Neutral Citation Number: [2024] EWHC 707 (Comm)

Case No: CL-2023-000309

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/03/2024

Before :

MR JUSTICE FOXTON

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Between :

(1) THOMAS ANTHONY CIVIELLO **(2) SURVEYSPEC LTE LTD**	**Claimants**
-and-	
ERIK BRODAHL	**Defendant**

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Michal Hain (instructed by **Campbell Johnston Clark Limited)** for **the Claimant**
David Caplan (instructed by **Enyo Law**) for **the Defendant**

Hearing date: 15 March 2024
Draft Judgment Circulated: 18 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

The Honourable Mr Justice Foxton:

Introduction

1. On 25 January 2019, the Second Claimant obtained judgment against Mr Brodahl for over US$2.5m.

2. In September 2019, using Norwegian court process, the Second Claimant attached shares held by Mr Brodahl in a Norwegian company, Ultima Management AS ("**Ultima"**).

3. On 18 February 2020, the Second Claimant assigned the benefit of that judgment to Mr Civiello.

4. On 26 October 2022, that judgment was registered as a judgment of the Queen's Bench Division pursuant to the Civil Jurisdiction and Judgments Act 1982.

5. The judgment remains outstanding, and now exceeds US$4.5 million. In June 2023, the Claimants applied for worldwide freezing order relief, relying in that context on the fact that Mr Brodahl was a director of a large number of English companies (**"the Waldorf Companies"**), who paid large sums for the benefit of his services, and also the sole shareholder of Ultima, which was the ultimate recipient of substantial amounts originating with the various English companies, in return for the work which Mr Brodahl was providing and by way of dividends.

6. In the event, Mr Brodahl gave undertakings which mirrored the terms of a domestic freezing order, and which I shall refer to as **the EWFO**. On 2 August 2023, His Honour Judge Pelling KC refused the Claimants' application for a worldwide freezing order:

    i) He was satisfied that a risk of dissipation was made out.

    ii) However, he held that the court's power to grant freezing order relief in respect of the registered Norwegian judgment was limited by Articles 31 and 41 of the Lugano Convention. The effect of that limitation was to require a "real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the state of the court before which such measures are sought" (the CJEU in *Van Uden Maritime BV v. Kommanditgesellschaft In Firma Deco-Line* [1999] QB 1225, [40])

    iii) No sufficient link was made out, with the result that only the EWFO was appropriate.

    (Permission to appeal has been given against that ruling by Falk LJ, and the appeal is to be heard in July.)

7. In an affidavit sworn on 16 August 2023 by way of asset disclosure, Mr Brodahl stated that he had no assets in England and Wales exceeding US$50,000 in value. It seems likely that Mr Brodahl knew he would be submitting a "nil return" when he offered the

EWFO.

8. On 9 October 2023, the Claimants issued the application which is the subject of this hearing, seeking "declarations that certain assets either received through or held by Mr Brodahl … are his assets within the meaning of HHJ Pelling KC's order dated 4 August 2023." The assets in question are:

    i) Dividends paid by the Waldorf Companies (**the Dividends**)

    ii) Consultancy fees paid by the Waldorf Companies in return for Mr Brodahl's services (**the Consultancy Fees**).

9. That application is put on two bases:

    i) The rights of Ultima and/or Eden Roses to receive the Dividends and the Consultancy Fees were held for Mr Brodahl beneficially.

    ii) Even if Mr Brodahl was not the beneficial owner of those rights, "he has power, directly or indirectly, to dispose of, or deal with [those rights] as if it were his own", with Ultima and/or Eden Roses holding or controlling those assets "in accordance with his direct or indirection instructions".

The background

10. The financial circumstances relating to the receipt of dividends and payment for Mr Brodahl's services are obscure and lacking in transparency, a situation Mr Brodahl has done little to ameliorate. On the material before me, it is strongly arguable that the position is as follows.

11. On 22 October 2019, Mr Brodahl was appointed director of a company now known as Waldorf Production UK plc ("**Waldorf Production UK"**) and he also serves on the board of a number of associated companies. His services to Waldorf Production UK and associated companies appear to have been provided under a consultancy agreement with Ultima.

