Fees

76. There was non-disclosure and an unfair presentation in respect of the fees charged on the Illiquid Portfolio. The fees as a whole (then put at $515 million) were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio, there was further criticism that the fees were charged on the full amount of the portfolio of $3 billion, when the amount invested in the projects was only a small part of that, some $2.2 billion remaining uninvested and held in liquid funds at the date of the WFO. There are several elements to what the Judge was not told, as he should have been.

    (1) As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as E&Y noted at paragraph 54 of

the report (to which the Judge's attention was not specifically drawn). In the course of the hearing before me Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the Claimants thereby lost visibility and control. But this was not how the matter was presented to Phillips J, which did not confine the criticism to this aspect. On the contrary it was suggested that at least one of the improper purposes of the drawdown into the partnership accounts was "to extract management fees by reference to the entirety of the US$3 billion, even though most of it has been sitting in cash (or cash like securities)": see the skeleton at para 16(5)(b), and see para 16(7) which made this criticism as a matter of "the structure by which the fees were calculated".

(2) Further, the Judge was not told what appears in paragraph 23 of Mr Gonçalves's subsequent witness statement, namely that he was aware of the reasons given at the time for the funds going into the partnership accounts, having been told by Mr dos Santos in 2013 that "the Fund was going to face increasing pressure in the economy and pressure to access its funds, so he wanted to use the funds now and put them into the private equity fund, so as not to give appetite to the state to come and use the funds." Mr Gonçalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

(3) Moreover, on the Illiquid Portfolio the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio (which accounted for over $100m of the fees on the figures then presented) and 2.5% plus 20% in relation to the hotel and other illiquid portfolios (which accounted for the balance). The Judge did not have specifically drawn to his attention paragraph 53 of the E&Y report which described 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to FSDEA in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again a matter not drawn to the Judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on ($263.4m out of $515.84m).

77. The level of fees charged was another of the central elements of the case against the Defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

(7) The stance of Northern Trust

78. There was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February 2018 and 4 March 2018, Northern Trust made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instructions from both FSDEA and Quantum and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, largely addressed to requests for disclosure, Northern Trust reiterated that there would be no change of position without prior notification. The first two letters were referred to in a narrative section of Mr Morris' Affidavit but were not identified in the section on risk of dissipation, were not

referred to in the skeleton argument and were not drawn to the judge's attention. The latter was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but was referred to at paragraph 190 of Mr Morris' first affidavit and in the Claimants' skeleton at 109(3) in sections addressing the risk of dissipation. In each case the letter was referred to by treating Northern Trust's statement that it would give prior notice as no more than a then current intention which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. This was to mischaracterise the correspondence as a whole, which suggested that Northern Trust were caught between conflicting claims and would not take steps without the agreement of both parties. Had the Judge been shown the correspondence, or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the Claimants being given sufficient advance notification to afford an opportunity to come before the Court again in those changed circumstances if necessary. That is my view, with the result that in respect of this aspect of non-disclosure, the Claimants have not made out a case of risk of dissipation in respect of over two thirds of the amount covered by the Freezing Order.

79. This last paragraph reflects what I said on this issue when giving judgment on the non-disclosure points at the conclusion of the hearing. Since then, on 9 August 2018 Mr Morris wrote to the court enclosing a seventh affidavit in which he explains that there were without prejudice communications with Northern Trust in March 2018. He had not consulted his notes when making his first affidavit, but had gone back to them in the light of the non-disclosure arguments at the hearing before me, and was now able to tell the court, having secured a limited waiver of privilege for this purpose, that in those discussions Northern Trust had "made observations with regard to the prospect, at or around the time of preparation of [Mr Morris' first affidavit] of [Northern Trust] making a stakeholder application under Part 86 of the Civil Procedure Rules" (which it is now known was an application which was in fact prepared and about to be issued at the time of the WFO, which overtook it). As Mr Morris fairly accepts, this confirms that what he said about Northern Trust's stance in paragraph 190 misled the Court as to the level of risk that Northern Trust might pay out from the Limited Partnership accounts without notice. It is regrettable, to say the least, that this matter was only drawn to the court's attention after the hearing and after I had announced my decision in relation to non-disclosure.

(8) Other non-disclosures

80. The Defendants advanced a number of arguments that there had been non-disclosure in other more minor respects. None are of sufficient significance to warrant separate consideration, save one. In the skeleton argument put before Phillips J on the without notice application, it was said that no proprietary injunction was sought against Mr dos Santos or Mr Bastos. In fact such an order was sought in paragraph 5(5) of the draft order put before the Judge, and such an order was made by him. Mr McGrath has apologised for this mistake (the mistake being in the skeleton, not in the order sought), and submitted that because the Judge had clearly read the order with care he was not misled and appreciated that such an order was in fact being sought against Mr dos Santos and Mr Bastos. Had there been no room for argument that a proprietary order was justified against Mr dos Santos and Mr Bastos personally this error might have assumed less significance. However there clearly was room for argument on the point,

not merely because there was a question whether there was a serious issue to be tried/good arguable case for a proprietary claim, but also because there was and is no evidence of receipt of any of the money or its traceable proceeds by Mr dos Santos. The vice of the mistake lay in these issues being ignored in the written and oral presentation to the Judge. This is a further significant failure to make a fair presentation of the application.

The consequences of the non-disclosure

81. I was referred to a number of authorities which contain summaries of the factors relevant to determining the consequences of material non-disclosure, including ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [61] to [64] (Flaux J); ***In re OJSC ANK Yugraneft; Millhouse Capital UK Ltd v Sibir Energy Plc*** [2008] EWHC 2614 (Ch) at [102] to [106] (Christopher Clarke J); and ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [68] to [77] (Mann J); and ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) (Males J).

82. Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In ***Banca Turco Romana v Cortuk*** [2018] EWHC 662 (Comm), I expressed it in this way:

> "….It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

83. In this case the breaches taken cumulatively are serious and substantial. They do not relate to a few, merely peripheral, matters, but to numerous matters at the heart of the Claimants' case. The Court was being asked to infer a dishonest conspiracy by which Mr dos Santos sought improperly to benefit his friend and associate Mr Bastos, and a consequent risk of dissipation, from four central allegations, namely (1) that Mr dos Santos was solely responsible for appointing Quantum without any proper selection process; (2) that Quantum was not properly qualified for the task; (3) the extraordinarily high and unjustified level of fees charged; and (4) the funds being used to benefit entities owned by or associated with Mr Bastos involving an undisclosed and

inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the Claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the Claimants to say that the subsequent evidence put before the court to deal with them raises disputes which are sufficient to surmount the merits hurdle of a good arguable case. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood. But the unfair presentation in this case in the respects I have identified goes far beyond the odd accidental slip, and goes to the central elements of the case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds. The matter had obviously been under consideration for many months, at least since the E&Y Report in December 2017 and Mr dos Santos' dismissal in January 2018. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use a large team to make the necessary inquiries and to consider all the documents available. Given the size of the freezing order sought, and the allegations of dishonesty being made, it was incumbent on the Claimants and their legal advisers to make the fullest inquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris emphasised in his first affidavit the limits on the inquiries which had been made by his firm, that does not excuse a failure to make the necessary inquiries or the presentation of incomplete material in an unfairly one-sided way.

84. The Claimants' legal team were at pains to make clear on the without notice application that they were aware of the duty of full and frank disclosure and were purporting to fulfil it. I do not find that there was any deliberate breach on the part of the Claimants' legal team. It is less clear whether that is so of the personnel at FSDEA itself. Some, at least, of the material would have been readily available to anyone in a senior position and the necessity to disclose it obvious to anyone aware of the duty of disclosure. Because privilege attaches to communications between Norton Rose Fulbright and their clients, it is impossible to identify whether any individual was aware of the duty and deliberately failed to comply with it. What can be said, however, is that the failures were serious and should not have occurred had the duty been properly understood and complied with by the Claimants themselves. There was therefore a high degree of culpability in the failures, even though I do not find that anyone deliberately set out to abuse the court's process.

85. This is not a case in which there are any strong reasons for departing from the usual sanction for serious and culpable non-disclosure. I have concluded that for the reasons given below, the Claimants have not established by solid evidence that there is a sufficient risk of dissipation to justify a freezing order, or that the balance of convenience would justify a proprietary injunction, so that there is in fact no prejudice to the Claimants in discharging the injunction and refusing to grant a fresh one as a result of the non-disclosure. I should make clear, however, that I would reach the same conclusion even if satisfied of a risk of dissipation, as was implicit in my decision announced at the conclusion of the hearing. The breaches of duty are sufficiently serious and culpable to warrant discharging the WFO and not granting fresh relief, irrespective of the other grounds of challenge.

WFO: No risk of dissipation

86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; ***Holyoake v Candy*** [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and ***Petroceltic Resources v Archer*** [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

(1) 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.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) 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 are likely to 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.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Risk of dissipation: Mr dos Santos

87. There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence. There was some suggestion in Mr Morris' evidence that his asset disclosure pursuant to the WFO was incomplete so as to support such an inference, but his solicitor's letter of 10 July 2018 adequately addresses the points made and leaves no evidence on which the court could conclude that his asset disclosure is incomplete or inadequate.

