Neutral Citation Number: [2020] EWHC 2629 (Comm)

Case No: CL-2020-000192

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 05/10/2020

Before :

MR JUSTICE JACOBS

- -

Between :

(1) YS GM MARFIN II LLC	**Claimant**
(2) YS GM MF VIII LLC	
(3) YS GM MF VII LLC	
(4) YS GM MF IX LLC	
(5) YS GM MF X LLC	
- and -	
(1) MUHAMMAD ALI LAKHANI	**Defendant**
(2) MUHAMMAD HASAN LAKHANI	
(3) MUHAMMAD TAHIR LAKHANI	

- -

Richard Waller Q.C., Adam Turner and Charlotte Payne (instructed by **Watson Farley & Williams LLP**) for the **Claimants.**
Matthew Cook (instructed by **Greenberg Traurig LLP**) for the **Defendants**

Hearing dates: 22nd and 23rd September 2020.

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 5th October 2020 at 13:30pm.

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MR JUSTICE JACOBS

MR. JUSTICE JACOBS:

A: Introduction

1. This judgment concerns two applications which were heard on 22 and 23 September 2020.

2. The Claimants, whose case was argued by Mr. Richard Waller QC, seek summary judgment against three Defendants under a series of guarantees issued in order to support loans made for the purpose of financing a large-scale family-controlled business relating to the purchase and sale of ocean-going vessels for scrap.

3. This ship recycling business had been built up by the Third Defendant ("Tahir") over many years. A presentation made to the Claimants in July 2019 described the background to this business. Tahir was an "internationally recognized visionary shipping executive" with more than 40 years' experience. The business was originally carried out by a company called Dubai Trading Agency, which was the first company based in the Middle East to start buying ships for recycling. By 2019, the business was carried out by North Star Maritime Holdings Ltd ("North Star"), which was "a market leading ship recycling company (top 3 in the world) with a stable financial track record", enjoying "a respectable and trustworthy market reputation since the inception of the group in 1973". North Star was one of a number of related companies engaged in different aspects of the shipping industry which were described in the presentation. The others were Dubai Navigation Corp. (on whose behalf the presentation was made), which owned a number of trading vessels; Gulfstar SA, described as the "Commercial arm" of the group, handling sale and purchase, chartering and projects via an extensive worldwide network including its own offices in New York, London and Monaco; and DTA Maritime LLC, a "market leading provider" of marine and logistic services to shipowners, ship managers and others.

4. Tahir is the father of the First Defendant ("Ali") and the Second Defendant ("Hasan"). Each of them provided the guarantees which provided the basis for the summary judgment application. Although Tahir, Ali and Hasan are all represented in these proceedings by Greenberg Traurig ("GT"), who came on the record in May 2020, no defence to the claim has been intimated or advanced by Tahir. No submissions were made on his behalf at the hearing of the summary judgment application. Since there is a straightforward claim under the guarantee given by Tahir, and since it has not been and cannot be suggested that he has not been properly served with proceedings or with the application (GT remain on the record as far as he is concerned), summary judgment is clearly appropriate in his case.

5. Ali and Hasan were represented at the hearing by Mr. Matthew Cook. Only one defence is advanced by way of response to the summary judgment application: a defence of undue influence. The question is whether that defence has a real prospect of success.

6. Separately, Ali and Hasan apply to discharge a worldwide freezing order ("WFO") which was originally granted by Butcher J. on 2 April 2020, and which was continued at the hearing of the return date on 22 April 2020. The principal argument is that the Claimants failed to disclose certain facts which were material to the application. A separate point is raised in relation to notices of the WFO which were given to third

parties following its grant. It is said that the giving of these notices, and the manner in which notice was given, was an abuse of the court's process such as to warrant, independently of non-disclosure, the discharge of the WFO.

7. I shall deal separately with both applications.

B: Factual background.

8. This section addresses the factual background and evidence which is relevant, principally, to the summary judgment application. To a very large extent, these facts were not in dispute.

9. The Claimants are Delaware corporations established to advance commercial loans, financed by private equity funding. Their business is managed by Yield Street Management, LLC, which provides an online platform where qualified individuals can participate in investment opportunities. Yield Street Management LLC's parent company is YieldStreet Inc., a Delaware corporation headquartered in New York. The facilities provided by the Claimants were therefore referred to as the "YieldStreet facility" or by similar expressions.

10. Over a 15-month period, between 1 June 2018 and 11 September 2019, the Claimants agreed to advance, to various borrower counterparties ("the Borrowers"), a number of commercial loans. 4 out of the 5 loan agreements were signed by Ali. The terms of each loan made it clear that, as is usual in ship finance transactions, the security was to include personal guarantees. The Borrowers themselves were, as is common, special purpose vehicles. The total principal sum advanced by the Claimants to the Borrowers, between 1 June 2018 and 5 March 2020, was US$74.6 million.

11. Each of the Loans was secured by personal guarantees ("the guarantees" or "the personal guarantees") given by each of the Defendants. The guarantees were expressly governed by English law and jurisdiction. It is not necessary to describe the detailed terms of the guarantees, because there is no dispute that, subject to the undue influence defence, Ali and Hasan are liable under those guarantees for the full amounts claimed: the guarantees contain comprehensive indemnity provisions. In addition to these personal guarantees, a "Corporate" guarantee was provided by North Star, the parent company of the Borrowers.

12. A feature of the documentation is that there was a separate guarantee issued by each of the Defendants in respect of each underlying loan. Each Defendant therefore executed 5 guarantees. Each guarantee had an initial cover page. This contained the following:

> "Warning to Guarantor
>
> This is an important document. You should take independent legal advice before signing and sign only if you want to be legally bound. If you sign and the Lender is not paid you may have to pay instead of the Borrowers without any limit on your liability."

13. Each guarantee was signed by Ali and Hasan as a deed before a witness. Beneath the signature block was text which repeated the warning set out above.

14. Subsequent to signing the guarantees, the Defendants also executed numerous deeds of confirmation, re-affirming their guarantee liabilities whenever the underlying loans were amended. Overall, Ali and Hasan executed between them 26 relevant contracts or deeds, at regular intervals, over a period of approximately 18 months.

15. There is no dispute that the loans were the subject of numerous non-payment "Events of Default". In February 2020, further Events of Default occurred when the Borrowers' corporate parent company, North Star, was put into voluntary liquidation in Nevis. Before describing these events, I will say something about North Star and the relationship of Ali and Hasan with that company.

16. North Star was the holding company of a large number of other companies, including the Borrowers. Ali and Hasan each owned 50% of North Star, and they were its sole directors. The reason for their ownership was explained in a "Q and A" document sent by e-mail by Ali to another creditor group, Njord Partners ("Njord"), in December 2016. The covering e-mail said that "North Star/ DTA" was one of the oldest and leading companies in the ship recycling sector. Njord had asked two questions, to which answers were given in bold text:

> "7. What were all of the reasons for the change of entity and name from DTA to North Star?
>
> **The Q4 2008 collapse in freight rates gave DTA further opportunity to expand its activities in the ship recycling market. 2012 was a record year for ship recycling volumes and in 2013 we decided to restructure our trade finance lines to cater for the increase in ship recycling volumes. At this juncture, the most interesting financing options at our disposal required us to set up North Star which has 100% beneficial ownership as oppose[d] to DTA's 49/51% (on paper) share split which has to exist in any onshore UAE based LLC Company. North Star's corporate structure provides an investor friendly transparent framework, devoid of Sharia Law governed corporate LLC requirements.**
>
> **In addition to the above, DTA continues to operate as a service company in Dubai. The company continues to be in good standing, holding a valid commercial license (copies of which can be provided for reference & records), having assets and providing services to the shipping industry from its registered office in Dubai, UAE.**
>
> 8. Why is Tahir Lakhani not a director of North Star?
>
> **Apart from the reason listed above, North Star was formed also with forward succession planning in mind, with Tahir Lakhani's sons Ali Lakhani and Hasan Lakhani who are now fully active in the business**."

17. This document was not seen by the Claimants at the time. It has been obtained recently as a result of separate litigation commenced by Njord. Ali and Hasan did not argue, on this application, that the beneficial ownership of North Star was held by anyone other than themselves. Indeed, on 10 September 2019, shortly before the final loan was advanced by one of the Claimants, both Ali and Hasan signed formal "Declarations of Ultimate Beneficial Ownership" which stated that each of them was, as to 50%, the ultimate beneficial owner of North Star. Consistent with this beneficial ownership, the asset disclosures made by Ali and Hasan, pursuant to the WFO granted by Butcher J., include their ownership of North Star. Tahir's asset disclosure does not.

18. Although it was a theme of Mr. Cook's written submissions, and to some extent his oral submissions, that North Star was a "vehicle" for Tahir, he ultimately did not press an argument that the ultimate beneficial ownership of those companies was other than with Ali and Hasan. There is therefore, and can be no sustainable argument that the shareholdings of Ali and Hasan in North Star were either sham or nominal.

19. It was also not suggested that there was anything untrue or inaccurate in the statement, made to Njord, that an important reason for their ultimate beneficial ownership of North Star was "forward succession planning".

20. A degree of controversy did, however, surround the statement that both Ali and Hasan were "now fully active in the business". Mr. Cook submitted that this particular statement had no relevance to the issues arising in relation to the undue influence defence. This was because it was not made to the Claimants and they did not know about it until recently. Furthermore, he submitted that it was only concerned with the position in December 2016, whereas the first loan by the Claimants was only made in June 2018. The submission implied, therefore, that there had been a material change in the involvement of Ali and Hasan between the time when the statement was made to Njord in late 2016, and the time when the dealings with the Claimants occurred.

21. Ultimately, I do not consider that the precise extent of Ali and Hasan's activity in the business is a matter which is necessary for my decision as to the potential availability, within a summary judgment application, of the undue influence defence. However, I am fully entitled, even on a summary judgment application, to reject assertions which have no real substance, particularly if contradicted by contemporaneous documents: see *Easyair Limited v Opal Telecom Ltd.* [2009] EWHC 339 (Ch), para [15 (iv)].

22. Insofar as Ali and Hasan now assert that they were not fully active in the ship recycling business of North Star and its subsidiaries, I consider such assertions to be without substance. No reason was suggested as to why Ali would have lied to Njord in December 2016. There was in my judgment nothing in the evidence of Ali and Hasan which indicated that there had been a change, post December 2016 and prior to June 2018, in their level of involvement in the business. Had such a change occurred, it was certainly not reflected in the 2019 presentation to which I refer below. The assertions also make little sense in circumstances where (as was not disputed) beneficial ownership had indeed been transferred by Tahir to his sons as part of succession planning. It would be natural in circumstances where the business is to be carried on by the sons in the future, and where it is owned by them, for them to have an active involvement, at least to some degree, in that business.

23. The assertions are also contradicted by a range of contemporaneous documents, albeit that these documents principally concern Ali rather than Hasan. This contemporary documentation included various press articles from the shipping industry publication Tradewinds, which were obviously based upon what they were being told either by Tahir or Ali or both. Thus, in January 2013, Tradewinds reported that Ali had "some time ago joined his father in the business" and that it was "understood that another son, Hasan … will be part of DTA after completing his studies at Regent's Business School in London" (There was no dispute that Hasan had indeed attended this college). The article therefore evidences the fact that Ali was already working in the business, and the intention that Hasan would do so. This is consistent with the situation described to Njord in 2016.

24. A number of earlier articles evidence Ali's involvement in the business, and his enthusiasm and knowledge of it. For example, in an article headlined "Young gun has work cut out in a tough industry", the author described Ali as having "no problem articulating his thoughts" in relation to the industry.

25. In 2016, Ali was awarded the "Maritime Standard Young Person in Shipping Award", and a video of the presentation of the award is still available on YouTube. Ali was identified as the MD of DTA Maritime, and the announcer said:

> "This year's winner of the Young Person in Shipping award joined the family business in 2012 and now has overall responsibility of the company's sale-and-purchase and operational activities as well. Demonstrating his capabilities to the full, he has recently been responsible for overseeing and managing the successful dry-docking of the company's latest vessel acquisition which was carried out in February 2016 in Dubai dry-docks. He has also built on an important strategic relationship with the Emirates National Oil Company, ENOC, and he is clearly a young man with a great future ahead of him in the shipping business."