12. Waldorf Production UK's accounts as at 31 December 2021 (and signed off by Mr Brodahl on 28 September 2022) record:

> "The majority of the Directors are contracted by Waldorf Energy Partners Limited and paid by Waldorf Production UK Plc (formerly Waldorf Production UK Limited) for consultancy services including carrying out management for the Waldorf Energy Partners Group as a whole. Two directors are contracted and paid by Waldorf Production UK for services including carrying out management for the Waldorf Energy Partners Group as a whole. The total remuneration paid by the group in respect of the directors of this Company amounts to $5,681 k in the current period (2020: $575k). The Directors do not believe it practical to apportion their remuneration between their services as directors of the Company and as directors of other group companies."

13. The related party transaction disclosure recorded that "key management personnel are remunerated via consultancy costs through a third party and therefore there are no reporting requirements under IAS 524" and disclosed payments to Ultima in respect of Mr Brodahl of US$125,000 in 2020 and $2.393m in 2021.

14. Accounts for Waldorf Production UK for the year ending 31 December 2022 and signed off by Mr Brodahl on 31 May 2023 provide:

> "Three of the Directors were directly employed by the Company and two were paid for consultancy services through third party arrangements. All of the Directors perform management duties for the WEPL Group as a whole, though the Directors do not believe it practical to apportion their remuneration between their services as Directors of the Company and as Directors of other group companies".

15. These accounts record payments to Ultima in respect of Mr Brodahl in 2022 of US$726,000.

16. The position concerning dividends is more complex still, but in summary:

    i) Waldorf Production UK is owned (indirectly) by an English company called Waldorf Energy Partners Ltd, but pays dividends to another English company called Waldorf Acquisition Co Ltd.

    ii) An English company called Waldorf Management Limited owns 41.57% of Waldorf Energy Partners Limited.

    iii) Until 28 February 2022, Ultima held 23,778,630 shares in Waldorf Management Limited. 270,000 shares were transferred – it would seem to Derek Neilson – on 28 February 2022. The remaining 22,754.315 shares were transferred to Eden Roses SARL (**"Eden Roses"**), a Luxembourg company, on 23 June 2022.

    iv) In 2019, Ultima paid NOK 700k in dividends to Mr Brodahl. In 2021, the amount paid was NOK 7.5m.

17. Pausing to consider the position at this time:

    i) The employment arrangements referred to above appear to post-date the Norwegian judgment, but undoubtedly pre-date the English judgment and the EWFO.

    ii) Unless Ultima was receiving those payments as nominee for Mr Brodahl, then Mr Brodahl had no legal entitlement to the sums due from Waldorf Production UK, albeit, to the extent that he was a shareholder in Ultima, Mr Brodahl would no doubt benefit from those payments in his capacity as a shareholder of a Norwegian company.

    iii) So far as the dividends are concerned, unless Ultima held its shares in Waldorf Management Limited as nominee for Mr Brodahl, then Mr Brodahl had no legal

entitlement to the dividends payable by Waldorf Management Limited, albeit, to the extent that he was a shareholder in Ultima, Mr Brodahl would no doubt benefit from its receipt of those dividends in his capacity as a shareholder of a Norwegian company.

18. I have referred to an apparent transfer of shares from Ultima to Eden Roses in June 2022, after the shares in Ultima had been attached. It is not clear whether there was any consideration for the transfer. That transfer may, or may not, be a matter of concern for the Norwegian court which granted the Claimants an attachment over Mr Brodahl's shares in Ultima, or to those with control of those shares to the extent the transfer was not undertaken for fair value. However, its efficacy was not in issue at this hearing.