Risk of dissipation: Mr Bastos and the Quantum defendants

88. In my view the same is true of the different circumstances of Mr Bastos and the Quantum Defendants. Again, the accepted good arguable case of dishonesty does not support an inference of a sufficient risk of dissipation: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. The particular facts of Mr Bastos' criminal conviction many years ago, for which he ultimately was fined CHF4,500, do not support the inference of a current risk of dissipation. There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. There is no evidence to suggest that the fact or threat of either the claim itself, or the freezing order, has caused or would cause any of them to act in a way which differed from their previous practice so as to make any adverse effect on the claimants' ability to enforce a judgment something which could properly be characterised as "unjustified". This applies with equal force to the Mauritian Limited Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations; and that the drawing down of the full committed amounts into the accounts in the names of the Limited Partnerships so as to put them beyond the control of FSDEA was for a legitimate political objective explained at the time by Mr dos Santos to Mr Gonçalves (see above). The Liquid Portfolio and the majority of the Illiquid Portfolio are secured without the need for a freezing order. There is no evidential basis for suggesting that Mr Bastos or the relevant Quantum Defendants intend to deal with the monies invested in the projects or the projects themselves otherwise than by way of promotion of the success of those projects. There is no

suggestion that Mr Bastos or the Quantum Defendants have taken any sums other than those to which there is a contractual entitlement; nor that they have dealt with them otherwise than in accordance with those contractual arrangements. The complaint about the execution of those contractual arrangements does not support a risk of dissipation. As the Claimants' skeleton argument itself put it, this is not a routine case of "hands in the till" type fraud.

89. Although this was not put in the forefront of the argument on this point, complaint was also made about the history and nature of the asset disclosure by Mr Bastos and the Quantum Defendants pursuant to the WFO; it was said that the failure to make proper disclosure was a continuing effort to hide assets in order to protect them from a judgment. Whilst the dilatory nature of that disclosure is properly the subject of criticism, full purported compliance has taken place, and there is a hotly contested issue whether there has been any failure to give a full and accurate account of the defendants' assets. It is not clear from the evidence ultimately put before me on the point that there has been any failure to attempt full compliance in a way which would provide any support for a finding of a risk of dissipation.

Proprietary injunction: balance of convenience

90. For similar reasons the balance of convenience would not lie in favour of granting a proprietary injunction. There is no evidence to suggest that Mr dos Santos has, or has ever had, any sums to which a proprietary claim could attach. So far as Mr Bastos and the Quantum Defendants are concerned, I have said that I am prepared to assume, without deciding, that the Claimants have established a serious issue to be tried, but the contrary is plainly arguable and a proprietary claim may well not be capable of being established. There is no real evidential basis for concluding that the funds in the Illiquid Portfolio which have been invested in projects have not been well invested, or that in the absence of an injunction they would not continue to be managed so as to promote their profitability. The adverse effects of the proprietary order on Mr Bastos himself appear to have been serious: he has been unable to say with certainty that any of his assets can be divorced from those received ultimately from FSDEA because his modus operandi has always been to take income through his corporate vehicles from the Quantum group as dividends so that funds have inevitably become mixed. The effect of the proprietary injunction is therefore effectively to prevent Mr Bastos having access to any funds other than the permitted living allowance.

WFO: No justification for US$ 3 billion or any amount

91. Mr Edey submitted, correctly in my view, that the quantum of any loss suffered by FSDEA could not be put at US$3 billion or anything like it. Leaving aside the payment of fees, the investment of those funds was for the benefit of the Claimants who retain their equitable interest in the assets, as is and has always been common ground. In fact, over $2.2 billion remains uninvested in accounts at Northern Trust which are sufficiently secured for the time being. Accordingly, any present quantification of the loss is limited to (1) the fees taken by the Quantum Defendants and other Bastos related companies and (2) such loss as could be established by reference to the value of the projects in which investments have been made. In relation to the fees there is an argument that the amount of loss is not the full amount of the fees but only the amount by which they exceeded what would have been charged by another investment manager or service provider in any event. I have already dealt under the heading of non-

disclosure with the failure fairly to address the position of Northern Trust, which itself meant that a freezing order could not be justified in the sum of US$3 billion or anything like it. In the light of my other conclusions, it is not necessary for me to determine what, if anything, had been established as a sufficiently arguable quantum of loss for the purposes of identifying the proper amount of any freezing order or proprietary injuntion.

Conclusion

92. The WFO must be set aside and no fresh freezing order will be granted. I will hear the parties on the case management stay issues which are outstanding and the form of the order.

Neutral Citation Number: [2018] EWHC 2199 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Claimants

(1) FUNDO SOBERANO DE ANGOLA
(2) FSDEA HOTEL INVESTMENT LIMITED
(3) FSDEA AFRICA AGRICULTURE (LP) LIMITED
(4) FSDEA AFRICA INVESTMENT (LP) LIMITED
(5) FSDEA AFRICA HEALTHCARE (LP) LIMITED
(6) FSDEA AFRICA MEZZANINE (LP) LIMITED
(7) FSDEA AFRICAN MINING (LP) LIMITED
(8) FSDEA AFRICA TIMBER (LP) LIMITED

- and -

Defendants

(1) JOSÉ FILOMENO DOS SANTOS
(2) JEAN-CLAUDE BASTOS DE MORAIS
(3) QUANTUM GLOBAL INVESTMENT MANAGEMENT AG
(4) QG INVESTMENTS AFRICA MANAGEMENT LIMITED
(5) QG INVESTMENTS LIMITED
(6) QUANTUM GLOBAL ALTERNATIVE INVESTMENTS AG
(7) INFRASTRUCTURE AFRICA (GP) LTD
(8) HOTEL AFRICA (GP) LTD
(9) AGRICULTURE AFRICA (GP) LTD
(10) HEALTHCARE AFRICA (GP) LTD
(11) MEZZANINE AFRICA (GP) LTD
(12) MINING AFRICA (GP) LTD
(13) TIMBER AFRICA (GP) LTD
(14) QG AFRICAN INFRASTRUCTURE 1 LP
(15) QG AFRICA HOTEL LP
(16) QG AFRICA AGRICULTURE LP
(17) QG AFRICA HEALTHCARE LP

(18) QG AFRICA MEZZANINE LP
(19) QG AFRICA MINING LP
(20) QG AFRICA TIMBER LP
(21) THE NORTHERN TRUST COMPANY

- -
- -

Paul McGrath QC, Nik Yeo, Alexander Milner, Samuel Ritchie and Joseph Farmer (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **First Defendant**
Stephen Auld QC and Alexander Brown (instructed by **Grosvenor Law LLP**) for the **Second Defendant**
Philip Edey QC, Andrew Fulton and Sam Goodman (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third to Twentieth Defendants**

Hearing dates: 24-27 and 30 July 2018
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimants in this action are the sovereign wealth fund of the Republic of Angola ("FSDEA") and seven of its subsidiaries. On 27 April 2018 Phillips J granted a worldwide freezing order and proprietary injunction ("the WFO") against the First to Twentieth Defendants restraining them from disposing of or dealing with assets up to the value of US$3 billion.

2. At the adjourned return date hearing before me, the Claimants sought an order that the WFO, as amended, be continued until trial or further order. The Defendants sought to set aside the WFO on a number of grounds, including material non-disclosure, and raised various jurisdiction challenges. At the conclusion of the hearing I announced my decision that the WFO should be discharged for non-disclosure, and no fresh order granted, and gave reasons. I reserved judgment in relation to all the issues which I did not address. This is my full judgment, including amplified reasons in relation to non-disclosure.

3. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between the First Defendant, Mr dos Santos, the former Chairman of FSDEA, and his friend and business partner, the Second Defendant, Mr Bastos, who is the 95% beneficial owner of the Quantum group of companies which include the Third to Twentieth Defendants. It is the Claimants' case that, pursuant to this conspiracy, Mr dos Santos placed some US$5 billion at the disposal of the Quantum group to manage and invest on FSDEA's behalf, when the Quantum group manifestly lacked the appropriate or any qualifications and experience for such a mandate; that in the event, most of the US$5 billion has not been invested at all and has simply been used by the Quantum group to extract what were described as an extraordinary levels of fees (amounting to some US$406 million); that of the limited proportion which has been invested, the investments have not been made in the interests of the Claimants but have mostly been channelled into other projects belonging to Mr Bastos; and that in addition, as part of the same conspiracy, Mr dos Santos committed FSDEA to pay around US$153 million to the Quantum and other companies controlled by Mr Bastos, under contracts for various purported services, which contracts, if genuine at all, were manifestly uncommercial and were intended mainly to divert money from FSDEA into the pockets of Mr Bastos without FSDEA receiving anything of remotely commensurate value in return. The Defendants' case is that they are the victims of political change in Angola and a desire on the part of those now in power to get their hands on money which the previous regime sensibly and appropriately invested on a long-term basis for the people of Angola; and that the allegations are a spurious and flawed attempt to achieve this political objective.

Narrative

4. Mr dos Santos' father was the President of Angola from 1979 until 26 September 2017, when he was replaced by President Lourenço, who was elected on 23 August 2017 following President dos Santos' decision to step down.

5. FSDEA was established by a Decree of President dos Santos of 9 March 2011. It was then called the Petroleum Fund. It was renamed FSDEA by a Decree of 19 June 2013.

By a further Presidential Decree of 28 June 2013 FSDEA was allocated a capital endowment of US$5 billion for investment. Its Chairman from 2012 to May 2013 was Dr Armando Manuel, who had been the Economic Adviser to President dos Santos. In 2012 its other directors were Mr dos Santos and Mr Gonçalves. In May 2013 Dr Manuel became the Minister of Finance of Angola, and shortly after FSDEA was renamed in June 2013, Mr dos Santos was appointed Chairman. Mr Fortunato was at that time appointed a director. Mr dos Santos remained Chairman until his removal in January 2018. His fellow directors were Mr Gonçalves and Mr Fortunato until the autumn of 2016, when Mr Gago replaced Mr Fortunato. Mr Gago had before that acted as Director of the Office of the Chairman of the Board of Directors from 2013 until 2015. He remains a director of FSDEA. Mr Gonçalves remained a director of FSDEA until January 2018, since when he has acted as a consultant to it. There is a dispute as to the degree of involvement that the other directors had in the running of the fund.