Ali was clearly happy to receive the award on this basis. The statement that he had overall responsibility for sale and purchase activities is consistent with a substantial body of documentary evidence which shows Ali's signature on MOAs which related to vessels financed by the Claimants, and indeed Ali accepts in his evidence that he would assist in finding ships to purchase for recycling (although he says that this happened only "occasionally").

26. In July 2019, the presentation (to which I have already referred) was made to the Claimants' representatives in connection with another Lakhani family company, Dubai Navigation Corp (DNC). This presentation was therefore made well into the period of the Claimants' involvement and when it was argued that, as Mr. Cook's submission implied, there was or may have been a change from the position (as stated to Njord Partners in 2016) as to the active involvement of Ali and Hasan. This alleged change is not supported by the presentation. This (Powerpoint or equivalent) presentation began by describing the DTA Group, which comprised the four companies: North Star, Gulfstar SA, DTA Maritime LLC, and DNC itself. The description of North Star was

that it was "a market leading ship recycling company (top 3 in the world)". Unsurprisingly, no attempt was there made to distinguish between North Star and the individual SPV shipowning companies which were its subsidiaries. In circumstances where North Star was the holding company of a number of SPVs, and where the ship recycling business would naturally be regarded (as it was in this presentation) as North Star's business, I did not consider that there was any substance in Mr. Cook's submissions that it was significant that Hasan was a director of North Star, but was not a director of the individual SPVs. In any event, this was not, however, a submission that could be advanced on behalf of Ali who was a director at both holding company and subsidiary level.

27. The presentation then went on to describe DNC as having taken an opportunity in 2017/2018 to purchase ships for trading rather than recycling. Ali and Hasan were shown as 50% owners of DNC. Ali was described as an executive director of DNC, although Hasan was only described as a 'director'. A later slide was headed: "Management Team with Considerable Experience". This referred to both Ali and Hasan, as well as a number of other individuals. A brief biography was given of various individuals. These were as follows in relation to Ali and Hasan:

> "Mr. Ali Lakhani is the oldest son of the Chairman, graduating from Plymouth University U.K., in Maritime Law and Maritime Business in 2009. He went on to work for top-tier ship broking Companies; Braemar Seascope London (now Braemar ACM), SSY (Simpson Spence & Young) London and leading international law firm Stephenson Harwood, London.
> He then joined the group in 2012 being responsible for it's S&P and trading activities.
>
> "Mr. Hasan Lakhani is the youngest son of the Chairman, a graduate from Regents University London with BA in Global Finance Management, joined the DTA Ship Agency in 2013, currently holding the position as General Manager of the DTA Ship Agency, Dubai Branch. He has had Internships with Emirates National Bank of Dubai and the world largest shipbrokerage Clarksons Platou Shipbrokering."

28. This presentation therefore provides further contemporaneous evidence of Ali's active involvement in the business of North Star: he was described as being responsible for the "S&P and trading activities" of the "group". It also provides contemporaneous evidence of Hasan's active involvement in the business of the group, although not directly in relation to DNC itself (where he was on the board, but not described as an Executive Director) or North Star. The description of him as "General Manager of the DTA Ship Agency" indicated that his focus was on the business of DTA Maritime LLC which was described earlier in the presentation as a "market leading provider of Marine and Logistic services to ship owners" and others. This is consistent with Hasan's LinkedIn profile, downloaded in March 2020, where he describes himself as "General Manager at DTA Maritime". On any view, the sons were both being presented in 2019 as well-educated (which they clearly were) and already with industry

experience over a number of years: Ali having joined the group in 2012, and Hasan having joined the DTA Ship Agency in 2013.

29. Reverting now to the chronology of events in 2020. On 13 February 2020, North Star, which was the Corporate guarantor of each of the loans, executed Articles of Dissolution in Nevis. This recorded that Ali and Hasan were the sole directors and officers of North Star, and that they each owned 50% of its shares. The reason the company had elected to dissolve was that: "The corporation is insolvent and unable to pay its debts as they became due." The petition was signed by Ali, and he also swore a supporting Affidavit. This stated that:

> "As a director of North Star I have been concerned in the matters giving rise to the Petition and have the requisite knowledge of the matters referred to in the Petition".

30. The Affidavit went on to describe, relatively briefly, North Star, its subsidiaries, and its indebtedness. The Affidavit states that the statements in the Petition are "made from my own knowledge except where otherwise indicated." The statement that the company was "insolvent and unable to pay its debts as they become due" was, therefore, not said by Ali to be based on information from others. The Affidavit, when read with the Petition, is therefore consistent with Ali's active involvement in the business of North Star from which he derived his knowledge of the matters set out in both documents.

31. North Star's Articles of Dissolution were filed with the Registrar of Corporations in Nevis on the day they were executed, and on the same day Messrs. Philip Reynolds and Geoffrey Rowley of FRP Advisory LLP, London, signed a Notice of Appointment of Liquidators under section 117 of the Nevis Business Corporation Ordinary 2017, giving notice that North Star was in voluntary liquidation.

32. On 17 February 2020, the High Court of Justice of the Federation of Saint Christopher and Nevis, on an ex parte summons, ordered inter alia a moratorium upon actions against North Star, in the following terms: "No creditor of [North Star] shall have any remedy or shall commence or continue any action, execution or other proceedings, against [North Star] or the property of [North Star] that has vested in the Liquidators, for the recovery of a claim provable in the liquidation until further order of the court".

33. There is no dispute that the entry of North Star into voluntary liquidation amounted to an "Insolvency Proceedings Event of Default" under the various loan agreements. This led, on 5 March 2020, to the Borrowers being given notice of acceleration of the loans under powers contained in the loan agreements, and to demands for repayment. Upon acceleration of the loans, the total sum due from the Borrowers was US$76.7 million.

34. Each of the notices of acceleration sent on 5 March 2020 was also addressed and sent to each of the Defendants, individually, in their capacity as the personal guarantors of the loans. Each notice included a demand addressed to the personal guarantors to pay the sum due under the loan in question. These demands triggered the liability of the Defendants under the guarantees for the full amount of the Borrowers' liabilities under their respective loans. Accordingly, since 5 March 2020, the cumulative principal liability of each of the Defendants under the personal guarantees has been US$76,700,093.70.

35. There was no substantive response to the demands under the guarantees. On 5 and 6 March 2020, Mr. Charles Buss of Watson Farley & Williams ("WFW"), the partner acting for the Claimants, contacted Mishcon de Reya ("Mishcons") in relation to developments, and attempted to speak to Mr. Mohammed Khamisa QC of that firm. Mr. Buss had been given to understand that Mishcons were acting for the Defendants. Neither Mr. Khamisa nor the Defendants gave any substantive response to the demands.

36. On 2 April 2020, Butcher J., at a without notice hearing, made a WFO against each of the Defendants. On 22 April 2020, at a return date hearing on notice to the Defendants, but which they did not attend, the WFO was continued by Butcher J. On 19 May 2020, the Claimants issued their present application for summary judgment, supported by the Third Affidavit of Charles Buss. By this time, no substantive response to the demands had been received, and no defence intimated, notwithstanding the notification to Mr. Buss on 5 May 2020 that GT was now acting for the Defendants. (Mr. Khamisa had moved from Mishcons to GT at some stage between March and May).

C: The evidence concerning the undue influence defence.

37. The potential defence of undue influence emerged in the first witness statements of Ali and Hasan served on 8 June 2020. These witness statements were in fact sworn in support of applications to discharge the WFO, rather than by way of response to the summary judgment application. But in due course the same factual matters were relied upon, in their second witness statements dated 15 July 2020, in response to the summary judgment application. The defence is summarised in paragraph 11 of Ali's second statement, where he says that he understood that he may not be liable under the personal guarantees:

> "because I entered into them on instructions from my father, without understanding the nature of the liabilities I would be taking on or the risks involved, where I had no active involvement in the borrower companies and in circumstances where, as the Claimants (and their advisers and agents) were aware, I had not received any legal advice in relation to them."

38. Paragraph 11 of Hasan's second statement was in materially identical terms, except that whereas Ali said that he had no "active" involvement in the borrower companies, Hasan said that he had no involvement without the adjective "active".

39. Ali's first statement describes his educational and family background. He said that while he was formally a director of North Star and its subsidiaries and in that capacity signed, on the instructions of his father, a number of agreements and other documents relied upon by the Claimants, he had no "real involvement in or knowledge of North Star's business or the loan agreements entered into by North Star's subsidiaries with the Claimants". As a result, he had little or no knowledge of the matters raised in the Claimants' Particulars of Claim (and the WFO application) until receipt of those documents. He described his educational background and the founding of the business by his grandfather, and how it had subsequently been taken over by his father who was

fairly described as a "straight-talking, pull-no-punches archetypal trader". His family originated in Pakistan, and his father retained the traditional view that he was head of the family and he "makes all significant decisions regarding the family and its members". His father expected him to follow him into the business. After graduating from the University of Plymouth having studied Maritime Business and Maritime Law, his father insisted that he returned to Dubai to work for him. He had worked for his father ever since. In paragraphs 12 and 13, he said:

> [8] Although my father has given me a number of titles and made me a shareholder in a number of family companies, he has been reluctant to give up any control over the business or give me any real responsibility. All major decisions relating to the business are taken by my father and I have no decision making role. This has led to me being demotivated and so for years now I often go into the office late and only stay for a short while or sometimes I do not go in at all.
>
> [9] It is fair to say that the only substantial decision which I have made against my father's wishes was in my choice of wife. My father expected me to marry a traditional Pakistani girl, but I fell in love with a British girl. I got married in January 2019 after my father finally agreed following several years of seeking his permission and approval, including with the assistance of third parties. That period was really difficult.

40. He then described North Star and its subsidiaries. He said that notwithstanding his 50% beneficial shareholding in North Star, and his directorship of North Star and its subsidiaries, his father "retained full control over the business carried out by North Star and its subsidiaries and the YieldStreet relationship, even though he had no formal role at those companies". He went on to say, in evidence which goes to the heart of the arguments as to the availability of a defence of undue influence:

> "[16] I had no involvement in the day to day management of North Star (and its subsidiaries) and no involvement or detailed knowledge of North Star's maritime recycling business, apart from the fact that I would occasionally assist in finding ships to purchase for recycling. I also had no knowledge of North Star's overall financial position, the detailed terms of its loan agreements or the status of its loans (including the loans with the Claimants).
>
> [17] In particular, I had no real contact with lenders relating to the financing for acquisition of vessels, including Yield Street, and their agents. So far as I can recall, the only direct contact I ever had with Yield Street was that I attended a relationship meeting at Yield Street's New York office in August 2018. This was more of a social meeting to allow us to meet the main individuals at Yield Street and there was no discussion of the

> specifics of North Star's business with Yield Street. I was also occasionally copied on emails from my father to Yield Street.
>
> [18] As a director of North Star and its subsidiaries (as well as several other group companies), I was often required to sign documents. I would estimate that I signed hundreds of documents each year without reading them. Where my signature is required on documents, my father or one of his staff would place the documents in front of me with marks to show me where I need to sign. Once I had signed, they would take the document away for onward transmission. It is not my father's practice to explain the purpose or effect of agreements which he has negotiated. It may seem surprising to the Court that I would sign important documents without seeking to understand exactly what I was signing, but given my father's decades of experience and my limited knowledge of the business, I had no reason to question and never felt able to question his judgment and would, therefore, sign as directed. My father is aggressive and domineering and would therefore react badly to me questioning his judgment. I was being particularly careful in 2018, since I had finally managed to get his approval to my marriage and did not want to give him any reason to change his mind.
>
> [19] Although I had a 50% beneficial shareholding in North Star, it was never my expectation that I would receive 50% of any profits made. My father would determine what happened to any profits, whether they were reinvested in North Star (or another family company) or paid out to him, me or my brother. In fact, given my limited role, I did not even expect to be told what profit was made. This was my father's business and he had control."