19. What was challenged was Mr Brodahl's suggestion that he had taken steps to transfer the income stream arising under the consultancy agreements so that amounts which previously went to Ultima now went to Eden Roses. As to this:

    i) There is an apparent agreement dated 18 November 2022 governed by Norwegian law and subject to the jurisdiction of the Norwegian courts between "Waldorf Production Ltd ... 1214933, Eden Roses and Mr Brodahl providing for Eden Roses to provide Mr Brodahl's services to Waldorf Production Limited. There is an English company 12149322 called Waldorf Production Ltd, and it would appear that the wrong company number was used.

    ii) A yearly fee of £600,000 excluding VAT was payable in quarterly instalments, with the agreement said to enter into force on 1 January 2022, over 10 months before the agreement was signed.

    iii) On that basis, the first year of operation of the consultancy agreement would be co-extensive with the period covered by Waldorf Production UK's annual accounts ending 31 December 2022, which recorded Waldorf Production UK (i.e. a different recipient of the services) paying Ultima (i.e. a different provider of those services) the sum of US$726,000 (which appears close to the US$ equivalent of £600,000).

    iv) It is not clear whether there was any consideration for the transfer of this income stream.

    v) There is also a dispute as to the nature of Mr Brodahl's interest in Eden Roses. It is accepted that he held 100% of Eden Roses in June 2022 at the date of the share transfer. Mr Brodahl claims that:

> "I have since transferred my entire shareholding to my children's partnership entity. While I do not have documents to hand to show this because of the complex nature of our family tax arrangements, and the fact that I am no longer an owner or director of any Eden Roses entity, I will continue to try and procure documents which evidence this and will produce them once I am able to."

Some 9 months on, either Mr Brodahl still does not have the documents "to hand" or he has chosen not to provide them to the court.

vi) Mr Brodahl continues to be listed as a person with significant control over Waldorf Management Limited and listed as owner of the entire shareholding in Eden Roses and as one of its directors on Luxembourg's equivalent of Companies House.

vii) On 2 November 2022 (i.e. before the consultancy agreement was signed), Mr Brodahl was paid NOK 1 million from Eden Roses.

20. Pausing to consider the position after Eden Roses enters into the picture:

i) The share transfer pre-dates the entry of the English judgment and the granting of the EWFO. The consultancy agreement is dated after the entry of the English judgment.

ii) Assuming that the changes to the consultancy arrangements took place and are genuine, then unless Eden Roses was receiving those payments as nominee for Mr Brodahl, then Mr Brodahl had no legal entitlement to the sums due from Waldorf Production Limited, albeit, to the extent that he was a shareholder in Eden Roses, or otherwise interested in it, Mr Brodahl would no doubt benefit from those payments in his capacity as a shareholder of a Luxembourg company or as a potential beneficiary in some form of family trust.

iii) If there was no genuine transfer, then the position remains as per [17] above.

iv) So far as the dividends are concerned, unless Eden Roses held its shares in Waldorf Management Limited as nominee for Mr Brodahl, then Mr Brodahl had no legal entitlement to the dividends payable by Waldorf Management Limited, albeit, to the extent that he was a shareholder in Eden Roses, or otherwise interested in it, Mr Brodahl would no doubt benefit from those payments in his capacity as a shareholder of a Luxembourg company or as a potential beneficiary in some form of family trust.

21. On Mr Brodahl's own account (i) at a time when he owed the Claimants a substantial sum under the Norwegian judgment, he took steps which significantly reduced the value of one of his assets (Ultima) by transferring a valuable shareholding to Eden Roses; (ii) at a time at a time when he owed the Claimants a substantial sum under the Norwegian judgment, and a judgment of this court, he took further steps which significantly reduced the value of one of his assets (Ultima) by moving the benefit of the consultancy arrangement from Ultima to Eden Roses; and (iii) on a date Mr Brodahl has chosen not to reveal (and which might, therefore, have been after becoming aware of the Claimants' application for a freezing order or after he had offered undertakings), at some point after 20 December 2022 he divested himself of any interest in Eden Roses.

The assets to which the freezing order extends

22. The terms of freezing orders granted by the English courts have sought to keep pace with the increasingly sophisticated attempts made by some defendants or judgment debtors to render themselves immune from English court judgments. That evolution is traced in Grant and Mumford, *Civil Fraud: Law Practice and Procedure* (2018), [28-107]-[28-125]. The decisions reflect something of a tension between two features of the freezing order jurisdiction.