6. On 29 November 2013, Mr dos Santos on behalf of the FSDEA signed an Investment Management Agreement ("the IMA") with the Third Defendant ("QGIM"), acting by Mr Bastos, whereby QGIM was appointed to act as investment manager for FSDEA *"with respect to such monies and properties as are designated to it from time to time"*. QGIM is part of the Quantum group of companies which are 95% owned and controlled by Mr Bastos. Mr Bastos, who has dual Swiss and Angolan citizenship, is a long-standing business associate of Mr dos Santos. They were jointly involved in the founding and management of an Angolan Bank, Banco Kwanza Invest, which was launched in 2008, and they jointly owned several other companies in Angola. Mr Bastos' evidence is that Mr dos Santos relinquished his shareholdings in these companies prior to the IMA but that is not accepted by FSDEA.

7. The IMA is governed by English law and contains an arbitration clause providing for disputes to be resolved by arbitration in accordance with UNCITRAL Rules in Lisbon and in the Portuguese language. There is a dispute as to whether the seat of the arbitration is England (as FSDEA contends) or Portugal (as QGIM contends). The fee payable under the IMA was a base fee of 1% of the average value of the fund plus a performance fee of 20% above a hurdle rate equivalent to the Benchmark Bank of America/Merrill Lynch 3-month Treasury Bill Index.

8. The IMA provided for there to be a custodian of the assets other than QGIM. On the same day as the IMA, 29 November 2013, FSDEA entered into a Master Custody Agreement with the Twenty First Defendant ("Northern Trust"), a US bank established under the laws of Illinois with a London branch in Canary Wharf. It provided for cash and security accounts to be held in FSDEA's name. It did not in terms require the accounts to be at the London branch, although references to the London branch address and UK regulatory standards suggests that that was what was envisaged, and the accounts were in fact established at the London branch.

9. The US$5 billion was to be invested in two conceptually different portfolios. US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities etc) which were to be sufficiently liquid to be realisable within no more than 3 months ("the Liquid Portfolio"). The balance of US$3 billion was to be invested as private equity capital in longer term projects in sectors such as infrastructure, hotels, timber, agriculture, mining and healthcare, especially in Angola and elsewhere in Africa ("the Illiquid Portfolio"). It is FSDEA's case that the IMA appointed QGIM as investment manager in respect of the entire $5 billion, both the Liquid and Illiquid Portfolios. It is Mr Bastos' and the

Quantum group's case that the IMA was confined to the Liquid Portfolio, and that the Illiquid Portfolio was governed by separate contractual arrangements. These involved the establishment of seven limited partnerships governed by Mauritian law ("the Limited Partnership Agreements"), who are the Fourteenth to Twentieth Defendants ("the Limited Partnerships"). Each had a Mauritian limited partner, a subsidiary of FSDEA, who are the Second to Eighth Claimants, ("the Limited Partners") and a Mauritian General Partner owned and controlled by the Quantum group who are the Seventh to Thirteenth Defendants ("the General Partners").

10. The Limited Partnerships were established pursuant to seven agreements signed on FSDEA's side by Mr dos Santos in April 2014. Five Incorporation Service Agreements ("the ISAs") were made with the Fifth Defendant ("QGI Ltd"), to establish five funds to invest in various sectors in Africa. The ISAs were governed by Angolan law and provided for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language. Two Consultancy Agreements ("the CAs") were made with the Sixth Defendant ("QGAI") in relation to the establishment of two further funds to invest in the hotel sector and in infrastructure projects. Each of the Limited Partnerships had a management agreement with the Fourth Defendant ("QGIAM") under which the latter was entitled to an annual management fee of 2% (infrastructure) or 2.5% (other funds) plus in each case 20% above a rate of return of 8%.

11. The US$5 billion was paid to Northern Trust over a period concluding in December 2014. The Liquid Portfolio was held in accounts in FSDEA's name. QGIM was the asset manager which exercised the investment decision making and discretion from its base in Switzerland; Northern Trust's role was executory and as custodian of the investments. FSDEA had visibility over the Liquid Portfolio held in accounts in its name, and received regular investment reports in relation to the portfolio from QGIM.

12. The US$3 billion in the Illiquid Portfolio was transferred to accounts in the name of the Limited Partnerships at Northern Trust. Part of FSDEA's complaint is that it and the Limited Partners had no visibility or control over the monies in those accounts, which were under the control of the General Partners exercising their powers of management in relation to the Limited Partnerships. Only part of this had been invested by the time of the freezing order. Approximately US$2.27 billion remained at Northern Trust in liquid form at the time of the WFO, and has been secured. The balance, apart from deduction of fees, was paid into a number of investment projects of the kind envisaged, including projects controlled by Mr Bastos. For example, it is said that the hotel partnership (the Eighth and Fifteenth Defendants) invested US$157 million in a hotel project in Angola in which Mr Bastos had an interest (although this figure is difficult to reconcile with Table 4 of the EY Report – defined in paragraph 14 below); and the infrastructure partnership (the Seventh and Fourteenth Defendants) invested US$180 million into the Port of Caio in Angola, which Mr Bastos had a concession to develop. These are said to be stark examples of the conflicts inherent in the appointment of Quantum to manage FSDEA's funds with Mr Bastos able to dictate the terms of major transactions from both sides of the table.

13. In addition to the IMA and the agreements relating to the Mauritius funds, Mr dos Santos additionally committed FSDEA to some 49 other contracts with companies connected to Mr Bastos for the provision of various kinds of services (the "Service Contracts"). There is a dispute about whether services were provided to the value of what was charged by the relevant counterparties; FSDEA's case is that they were not

and that the Service Contracts were another element of the conspiracy whereby Mr dos Santos permitted Mr Bastos to extract large fees from the Claimants without any proper justification. These counterparties are not Defendants and no claim is brought against them in these proceedings. The Service Contracts have not been avoided or rescinded.

14. In November 2017 details of the arrangements between the Claimants and Quantum were publicly leaked and discussed in the so-called "Paradise Papers". The Angolan government commissioned a report from Ernst & Young ("E&Y") regarding the operation of the FSDEA, which was produced on 15 December 2017 ("the E&Y Report"). Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018. Notice of termination of the IMA was given on 16 February 2018 and took effect two months later, on 17 April 2018. The Liquid Portfolio was put into the hands of a replacement investment manager. The Claimants brought these proceedings and applied for the WFO on 27 April 2018. In the light of some of the asset disclosure given by the Defendants pursuant to the WFO, E&Y updated their report on 9 July 2018 ("the Updated E&Y Report").

15. There is no evidence that Mr dos Santos benefited at all from any of the arrangements complained of. Following the termination of the IMA, the Liquid Portfolio has remained within FSDEA's control. Although FSDEA's case is that Quantum was manifestly ill qualified to undertake the investment management role of the Liquid Portfolio, there is not in fact any particularised allegation that QGIM acted negligently in the choice of investments or otherwise in the handling of the Liquid Portfolio during its time as investment manager. The complaint is not about the performance of the Liquid Portfolio investment, but about the level of fees set contractually under the IMA at 1% plus 20% above the benchmark hurdle, which EY describe in their report as "high given the size of the portfolio", a relatively slight basis for an allegation of fraud. The total of such fees over the life of the IMA was US$81.83m according to the Updated E&Y Report.

16. Accordingly the argument in respect of the WFO has focussed on the Illiquid Portfolio. The amount of the Illiquid Portfolio was US$3 billion, but at the time of the WFO some US$2.27 billion remained in the accounts in the names of the Limited Partnerships at Northern Trust in London. By letters in March 2018 Northern Trust and their solicitors had made clear to the Claimants that they would not deal with those funds without the written instructions of both sides, and would not change their position without giving the Claimants prior notification. In my view those assurances removed any risk of dissipation in justifying an order freezing that sum, which was more than two thirds of the amount frozen by the WFO. This was the subject matter of material non-disclosure on the without notice application to Phillips J, to which I return below. The Updated E&Y Report suggests that a total of US$454m was invested in projects in the seven Mauritian funds, with the balance presumably being accounted for by fees.

17. The fees alleged to have been paid to Quantum or to other Bastos related companies are set out in the Updated E&Y Report as follows (with figures in brackets being those identified in the E&Y Report which formed the basis for the without notice WFO application, where they differ):

    (1) QGIM was paid US$81.83m (US$82.965m per Table 1 or $92.48m per Table 5), under the IMA for managing the Liquid Portfolio.

(2) Under the five ISAs QGI Ltd was paid US$26.39m in respect of the establishment of the Illiquid Portfolio funds.

(3) A further sum of US$10m was due to QGAI for the setting up of the infrastructure and hotel funds under the two CAs, but it does not appear from the E&Y Reports that such sum was paid, although Mr Morris deposes that it was at paragraph 62 of his first affidavit, apparently on the basis that there were two earlier invoices from December 2012 from Quantum Global Wealth Management to the Petroleum Fund requesting payment of $5 million each; he does not exhibit any evidence of payment.

(4) Under the management agreements for the Illiquid Portfolio, QGIAM received by way of annual management fees a total of US$298.13m (US$263m).

(5) Under the Service Contracts the following companies received the following fees totalling $153m.

Stampa QG:	US$58.06m
Tome International AG:	US$40.04m
Djembe Communications:	US$9.91m (US$ 0)
African Innovation Foundation:	US$36.29m
Uniqua Consulting GmbH:	US$8.7m

18. The total fees taken by Bastos related entities are therefore put at US$559.35m (US$515m). It is worth emphasising that all these fees were in accordance with the contracts signed between the parties, and none of the contracts had been rescinded or avoided at the date of the WFO. This is not a case in which any of the Defendants are accused of extracting sums to which there was no contractual entitlement. The thrust of the complaint is the creation by Mr dos Santos of that contractual entitlement.

Jurisdiction

19. The following causes of action are asserted against the following Defendants:

(1) against Mr dos Santos:

(a) breach of duty under the Public Probity Law of Angola;

(b) conspiracy to injure by lawful and unlawful means;

(c) procuring breach of contract by QGIM (see below for the breaches of contract alleged against QGIM);

(d) constructive trust: dishonest assistance of breaches of fiduciary duty by QGIM (see below for the breaches of fiduciary duty alleged against QGIM);

(2) against Mr Bastos:

(a) conspiracy to injure by lawful and unlawful means;

(b) procuring breach of contract by QGIM;

(c) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM (I take this to be the intended reference in para 12(e)(ii) of the Claim Form which in fact refers to "QGIM Ltd").