41. He then addressed the "Yield Street relationship", and commented on various documents which he had not previously seen. He said:

> "I do not recall having entered into a personal guarantee in relation to this facility, however, as I have explained above, my father regularly required me to sign documents without explaining their effect, so it is possible that I did so."

42. One document on which he commented (and upon which argument at the hearing focused) was an e-mail dated 21 March 2018 sent to Tahir from Mr. Andrew J. Simmons, the Chief Executive Officer of GMTC LLC in Athens. Mr. Waller accepted, purely for the purposes of the present application, that Mr. Simmons could be regarded as acting on behalf of the Claimants in relation to the negotiations for the loan facilities which Mr. Simmons was conducting. The email discussed the need for guarantees to be provided by Ali and Hasan, as well as Tahir. Mr. Simmons stated:

> "On another matter re the new scrap facility do Ali and Hassan still own NSMH 50/50. This is the corporate guarantor of the

> facility. However you now want to personally guarantee this on your own unlike the existing guarantee whereby the three of you provide one each. How do we square this away? Their company will provide a corporate guarantee but as such you have no shareholding in it so your guarantee is questionable as there is no consideration legally on your part. I know you will say that ultimately "it is all you" but legally and technically as such this does not work on paper?"

43. Ali's comment on this e-mail, in his witness statement, was that Mr. Simmons was right to say that North Star was "in practice all my father and it is clear that Yield Street and its advisers/ agents were well aware of this".

44. He said that his father appeared to have agreed in response to the email that Ali and Hasan would give personal guarantees in support of the new YieldStreet facility, but this "was not discussed or agreed with me". He acknowledged that the documents showed that he had then signed the term sheet, in his capacity as director of North Star, but he did not specifically recall signing this document.

> "As noted above, I signed hundreds of documents each year and, as was normal practice, my father or his staff would have told me there was a document which needed my signature and I would have signed on his instructions. To the best of my recollection, there was no discussion either then or subsequently about the size of the borrowing, the need for personal guarantees from me (and my brother), or about the risk that I/we would be taking in guaranteeing this borrowing."

45. His father had copied him into his e-mail returning the signed copy of the term sheet, but this was the full extent of his involvement in the negotiations in relation to the YieldStreet facility.

46. He then commented on an e-mail exchange between Mr. Simmons and Mr. Nolan on 15 May 2018. Mr. Nolan was an executive within the North Star group. Mr. Simmons had forwarded the personal guarantees (for Ali and Hasan) to Mr. Nolan. Mr. Nolan had asked whether Tahir needed to run these documents by his outside counsel, although it seemed to him not to be necessary if Mr. Simmons was casting an eye over them. Mr. Simmons' response was:

> "Hi Brian.
>
> I guess that is your call.
>
> SH here have drafted them off the old facility agreement so hopefully they are very similar. YS are running them by Seward and Kissel in NYC I believe so I suggest we wait to see if they come up with any major changes or not. If they don't I believe

> you would not need to run them by presumably SH DXB but at the end of the day it is his/your call.
>
> My suggestion is to wait on the US attorneys response. Nigel is aware of this and knows the guy quite well at S&K so hopefully there will be no major hiccups. As I said I suggest we wait to hear back from the USA and we can then decide appropriately."

47. Ali said that this document confirmed that Mr. Simmons knew that it was Tahir making decisions about the personal guarantees, and that Mr. Simmons had suggested that there would be no need to have the personal guarantees run past outside counsel. Ali said that he had not been aware of this exchange, and it appeared that there had been no review by outside counsel (as far as Ali's lawyers had been able to ascertain). Ali certainly did not receive any advice from a lawyer about the personal guarantee.

48. Ali then said that it appeared that he had signed the required loan documentation in June 2018, but he did not recall doing so. This would have been 'another set of documents that I was told needed signing and signed on my father's instructions'. He continued:

> "[30] I am confident, however, that neither my father nor anyone else discussed with me the responsibility that I was taking on by signing these documents (including the personal guarantee) or the nature of the risk involved. It never crossed my mind that I was accepting personal responsibility for repaying USD 25 million, since I do not have anything like the funds required to do so.
>
> [31] It has been pointed out to me that the first page of the Personal Guarantee includes a "Warning" stating that I should take independent legal advice. This was not pointed out to me at the time and I did not see this Warning. I would not have been given the opportunity to review the documents that I was asked to sign before signing them. I would therefore not have read this warning. I knew that my father was satisfied with the agreements and so signed them on that basis. I certainly did not receive any legal advice before doing so.
>
> [32] I now know that there were four further loans taken out with the Claimants in the amounts of USD 16.05 million, USD 12.65 million, USD 9 million and USD 14.5 million, in addition to an increase to the original loan from USD 25 million to USD 37.5 million, resulting in loans totalling nearly USD 90 million. I am also now aware that I signed further personal guarantees in relation to each of these loans.
>
> [33] As with the original loan, I was not involved in any of the discussions/negotiations in relation to these additional loans. My father did not discuss with me the scale of this additional borrowing. As was normal practice, I was simply told that there

> were documents which needed my signature and I signed them on my father's instructions.
>
> [34] No one ever discussed with me the fact that the suite of documents I was signing included personal guarantees, which meant I was accepting personal responsibility for the entire borrowing. There was no discussion of the sums involved or the nature of the risk involved. I had no idea that I had personal responsibility for repaying tens of millions of US Dollars, money that I do not have and have never had.
>
> [35] Since my father had complete control of North Star, I had no idea the business was in serious trouble until January 2020 when I received notices of default from a number of the Claimants. I was, however, assured by my father that these problems would be resolved and a liquidator would be appointed in relation to North Star who would negotiate a resolution.
>
> [36] I only became aware of the scale of my potential exposure when I received demands for payment from the Claimants on 5 March 2020. I was again reassured by my father that he would resolve these issues."

49. In paragraph 60, Ali set out his case as follows:

> "Although I understand this is a matter for legal submissions, I understand that I may not be liable under the personal guarantees because I entered into them on instructions from my father without understanding the nature of the liabilities I would be taking on or the risks involved (which were vastly greater than any potential benefit that I might receive from the business undertaken pursuant to the loans), where I had no active involvement in the borrower companies and in circumstances where, as the Claimants (and their advisers and agents) were aware, I had not received any legal advice in relation to them. The Claimants were fully aware that I did not have the knowledge or experience to undertaken business of this nature or scale. They were relying on my father's experience of the industry rather than mine in making their lending decisions."

50. The evidence of Hasan supported and to a large extent repeated the evidence of Ali. Hasan had studied Global Financial Management at Regent's University, and had thereafter worked in London for a few years to get work experience. This included working in e-commerce and for a UAE Bank in London, before moving back to Dubai to work in the family business. He had moved in with his parents and still lived there now. His father was less strict with him than with Ali. His role in the family business was limited: that work was confined to the ship agency side of the business. He had no involvement in the maritime recycling business, which was completely controlled by Tahir. As with Ali, his father had given him a number of titles and made him a

shareholder in a number of family companies. But he did not have any real responsibility. All major decisions were taken by his father and he had no decision-making role.

51. Hasan agreed with Ali's description of his [Ali's] role in relation to North Star, but his own role was even more limited. He had no involvement in the day to day management of North Star's maritime recycling business. He had no knowledge of its overall financial position, its loan agreements or the status of its loans (including the loans with the Claimants). Whilst he may have been copied into correspondence on a few occasions, he had no other contact with YieldStreet or other lenders relating to financing for the acquisition of vessels.

> "[15] As a shareholder and/or director of some of the family companies, I am asked from time to time to sign documents which I understood were required for the maritime recycling business. I never receive any explanation of what I am signing or why this is required. I am simply given the documents by my father or one of this staff with marks to show me where to sign and I will generally sign them without reading, since I am not involved in the maritime recycling business and my father would react badly to me questioning his judgment.
>
> [16] While I understood that I had a 50% beneficial shareholding in North Star, the maritime recycling business was controlled by my father and it was his decision when or if I received any money from this company. I was not given any information about the financial performance of this business."

52. He had no knowledge or involvement in the negotiations with YieldStreet. He did not see any term sheet or loan agreement. He was not involved in any discussion as to whether he should provide a personal guarantee or whether legal advice should be obtained. He did not recall signing a personal guarantee in relation to a YieldStreet facility – this would have been a document that he was told needed signing and signed on Tahir's instructions. No-one discussed with him the legal responsibility involved in a personal guarantee and the nature of the risk involved. He would have been "very reluctant to accept personal responsibility for millions of US dollars if they had done so". He did not read the warning on the first page of the guarantee. Nor was this pointed out to him. He simply signed because his father told him to sign. He did not receive any legal advice as to the consequences of doing so. He was not involved in any of the discussions leading to the total lending by YieldStreet, which amounted to around US$90 million. There was no discussion about the sums involved, nor any explanation that he was accepting personal liability or the size of that liability. There was no discussion of the risks involved. He simply did "as my father directed." He only became aware of his potential exposure to enormous claims in early March 2020, although his father assured him that he was dealing with it.

53. Ali and Hasan each served two further witness statements, but these essentially referred back to, or repeated, points made in their first witness statements. In his third statement, Ali said:

> "For the avoidance of doubt, all the documents which I signed in relation to North Star's relationship with Yield Street (including the Deeds of Confirmation) were signed on instructions from my father and without any explanation of the purpose or effect of the documents or any legal advice."

54. A similar statement was made by Hasan in his third witness statement.

D: Legal principles.

D1: Summary judgment

55. The approach to applications for summary judgment is set out in the judgment of Lewison J. in *Easyair v Opal* [2009] EWHC 339 (Ch):

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success:
> *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents:
> *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the

> evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

56. In addition, in the seminal decision on undue influence, *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 AC 773, Lord Hobhouse at [123] gave the following guidance on the approach that should be adopted to summary judgment applications in undue influence cases:

> "… There is an important distinction to be drawn between cases which have been tried where the parties have been able to test the opposing case and the trial judge was able to make findings of fact having seen the critical witnesses and evaluated the evidence. By contrast, in those cases where the lender is applying … to have the defence struck out, the court is being asked to hold that, even if the wife's allegations of fact be accepted, the wife's case is hopeless and bound to fail and that there is no reason why the case should go to trial. This conclusion is not to be arrived at lightly nor should such an order be made simply on the basis that the lender is more likely to succeed. Once it is accepted that the wife has raised an arguable case that she was in fact the victim of undue influence and that the bank had been put on inquiry, it will have to be a very clear case before one can say that the bank should not have to justify its conduct at a trial."

57. The reference to "an arguable case" may reflect the pre-CPR authorities. The relevant test is now "real prospect of success".

D2: Undue influence

58. It was common ground that the relevant principles are those set out in the judgment of Lord Nicholls in *Etridge*, and I was referred in detail to many paragraphs within his judgment, with some of them being subject to close textual analysis.

59. In *Chater v Mortgage Agency Services Number Two Ltd* [2003] EWCA Civ 490, at [20], the Court of Appeal identified three requirements which a party seeking to rely on an undue influence defence needs to demonstrate (in a case where, as here, no misrepresentation is alleged). These are:

a) that he/she was unduly influenced to enter into the transaction;

b) that the lender was put on inquiry as to some equitable wrong; and

c) that the lender did not take reasonable steps and as a result was fixed with notice of the undue influence.

60. As regards the first of those requirements, the basic principles are set out in the early part of Lord Nicholls' judgment:

> "6. … Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.
>
> 7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley 14 Ves 273 ,* 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of

a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne (1881) 18 Ch D 188*.

9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In *Allcard v Skinner (1887) 36 Ch D 145*, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman [1961] 1 WLR 1442* , 1444–1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.

10. The law has long recognised the need to prevent abuse of influence in these ‘relationship’ cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see *Treitel, The Law of Contract*, 10th ed (1999), pp 380–381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *National Westminster Bank Plc v Morgan [1985] AC 686*, 707–709.

> 11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.
>
> 12. In *CIBC Mortgages Plc v Pitt [1994] 1 AC 200* your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out."