23. First, the evolution of forms of wording which extend beyond assets to which the respondent has a present legal right:

    i) What has been referred to as "the Commercial Court wording" was introduced as an "opt-in" feature of the Commercial Court form in an appropriate case in 2002. It extends the injunction to "any asset which he has power, directly or indirectly, to dispose of, or deal with as if it were his own", with the respondent being regarded as having such a power "if a third party holds or controls the assets in accordance with his direct or indirection instructions".

    ii) In *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436, [26], [28], Pattern LJ held that these words made it clear that 'the respondent's assets' "can include assets held by a foreign trust or a Liechtenstein Anstalt when the defendant retains beneficial ownership or effective control of the asset". He stated that the words had been introduced to catch assets held by the defendant in what were described as sham trusts "in which assets owned or controlled by the defendant were held by third parties in a trust or other similar entity ostensibly for the benefit of a third party." That language posited "control" as an alternative to "ownership".

    iii) In April 2009, the standard form freezing order wording in the Commercial Court allowed in appropriate cases for the inclusion of language stating that the injunction applies to assets "whether the Respondent is interested in them legally, beneficially or otherwise." In *Solodchenko,* [46] Patten LJ accepted that the words "or otherwise" were clearly intended to add to the words "legally, beneficially", and extended to assets held by the respondent on trust for someone else.

    iv) In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [15], [24], the Court of Appeal held that bespoke language in the freezing order in issue in that case, together with the words "or otherwise", extended the order to assets held under the terms of a discretionary trust, where the respondent is one of the potential class of beneficiaries, even if enforcement could not be levied against those assets (although that a member of the class does have a legal right, capable of legal protection, as Lewison LJ pointed out at [13]).

    v) In *JSC BTA Bvank v Ablyazov (No 10)* [2015] UKSC 64, [39], the Supreme Court held that (certainly) the Commercial Court wording (and perhaps the 2002 wording) extended to a loan facility which the respondent was entitled to draw-down from and apply as he wished.

24. Second, the principle underlying the freezing order jurisdiction, which is that it is intended to prevent the unjustified dissipation of assets against which the claimant might enforce its judgment:

i) In *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695, 1709, Mummery LJ noted:

> "The order is designed to prevent injustice to a successful claimant by preserving assets and funds and guarding so far as possible against the risk that they will be disposed of or dissipated before a judgment is satisfied so as to render ineffective the claimant's attempts to recover what is due to him".

ii) The enforcement principle was restated by Rimer LJ in *Lakatamia Shipping Co v Su* [2014] EWCA Civ 636, [46]:

> "The point of freezing orders is to restrain dealings by the defendant with assets which, if judgment is obtained, will be available to satisfy the judgment. It is obvious, therefore, that the assets targeted by such an order are assets that belong beneficially to the defendant, since only such assets will be so available. Thus assets held by the defendant as a trustee for others will not, in the absence of words expressly extending the order to them, be caught by the order."

iii) Perhaps the purest formulation of the enforcement principle is to be found in the judgment of Sir John Chadwick sitting as a judge of the Court of Appeal of the Cayman Islands in *Algosaibi v Saad Investments Company Ltd* (CICA 1 of 2010), [32]-[33]:

> "It is necessary to keep in mind the basis upon which a court exercises the Mareva jurisdiction. It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant.
>
> The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD) — say, because the NCAD can be expected

> to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so) — is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD."