(d) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds;

(3) against QGIM:

(a) breach of clause 4 of the IMA in failing to carry out the services under the IMA with due skill and care and/or in good faith;

(b) breach of clause 14 of the IMA in failing to disclose conflicts of interest and/or procuring contracts which involved a conflict of interest, including the Luanda Hotel and Port of Caio projects;

(c) breach of the IMA in failing to invest the Liquid Portfolio "properly or at all"; although this is a pleaded head of claim, it is not supported by any evidence on these applications of any particularised negligent management or investment of the Liquid Portfolio;

(d) breaches of fiduciary duty in the respects alleged to be breaches of contract under (a), (b) and (c) above;

(e) conspiracy to injure by lawful and unlawful means;

(f) constructive trust: dishonest assistance of breaches of fiduciary duty by Mr dos Santos (in breaching the Public Probity Law);

(g) constructive trust: unconscionable receipt of any part of the US$5 billion its traceable proceeds;

(4) Against QGIAM Ltd (D4), QGI Ltd (D5), QGAI (D6) the General Partners (D7-13) and the Limited Partnerships (D14-20):

(a) conspiracy to injure by lawful and unlawful means;

(b) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM

(c) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds.

20. In addition, there is a proprietary claim against each Defendant in respect of any part of the US$5 billion received by them or its traceable proceeds. The basis put forward for the proprietary claim was initially the claim based in constructive trust. In the course of argument, Mr McGrath sought to support it also on the basis that FSDEA at all material times retained a proprietary interest in the funds.

21. Mr dos Santos is resident and domiciled in Angola. There is a dispute whether Mr Bastos is domiciled in Switzerland or Dubai. QGIM (D3) and QGAI (D6) are incorporated in Switzerland. QGIAM (D4) is incorporated in Mauritius and is the manager of the Limited Partnerships, which are domiciled in Mauritius as are the General Partners. QGI Ltd (D5) is a company incorporated in the British Virgin Islands.

22. The challenges to jurisdiction involve the following submissions on behalf of the Defendants:

    (1) The claims against the Swiss companies, QGIM (D3) and QGAI (D6), are governed by the Lugano Convention, and those companies must be sued at their place of domicile which is Switzerland. The Claimants assert that under the Lugano Convention these claims may be brought in England. The Claimants also contend that the claims against Mr Bastos may be brought in England pursuant to the Lugano Convention on the grounds that he is domiciled in Switzerland. Mr Bastos disputes that he is domiciled in Switzerland and that jurisdiction over him is governed by the Lugano Convention.

    (2) Certain of the claims do not pass the merits threshold of a serious issue to be tried.

    (3) England is not the appropriate forum for the claims against the non-Lugano Defendants.

    (4) Insofar as any claims would otherwise remain to be tried in England, certain of the claims are within arbitration agreements and are subject to a mandatory stay under s. 9 of the Arbitration Act 1996; and there should be a case management stay of any remaining claims pending the determination of proceedings in arbitration and/or elsewhere abroad.

Jurisdiction: the Lugano Defendants (QGIM and QGAI and query Mr Bastos)

The claims against Mr Bastos

23. The Claimants submitted that jurisdiction could be established under the Lugano Convention against Mr Bastos because he was domiciled in Switzerland. The evidence of his residence is exiguous and there is no Swiss law evidence on domicile. The weight of the evidence is that he left Switzerland to go and live in Dubai in May 2017 and has resided in Dubai since then. Accordingly the Claimants have failed to establish that at the relevant time he was domiciled in Switzerland, and jurisdiction over him falls to be established under the common law, not the Lugano Convention.

FSDEA's breach of contract claim against QGIM (D3)

24. FSDEA invokes Article 5(1) of the Lugano Convention to establish jurisdiction for this claim, which provides that contractual claims may be brought in respect of a contract for services at the place where the services were or should have been provided. The question therefore is where the services were, and were to be, provided by QGIM under the IMA. FSDEA contends that this is London where the Northern Trust accounts were held. I am unable to accept this submission. The services to be provided by QGIM under the IMA were investment management services which involved determining how the Liquid Portfolio was to be invested in various short-term investments. That management function was to be, and was, carried out in Switzerland where Quantum had its place of business. That aspect of its business was regulated and supervised by the Swiss financial authorities, as the preamble to the IMA recorded at paragraph C. QGIM had no custody of the assets, in London or elsewhere. The IMA did not identify any place for the receipt of those instructions, which only became London as a result of FSDEA's choice of custodianship, which might originally have been elsewhere than London and could at any time have been changed to a different location. On any view, therefore, it cannot be said that the IMA provided for any part of the services to be performed in London. It is true that QGIM's investment management in Switzerland in the event resulted in instructions from Switzerland to London to the custodian of the funds in London, but that does not make London the place of performance of the services to be provided under the IMA. Those services do not consist solely or even primarily of the investment instructions, but rather the investment management activity in determining what investments to make, which took place in Switzerland, as envisaged by the IMA.

FSDEA's breach of fiduciary duty claim against QGIM (D3)

25. FSDEA seeks to found jurisdiction under Article 5(3) of the Lugano Convention, which provides that a party may be sued in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred, which is said to be in London where the payments out of the Northern Trust accounts occurred. However I accept Mr Edey QC's submission that the breach of fiduciary duty claim is properly characterised as being in a "matter relating to contract" so that allocation of jurisdiction falls to be determined in accordance with Article 5(1), not Article 5(3); and that accordingly Switzerland is the allocated jurisdiction for the same reason as for the contractual claims under the IMA. This is because the equitable claim for breach of fiduciary duties depends upon the existence of the IMA: the duties are said to arise by virtue of the relationship created by the IMA. The Claim Form describes them as "arising by virtue of the IMA and/or the authority thereby vested in QGIM to…handle and otherwise deal with assets belonging to the FSDEA". The position is accurately described in Briggs on Civil Jurisdiction and Judgments 6th Edn at paragraph 2.196:

> "The answer is to be found by deciding whether the obligation which lies at the heart of the claim is rooted in an agreement between the parties, or on an allegation of wrongful behaviour which has caused loss to another. If the obligation arises from the unconscionable disregard of the duties of an agreement, such as those imposed upon a person who has with the agreement of the other party placed himself in a fiduciary relationship with that other, such as an agent to his principal, the matter should be seen as one relating to a contract and the fiduciary aspect of the claim as going only to define or augment the remedies available to the claimant."

FSDEA's proprietary claim against QGIM (D3)

26. A proprietary claim only exists "against" a person to the extent that that person holds property in which the Claimant is entitled to a legal or equitable interest. It is a claim to the property itself, and is only asserted against the holder of the property or one who is in a position to give effect to the proprietary interest. Accordingly, in the current context the question is whether, assuming that there is a sufficiently arguable case that QGIM holds such property, the claim to enforce the proprietary interest in respect of the property against QGIM falls within Article 5(3). Mr McGrath QC submitted that the proprietary claim fell within Article 5(3) as being in a matter relating to tort, delict or quasi delict. Mr Edey submitted that if the proprietary claim passed the threshold merits test of raising a serious issue to be tried, it did not fall within Article 5(3). He submitted that it was clear from ***Kalfelis v Bankhaus Schröder*** 189/87 [1988] ECR 5565 and ***Kleinwort Benson Ltd v Glasgow City Council*** [1999] 1 AC 153 that Article 5(3) only covered claims which gave rise to a personal liability. This submission is in my view well founded. The proprietary claim has nothing to do with any personal liability on the part of QGIM; it is a claim to property insofar as it remains in the hands of QGIM irrespective of fault; it is not based on a constructive trust (which would give rise to a claim falling within Art 5(3): see ***Casio Computer Co Ltd v S*** [2001] EWCA Civ 661 and ***Dexter v Harley*** [2001] All ER (D) 79) because dishonest assistance constructive trust claims are not proprietary: see per Lord Millett in ***Paragon Finance Plc v D B Thackerar & Co*** [1999] 1 All ER 400 at p. 409e-g.

Proprietary claim against QGAI (D6)

27. For the same reasons as apply in relation to QGIM, the proprietary claim against QGAI does not fall within Article 5(3) of the Lugano Convention and can only be brought at its place of domicile which is Switzerland.

Jurisdiction: serious issue to be tried

28. The Defendants argued that the Claimants had failed to establish a serious issue to be tried in respect of the following causes of action:

    (1) the proprietary claim;

    (2) the claim for lawful means conspiracy;

    (3) the claims against Mr dos Santos in unlawful means conspiracy and dishonest assistance constructive trust;

    (4) the claims by FSDEA against QGIM (D3) for breach of contract and breach of fiduciary duty;

    (5) the claims by FSDEA against the general Partners and Limited Partnerships;

    (6) the "cross claims" between the Partnerships, i.e. the claims by the Limited Partners against General Partners of other Partnerships, and against those other Partnerships; and

    (7) some of the knowing receipt claims.