61. I was referred to a large number of authorities relating to undue influence, principally post-*Etridge* authorities where the above principles, as well as those concerning a bank being put on inquiry, had been applied. These were: *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 (a pre-*Etridge* case); *National Commercial Bank (Jamaica) Ltd. v Hew* [2003] UKPC 51; *Hogan v Commercial Factors Ltd.* [2006] 3 NZLR 618 (a decision of the New Zealand Court of Appeal); *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312; *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192; *Mahon v FBN Bank (UK) Ltd.* [2011] EWHC 1342 (Ch) (HHJ Barker QC); *National Westminster Bank PLC v Alfano* [2012] EWHC 1020 (QB) (Cranston J). At the conclusion of the hearing, I referred the parties to the discussion of undue influence in *Chitty on Contracts* 33rd edition, and specifically paragraphs 8-061, 8-069 and 8-073 which seemed to me to be pertinent to the parties' arguments as they had developed. The parties then made brief further written submissions on those paragraphs, and referred to a number of authorities including the pre-*Etridge* decision of the Court of Appeal in *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876.

E: The parties' submissions.

62. The Claimants submitted that Ali and Hasan had no real prospect of a successful defence based on undue influence because (i) neither of them would be able to establish that he was unduly influenced to enter into the guarantees and (ii) the Claimants were not put on inquiry as to some equitable wrong. These issues should be treated separately. The Claimants accepted, for present purposes, that if these two hurdles could be overcome by the sons, Ali and Hasan had a sufficient argument, for summary judgment purposes, on the third question (if it arose): i.e. whether the Claimants took reasonable steps.

63. In relation to the issue of whether there was undue influence, the Claimants submitted that this was not a case where Ali and Hasan could take advantage of the evidential presumption, discussed in detail in *Etridge,* that there had been undue influence. The Claimants accepted that a relationship of trust and confidence existed between the sons and their father, and that therefore the first ingredient necessary for the evidential presumption existed. However, there was nothing peculiar about the giving of the guarantees at all. In a situation where the North Star subsidiaries were refinancing their existing ship finance debt with a new lender, it was entirely natural to expect Ali and Hasan – as owners of North Star, and as directors of that company – to provide personal guarantees. They had given such guarantees to the previous lender, and it was only to be expected that a new lender would want equivalent security. This was not a transaction that called for explanation.

64. This meant that any case of undue influence would need to depend upon proof of actual undue influence. Here, no case was made of any overt acts of improper pressure or coercion. The case put forward rested entirely on the evidence that Tahir wielded considerable influence over his sons. That was insufficient. They needed to show that Tahir had abused that influence or, put another way, that the reason that they entered in to the personal guarantees was not due to their own folly (allegedly not bothering to read or understand the documents), but because they had been the victims of some serial betrayal or abuse of trust by Tahir. This second element was, the Claimants submitted, completely missing on the evidence adduced by the sons. That evidential lacuna could not be filled by relying on any presumption. The need to show abuse could only be demonstrated by showing that some "conscious act of wrongdoing" had been committed. Otherwise, it could not be shown that there had been any exploitation of the influence which existed.

65. This meant that the second stage of the enquiry did not arise. However, a lender would only be put on inquiry if two factors combine. First, the relationship between the debtor and the surety must be non-commercial (therefore giving rise to the possibility of undue influence). Secondly, the transaction must be on its face not to the financial advantage of the surety. Thus, it follows from the first factor, that a bank is generally not put on inquiry where the relationship between the debtor and the surety is commercial, as where a company is guaranteeing the debts of another company in the same group. This is because "those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees": *Etridge* at [88].

66. In the present case, the central and most relevant relationship (between Ali and Hasan as guarantors, and the Borrowers as debtors) was commercial: they were, via their ownership of North Star, the owners of those Borrowers. Furthermore, the guarantee was for their financial benefit.

67. On behalf of Ali and Hasan, it was submitted that their evidence gave rise to a sufficient case, for summary judgment purposes, of undue influence. The inherent nature of undue influence was that the influenced party took actions without making a free and informed decision, assuming that they could rely on the other party's judgment. When set against the evidence of the sons as to their relationship with their father, an aggressive and domineering man who expected his sons to do as they were told, without explanations

or questions, their evidence more than establishes that their father took advantage of his influence over his sons by having them enter into transactions which exposed them to enormous liabilities. Those liabilities far exceeded their assets, and so could ruin them. This was in relation to a business which was completely controlled by Tahir, including the allocation of any profits. The sons had no knowledge or control over the risk that they were taking. There was no good reason to expose Ali and Hasan to those risks, and Tahir was clearly not acting in their best interests in doing so. This was, therefore, a case of actual undue influence.

68. In his oral submissions, Mr. Cook disputed the proposition that it was necessary to show conscious wrongdoing, certainly in so far as it was suggested that this required subjective wrongdoing on the part of Tahir. There was an objective standard. It did not matter whether or not the person with influence believed that he was behaving badly, or had set out deliberately to improperly influence. The only question was to look at how the intention of the influenced party was produced, and whether it should be fairly treated as an expression of the person's free will. Thus, the focus was very much on the effect on the influenced party, not the intentions of the party with influence. Mr. Cook accepted that this was not a case, comparable to the decision in *Hewett*, where the husband had not told his wife about his affair with another woman, where a material fact was withheld. But it was not necessary to show this, nor to establish a misrepresentation. It was, he submitted, more than sufficient "that there is this relationship where you can get somebody to do what you like, and you simply take advantage of that by getting them to do exactly as you want, without giving them the chance for any free will".

69. Mr. Cook also submitted that the sons could also rely upon the evidential presumption that an equitable wrong was committed, since "accepting enormous potential liabilities for the benefit of a business which was in practice a vehicle for their father, is exactly the kind of transaction which calls for explanation."

70. As far as the duty of inquiry is concerned: Mr. Cook submitted that the Claimants were aware of facts sufficient to put them on inquiry that the sons' concurrence was procured improperly by Tahir. The threshold level for 'on inquiry' was a low one. The fact that the sons owned North Star (and indirectly its subsidiaries) 100% was of no assistance to the Claimants, because this was a case where the shareholding interests and the identity of the directors were "not a reliable guide to the identity of the persons who actually had the conduct of the company's business": see *Etridge* paragraph [49]. What was critical was who actually had conduct of the company's business.

71. Particular reliance was placed on the decision of HHJ Simon Barker QC, sitting as a High Court Judge, in *Mahon v FBN Bank*. This case showed that even if the potential guarantor is a shareholder and/or director in the debtor company, the lender is "put on inquiry" unless they have substantive involvement in the company and are rewarded by remuneration or dividends for their role. But even if a potential guarantor did have a substantive involvement, a bank would be put on inquiry where the financial arrangements to be guaranteed were negotiated by a husband (here a father), and the wife (here the sons) played no part in those negotiations but is asked to become surety for the debts of the company.

F: Discussion.

F1: Do Ali and Hasan have a real prospect of showing that each was unduly influenced to enter into the transaction?

72. There are a number of matters which I will address at the outset, before addressing what seem to me the critical issues.

73. First, the evidence clearly establishes a sufficient case that Tahir exercised de facto control over the business of North Star, and the wider group, in which his sons worked. Indeed, the Claimants' case on the WFO application described Tahir as a major figure in the ship-recycling industry, and stated that he exercised "significant de facto control over the companies responsible for the borrowing, of which [Ali] and [Hasan] were the co-beneficial owners." In support of the case on risk of dissipation, the Claimants relied upon Tahir's "proven influence over companies which are to be counted" among the assets of Ali and Hasan.

74. Secondly, the case of Ali and Hasan, to the effect that they did not understand the nature of the guarantees that they were signing, and that they did not realise that they were guaranteeing very significant liabilities under the loans, carries no degree of conviction at all. Both sons were well-educated and had taken business degree courses. Ali's degree was in Maritime Business and Maritime Law. He had then worked for Stephenson Harwood, a leading international law firm. Hasan's degree was in Global Finance Management, and he had worked as an intern at the Emirates National Bank of Dubai. The warnings on the guarantees were prominent, at the beginning and end. This is not a case involving a single guarantee, but one where a large number of guarantees and subsequent confirmations were signed. Ultimately, however, a defence of undue influence can arise in circumstances where a party does understand the nature of the guarantees that are being signed.

75. Thirdly, I do not consider that there is any realistic prospect of Ali and Hasan establishing at trial that a "presumption" of undue influence applies in this case. Equally, I do not consider that there is any basis for saying that the present summary judgment application should be determined on the basis that Ali and Hasan have, because of the presumption, provided prima facie evidence that Tahir abused the influence that he had acquired.

76. The question of whether a transaction was brought about by the exercise of undue influence is always a question of fact: *Etridge* paragraph [13]. In paragraph [14], Lord Nicholls said:

> "Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the

> defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

77. Similarly, at paragraph [21] Lord Nicholls referred to the evidential shift being dependent on two prerequisites, the second being that the "transaction is not readily explicable by the relationship of the parties." He then addressed the debate as to whether the second prerequisite was appropriate, and concluded (at [24]) that it was:

> "So something more is needed before the law reverses the burden of proof, something which calls for an explanation."

78. In the present case, I do not consider that the relevant transactions (the guarantees which the sons gave to the Claimants) call for an explanation. They are readily explicable by the relationship of the parties. The guarantees were not given in relation to the debts of Tahir. The relevant debtors were the companies which borrowed money from the Claimants. Those companies were SPVs owned by North Star, which was in turn beneficially owned by Ali and Hasan. They were also the sole directors of North Star. It was entirely natural and normal for guarantees of the finance to be provided not only by the corporate parent of the SPVs, but also by the beneficial owners of that corporate parent. It is therefore wholly unsurprising to see that Ali and Hasan had both given guarantees to the previous lender called Alterna.

79. Indeed, the existence of the guarantees given to Alterna provides a further reason why the guarantees given to the Claimants did not call for an explanation. This was, as Ali and Hasan accept on the basis of the contemporaneous documentation, a refinancing in circumstances where "there were problems with the existing facility with Alterna". It was therefore readily explicable that if a new lender was to come on board, and was agreeable to lending money to SPV subsidiaries of North Star (of which Ali and Hasan were the only shareholders and directors), it would also want guarantees from those individuals. This was a point which was being made by Mr. Simmons in the email of 21 March 2018, apparently in response to a suggestion from Tahir that he should be the only individual guarantor. Mr. Simmons asked, rhetorically, how 'we square this away': i.e. the provision of only a single guarantee from Tahir. He made an incorrect legal point to Tahir that the absence of a shareholding by Tahir in North Star meant that there was 'no consideration legally on your part' for a guarantee. However, it is obvious from the e-mail that it would not be practical to arrange a ship refinance transaction without guarantees from Ali and Hasan who "still own [North Star] 50/50".

80. This means, in my judgment, that Ali and Hasan need to establish a case, sufficient to defeat summary judgment, based upon what is described in the authorities and text books as "actual" undue influence. It was common ground that a party could succeed in that regard even if the presumption is not available: see *Etridge* paragraph [18].

81. The critical question then becomes, in my view, whether there is indeed an important lacuna in the Defendants' evidence, as Mr. Waller suggested; i.e. the absence of evidence which established a realistic prospect of showing that Tahir did not simply exercise influence over his sons, but that he abused that influence.

82. Mr. Cook's submissions, as summarised above, were (at least principally) that the court is concerned in this context with the effect of the influence. He relied upon the sons' evidence as to the overbearing and domineering nature of their father, and their own unthinking and unquestioning approach to signing the documentation placed in front of them. His submission was that this evidence, if accepted (a matter which cannot now be determined) would provide a defence of undue influence. This was because this would be a case where the words used by Lord Nicholls in paragraph [7] of *Etridge* would apply: i.e. because the "consent thus procured ought not fairly to be treated as the expression of a person's free will."

83. I do not consider that this submission is consistent with the authorities. In my view, a case of undue influence does not depend simply upon the effect of the influence on the person who responds. Lord Nicholls explains at paragraph [32] that undue influence has a connotation of impropriety, and that in the eye of the law "undue influence means that influence has been misused." In paragraph [33], he referred to a husband who "abuses the influence he has" in a situation where his wife reposes in him trust and confidence for the management of her affairs, and he then "prefers his interests to hers and makes a choice for both of them on that footing." These statements are therefore in the same vein, and to the same effect, as the explanation in paragraph [14] of why and how the burden of proof shifts in a case where the presumption applies:

> "In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him."