25. The tension between these two features of the freezing order jurisdiction is at its most acute where the respondent controls a company which owns assets, and an attempt is made to apply the freezing order to those assets (rather than just the shares of the company), because of the risk that it will fundamentally undermine the distinct nature of corporate personality under English law. Thus:

i) In *Group Seven Ltd v Allied Investment Corporation Ltd* [2013] EWHC 1509 (Ch), [64]-[75], Hildyard J posed the question "does a company which has a sole director, who also owns all its shares, hold or control its assets in accordance with that sole director and shareholder's 'direct or indirect instructions' within the meaning of" the standard wording, concluding that "settled principles of company law … mandate the answer: which is "No". This response may dilute the efficacy of the standard CPR form of freezing order, and surprise and unsettle not a few; but to my mind, there is no escape from it."

ii) In *Lakatamia Shipping Co v Su*, [50]-[51], Rimer LJ stated:

> "It is trite law that a company's assets so held do not belong beneficially to their shareholders, not even to a shareholder in the position of the first defendant who is, for all practical purposes, the sole owner of the companies. This was explained, by reference to high authority, by the majority of the Court of Appeal in *Prest v Prest* to which Burton J was referred, but which, when he came to para 16, he overlooked. He preferred the heretical view that because the sole owner of a company is in a position to control the destiny of its assets, the company's assets are his assets within the meaning of paragraph 3 of the order.
>
> That is wrong. The owner is of course able to control the destiny of the company's assets. But that does not make them *his* assets; and paragraph 3 is concerned only with assets which are his assets."

iii) However, in an appropriate case a court can make an order preventing dissipation of assts of a company as a means of preserving the value of the respondent's shareholding (and thereby preserving the value of the respondent's

assets against which enforcement might be levied, just as a freezer prevents the encumbrance of the respondent's assts for the same reason). An order of this kind (in the form of a notification injunction) was made in *Lakatamia Shipping Company v Su*.

iv) There has been discussion of whether the decisions that control of a company does not give control of its assets within the terms of the standard freezing order are wholly consistent with the Supreme Court decision in *Ablyazov* that the respondent's power to drawdown on a loan and apply it for whatever purposes he saw fit gave the respondent control over the assets of the lender (e.g. Grant and Mumford, [28-120] and *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), [51]). There is a point of distinction between the unfettered power enjoyed by the respondent in *Ablyazov*, and the powers enjoyed by de jure or de facto directors of a company to act in its best interests, and, in addition, *Ablyazov* did not raise the concern that the distinct nature of corporate personality is not being respected.

v) In *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), [53], Peter Macdonald-Eggers KC held that the Supreme Court's decision was not inconsistent with and had not overruled the conclusions in *Group Seven* and *Lakatamia* "that the mere fact that the respondent was the sole shareholder and director of a company did not mean that the respondent had 'control' over the company's assets for the purposes of the extended definition, because any decision taken by the respondent as to the disposition of or dealing with the company's assets was not taken by the respondent in his or her own right, but was taken in his or her capacity as an organ or agent of the company."

vi) The Privy Council has referred to the decisions in *FM Partners* and *Lakatamia* with apparent approval in *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389, [110].

vii) In *Group Seven Ltd*, [80], Hildyard J referred to the position where "the respondent has or is likely to have assets in a non-trading body corporate which he wholly owns and controls, which do not have any active business, and which are in truth no more than pockets or wallets of that respondent," suggesting that in such cases "an extension to the ordinary form of order may be justified." The scope of any "pockets or wallets" category is not entirely clear, but it can readily be seen that a company whose sole function is to hold assets on behalf of an individual or small group of shareholders - and thus will not have trade creditors – does not raise the particular concerns arising from the distinct nature of corporate personality in as acute a form. Rimer LJ's observations in *Prest v Petrodel* [2013] 2 AC 415, [105] are in point:

> "The flaw in the 'power equals property' approach is that it ignores the fundamental principle that the only entity with the power to deal with assets held by it is the company. Those who control its affairs—even if the control is in a single individual—act merely as the company's agents. Their agency will include the authority to procure an exercise by the company of

> its dispositive powers in respect of its property, but those powers are still exclusively the company's own: they are not the agents' powers."