The proprietary claim

29. The Liquid Portfolio was held in FSDEA's name by Northern Trust. The proprietary claim in respect of those funds, which have been returned to FSDEA's control, is limited to the fees taken by QGIM and their traceable proceeds. So far as the Illiquid Portfolio is concerned, the funds were initially in accounts under QGIM's control at FSDEA and were transferred to accounts at Northern Trust in the names of the Limited Partnerships pursuant to written instructions from FSDEA to QGIM dated 30 June 2015 signed by Mr dos Santos which stated "The transfers doesn't [sic] cause a change in the ultimate beneficial ownership". Mr Edey submitted that there could be no proprietary claim for property which was transferred pursuant to contracts where those contracts had not been avoided or rescinded. He accepted that the Claimants retained a beneficial interest in the investments in the Illiquid Portfolio, but submitted that those interests were held on the terms of the Limited Partnership Agreements which were long term contracts (of 10 or 15 years), such that there was no immediate entitlement to possession. He submitted that property passed in full under the contracts (the IMA and the Limited Partnership Agreements), and unless and until they were avoided there could be no vesting of any equitable interest in the transferor. Until very shortly before the hearing before me the Claimants had not suggested that the agreements were invalid or had been avoided, and indeed had proceeded on the basis that they remained validly in place. Mr McGrath sought to argue before me that they were void, alternatively voidable and had been rescinded. In my view Mr Edey was correct to submit that it was too late to run such an argument, which gave rise to issues of election and affirmation, and to allow the Claimants to do so would have been unfairly prejudicial to the Quantum Defendants, who would have been able to deploy arguments of election and affirmation. Accordingly the question whether there is a serious issue to be tried that the Claimants have a proprietary claim falls to be addressed on the footing that the sums transferred were paid in accordance with contracts which are not void and have not been rescinded.

30. On that footing, Mr McGrath submitted that where a contract split the legal and equitable interests so as to confer a legal title whilst retaining an equitable title, there is no need to rescind or avoid the contract in order for the transferor to assert the equitable proprietary right to the property. That was, he submitted, the effect of the contractual arrangements in this case because the funds were always invested for benefit of the Claimants who retained an equitable interest throughout; the Liquid Portfolio was held in accounts in the name of FSDEA and funds for the Illiquid Portfolio were transferred into the Limited Partnership accounts by instructions from FSDEA to QGIM which expressly purported to retain "ultimate beneficial ownership" in the funds. This argument does not work for the fees in respect of the Liquid Portfolio, where it was intended by the IMA that legal and beneficial interest in the fees should pass to QGIM. However, the main issue on this point was whether there was a sufficiently arguable proprietary claim to the sums transferred in the Illiquid Portfolio because the challenge is aimed at the proprietary element of the WFO, which is confined in amount to $3 billion to reflect such transfer. So far as that is concerned I was referred to a number of authorities on each side. This is an issue which raises difficult questions of law which will have to be applied to the facts once established. I am inclined to the view that the Claimants have met the relatively low merits threshold of a serious issue to be tried. However I do not propose to explore the legal issues in this judgment which would fall to be addressed in the light of the fact specific circumstances once established, nor to

express a concluded view, because in the event this issue is not determinative of the outcome of the applications which I have to decide. I shall assume, without deciding, that there is a serious issue to be tried for the proprietary claim advanced.

Lawful means conspiracy

31. The Claimants submitted that it was sufficient to establish the necessary predominant intention to injure that the predominant intention of the Defendants was to benefit themselves in circumstances in which the benefit could only be at the expense of the Claimants, relying on what was said by the Court of Appeal in ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174 at [34]. The passage relied upon does not support the suggested principle, and the suggested principle is inconsistent with the essence of the tort which is that if lawful means are deployed a conspiracy can only be unlawful if it involves a predominant intention to injure the claimant. If the predominant intention is to benefit the conspirators, by definition the predominant intention cannot be to injure the claimant, even if such injury is the inevitable result and even if it is intended. The lawful means conspiracy does not surmount the merits threshold of raising a serious issue to be tried on the facts alleged by the Claimants in this case, which clearly involve an allegation that the alleged conspirators were motivated by a desire to benefit themselves without any animus against the Claimants.

Claims against Mr dos Santos in conspiracy and dishonest assistance

32. Mr Anderson QC accepted that there was a serious issue to be tried (and a good arguable case) that Mr dos Santos was in breach of the Public Probity law of Angola, but contended that the merits threshold was not met for the claims in conspiracy and dishonest assistance. He submitted that under Article 4 of the Rome II Convention the question was governed by Angolan Law; and that there was no evidence that Angolan law recognised such causes of action. The difficulty with this submission is that the evidence before me simply did not purport to address the question whether Angolan law recognised a liability based on facts which would in English law establish liability for unlawful means conspiracy or dishonest assistance constructive trust. Accordingly, even if the appropriate law is Angolan law, the Court proceeds on the evidential assumption that Angolan law does not differ from English law in the absence of evidence to the contrary. I therefore reject Mr Anderson's submission on this point.

FSDEA claims against QGIM (D3)

33. This argument is of no consequence to the current application because jurisdiction for these claims is governed by the Lugano Convention, which involves no merits threshold, and in any event if there were otherwise jurisdiction, they are governed by the arbitration clause in the IMA (and Mr McGrath confirmed that he was not seeking to maintain any aspect of the WFO under the jurisdiction conferred by s. 44 of the Arbitration Act 1996). Since any such claims are a matter for arbitrators to decide, I decline to express any views on their merits.

FSDEA claims against the Limited Partnerships and the General Partners

34. The argument in respect of these claims was that any loss had been suffered by the Limited Partners, not FSDEA, and that a claim by FSDEA fell foul of the principles

that a shareholder may not sue for reflective loss. Mr McGrath countered that the principles were not applicable to the facts of this case, in part at least because FSDEA's claim was in its capacity as the source of the funds and transferor to the Limited Partners, not merely as shareholder in the Limited Partners. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

The cross claims

35. Mr Edey's argument was that there is no evidence that any of the Limited Partnerships or General Partners said or did anything in relation to the project outside its own partnership, and that the Limited Partner of one partnership could not have been caused a loss by anything done by the General Partner or the Limited Partnership itself in another partnership. Mr McGrath's response was that if there was as alleged, a single conspiracy which the General Partners and Limited Partnerships joined, they became liable as conspirators for the losses suffered by any of the victims of the conspiracy, irrespective of their own acts of participation. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

Knowing receipt claims

36. Mr Edey's argument was that the only receipts which could found a knowing receipt constructive trust claim were for the Liquid Portfolio such fees as QGIM received from the US$2 billion Liquid Portfolio; and in respect of the Illiquid Portfolio, the only relevant receipts were by the General Partners of their US$1,000 per annum in fees, and by QGAIM of its fees under the management fees due under the Limited Partnership Agreement; and that there was no wider knowing receipt claim in respect of the US$3 billion because although the Limited Partnerships did receive the US$3 billion, they did not do so beneficially: they held the funds for the Limited Partners on the terms of the Limited Partnership Agreements. The contrary is plainly arguable and on this aspect the Claimants have established a serious issue to be tried.

Jurisdiction: the arbitration agreements

37. By the conclusion of the hearing it was common ground that insofar as there would otherwise be jurisdiction, the following claims must be stayed in favour of arbitration under the mandatory provisions of s. 9 Arbitration Act 1996:

    (1) All FSDEA's claims against QGIM (D3) are governed by the arbitration clause in the IMA, which provides for arbitration to take place in Portugal. QGIM commenced an arbitration by a Request dated 18 June 2018. It is common ground that those claims must be the subject matter of a mandatory stay under s. 9 of the Arbitration Act 1996 to the extent that there is otherwise jurisdiction over them. On my findings this catches the claims in conspiracy, dishonest assistance and knowing receipt, the others being claims in respect of which the Claimants have failed to establish jurisdiction under the Lugano Convention in

any event. I am inclined to think that the seat of the arbitration is Portugal, not England, but since this does not affect the outcome of anything I have to decide I prefer to express no concluded view.

(2) All FSDEA's claims against QGI Ltd, which are governed by the arbitration agreements in the ISAs which provide for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language.

(3) All the claims by the Limited Partners against their General Partners are governed by the arbitration agreement in the Limited Partnership deeds which provide for arbitration in Mauritius. The General Partners and Limited Partnerships commenced arbitrations against the respective Limited Partners in Mauritius on 8 May 2018. The Limited Partners have disputed whether the Partnerships are entitled to invoke the arbitration clause. In the light of my earlier conclusions, I do not need to resolve that question.

Jurisdiction: Forum conveniens

38. This is not a case where fragmentation can be avoided. The starting point is that there are arbitrations in Mauritius which involve the disputes between the Limited Partners and the General Partners in relation to the Illiquid Portfolio, to which the Limited Partnerships are arguably properly joined parties. There are also winding up proceedings commenced by the Limited Partners in Mauritius which will raise some of the issues which arise in these proceedings. There is no jurisdiction under the Lugano Convention over certain of the claims against QGIM (D3) and over the proprietary claim against QGAI (D6), who must be sued in Switzerland; and in any event, even were jurisdiction otherwise to be established, any claims by FSDEA against QGIM would have to be stayed in favour of arbitration in Portugal. It is FSDEA's case that the IMA (and therefore its arbitration clause) governs the Illiquid as well as the Liquid Portfolio. Accordingly, on the Claimants' case, all the tortious and contractual claims by FSDEA against QGIM will have to be dealt with in that arbitration. On any view, and even if the arbitration is confined to the issues in relation to the Liquid Portfolio, that will involve an examination of the circumstances in which the Quantum group came to be appointed, which raises many of the issues at the heart of the dispute in these proceedings.

39. It is against that background that the Claimants bear the burden of establishing that England is clearly and distinctly the appropriate forum: ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460.

40. There are weighty factors in favour of Angola as the appropriate forum:

(1) The claim is brought by the sovereign wealth fund of Angola and its special purpose subsidiaries. Of the two personal Defendants, Mr dos Santos is resident in Angola, and Mr Bastos, although resident in Dubai, is currently confined to Angola because his passport has been confiscated. These are the protagonists whose conduct is at the heart of the issues between the parties.

(2) The central ingredient in most of the causes of action against most defendants is the allegation that Mr dos Santos was in breach of the Public Probity Law in granting the contracts to the Quantum Defendants and Bastos-related entities.