84. If, therefore, there is a case of abuse of the influence, then the law's conclusion will indeed be that the "consent thus procured ought not fairly to be treated as the expression of a person's free will" (my emphasis). If not, then the consent will be valid, even if the influenced person simply signed documents without reading them or because he trusted the other person.

85. The need to focus on abuse, and not simply upon the conduct of and effect on the influenced party, is in my view clear from two judgments of Lord Millett, one prior to *Etridge* (when he was Millett LJ) and one subsequent (in a Privy Council decision to which Lord Nicholls was also party).

86. *Dunbar Bank PLC v Nadeem* was a case involving a husband and wife. The husband sought finance for a new lease of the house in which he lived with his wife. The new lease was advantageous because its cost was worth significantly less than its value. The husband informed the bank that he intended to acquire the lease jointly with his wife, in order to give her an interest in the matrimonial home. The husband was thereafter unable to meet the repayments due to the bank, which commenced proceedings to enforce its charge over the house. The wife sought to have the charge set aside for undue influence. The judge had rejected a case of actual undue influence, because he held "that there was no coercion, pressure or deliberate concealment by Mr. Nadeem in relation to his wife. They each proceeded merely on the footing that he knew best what

was to be done in relation to financial and legal matters. I do not think that Mr. Nadeem deliberately set out to take unfair advantage of his wife."

87. Millett LJ said that he had some difficulty with this part of the judge's judgment ([1998] 3 All ER 876, 883):

> "since neither coercion, nor pressure, nor deliberate concealment is a necessary element in a case of actual undue influence. Moreover, the judge did to my mind find more than a relationship in which Mrs Nadeem was content to leave it to Mr Nadeem to make decisions in financial matters because she trusted him. He expressly found that she did not read the facility letter and could not have understood it if she had read it. She simply signed the documents because her husband told her to sign, probably without any explanation at all."

88. He continued ([1998] 3 All ER 876, 883-884):

> "In my view, the judge's description of the parties' relationship is closely similar to that which has been described in a number of the cases-for example, *Tufton v. Sperni* [1952] 2 T.L.R. 516what Jenkins L.J. called "actual domination ... over the mind and will" and what Morris L.J. has called "complete domination by the defendant over the plaintiff-so that the mind of the latter became a mere channel through which the wishes of the former flowed". Lord Donaldson of Lymington M.R. in *Re T* [1992] 2 FL.R. 458 said:
>
> > "The real question in each case is, 'Does the patient really mean what he says or is he merely saying it for a quiet life to satisfy someone else or because the advice and persuasion to which he has been subjected is such that he can no longer think and decide for himself?' In other words, 'Is it a decision expressed in form only, not in reality?' "
>
> Such a situation has been described in many different ways. Before us Mr Price, to my mind, aptly described it as a case where although the pen may have been the pen of Mrs Nadeem, the mind was the mind of Mr Nadeem.
>
> But I need not decide this question because of the judge's clear finding that Mr Nadeem did not take unfair advantage of his position. Seen through his eyes, the transaction was obviously beneficial to his wife and was intended by him to be for her benefit. She was obtaining a beneficial interest in the matrimonial home for the first time. Far from seeking to exploit the trust which she reposed in him for his own benefit, he was seeking to give her an interest in the matrimonial home "because he was getting on". He may well also have thought it expedient

> to give her some protection in case his precarious financial position disintegrated further, because if he did not take the opportunity to acquire the new lease, at least in part for his wife, it would be available in its entirety for his creditors, leaving her without a roof over her head. It is true that he did not give evidence to this effect. If he did not do so, it may be that he was not certain that his conduct was lawful. In my judgment, his own evidence, coupled with the situation in which he found himself, and, to my mind, objective criteria, he was not exploiting the trust reposed in him for his own benefit but seeking to turn an opportunity of his own, at least in part, to his wife's advantage.
>
> The court of equity is a court of conscience. It sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable. But however the present case is analysed, whether as a case of actual or presumed influence, the influence was not undue. It is impossible, in my judgment, to criticise Mr Nadeem's conduct as unconscionable."

89. There is some parallel between the facts in *Dunbar Bank*, and the case presently advanced by Ali and Hasan that they simply did what their father told them, and that they did not read any of the documents put in front of them. The parallel is not complete, however, because Ali and Hasan could certainly have understood the documents if they had read them, and their argument that they did not see, read or understand the warnings in the guarantees has no degree of conviction. However, the significance of the judgment of Millett LJ for present purposes is that it makes it clear that even in a case of 'actual domination of the mind and will', this is not sufficient for a case of undue influence. It was still necessary to show that the husband took "unfair advantage" of his position, and that his conduct could be criticised as "unconscionable". Although the other two judges did not address this issue, and although this was a pre-*Etridge* case, the judgment of Millett LJ is in my view entirely consistent with the approach to undue influence in *Etridge* itself.

90. *Dunbar Bank*, and the judgment of Millett LJ, is referred to in the paragraphs of *Chitty* to which I have referred. In paragraph 8-073, headed "Must the defendant have preferred his own interest?", the author (Professor Beale) describes the law as not being wholly clear. But the conclusion of that paragraph is as follows:

> "The critical case would be one in which the defendant made the decision without reference to the complainant's wishes, or without giving him full information, when at the time the transaction appeared to be one that was for the complainant's benefit but subsequently it turned out badly for the complainant and the claimant now wishes to set it aside. In other words, denying the complainant the chance to decide for himself might amount to actual undue influence. However, on the balance of recent authorities it seems unlikely that a court will find it proved

> directly that the defendant exercised "undue" influence in such a case unless he has at least preferred his own interests."

Although there was some argument as to the overall consistency of the treatment of this issue in *Chitty*, it seemed to me that this passage was similar to the conclusions reached in paragraphs 8-061 and 8-069.

91. The second judgment of Lord Millett was given in *National Commercial Bank (Jamaica) Ltd. v Hew*. This judgment reiterates the need for what Lord Millett variously described as unconscionable conduct, abuse of the influence, and unfair exploitation of the influence over the vulnerable party. He said:

> "28. Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. As Lord Nicholls of Birkenhead observed in *Royal Bank of Scotland plc v Etridge (No 2) [2002] 2 AC 773* at p 794–5:
>
> > "Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. …
> >
> > … [It] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."
>
> 29. Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused.
>
> 30. The necessary relationship is variously described as a relationship "of trust and confidence" or "of ascendancy and dependency". Such a relationship may be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient. The banker-customer relationship does not fall within this category. But the existence of the necessary relationship may be proved as a fact in any particular case.
>
> 31. Both courts below found that the necessary relationship of trust and confidence existed between Mr Cobham and Mr Hew, and their Lordships are not disposed to interfere with their finding. There was little if any objective evidence to support it, but the assessment of the relationship between two persons is

> essentially a matter of impression. The trial judge had the advantage of seeing the two men in the witness box and of forming his own impression of their relationship. Their Lordships do not have that advantage, and cannot obtain any clear intimation from the material before them which would enable them to form their own view one way or the other.
>
> 32. But the second element is also necessary. However great the influence which one person may be able to wield over another equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people: see *Allcard v Skinner (1887) 36 Ch D 145*, 182.
>
> 33. Thus it must be shown that the ascendant party has unfairly exploited the influence he is shown or presumed to possess over the vulnerable party. It is always highly relevant that the transaction in question was manifestly disadvantageous to the person seeking to set it aside; though this is not always necessary: see *C I B C Mortgages plc v Pitt [1994] 1 AC 200*. But "disadvantageous" in this context means "disadvantageous" as between the parties. Unless the ascendant party has exploited his influence to obtain some unfair advantage from the vulnerable party there is no ground for equity to intervene. However commercially disadvantageous the transaction may be to the vulnerable party, equity will not set it aside if it is a fair transaction as between the parties to it.
>
> 34. Their Lordships have looked in vain for any evidence that the transaction of loan was unfair as between the Bank and Mr Hew. (Emphasis supplied)"

92. In his oral submissions on *Hew*, Mr. Cook submitted that unconscionable conduct did not require a conscious act of wrongdoing, and that it was essentially the conclusion that the law imposes on a particular set of facts. I have some difficulty in seeing how there can be unconscionable conduct without a conscious act of wrongdoing. The expression relied upon by Mr. Waller – "some conscious act of wrong-doing" – comes from the judgment of Patten LJ in *RBS v Chandra*, in the context of distinguishing cases of negligence or innocent misrepresentation from cases where undue influence may arise. At paragraphs [24] – [27], Patten LJ said:

> "[24] A relationship of trust and confidence between two parties is recognised in equity as being fiduciary in nature. It will therefore be the source of various fiduciary duties including an obligation to act in good faith and an obligation to avoid conflicts of interest and duty. But it is also important to keep firmly in mind that not every failure by the fiduciary party will amount to a breach of these core obligations. The defining characteristic of a fiduciary relationship is loyalty. A fiduciary who acts negligently but in good faith is not unfaithful and commits no

> equitable wrong: see *Bristol and West Building Society v Mothew* [1998] Ch 1 at page 18F.
>
> [26] … It is convenient to deal with the second question first. As Lord Nicholls explained in *Etridge* at paragraphs 6-12, it is impossible adequately to classify every type of situation in which improper or undue influence can be said to have been used to persuade a person to enter into the transaction under review. But for a person's conduct to fall into this category it must, on established principles, make it unconscionable for that person and any who have notice of his conduct to seek to rely on the effect of what has been done. Conscious deception obviously satisfies this test as does an abuse of confidence in the form of a breach of loyalty or good faith of the kind described above. The trusted adviser who chooses to prefer his own interests over those of the person who confides in him is a classic example of this.
>
> [27] The language of the decided cases summarised by Lord Nicholls in the passage I have referred to is replete with references to abuse of trust, exploitation and domination of the injured party. All of these characterise some conscious act of wrong-doing on the fiduciary's part. But it is much more difficult to apply these notions to cases of innocent misrepresentation where the highest it can be put is that more care should have been taken in giving the information or advice which was relied on. To elevate such a failure into a breach of fiduciary duty or abuse of confidence is to fall into the very trap exposed by Millett LJ in his judgment in *Mothew* which I have already referred to."

93. I agree with Mr. Cook that the concept of "conscious act of wrongdoing" probably does not mean that that the influencing party must subjectively appreciate that he is acting wrongly in a situation where he in fact abuses his influence. But I did not understand Mr. Waller's argument to depend upon the proposition that it is necessary for Tahir to have subjectively appreciated that he was acting wrongly. In any event, I regard the statement of the law by Patten LJ, as set out above, as authoritative.

94. Mr. Cook went on in his oral submissions to say that: "where you direct the conduct of another in a way which produces the outcome you want, knowing that that means they haven't made an independent informed decision, that is considered to be, in the context of a relationship of trust and confidence, an unconscionable act. It is not something you should do, to use your influence in that kind of way". I do not consider that this submission is correct or that it can be reconciled with the principles set out in *Hew*. Nor do I accept that the concept of abuse simply requires, as Mr. Cook submitted, "some connection between the influence and … the transaction in question".

95. In the light of these authorities, I need to consider whether there is a real prospect of Ali and Hasan establishing at trial the necessary second element of the undue influence doctrine, described in *Hew* as abuse or unfair exploitation of the influence so as to

obtain some unfair advantage from the vulnerable party. I do not consider that there is. A principal difficulty for Ali and Hasan is that, consistent with the submissions of Mr. Cook as summarised above, their evidence only sets out to show that, in substance, they were dominated by their father and did what they were told without giving any thought to what they were doing and without appreciating the scale of the liabilities that they were incurring. This is not sufficient for the purposes of establishing a case of undue influence.