26. There are a number of reasons why, in a particular case, it might be appropriate for a freezing order to "cast a wider net" (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2014] EWHC 3547 (Ch), [4]), so as to extend to assets which are susceptible to the respondent's control, but where it cannot be shown at the date of the application that these assets would be amenable to execution of any judgment obtained against the respondent. For example:

    i) There may be pragmatic reasons, such as where there is a risk that it may later become apparent that the assets are subject to some legal right on the part of the respondent and/or where the claimant has not had a sufficient chance to investigate the position (*Solodchenko*, [46]). On this approach, however, should there come a time when it has become clear that the respondent has no relevant legal right, or when the claimant has had a chance to investigate the position and come up empty-handed, there would be no justification for the freezing order continuing to apply to such assets (see *Yossifoff v Donnerstein* [2015] EWHC 3357 (Ch), [14]).

    ii) The control the respondent has may provide a basis for bringing the assets into its ownership, and thereafter levying execution against them. For example, in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd and others* [2011] UKPC 17, the court held that the respondent had a power to revoke a Cayman Islands Trust, and the court could order the respond to delegate that power to a court-appointed receiver who would exercise it. In *Blight v Brewster* [2012] EWHC 65, [75], it was held that the court could order a respondent to delegate his right to bring an asset into existence by electing to draw his pension to the claimant's solicitor.

    iii) A freezing order extending to such assets may be appropriate where a sufficient risk is established that the respondent may use its control of assets which are not amenable to execution to reduce the value of assets which are amenable to execution (*Lakatamia Shipping Co v Su* [2014] EWCA Civ 636. In *FM Capitol FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), [40] appears to regard *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64 as such a case.

    iv) The question of whether the court can order the respondent to exercise its powers of control remains controversial (see the discussion in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd and others*, [63]). However, it may be possible that the court will treat the fact of control as a sufficient basis to grant relief by way of execution. In *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm), Mr Skurikhin's power to call for assets held by the Berenger foundation to be transferred to him was held to be a sufficient basis to appoint a receiver by way of equitable execution over one of those assets (membership rights in an LLP), rather than simply appointing a receiver over Mr Skurikhin's power to call for those assets.

    v) To the extent it is not possible for the court to exercise, procure the exercise or

deem the exercise of the power of control, the courts have yet to grapple with the difficult issue of whether the court could nonetheless retrain the use of the assets for other purposes, to prevent a judgment debtor who could satisfy a judgment debt but chooses not to do so from taking the benefit of those assets for other purposes (and "incentisiving" the discharge of the judgment debt in the process).

Mr Brodahl's preliminary objection

27. On behalf of Mr Brodahl, Mr Caplan takes a preliminary objection that the court should not entertain an application to give a declaration as to the application of the EWFO. He relies in this regard on principles set out in the decision of Mrs Justice Dias in *Invest Bank v El-Husseini* [2023] EWHC 3350 (Comm) [17]-[19] and [23]. In that case, undertakings were accepted in lieu of freezing order relief which contained the usual exceptions for living and legal expenses, "but only where she has no other means to pay for the same". The claimant later sought an order by which the court would determine that the respondent had not established that she had no other funds from which to meet living and legal expenses, that she could no longer access the frozen funds for those purposes and that she should be required to replenish amounts previously so used.

28. Dias J held that it was not appropriate to grant a declaration, both because there was insufficient factual material to do so (there had been no disclosure or cross-examination) ([22]) and because any finding by the court on the balance of probabilities would involve an unsatisfactory "halfway house" which would prejudice the respondent, with the court being asked to make "a finding on untested evidence in circumstances where the primary sanction for breach of a voluntary undertaking is an application to commit with all the concomitant safeguards that that entails" ([23]); and where "such a determination would be of no practical utility whatsoever" because the claimant had undertaken not to rely upon any determination for the purposes of establishing a past breach, and the court could only make a finding as to the position then-prevailing ([24]).