This is the foundation for the claims in unlawful means conspiracy, dishonest assistance, knowing receipt and the proprietary claims. These allegations of breach are of what occurred in Angola and are clearly more suitably tried in Angola, not only because they are governed by Angolan law, but also because the Public Probity Law imposes duties expressed in terms of generality which take their content from their Angolan context. Article 3 provides: that "*Public agents should, in performance of their duties, be guided by the following principles: (a) principle of legality (b) principle of public probity (c) principle of competence (d) principle of respect for public property (e) principle of impartiality (f) principle of the pursuit of public interest….(j) principle of prudence (k) principle of loyalty to public institutions and entities and to the higher interests of the State.*" The subsequent articles develop these principles, again using language of some generality (e.g. "*the highest criteria for public professionalism*"). These duties are properly to be interpreted in accordance with the cultural standards and norms of Angolan public life at the time, which is clearly a matter on which the Angolan court is better equipped than the English Court.

(3) The projects of which complaint is made include major projects in Angola, including in particular the hotel project in Luanda and the Port of Caio project.

(4) The witnesses or potential witnesses likely to be of central importance, apart from Mr Bastos and Mr dos Santos, will be those involved in the appointment of Quantum and supervision in Angola of its activities, including Dr Manuel, Mr Gonçalves, Mr Fortunato and Mr Gago, who are to be found in Angola.

(5) Similarly, the predominance of the documentary evidence is likely to be found in Angola, and some will be in Portuguese.

41. There are also factors in favour of Mauritius. In particular the claims are in part governed by Mauritian law, and the evidence will have to be gathered and deployed in Mauritius for the purposes of the Mauritian arbitrations and the winding up proceedings.

(1) The Limited Partnership Agreements contain a Mauritian governing law term which is of very wide ambit, such that it will govern both contractual and non-contractual claims between the Limited Partners and the General Partners.

(2) The Limited Partnership Agreements contain Mauritian arbitration clauses and arbitrations have been commenced in Mauritius. The arbitrations will cover much of the ground which is in issue in these proceedings, although Mr dos Santos and Mr Bastos will not be parties.

(3) The winding up proceedings commenced by the Limited Partners in the Mauritian courts involve allegations covering almost exactly the same ground as the allegations in relation to the Illiquid Portfolio in the current proceedings. Such winding up proceedings were foreshadowed at the time of the without notice application and have subsequently been commenced.

(4) The Claim Form in these proceedings does not contain a claim by the Limited Partners against Mr dos Santos for breach of duty, but the Claimants' skeleton argument asserts that such a claim clearly exists for breach by Mr dos Santos of his duties under Mauritian law, and states that the Claimants will seek to amend the Claim Form to include such a claim by the Limited Partners, and ancillary claims for dishonest assistance in relation to such breaches.

42. Some factors also point towards Switzerland. QGIM, the Third Defendant and party to the IMA under which, on FSDEA's case, the entirety of the management took place, is a Swiss company. QGIM is based in and operating from Switzerland. Indeed this is the centre of gravity of all the Quantum group and its activity. The investment management took place from Quantum's offices in Switzerland.

43. Against this there is relatively little which points to England as an appropriate forum.

(1) None of the parties is resident or incorporated in England or carries on business here, other than Northern Trust whose stance is essentially neutral. At the heart of the case against all the Defendants is the personal relationship between an Angolan individual, Mr dos Santos, and a Swiss/Angolan individual, Mr Bastos; breach of Angolan duties owed by the Angolan individual; and Mr Bastos' alleged knowledge of or collusion in that breach (which is relied on as that of all the corporate Quantum Defendants).

(2) None of the relevant witnesses or documents are located in London. (save to the extent brought there for the purpose of these proceedings, and save possibly for a few Northern Trust documents). Much of the relevant evidence, both of witnesses and in documents will originate from Angola and Switzerland. Most of the evidence will have to be collected and deployed abroad: in Portugal in any arbitration with QGIM; and in Mauritius in relation to the partnership arbitrations and the winding up proceedings.

(3) The fact that the Liquid Portfolio and Limited Partnerships bank accounts were held at the London branch of Northern Trust provides only a slight connection with England for the purposes of determining the appropriate forum. The location of the accounts under the Master Custody Agreement was a matter of choice for FSDEA, not a matter of contractual agreement with Mr Bastos or the Quantum group. Under the IMA, FSDEA could have chosen to establish the custodian accounts at any bank anywhere, for example in New York. The funds were dollar denominated and the Liquid Portfolio was invested in a range of international securities in the usual way. The centre of gravity for the allegations in relation to investment of the Illiquid Portfolio is not in London, from where the funds were to be transferred to be invested in projects, but in the places where the events giving rise to the complaints arises: Switzerland for the decision to set up Mauritian limited partnerships and Angola or elsewhere in Africa in relation to investment in projects where a conflict of interest is complained of. The fact that a London branch of a US Bank was chosen by FSDEA as the place of custody is of no significance to the issues in the case. Nothing turns on the place at which the funds or securities were held.

(4) Some of the issues in the case are, at least arguably, governed by English law. Others, however, are not. Angolan law governs the breach of duty allegation by

FSDEA against Mr dos Santos which is at the heart of the complaint. Mauritian law governs the claim intended to be added by amendment by the Limited Partners against Mr dos Santos for breach of duties owed under Mauritian law. Mauritian law governs the Limited Partnership Agreements. The fact that English law governs the IMA is of no significance because there is no jurisdiction over the contractual claims against QGIM which will in any event have to be determined in arbitration in Portugal.

44. For these reasons I conclude that the Claimants have failed to establish that England is clearly or distinctly the appropriate forum. Accordingly, the Court should not exercise jurisdiction over any of the Defendants in relation to any of the causes of action, save those governed by the Lugano Convention (D3 and D6).

Conclusion on jurisdiction

45. The upshot of my conclusions is that there is only a small rump of causes of action in respect of which jurisdiction is established and which do not fall to be stayed for arbitration, namely some, but not all, of the claims against the Lugano Convention Defendants, QGIM (D3) and QGAI (D6). What remains are the claims against QGIM by the Limited Partners in unlawful means conspiracy, dishonest assistance and knowing receipt, (but not any of the claims by FSDEA against QGIM, for which jurisdiction under the Lugano Convention is not established and which are governed by the arbitration clause in the IMA); and the claims by the Limited Partners and FSDEA against QGAI (D6) in those causes of action.

46. The Defendants submitted that there should be a case management stay in respect of any claims which fell into this category. It was agreed at the hearing that arguments in respect of a case management stay should be deferred until after I had given judgment identifying which of the claims might be affected.

The WFO

47. There were essentially four grounds on which the Defendants sought to have the WFO set aside and not continued:

(1) There was no jurisdiction over the claims. FSDEA did not seek to support the relief as appropriate in aid of foreign proceedings. Nor was the application made under s. 44 Arbitration Act 1996. At one stage Mr McGrath did seek to invoke this latter jurisdiction and a s. 44 application was belatedly issued on 25 July 2018, the second day of the hearing. Mr Edey submitted that such an application was made far too late for it fairly to be addressed, correctly in my view, and it was not ultimately pursued by Mr McGrath.

(2) There is no good arguable case in respect of some of the causes of action, including, most relevantly for present purposes, the proprietary claim.

(3) There was a breach of the duty of full and frank disclosure.

(4) FSDEA has not established a sufficient risk of dissipation.

(5) In addition, the Defendants submitted that none of the arguable causes of action raised a good arguable case of a claim to $3 billion or any identified sum.

WFO: No Jurisdiction

48. I have held that the court has no jurisdiction over the claims save for a small rump of some of the claims against QGIM (D3) and QGAI (D6), in respect of which there is an as yet undetermined application for a case management stay. I shall reserve questions of whether this would be a sufficient ground to discharge the WFO or to refuse to continue it, if necessary, until after determination of the question whether there should be a case management stay.

WFO: No good arguable case

49. Although there is a distinction between the merits threshold of a serious issue to be tried, for the purposes of jurisdiction, and that of a good arguable case which is required for the purposes of a freezing order, the Defendants submitted that it made no difference on the facts of this case, and asked me to treat the causes of action as standing or falling together under both tests. Accordingly, my earlier conclusions on the question whether there is a serious issue to be tried in relation to the various impugned causes of action should be treated as conclusions to the same effect in relation to whether the Claimants have established a good arguable case for the purposes of the WFO, including the conclusion that I will assume, without deciding, that the merits threshold is reached in respect of the proprietary claim.

WFO: Non-Disclosure

50. The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in ***Brink's Mat Ltd v Elcombe*** [1998] 1WLR 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:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

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

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

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

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was 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.

> "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could

> properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp.1343H-1344A."

51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in ***Memory Corporation v Sidhu*** (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in ***Bank Mellat v Nikpour*** [1985] FSR 87, 92, Bingham J in ***Siporex Trade v Comdel Commodities*** [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in ***Marc Rich & Co Holding v Krasner*** (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to

disclosure of documents (see CPR PD31A and ***Hedrich v Standard Bank London Ltd*** [2008] EWCA Civ 905).

54. In this case I have concluded that there has been a breach of the duty to make a fair presentation of the case in eight material respects.

(1) The selection of Quantum

55. There was non-disclosure and an unfair presentation in respect of the Quantum selection process in a number of ways.

56. The Claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr dos Santos being chairman of that organisation (which subsequently became FSDEA), and at a time when Dr Manuel was Chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered into an Investment Management Agreement with Quantum on 13 July 2012, signed by Dr Manuel. Further, Quantum entities had been engaged as managers in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, each signed by Dr Manuel.

57. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments and two in respect of equity investments, in infrastructure and hotel projects respectively. None were by Mr Bastos. The presentation in relation to the Liquid Portfolio was by Gareth Fielding, QGIM's Chief Investment Officer since 2008, with 25 years' experience in asset management including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, Ulrich Otto, who had more than 10 years' experience of private equity investments involving assets which reached more than $2 billion in value, and sat on the supervisory board of a company with revenues of US$ 1 billion. It contained a detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by Mr Antoine Castro, Quantum's managing director of Real estate, with extensive prior experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages.