96. Ali and Hasan have not sought to assert that there was any coercion, pressure, deliberate concealment (or indeed non-deliberate concealment), or misrepresentation by Tahir. These are not as Millett LJ said in *Nadeem* necessary elements in a case of actual undue influence. However, no case has been advanced, and no evidence adduced in support of an argument, that Tahir abused his influence in the typical way; i.e. by exploiting the trust placed in him for his own advantage. These guarantees were given in circumstances where Ali and Hasan had given guarantees to the previous lenders in order to support the financing of companies of which, via North Star, they were the beneficial owners and directors. It is not easy to see how, in those circumstances, a case could be advanced, with a sufficient degree of conviction for summary judgment purposes, that a refinancing involving Hasan and Ali giving guarantees to a new lender, involved Tahir exploiting their trust for his own advantage or benefit. If, as Ali's evidence indicates, those previous loans were in difficulties, the practical solution to a potential claim on the guarantees would have been a refinancing. No facts have been adduced in evidence as to why this practical solution was, at the time the replacement guarantees were put in place, in some way abusive of the relationship between Tahir and his sons or unconscionable. Whilst it is true that the guarantees (as with nearly all guarantees) imposed potentially significant liabilities on the guarantors, it does not follow that a relationship was abused, or that an influencer acted unconscionably, in procuring them. Here, Ali and Hasan have not put forward a case, or evidence, which explains why Tahir was, when he obtained their signatures on the guarantees, acting other than in the short and long-term interests of his sons and the business which they now owned, in circumstances where they had already given guarantees to an existing lender and the business was in need of refinance.

97. Mr. Waller agreed that – leaving aside the potential significance of the fact that this was a refinancing where the sons had already given guarantees to a lender – there would be the makings of an undue influence case if Ali and Hasan had put in evidence to the effect that: the companies were in a parlous financial state; Tahir fully appreciated this; and he consciously and wrongly withheld that from them because he knew that if he told his sons the true position, they would not sign up to the guarantees. But he fairly pointed out that this was not the evidence which they had adduced, nor the case which they had sought to make.

98. Mr. Waller submitted that there had been a deliberate decision not to run the case in this way, and put forward various reasons as to why this was so. But it is not necessary for me to address the reasons why the case has been put forward in the way that it has. I am concerned with the case which is advanced, and the evidence adduced in support of that case. For the reasons given, I do not consider that the case of Ali and Hasan on the exercise of undue influence, or their evidence adduced in support of that case, is sufficient to give rise to a real prospect of success at trial.

F2: Do Ali and Hasan have a real prospect of showing that the lender was put on inquiry as to some equitable wrong?

99. In view of my conclusion on the first issue, the question of whether the Claimants were put on inquiry as to an equitable wrong does not arise. However, I consider that the answer to the above question is "no", and that this provides an additional reason why summary judgment is appropriate in this case.

100. The parties' arguments naturally focused on the discussion in *Etridge* of what is sometimes called the *O'Brien* principle (see *Barclays Bank PLC v O'Brien* [1994] 1 AC 180, and the case of *CIBC v Pitt* decided at the same time): i.e. the circumstances in which a bank is put on inquiry. *Etridge* made it clear that those circumstances were not confined to cases where wives or partners provided support for loans made to their husbands/ partners, but can extend to relationships of parent and child. At paragraph [87], after a discussion of prior authority and different relationships, Lord Nicholls said:

> "[87] These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.
>
> [88] Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees."

101. The parties addressed arguments as to whether the present case involved relationships which were "commercial" as described by Lord Nicholls in paragraph [88].

102. Close attention was also paid in argument to paragraphs [46] – [49] of the judgment of Lord Nicholls. He described the typical situations in which a duty of inquiry would and would not arise:

> 48. As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages Plc v Pitt [1994] 1 AC 200*.
>
> 49. Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business.

103. Before addressing the applicability of these principles to the present case, I shall recap and summarise the relevant facts which in my view are of potential relevance to the present question, and on which reliance was placed in the context of the present arguments. In so doing I bear in mind the limits of the present summary judgment process, and that I cannot resolve factual issues as to which there is a realistic dispute.

104. The guarantees in the present case were provided in the context of large-scale ship finance transactions, where the Claimants were refinancing loans which had previously been provided by another lender. The Borrowers, whose obligations to the Claimants were guaranteed, were special purpose vehicles owned by North Star which was wholly owned by Ali and Hasan. The Claimants knew that guarantees had been provided by Ali and Hasan in connection with the previous ship finance. As the declarations made at the time of the final loan made clear, this ownership interest was beneficial and was not held on behalf of Tahir. Ali and Hasan were the sole directors of North Star, which itself provided a guarantee. Notwithstanding their ownership and directorship, Tahir exercised a significant degree of de facto control over the recycling business of North Star and its subsidiaries. Through Mr. Simmons (whose knowledge is, for present purposes, to be treated as the knowledge of the Claimants), the Claimants were arguably aware of the significant degree of control exercised by Tahir. The negotiations for the loans and the guarantees were conducted by Mr. Simmons principally with Tahir, with neither Hasan nor Ali playing any significant role in those negotiations. Both sons were actively involved in working in the various shipping industry businesses which the family ran, although the precise extent of this active involvement, in particular in relation to the ship recycling business – as well as the extent to which this involvement was known by Mr. Simmons or others whose knowledge may be attributed to the Claimants – is not a matter that can be determined on a summary judgment application. The two sons received some financial reward for their work within the family business: there is no evidence that they had any other material source of income. Again the extent

to which they did so, and the knowledge of the Claimants in that regard, cannot be determined on the present application.

105. In my judgment, the relationship between the debtors in the present case (the Borrowers), and Ali and Hasan (the guarantors) was commercial. The financing involved a large-scale international business carried on by North Star and its subsidiaries. North Star was part of a group of family-owned companies carrying on substantial international business involving different aspects of the shipping industry. This financing was an international transaction, involving lenders based in New York, a business operated from Dubai, the intended purchase of ocean-going vessels, negotiations via Mr. Simmons in Greece, and with Ali having gone to New York in order to meet the Claimants prior to the transaction. Notwithstanding the control exercised by their father, and the fact that he negotiated the refinancing, both Ali and Hasan were engaged in the international business of the group, and could be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees. The Claimants knew that they had given guarantees in relation to the previous financing. This is not a case involving young children, but welleducated individuals in their 20s or 30s, and in whom their father had sufficient confidence to vest the entire ownership of the ship recycling business in order to accomplish family succession.

106. In paragraph [88] of his judgment, Lord Nicholls illustrates situations where the relationship is commercial. These are not, in my view, exclusive but are illustrative. One situation is where a company is guaranteeing the debts of another company in the

group. In that situation, the company (and by necessary implication the businessmen who commit the company to the guarantee) can be expected to look after themselves. Here, there was a corporate guarantee from North Star. It would in my view be a surprising and strange conclusion for the corporate guarantee from North Star to be regarded as part of a commercial relationship between the debtors and the guarantors, but for the guarantees provided by North Star's owners – who authorised the giving of North Star's guarantees – to be regarded otherwise.

107. Furthermore, the present transaction involved ship finance transactions where it would ordinarily be expected that the owners of the Borrowers, including their natural owners, would give guarantees. Mr. Waller made this point in his submissions, and I did not take Mr. Cook to dispute it. Indeed, the Commercial Court is very familiar with ship finance cases where guarantees have been provided by the beneficial owners of borrowing companies. In my view, this underlines the commercial nature of the relationship in the present case.

108. Equally, bearing in mind the ownership structure, the ordinariness of owners giving guarantees, and the fact that this was a refinancing where guarantees had previously been given, there was (to apply the words of Gibson LJ in *CIBC* at 210G-H, approved by Lord Browne-Wilkinson) nothing to put the Claimants on notice that this was other than a routine transaction for the benefit of the sons.

109. Furthermore, the present case does not fit into any of the categories described by Lord Nicholls in paragraphs [48] and [49]. It is not a case of sons becoming surety for the debts of a company whose shares were held by their father, in circumstances where

those sons had only a nominal or minority shareholding, or where the shares were equally held. Whilst it is true that the ownership in this case did not provide a reliable guide to the person who (if the sons' evidence is accepted) had conduct of the company's business, I do not think that this is sufficient in itself to put the bank on inquiry. I do not consider that the final sentence of paragraph [49] should be read as a statute, divorced from the circumstances as a whole, including the commercial background, which I have described in the previous paragraphs.

G: Non-disclosure on the WFO application.

G1: Introduction

110. Ali and Hasan seek to discharge the WFO on the basis of material non-disclosure. The alleged non-disclosures concern the case advanced by the Claimants, on the without notice application, that there was solid evidence of a risk of dissipation on the part of Ali and Hasan. There is therefore no argument that the Claimants did not have a good arguable case on the merits.

111. Ali and Hasan also no longer argue that the WFO should be discharged because the Claimants have an insufficient case as to the risk of dissipation. The application to discharge originally advanced this contention, but it has not been pursued. Mr. Cook sought to explain his clients' decision not to pursue this contention on the basis that the evidence had moved on, and also that there would be difficulties in making that argument in circumstances where it had not been advanced at the return date. Mr. Waller rejected this explanation: the real explanation was that Ali and Tahir did not want the court to focus on the considerable strength of the evidence as to risk of dissipation, and its impact on the merits of the application for non-disclosure.

112. I do not need to decide the reasons why the application has not been pursued on this ground. I can properly approach the application, however, on the basis that there is indeed solid evidence of a risk of dissipation sufficient to warrant the grant of a WFO. Furthermore, having read the Affidavit of Mr. Buss in support of the original application, it is in my view clear that there was a case of sufficient strength at that stage, both in relation to the risk of dissipation and the justice and convenience of granting the injunction. None of the three alleged non-disclosures, discussed in more detail below, materially weaken that case.

113. There was no dispute as to the applicable legal principles, which are summarised by Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1998] 1WLR 1350 at 1356F to 1357. Omitting internal citations to other authority, these principles are as follows:

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

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty."

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the nondisclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded." 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."

114. Materiality depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it: see Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm),* at [25].

115. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the nondisclosure is non-culpable. Thus, in *OJSC ANK Yugraneft v Sibir Energy [2008] EWHC 2614 (Ch)* , Christopher Clarke J. said at [106]:

> "As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

116. I was also referred to the decision of Popplewell J. in *Fundo Soberano de Angola and ors v Jose Filomeno dos Santos and ors* [2018] EWHC 2199 (Comm) where he considered the consequences of material non-disclosure. He said, at paragraph [82], that 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 the risk of dissipation of assets. It was 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 is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply.

G2: Non-disclosure as to the lack of involvement of Ali and Hasan in the business of North Star.

117. This non-disclosure argument was originally advanced, in paragraph 11 of Mr. Cook's skeleton argument, on the basis that:

> "… the Claimants made no attempt to explain that Ali and Hasan had little or no involvement in the ship-recycling business, the day-to-day operations of the borrowers or the relationship with Yield Street. This was key evidence since it made it highly unlikely (as was indeed the case) that Ali and Hasan would have had the requisite knowledge to determine that Tahir was engaged in deception".

118. The background to this point is that the Claimants, in their without notice application, placed significant reliance on evidence as to deception concerning the operation of the financing facilities after it had been put in place. The Claimants' case was that false statements were made to them, and false documents presented, in order to obtain drawdowns under the facility or to explain why repayments had not been made. This

fraud occurred in a number of ways, which were explained in detail in Mr. Buss's evidence.

119. First, the Second Claimants re-financed a vessel called the Wu Xian pending her intended re-sale to her bareboat charterers in September 2019. They agreed to extend the loan maturity in reliance on representations by Tahir that the bareboat charterer required to postpone completion due to delays in its obtaining financing. Having obtained the extension, the borrower ultimately defaulted on repayment of US$4.47 million. However, the evidence now showed that the sale had completed on time, and the sales proceeds had in fact been received by the borrowing company in September 2019.

120. Secondly, various of the Claimants between them provided secured finance for the acquisition of multiple vessels which were duly mortgaged to the relevant Claimant. These vessels were subsequently sold on for demolition, in contravention of the mortgage, and without the knowledge of the relevant Claimant. These facts were disguised for a sustained period of time, with the Claimants' loan administrators being told by Tahir that, for various reasons, including weather and financing issues affecting the scrap yards, the scrap re-sales had not yet been completed, causing delays in repayment of the corresponding loans.