29. I have reached the following conclusion:

    i) I do not feel able to make a final *factual* determination at this stage, not least because I think Mr Brodahl can fairly say he did not understand this to be the purpose of this two-hour hearing, and the court has not had the benefit of disclosure or cross-examination.

    ii) To the extent that there is a dispute between the parties as to the meaning or legal effect of the EWFO, there can be no objection to the court giving final declaratory relief to the extent that it would serve a useful purpose. I note that this was the means by which the issue determined by the Supreme Court in *Ablyazov* came before the court. Dias J confirmed the court's power to resolve an issue as to the meaning of an order in *Invest Bank* at [29].

    iii) It would also be possible for the court to vary the freezing order, with effect from the date of the variation application, if an issue arose as to the scope of the original order which the court concluded it was not appropriate to determine.

iv) When determining whether to grant a freezing order, issues as to the existence and location of assets and their ownership and control are generally approached by reference to an enhanced standard of arguability: e.g. "grounds for belief" the respondent has assets (*Ras al Khaimah Investment Authority and others v Bestfort Development llp and others* [2017] EWCA Civ 1014, [39]) and "good reason to suppose" the assets are the defendant's when an order is directed to a *Chabra* defendant (*JSC BTA Bank v Ablyazov (No 11)* [2015] 1 WLR 1287, [68]).

v) However, there will be contexts in which the court will hold a trial on the balance of probabilities to determine an issue of fact which will determine the application of the freezing order to a particular asset: most obviously when an injunction purports to apply to an asset on the basis that it is owned or controlled by the respondent, and a third party asserts that it owns the asset (*Ablyazov (No 11)*).

30. Where the issue between the parties is whether a particular asset falls within the scope of a freezing order as a matter of fact, there will be a difference where the order is expressed in general terms, and where the order specifically identifies the asset:

i) Where the order is in general terms, but they do in truth fall within the order, the respondent will be precluded from disposing of them and will be in contempt if he does so (*Ablyazov (No 11)*, [77]). If the position is in dispute between the parties, the claimant could apply to include a specific reference to the assets (which would operate prospectively and would be approached on the "good reason to suppose" test) or could bring committal proceedings to establish a breach of the order. I agree with Dias J that the court would be wary, in such a context, of holding a trial between claimant and respondent to determine the issue on the balance of probabilities.

ii) Where the order specifically mentions an asset, it is open to a third party to apply to remove the asset from the scope of the order, in which case the third party could seek a trial of the issue on the balance of probabilities (*Ablyazov (No 11)*). I can see no reason why a respondent, who would be bound by the order *pro tem*, should not similarly be able to seek such a determination.

Does the asset fall within the geographic scope of the EWFO?

31. The right to receive the Dividends and the Consultancy Fees are both choses in action. The issue of the location of a chose in action for the purposes of a freezing order with a restricted geographic scope is not one on which I have been able to locate any authority. A possible approach would be to view the issue through the lens of the court's power of attachment, given the enforcement principle. On that basis:

i) A debt is generally situated in the country where it is properly recoverable or can be enforced, which is usually where the debtor resides (*Dicey, Morris & Collins on the Conflict of Laws* (16th), Rule 129(1)).

ii) There is first instance authority which suggests that that rule is displaced where

the agreement under which the debt arises contains an exclusive jurisdiction clause in favour of another state (*Hardy Exploration & Production (India) Inc v Government of India* EWHC [2018] 1916 (Comm), [82] and *Ross Leasing v Nile Air* [2021] EWHC 2201 (Comm)) (applied by the Court of Appeal in a case in which this was common ground in *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599, [59]-[61]).

iii) The English court will, however, be able to make a third-party debt order in respect of a debt outside England and Wales, if by the law applicable in the situs of the debt an English order would be recognised as discharging the liability of the third party to the judgment debtor.

32. The effect of applying that second rule in a domestic freezing order case is that the claimant may not know where the asset is located without sight of the contract, and that a variation to the contract could in appropriate circumstances amount to a removal of the asset from the jurisdiction. Indeed, this may have happened here – the Eden Roses Consultancy Agreement contains an exclusive Norwegian jurisdiction clause, whereas the terms of the Ultima consultancy agreement are not known (although the same issue does not appear to arise in relation to the Dividends).

33. It is not necessary to determine whether and to what extent these principles are determinative of the location of a debt for freezing order purposes, and I did not hear argument on the subject. I would note that, in a case in which the original value arises from the profits of an English company and services provided by the respondent as a director and executive of that company, it might well be thought that a freezing order which extended to the Dividends and Consultancy Fees did have a "real connecting link" with England and Wales.