58. There was no attempt to put those presentations before the Judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA or other appointments, nor to address whether that selection was made otherwise than on merit. Instead Mr Morris' first affidavit and the skeleton argument before Phillips J gave the misleading impression that the selection had been entirely that of Mr dos Santos and made in 2013 when he was Chairman.

59. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of Mr Morris' first affidavit he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and

that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, and before any selection process; whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and December 2012 addendum were each signed not by Mr dos Santos but by Dr Manuel. The sub-paragraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for 6 months, amounting to $264 million. That would indeed have been breathtaking, to use the epithet applied to fees in the Claimants' skeleton argument, but was wrong: the fees were $44,000 monthly, giving a total of $264,000 for 6 months.

60. It was also misleading to characterise the process in the skeleton argument as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as "the extent of the selection process". Again, this ignores the selection process in 2012 which involved detailed presentations from Quantum. The false impression is reinforced by the assertion at para 31 of the E&Y report that no proposals were requested from any of the four potential managers, i.e. including Quantum, which implied that there had never been a formal proposal from Quantum.

61. Moreover, Mr dos Santos gave a fairly lengthy account of the selection process and the rationale for appointing Quantum in a letter of 27 September 2013 addressed to Jersey trustees who were then contemplated as being involved in the management of the fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not put in evidence before the Judge and its existence and contents were not referred to.

62. These were important matters. One of the central elements of the case against the Defendants was that it was Mr dos Santos as Chairman of FSDEA who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a significantly different complexion on the selection.

63. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However it seems likely that the existence of the prior appointment, the 2012 IMA other appointments, and the 2012 proposals were known to those at FSDEA with conduct of the case; and to Mr Gonçalves who was on the Board throughout the period, remains an adviser to FSDEA and who provided a witness statement subsequently; I say he was on the board throughout the relevant period because although in his own statement he describes himself as being on the board from October 2012, Mr Morris in his fifth affidavit says he was on the board from March 2012; and Mr Gonçalves refers to seeing one of the presentations in May 2012 at paragraph 26 of his subsequent witness statement; it seems likely that the circumstances of the 2012 appointment and presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013 and on the board from 2016, from whom Mr Morris did take instructions at the time of the without notice application; I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Gonçalves and gives

evidence about it. At the least, the circumstances of the 2012 presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

(2) Quantum's track record and suitability

64. Mr Morris described Quantum in his first affidavit as "an unknown and untested entity". In paragraph 14 of the skeleton Quantum was described as having a "limited track record" with a capitalisation of only 100,000CHF and contrasted with other candidates of the calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the Judge that:

(1) Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, in which Quantum had identified in its 2012 proposals the apparently well qualified staff with extensive relevant asset management experience who were employed by Quantum, and the independent board members apart from Mr Bastos who were of apparent eminence and experience.

(2) Quantum had had a capitalisation of CHF 1 million since 2007, as the detail in the E&Y Report accurately recorded.

(3) Quantum had managed assets for the Banco Nacional de Angola, the Angolan state bank, of $2.3 billion in liquid assets and a further $1billion in private equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at para 39 of his first affidavit by saying that "It appears from the documentation generated for the purposes of Project Rainbow…that Quantum Global at least at one point managed several hundred US$ (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA".

65. Again, these were important matters which were known to the Claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or absence of it, was at the heart of the allegations on which the Claimants' case is founded.

66. There was, additionally, an unfortunate mischaracterisation in relation to Mr. Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence; whereas, as was apparent from the material available to Mr Morris, the sanction was a suspended sentence ***of*** a fine, i.e. a fine payment of which was suspended and which in the event Mr Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended).

(3) Transparency and supervision

67. The appointment of Quantum, and its activities in carrying out the investment management, were transparent and regularly reported on to an audience within FSDEA beyond Mr dos Santos. The Claimants did not disclose or draw to the Judge's attention, as they should have done, the following.

68. The Board of FSDEA was by Presidential Decree overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA's policy and investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development, and the Governor of the National bank of Angola. Its role was not specifically addressed in the evidence or argument before Phillips J apart from an inaccurate reference in the E&Y report suggesting that the body never met, inaccurate because Mr Gonçalves' later evidence is that it met at least once. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example, it had detailed reports on the Illiquid Portfolio from Deloitte.

69. Moreover, FSDEA's accounts were audited on an annual basis by Deloitte.

70. Quantum also provided regular reports on the investments to FSDEA, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid Portfolio which contained the sort of detailed information one would expect from investment managers.

71. None of this was addressed in the Claimants' evidence or argument or drawn to the Judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable inquiries. Again, it was of importance to the case being advanced.

(4) The limited partnership model

72. Fourthly there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The Judge's attention was not drawn to the fact that the E&Y report described the structures used for the Illiquid Portfolio as based on a standard model and that "such models are commonly used in P[rivate] E[quity] and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

73. In argument before me, the thrust of the complaint changed to one that limited partnerships were only suitable vehicles for collective investment schemes, i.e. where there was more than one investor. But this was not the position taken by Deloitte in its audit reports which made no criticism of the structure, nor that of the Mauritian authorities in relation to 5 of the 7 Limited Partnerships. The Judge should have been told that both E&Y and Deloitte had not treated the structures used as inappropriate and

that they were a commonly used model. This was obviously important given the criticisms which were being made of the structure.

(5) Conflicts of interest

74. There was non-disclosure in relation to the allegation of conflicts of interest in the projects in the Illiquid Portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016 Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy, and expressly disclosing transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and conflicts dealt with in accordance with the policy. The disclosure included a hotel project in Luanda in which $157m had been invested which was the subject matter of particular criticism by Mr Morris in his first affidavit. The letter and waiver were signed not only by Mr dos Santos but also by Mr Fortunato, against whom no allegations of impropriety are made.

75. The 17 August 2016 letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris says that he and the team preparing the application were unaware of it because it was part of a set of over 750 documents which his firm held as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Mr Morris to have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the documents it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it all unless constraints of time or expense made this impossible. Neither applies in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum: if it was interrogated for that purpose it should have been fully interrogated. In any event Mr Fortunato was obviously aware of the letter, as a countersignatory, and reasonable inquiries would have extended to all the board members in place at the relevant times, including Mr Fortunato, who it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application.

(6) Fees

76. There was non-disclosure and an unfair presentation in respect of the fees charged on the Illiquid Portfolio. The fees as a whole (then put at $515 million) were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio, there was further criticism that the fees were charged on the full amount of the portfolio of $3 billion, when the amount invested in the projects was only a small part of that, some $2.2 billion remaining uninvested and held in liquid funds at the date of the WFO. There are several elements to what the Judge was not told, as he should have been.

    (1) As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as E&Y noted at paragraph 54 of

the report (to which the Judge's attention was not specifically drawn). In the course of the hearing before me Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the Claimants thereby lost visibility and control. But this was not how the matter was presented to Phillips J, which did not confine the criticism to this aspect. On the contrary it was suggested that at least one of the improper purposes of the drawdown into the partnership accounts was "to extract management fees by reference to the entirety of the US$3 billion, even though most of it has been sitting in cash (or cash like securities)": see the skeleton at para 16(5)(b), and see para 16(7) which made this criticism as a matter of "the structure by which the fees were calculated".

(2) Further, the Judge was not told what appears in paragraph 23 of Mr Gonçalves's subsequent witness statement, namely that he was aware of the reasons given at the time for the funds going into the partnership accounts, having been told by Mr dos Santos in 2013 that "the Fund was going to face increasing pressure in the economy and pressure to access its funds, so he wanted to use the funds now and put them into the private equity fund, so as not to give appetite to the state to come and use the funds." Mr Gonçalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

(3) Moreover, on the Illiquid Portfolio the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio (which accounted for over $100m of the fees on the figures then presented) and 2.5% plus 20% in relation to the hotel and other illiquid portfolios (which accounted for the balance). The Judge did not have specifically drawn to his attention paragraph 53 of the E&Y report which described 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to FSDEA in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again a matter not drawn to the Judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on ($263.4m out of $515.84m).

77. The level of fees charged was another of the central elements of the case against the Defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

(7) The stance of Northern Trust

78. There was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February 2018 and 4 March 2018, Northern Trust made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instructions from both FSDEA and Quantum and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, largely addressed to requests for disclosure, Northern Trust reiterated that there would be no change of position without prior notification. The first two letters were referred to in a narrative section of Mr Morris' Affidavit but were not identified in the section on risk of dissipation, were not

referred to in the skeleton argument and were not drawn to the judge's attention. The latter was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but was referred to at paragraph 190 of Mr Morris' first affidavit and in the Claimants' skeleton at 109(3) in sections addressing the risk of dissipation. In each case the letter was referred to by treating Northern Trust's statement that it would give prior notice as no more than a then current intention which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. This was to mischaracterise the correspondence as a whole, which suggested that Northern Trust were caught between conflicting claims and would not take steps without the agreement of both parties. Had the Judge been shown the correspondence, or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the Claimants being given sufficient advance notification to afford an opportunity to come before the Court again in those changed circumstances if necessary. That is my view, with the result that in respect of this aspect of non-disclosure, the Claimants have not made out a case of risk of dissipation in respect of over two thirds of the amount covered by the Freezing Order.

79. This last paragraph reflects what I said on this issue when giving judgment on the non-disclosure points at the conclusion of the hearing. Since then, on 9 August 2018 Mr Morris wrote to the court enclosing a seventh affidavit in which he explains that there were without prejudice communications with Northern Trust in March 2018. He had not consulted his notes when making his first affidavit, but had gone back to them in the light of the non-disclosure arguments at the hearing before me, and was now able to tell the court, having secured a limited waiver of privilege for this purpose, that in those discussions Northern Trust had "made observations with regard to the prospect, at or around the time of preparation of [Mr Morris' first affidavit] of [Northern Trust] making a stakeholder application under Part 86 of the Civil Procedure Rules" (which it is now known was an application which was in fact prepared and about to be issued at the time of the WFO, which overtook it). As Mr Morris fairly accepts, this confirms that what he said about Northern Trust's stance in paragraph 190 misled the Court as to the level of risk that Northern Trust might pay out from the Limited Partnership accounts without notice. It is regrettable, to say the least, that this matter was only drawn to the court's attention after the hearing and after I had announced my decision in relation to non-disclosure.