121. Thirdly, there were a number of vessels which were to be delivered to the companies owned by North Star. These were the "Prosper", "Ladinda", "Bangsa", "Boron", "Lateef" and "Ley". They were financed by the First Claimant, and were to be delivered at or in the vicinity of breakers' yards. As the resales were anticipated to follow shortly after acquisition, the First Claimant was only asked to finance the deposits payable under the relevant MOAs. The First Claimant took assignments of the MOAs as security, rather than mortgages, given the short tenor of the loans and the fact that its funding of MOA deposits pre-dated delivery. The relevant MOAs in respect of each vessel were signed by Ali. The First Claimant was told that the loan repayments could not be made on these loans because the delivery (and hence re-sale) had been delayed, and they were provided with MOA addenda which purported to show this. The evidence now showed, however, that the MOAs were shams. The true registered owners of the vessels at the time of their respective MOAs were not the sellers named in the MOAs.

122. The third category of deception was of particular significance in relation to Ali, and to a lesser extent Hasan. It directly implicated Ali, by reason of his signature on the sham MOAs that were used to procure lending from the Claimants. It also, albeit less directly, implicated Hasan. This was because the Claimants identified (subsequent to the preparation of the papers for the application, and shortly before the oral hearing before Butcher J) a document signed by Hasan. This was a proxy for a shareholder's meeting which related to one of the sham MOAs. Thus, North Star, by the signatures of Ali and Hasan, authorised Ali to represent North Star at a shareholders' meeting of North Star Marine Ltd, of which North Star was the sole shareholder. At that meeting, North Star approved the resolutions of the directors of North Star Marine Ltd concerning the sham MOA for the vessel "BANGSA."

123. This evidence of Ali and Hasan signing documents connected with a demonstrated instance of fraud therefore, on the Claimants' case, reinforced the inferences that

existed anyway from their position as the exclusive beneficial co-owners and directors of North Star.

124. It is also a significant feature of the case that these allegations of fraud were made in the application papers served on the Defendants approximately 5 months ago, and that none of the Defendants had served any evidence, or advanced any argument, disputing the facts relating to the underlying fraud on which the Claimants relied. It is to be noted in that connection that the solicitors who are acting for Ali and Hasan also act for Tahir in the present proceedings: the court was so notified by GT in a letter dated 12 May 2020 accompanied by a notice of change of legal representative.

125. Accordingly, the evidence as to these frauds was, and remains, strong and undisputed. The non-disclosure issue raised by Ali and Hasan therefore does not concern the existence of these frauds, but their participation in them. In that regard, the case set out in paragraph 11 of Mr. Cook's skeleton argument narrowed very considerably.

126. The point that there had been a failure by the Claimants to "explain that Ali and Hasan had little or no involvement in the ship-recycling business" was not pursued, and in my view was wholly unsustainable. That case depends upon a disputed assertion by Ali and Hasan that they had no such involvement. That assertion is flatly contradicted by what was said to Njord in 2016 as to the active involvement of both brothers in the business. There is also other clear evidence, to which I have already referred, of Ali's participation. His witness statement admits involvement in the acquisition of vessels, and his signature of a number of MOAs provides further support. This is consistent with the Tradewinds articles, the industry award to Ali, and the presentation to the Claimants in 2019.

127. The second point, that the Claimants failed to disclose that Ali and Hasan had little or no involvement in "the day to day operations of the borrowers", was also not pursued. Again, that involves essentially the same disputed assertion as the first point.

Furthermore, as will become apparent, the Claimants did not present their case to the judge at the WFO application on the basis that there was an extensive documentary trail showing the involvement of Ali and Hasan in the day to day operations of the borrowers. Rather, the Claimants' case identified those documents which showed some involvement, and relied upon inferences from the other circumstances of the case; in particular, that the relevant frauds were for the benefit of the sons, who were closely connected with their father and who were the owners and sole directors of the relevant business.

128. The third point made in paragraph 11 was the argument that was pursued by Mr. Cook. The substance of the case was that the Claimants had not fairly explained that Ali and Hasan had little or no involvement in the relationship with YieldStreet.

129. In my view, this non-disclosure argument can be readily dismissed. Having read the Claimants' skeleton argument for the WFO, the supporting Affidavit of Mr. Buss, and the note of the hearing, I consider that the Claimants' case was fairly and indeed scrupulously presented. The potential arguments available to Ali and Hasan, as to their lack of involvement with the deception, were identified. The presentation recognised what was described as the pernicious and pervasive involvement of Tahir in the running

of the business. (This was a reference to the deception of the Claimants. At that point, there had been no suggestion that Tahir had acted in a pervasive or pernicious way towards his sons). There was no suggestion to the court that there was an extensive volume of documentation which linked Ali and Hasan to the frauds. Where such documents did exist, they were identified. Nor was there any suggestion that Ali and Hasan played a significant part in the negotiations for the financing with YieldStreet, or in dealing with the Claimants thereafter. I do not in any event see why the fact that others dealt with the negotiation and administration of the YieldStreet loan materially weakened the case on risk of dissipation that was actually advanced.

130. It is not necessary to set out all the relevant passages in the skeleton argument, Mr. Buss's Affidavit, and the oral submissions which are relevant to the matters described in the previous paragraph. The following gives a sufficient flavour of what I consider, having considered the material as a whole, to have been a scrupulously fair presentation of the case.

131. In both the written materials and oral submissions, the Claimants carefully and properly identified the respective positions of Tahir, Ali and Hasan. In the skeleton argument in support of the without notice application, the Claimants said:

> "[52] The Claimants invite the court to find a risk of dissipation in respect of all three Defendants. As to the individual Defendants:
>
> a. D3 is the father of D1 and D2, a major figure in the shiprecycling industry, and exercised significant *de facto* control over the companies responsible for the borrowing, of which D1 and D2 were the co-beneficial owners: Buss, §21(b), §§22- 26.
>
> b. D1 and D2 are both now involved in the ship-recycling business established by their father, and each was a 50% beneficial owner of North Star, the parent and corporate guarantor of the relevant borrowing SPVs, whose employees played a significant parts in the events described below.
>
> [53] There is clear and documented evidence of fraud against D3 and D1, of a kind which on the facts evidences a risk of dissipation. The case for D2's involvement in the fraud is inferential, based upon his co-beneficial ownership, but the risk of dissipation does not depend solely upon an inference of his involvement. Rather, as noted in Buss, §70, D3's pervasive and pernicious role in the business of the loan borrowers is itself evidence of a risk of dissipation against D1 and D2, because D3 has a proven influence over companies which are to be counted among D1 and D2's assets."

132. It was clear from this paragraph that Tahir was alleged to have a very significant involvement in the business of the SPVs ("pervasive and pernicious"). That allegation was not made in relation to the sons, but the Claimants pointed (as they were entitled

to do) to the documented evidence of fraud against Ali: this was a reference to the fraudulent MOAs signed by Ali. The case against Hasan was described as inferential, based upon his co-beneficial ownership. There was therefore, at that stage, no documentation which directly connected Hasan to the frauds, although the Claimants subsequently identified one material document (the proxy described above) and brought it to the attention of the judge. I consider that this was a very fair summary of the evidence which was set out in Mr. Buss's witness statement, and did not overstate the case in any material respect.

133. The point made in the concluding sentence of paragraph [53] was also important. It did not seem to me that the present non-disclosure argument, and the supposed materiality of the limited dealings of Ali and Hasan in the loan negotiations and loan administration with YieldStreet, grappled with the argument as to risk of dissipation in that last sentence. This lack of involvement (and Tahir's significant involvement) did not materially affect the case on risk of dissipation, since it would simply reinforce the argument that Tahir's pervasive and pernicious role in the business of the borrowers was itself evidence of the risk of dissipation, because Tahir had a proven influence over companies which were amongst the assets of Ali and Hasan.

134. Mr. Buss's witness statement ran to 60 pages. His statement described the contractual background, and the involvement of Four Wood Capital Advisors LLC and its affiliate Global Marine Transport Capital LLC ("GMTC") of Athens in arranging and administering the loan. The Claimants' primary point of contact at GMTC was Mr. Simmons, who was described as being "in direct communication with [Tahir] and other representatives of the Defendants' companies". In paragraphs [24] and [25], Mr. Buss said:

> "[24] D3 acted on behalf of the borrowers as a key point of contact for GMTC, as will be seen from correspondence referenced below. Other points of contact were Mr. Brian P. Nolan, who worked in North Star's Finance department, and Mr. Richard France, Head of Purchasing for North Star in the UAE and a senior employee in its ship sale- and-purchase department.
>
> [25] The degree of control exercised by D3 over the borrowers' activities will emerge below, but can be illustrated by a striking exchange of emails on 10 February 2020, when GMTC (Mr. Simmons) posed a number of urgent questions to Mr. France (North Star *"Head of Purchasing"*) regarding the status of the loans and the financed vessels, at a time when the lending relationship was rapidly approaching crisis point **[9/1/244]**. Mr. France responded in the following terms **[9/1/243]**:
>
> *"Dear Andrew,*

> *Good morning - thank you for reaching out to us with the below email. I've checked with Azhar, Brian et al and it transpires that Tahir [i.e. D3] is the only party privy to the below requested information. Tahir is reading this email in copy and we've been assured will respond to you. Any future communication regarding these matters directed to us will be directed to Mr Lakhani, however for the sake of expediency, we would ask that such matters be only addressed to Tahir as neither ops, compliance, s&p etc or I are involved in the YieldStreet related matter and regrettably we cannot be of assistance to you.*
>
> *Brgs*
> *Richard*
>
> *(As agents only)"*
>
> [26] As well as demonstrating the degree of control exercised by D3, this email suggests a clear attempt by Mr. France to distance himself and other North Star employees from any responsibility for what D3 was believed or suspected to be doing. I will return to this, in context, below, although at present I note that it might be said on behalf of D1 and D2 that this places D3, rather than them, centrally in the frame.

135. This passage therefore identified Tahir as a key point of contact for GMTC and Mr. Simmons, and introduced the "degree of control exercised by [Tahir] over the borrowers' activities". There was no suggestion of significant involvement of Ali and Hasan in the negotiations or administration of the loan: that was no part of the Claimants' case. The Affidavit also drew specific attention to an e-mail, on the basis of which Ali and Hasan might argue that it placed Tahir, rather than them, centrally in the frame. All of this, in my view, is the very antithesis of a non-disclosure in respect of the matters which I am currently considering.

136. The distinction between father and the two sons, and the fact that the case against Hasan was based on inference, was set out in paragraphs 69 – 70 of Mr. Buss's Affidavit, by way of an introduction to the materials relating to the three categories of deception.

> "[69] As noted in the introduction, the Claimants invite the court to find a risk of dissipation in respect of all three Defendants, although it is right to acknowledge that the evidence is:
>
> (a) Very strong against D3;
>
> (b) Strong, although admittedly less strong, against D1; and

(c) Reliant upon inference against D2, based principally upon his co-beneficial ownership of North Star, his close relationship to D1 and D3, and his failure to respond to the demand on his Personal Guarantees.

> [70] The Claimants will say, however, that D3's pervasive and pernicious role in the business of the loan borrowers is itself evidence of a risk of dissipation against D1 and D2, because D3 has a proven influence over companies which are to be counted among D1 and D2's assets."

137. This point was in substance repeated in paragraph 179, under a section headed "Reasons for proceeding without notice to the Defendants". In that regard, Mr. Cook accepted that a without notice application was justified. Mr Buss said:

> "As I have said, the Claimants will invite the Court to infer that [Hasan] acted in collusion with [Ali] and [Tahir] in relation to at least some of the matters described herein, given that D1 and D2 are declared to be the ultimate beneficial owners of the borrowers".

138. The following section was headed "Full and frank disclosure". This referred back to the e-mail from Mr. France which had been set out in paragraph 25 of the Affidavit.