The suggestion Ultima and/or Eden Roses hold the rights to the Dividends and Consultancy Fees on trust for Mr Brodahl

34. As I have already noted, I would not be willing to make a final determination of this issue at this hearing, for the reasons I have set out above. However, on the material before the court, the Claimants have not established good reason to suppose that this is the case. I have reached this conclusion for the following reasons:

i) So far as the Consultancy Fees are concerned, the arrangements whereby Mr Brodahl's services were provided pursuant to a consultancy agreement with a company appear to have been in place from shortly after Mr Brodahl became a director of Waldorf Production UK. There were similar arrangements for other staff and the existence of the arrangements was disclosed in audited accounts. The arrangement is a well-known one (dealt with for tax purposes in IR35). Whatever benefits arrangements of this kind are intended to bring would be set at naught if the employee was the beneficial owner of the income stream, and the disclosure given in the audited accounts would be unnecessary and inaccurate. There are no features of this case which would explain why Mr Brodahl should have procured the conclusion of a consultancy agreement with a company, Waldorf Production UK should have paid Ultima under such an agreement and disclosed the arrangement in its accounts, when the true position was that Mr

Brodahl was the beneficiary of the debt.

ii) So far as the Dividends are concerned, there is a complex, but conventional, corporate structure which records Ultima, and then Eden Roses, as the shareholders who are entitled to the Dividends and the public register of shares also reflects that fact. Both the Dividends and the Consultancy Fees appear to be shown as assets on Ultima's financial statements.

iii) The material which Mr Hain relied upon to establish beneficial ownership – Mr Brodahl's effective enjoyment of the fruits of those rights, and ability to procure the alleged transfer from Ultima to Eden Roses – are the ordinary consequences of his 100% ownership of those entities at the time of the transaction. If these were sufficient to establish good reason to suppose that the rights in question were not the companies', but Mr Brodahl's, this would be the case in almost all "one person company" cases.

Did Mr Brodahl control the right to the Dividends and Consultancy Fees for the purposes of the EWFO?

35. Once again, I am not willing to make a final determination of this issue at this hearing, for the reasons I have set out above, but on the material before the court, the Claimants have not established good reason to suppose that this is the case:

i) I will assume, for present purposes, that the Claimants have sufficient grounds to question the efficacy of the transfers of the right to the Dividends and (in particular) the Consultancy Fees from Ultima to Eden Roses. It is sufficient, therefore, to consider the position of Ultima.

ii) On the basis of the decisions in *Group Seven* and *Lakatamia Shipping Co* to which I have referred above, the definition of assets in the EWFO does not extend the order to assets of companies wholly owned or controlled by Mr Brodahl.

iii) If there is an exception to this principle where the company can be said to be a "pocket" or "wallet" of the respondent but does not hold the assets for the respondent beneficially (as to which I express no view), I am not persuaded on the material before me that there is "good reason to suppose" that this is the case. Ultima (and, if the June 2022 arrangements are genuine, Eden Roses) traded, assuming contractual obligations under the respective consultancy agreements to the relevant Waldorf company. Both companies had a corporate purpose of a kind which is regularly encountered (see [34(i)] above).

36. That leaves the separate question of whether there is a risk that Mr Brodahl might act in such a way as to diminish the value of any ownership interest he has in Ultima and/or Eden Roses, so as to justify an injunction which captures assets held by those entities, or whether there is a good reason to suppose that he has the power to direct the use of funds received by Eden Roses by way of Dividends and Consultancy Fees.

37. I have set out matters at [18], [19] and [21] above which might be relevant to such an

application. However, it is not before me today, and in any event the current restriction to the geographic scope of the EWFO presents a real obstacle to an application of that kind. As that issue is before the Court of Appeal in July, and further material has now emerged with a potential bearing on that issue ([33]), I shall say no more about it.

Conclusion

38. For these reasons, the Claimants' application for a declaration that, properly interpreted, the EWFO extends to the Dividends and Consultancy Fees fails.