(8) Other non-disclosures

80. The Defendants advanced a number of arguments that there had been non-disclosure in other more minor respects. None are of sufficient significance to warrant separate consideration, save one. In the skeleton argument put before Phillips J on the without notice application, it was said that no proprietary injunction was sought against Mr dos Santos or Mr Bastos. In fact such an order was sought in paragraph 5(5) of the draft order put before the Judge, and such an order was made by him. Mr McGrath has apologised for this mistake (the mistake being in the skeleton, not in the order sought), and submitted that because the Judge had clearly read the order with care he was not misled and appreciated that such an order was in fact being sought against Mr dos Santos and Mr Bastos. Had there been no room for argument that a proprietary order was justified against Mr dos Santos and Mr Bastos personally this error might have assumed less significance. However there clearly was room for argument on the point,

not merely because there was a question whether there was a serious issue to be tried/good arguable case for a proprietary claim, but also because there was and is no evidence of receipt of any of the money or its traceable proceeds by Mr dos Santos. The vice of the mistake lay in these issues being ignored in the written and oral presentation to the Judge. This is a further significant failure to make a fair presentation of the application.

The consequences of the non-disclosure

81. I was referred to a number of authorities which contain summaries of the factors relevant to determining the consequences of material non-disclosure, including ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [61] to [64] (Flaux J); ***In re OJSC ANK Yugraneft; Millhouse Capital UK Ltd v Sibir Energy Plc*** [2008] EWHC 2614 (Ch) at [102] to [106] (Christopher Clarke J); and ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [68] to [77] (Mann J); and ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) (Males J).

82. Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In ***Banca Turco Romana v Cortuk*** [2018] EWHC 662 (Comm), I expressed it in this way:

> "….It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

83. In this case the breaches taken cumulatively are serious and substantial. They do not relate to a few, merely peripheral, matters, but to numerous matters at the heart of the Claimants' case. The Court was being asked to infer a dishonest conspiracy by which Mr dos Santos sought improperly to benefit his friend and associate Mr Bastos, and a consequent risk of dissipation, from four central allegations, namely (1) that Mr dos Santos was solely responsible for appointing Quantum without any proper selection process; (2) that Quantum was not properly qualified for the task; (3) the extraordinarily high and unjustified level of fees charged; and (4) the funds being used to benefit entities owned by or associated with Mr Bastos involving an undisclosed and

inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the Claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the Claimants to say that the subsequent evidence put before the court to deal with them raises disputes which are sufficient to surmount the merits hurdle of a good arguable case. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood. But the unfair presentation in this case in the respects I have identified goes far beyond the odd accidental slip, and goes to the central elements of the case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds. The matter had obviously been under consideration for many months, at least since the E&Y Report in December 2017 and Mr dos Santos' dismissal in January 2018. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use a large team to make the necessary inquiries and to consider all the documents available. Given the size of the freezing order sought, and the allegations of dishonesty being made, it was incumbent on the Claimants and their legal advisers to make the fullest inquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris emphasised in his first affidavit the limits on the inquiries which had been made by his firm, that does not excuse a failure to make the necessary inquiries or the presentation of incomplete material in an unfairly one-sided way.

84. The Claimants' legal team were at pains to make clear on the without notice application that they were aware of the duty of full and frank disclosure and were purporting to fulfil it. I do not find that there was any deliberate breach on the part of the Claimants' legal team. It is less clear whether that is so of the personnel at FSDEA itself. Some, at least, of the material would have been readily available to anyone in a senior position and the necessity to disclose it obvious to anyone aware of the duty of disclosure. Because privilege attaches to communications between Norton Rose Fulbright and their clients, it is impossible to identify whether any individual was aware of the duty and deliberately failed to comply with it. What can be said, however, is that the failures were serious and should not have occurred had the duty been properly understood and complied with by the Claimants themselves. There was therefore a high degree of culpability in the failures, even though I do not find that anyone deliberately set out to abuse the court's process.

85. This is not a case in which there are any strong reasons for departing from the usual sanction for serious and culpable non-disclosure. I have concluded that for the reasons given below, the Claimants have not established by solid evidence that there is a sufficient risk of dissipation to justify a freezing order, or that the balance of convenience would justify a proprietary injunction, so that there is in fact no prejudice to the Claimants in discharging the injunction and refusing to grant a fresh one as a result of the non-disclosure. I should make clear, however, that I would reach the same conclusion even if satisfied of a risk of dissipation, as was implicit in my decision announced at the conclusion of the hearing. The breaches of duty are sufficiently serious and culpable to warrant discharging the WFO and not granting fresh relief, irrespective of the other grounds of challenge.

WFO: No risk of dissipation

86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; ***Holyoake v Candy*** [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and ***Petroceltic Resources v Archer*** [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

(1) 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.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) 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 are likely to 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.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Risk of dissipation: Mr dos Santos

87. There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence. There was some suggestion in Mr Morris' evidence that his asset disclosure pursuant to the WFO was incomplete so as to support such an inference, but his solicitor's letter of 10 July 2018 adequately addresses the points made and leaves no evidence on which the court could conclude that his asset disclosure is incomplete or inadequate.

Risk of dissipation: Mr Bastos and the Quantum defendants

88. In my view the same is true of the different circumstances of Mr Bastos and the Quantum Defendants. Again, the accepted good arguable case of dishonesty does not support an inference of a sufficient risk of dissipation: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. The particular facts of Mr Bastos' criminal conviction many years ago, for which he ultimately was fined CHF4,500, do not support the inference of a current risk of dissipation. There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. There is no evidence to suggest that the fact or threat of either the claim itself, or the freezing order, has caused or would cause any of them to act in a way which differed from their previous practice so as to make any adverse effect on the claimants' ability to enforce a judgment something which could properly be characterised as "unjustified". This applies with equal force to the Mauritian Limited Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations; and that the drawing down of the full committed amounts into the accounts in the names of the Limited Partnerships so as to put them beyond the control of FSDEA was for a legitimate political objective explained at the time by Mr dos Santos to Mr Gonçalves (see above). The Liquid Portfolio and the majority of the Illiquid Portfolio are secured without the need for a freezing order. There is no evidential basis for suggesting that Mr Bastos or the relevant Quantum Defendants intend to deal with the monies invested in the projects or the projects themselves otherwise than by way of promotion of the success of those projects. There is no

suggestion that Mr Bastos or the Quantum Defendants have taken any sums other than those to which there is a contractual entitlement; nor that they have dealt with them otherwise than in accordance with those contractual arrangements. The complaint about the execution of those contractual arrangements does not support a risk of dissipation. As the Claimants' skeleton argument itself put it, this is not a routine case of "hands in the till" type fraud.

89. Although this was not put in the forefront of the argument on this point, complaint was also made about the history and nature of the asset disclosure by Mr Bastos and the Quantum Defendants pursuant to the WFO; it was said that the failure to make proper disclosure was a continuing effort to hide assets in order to protect them from a judgment. Whilst the dilatory nature of that disclosure is properly the subject of criticism, full purported compliance has taken place, and there is a hotly contested issue whether there has been any failure to give a full and accurate account of the defendants' assets. It is not clear from the evidence ultimately put before me on the point that there has been any failure to attempt full compliance in a way which would provide any support for a finding of a risk of dissipation.

Proprietary injunction: balance of convenience

90. For similar reasons the balance of convenience would not lie in favour of granting a proprietary injunction. There is no evidence to suggest that Mr dos Santos has, or has ever had, any sums to which a proprietary claim could attach. So far as Mr Bastos and the Quantum Defendants are concerned, I have said that I am prepared to assume, without deciding, that the Claimants have established a serious issue to be tried, but the contrary is plainly arguable and a proprietary claim may well not be capable of being established. There is no real evidential basis for concluding that the funds in the Illiquid Portfolio which have been invested in projects have not been well invested, or that in the absence of an injunction they would not continue to be managed so as to promote their profitability. The adverse effects of the proprietary order on Mr Bastos himself appear to have been serious: he has been unable to say with certainty that any of his assets can be divorced from those received ultimately from FSDEA because his modus operandi has always been to take income through his corporate vehicles from the Quantum group as dividends so that funds have inevitably become mixed. The effect of the proprietary injunction is therefore effectively to prevent Mr Bastos having access to any funds other than the permitted living allowance.

WFO: No justification for US$ 3 billion or any amount

91. Mr Edey submitted, correctly in my view, that the quantum of any loss suffered by FSDEA could not be put at US$3 billion or anything like it. Leaving aside the payment of fees, the investment of those funds was for the benefit of the Claimants who retain their equitable interest in the assets, as is and has always been common ground. In fact, over $2.2 billion remains uninvested in accounts at Northern Trust which are sufficiently secured for the time being. Accordingly, any present quantification of the loss is limited to (1) the fees taken by the Quantum Defendants and other Bastos related companies and (2) such loss as could be established by reference to the value of the projects in which investments have been made. In relation to the fees there is an argument that the amount of loss is not the full amount of the fees but only the amount by which they exceeded what would have been charged by another investment manager or service provider in any event. I have already dealt under the heading of non-

disclosure with the failure fairly to address the position of Northern Trust, which itself meant that a freezing order could not be justified in the sum of US$3 billion or anything like it. In the light of my other conclusions, it is not necessary for me to determine what, if anything, had been established as a sufficiently arguable quantum of loss for the purposes of identifying the proper amount of any freezing order or proprietary injuntion.

Conclusion

92. The WFO must be set aside and no fresh freezing order will be granted. I will hear the parties on the case management stay issues which are outstanding and the form of the order.