> "[180] (a) In relation to Mr. France's email at **[9/1/243]**, while this is evidence of D3's *de facto* control and responsibility for the events described herein, it might be said on behalf of D1 and D2 that it places D3, rather than them, centrally in the frame. It might also be said that the prominence of D3 in the email record has the same effect. I should say I do not believe that D1 can disassociate himself from the risk of dissipation, given the evidence of the MOAs he signed for the "delivered" vessels, but the point is rather stronger on behalf of D2. At this stage, the Claimants do not have the internal evidence that would demonstrate the extent of D2's involvement, but they would maintain that given his joint beneficial ownership of North Star with D1, it is to be inferred that the relevant events happened with his knowledge or connivance. They also rely upon the fact that, like the other two defendants, D2 has failed to respond to the clearly justified demand made upon his Personal Guarantee on 5 March 2020, which is one of the hallmarks of a defendant who intends to resist enforcement."

139. It was clear from this passage, and the Affidavit as a whole, that the case against Hasan was not based upon a documentary record of actual involvement in the fraud. Rather, it was an inference – as often described to juries as a common-sense conclusion – based upon other circumstances. Hasan, and indeed his brother, were the ultimate beneficial owners of the companies that stood to benefit from the loans and the deceptions, whose effect was to buy time for the borrowers and hence for the personal guarantors. They were also, of course, the directors of the holding company, and there was no suggestion

that the Claimants knew that (as Ali and Hasan now assert in the context of their undue influence defence) they had completely abdicated their responsibilities as directors. Although the Claimants had written to both Ali and Hasan by this stage, making demands on the guarantees, and although they were understood to be represented by Mishcons at this stage, there had been no suggestion that they had been the victims of undue influence by their father.

140. Against this background, the Claimants had in my view a very powerful case that a commonsense conclusion could be drawn as to the knowledge of both Hasan and Ali of the deception. The conclusion which the Claimants sought to draw was in the context of the need to show, for the purposes of obtaining a WFO, solid evidence of a risk of dissipation. The Claimants were not inviting the court to make a final determination that there had been a fraud, and that all the defendants were party to it. The authorities (e.g. *Fundo Soberano* at paragraph [49 (4)]) refer to a "good arguable case that the defendant has been guilty of dishonesty", and then the need to scrutinise the evidence to see whether the dishonesty in question pointed to the conclusion that assets may be dissipated. There was here, in my view, a good arguable case of dishonesty, and the narrow alleged non-disclosure did nothing to negate it. In any event, the allegation of non-disclosure has no substance in circumstances where the Claimants were not advancing a case that either brother had a significant involvement in the negotiations or administration for the loan, and where (i) they had drawn attention to the key involvement of Tahir in those negotiations and (ii) had specifically set out and discussed an e-mail relating to the loan negotiations which might support an argument that Tahir, rather then they, were 'centrally in the frame'.

141. The case orally presented to Butcher J. reflected the case set out in the skeleton argument and Mr. Buss's Affidavit. The note of that hearing records Mr. Waller's submission as follows:

> "Your Lordship that is evidence of what we say is a serious campaign of fraud in relation to many aspects of the loan. In the circumstances we say our submission that the Third
> Defendant will take steps to hide his assets to defeat an ultimate judgment is made out; in relation to the First Defendant, his involvement in signing 6 MOAs for delivered vessels which appear to be shams he cannot be trusted not to dissipate assets, the risk of dissipation is made out; in relation to the Second Defendant, there is limited evidence connecting him to the fraud, the only example we're aware of is that he appears to have signed a document which helped to execute fraud – there is therefore some direct evidence of his involvement, but we also rely on the fact of his ownership of North Star so he is, on the face of it, heavily involved in this operation and therefore we would ask the court to at least infer there is a real risk or prospect that he has known about what his father and brother were up to and also given what he is up to. Also, as a personal guarantor he stood to benefit from the fraud; the fraud was designed to buy time and avoid Events of Default to then mitigate the prospect of a claim on the personal guarantees. The Second Defendant was also

> going to benefit from fraudulent devices in so far as they were successful, which supports complicity and knowledge. In relation to the Second Defendant and others as needs be, we also rely upon his conduct and behaviour in relation to the demand, which is complete silence – we say he is not innocent and is like his father and brother, involved.
>
> An additional point: if, as appears to be the case, the ownership of these companies – the beneficial ownership of these companies – resides with the 2 sons, and the father does not appear to have any ownership and yet appears to control it; there is a real prospect he appears to control assets which are in the legal and beneficial ownership of his sons. Therefore there is a risk of dissipation of the assets of the First and Second Defendant which justifies the order."

142. This was, as I have said, a scrupulously fair presentation of the case. Mr. Cook directed criticism at the words "heavily involved" in the passage which I have underlined above. He says that that the judge should not have been told that Hasan was heavily involved in the operation. This criticism is, in my view, without substance. It divorces those words from their overall context. The Claimants were not suggesting to the judge that there was direct evidence of Hasan's heavy involvement in the ship recycling business: on the contrary, the preceding submission made it clear that the Claimants had only found one specific document linking Hasan to the frauds.
The Claimants' point was that if a person is a 50% owner of a business, and indeed also one of two directors, then "on the face of it" that person is heavily involved. That was an entirely fair point to make, in circumstances where it is not suggested that the Claimants knew at that stage the case now advanced by Ali and Hasan as to the neglect of their duties as directors.

143. I therefore reject this allegation of non-disclosure.

G3: Non-disclosure of WhatsApp messages

144. In paragraphs 11-12 of the skeleton argument in support of the without notice application, the Claimants explained why a without notice application was appropriate. They submitted that there was a well-recognised basis for proceeding without notice where giving notice would enable a respondent to take steps to defeat the purpose of the injunction. They then addressed a possible argument that the Defendants might submit that they had already effectively been "tipped off".

> "[11] Against this, the respondents might submit that they have already effectively been "tipped off" as a result of the fact that:
>
> a. On 5 March 2020, the Claimants sent notices accelerating the loans and including demands on the PGs, and that fact was advised to Mishcon de Reya the same day, with an open request for a dialogue about settlement of the PG claims: Buss, §§66- 67, §§160-162

b. Since 25 February 2020, WFW have been in occasional dialogue with the liquidator of the relevant corporate guarantor: Buss, §§59-65, §§163-166

c. The Defendants might, through Hercules or otherwise, have become aware of the enforcement action which the Claimants have taken in Malaysia against the "Wu Xian", as described in Buss §§77-80, 83.

[12] While the Claimants accept that there is no secrecy in their assertion of an entitlement under the PGs, that is separate from the question of a WFO. In the circumstances of this case, such an application might not be unexpected, but the fact and timing of the application is presently unknown to the Defendants, and there is accordingly good reason to hear the application without notice."

145. Ali and Tahir contend that the court's attention should have been drawn to two WhatsApp messages sent by Mr. Weisz, the founder and president of YieldStreet, to Tahir on 24 February 2020 and 26 March 2020. Those messages were as follows

"Message 1: 24 February 2020, 6.13pm

"I have done my best to work amicably with you. Although, I have given you many opportunities to be transparent, you have not seized any nor have you tried to work with me in good faith. I asked for 3 simple things, and you've delivered to me - none.

We have commenced legal action and will do so in a very aggressive and multi jurisdictional manner. We will also work with the state department and the embassy to further our efforts locally. We both know Tahir, your reputation will not survive a global legal action by us.

I urge you to get on the next flight and come clean. Whatever it is, you're better off working through it together with me, than against me." (emphasis added)

Message 2: 26 March 2020, 8.56am

"We informed our investors, thousands of people. Without working together things will be far more difficult; legally, reputation, governmentally, and more. Your resources, family name, ability to conduct business will all suffer the longer you choose to work in isolation. - - - - I understand you are working very hard. I'm suggesting you work with us on the plan and begin by telling us how this all transpired. Tahir, I can only walk you to the water, I cannot force you to drink it. But those who don't

> drink, always die of thirst. This is me offering you water.... have a good night (day)." (emphasis added)."

146. It was submitted on behalf of Ali and Hasan that a freezing order would be an obvious part of an aggressive and multi-jurisdictional manner of litigation. The Claimants had only informed the court of far more limited and less aggressive conduct, such as demanding payment under the guarantees. They made no reference to the "far more aggressive" messages from Mr. Weisz. Mr. Cook also submitted, in his written argument, that there was also a failure to inform the court that, despite having put the Defendants on notice by these threats, they were not aware that any attempts had been made by the Defendants to dissipate their assets.

147. These arguments are, in my judgment, without any substance. The Claimants drew attention to a possible point about tipping off in the context of justifying a without notice application. It is now accepted that a without notice application was justified. The Claimants did not specifically draw attention to the tipping off point in the context of their section on "Full and frank disclosure". In my view, this is unsurprising. Even if there had been some "tipping off" – either as a result of the matters to which the Claimants did refer, or as result of the WhatsApp messages, or both – that would, realistically, not provide a reason why the WFO should not be granted. There had been no significant delay in making the application for relief: the application was made a matter of weeks after the original demand. A delay of that kind would not be a reason to refuse to grant relief. Nor would the possibility that the Defendants had already dissipated assets. In *Antonio Gramsci Shipping v Recoletos* [2011] EWHC (2242) at [29], Cooke J. explained, colourfully, that the risk that any order may only freeze a less valuable pony, because the valuable horses have already been let out of the stable, is not a reason not to grant the order if the court were otherwise satisfied it is appropriate.

> "In my judgment it is no answer for a defendant to come to the court to say that his horse may have bolted before the gate is shut and then to put that forward as a reason for not shutting the gate. That would be to pray in aid his own efforts to make himself judgment proof - if that, indeed, is what has occurred - and to avoid the effect of any court order which the court might make. If he can show that there is no risk of dissipation on other grounds, that is one thing. If he can show that the claimants do not consider that there is such a risk by virtue of the delay in seeking the order, that again is a relevant factor. However, if the court is satisfied about those matters in favour of the claimant, there is no reason why the court should not shut the gate, however late the application, in the hope, if not the expectation, that some horses may still be in the field or, at the worst, a miniature pony."

148. In any event, I do not see that there was any non-disclosure, let alone a material one. The Claimants' skeleton argument acknowledged that in "the circumstances of this case, such an application might not be unexpected". At most, the first WhatsApp message might be said to support that proposition. It did not specifically warn that the Claimants would be seeking a WFO. Even if the message could be read as warning of

a possible WFO application, the Claimants did disclose that an application for a WFO might not be unexpected. The second message again did not warn of a WFO, and indeed took matters no further. It was part of a sequence of conciliatory messages which represented an attempt to keep a line of communication open, and which finished with Tahir saying: "I will work with you just let get back on the ground after a huge fall".

149. The argument – that there was a failure by the Claimants to disclose that they were not aware that any attempts had been made by the Defendants to dissipate their assets – was not pursued as a point separate from the argument about tipping off. In any event, it has no substance. A party in the position of the Claimants will not generally know what, if any, steps have been taken by defendants to dissipate assets. Knowledge of such steps may reinforce the application for an injunction. Ignorance of such steps does not weaken it, certainly in a case where (as here) there had been no material delay in applying for the WFO.

G4: Reasons for the borrower's financial difficulties.

150. In paragraph 180 (c) of his Affidavit, Mr. Buss identified (in the context of full and frank disclosure) a possible point that the Defendants might make in order to negate the case on risk of dissipation:

> "In my telephone call with Mr. Reynolds on Friday 28 February, he said his information was that the Claimants' advances had been consumed on interest repayments. It might therefore be said by the Defendants, in relation to the *"real risk of dissipation",* that the Defendants were not setting out to steal money from the Claimants, but simply struggling to fund an over-extended business, by means (if demonstrated) which they would not necessarily repeat when faced with any order that might be made by the English court. (Against this, the Claimants say that they have been the victims of sustained and sophisticated deception. There is also evidence of deception of flag state authorities, which indicates that institutional standing will not necessarily deter the Defendants from self-serving conduct; although it is right to say, here, that only D3 is clearly implicated in the deception of flag state authorities)."

151. Ali and Hasan argue that there was non-disclosure of certain advice that YieldStreet had received prior to entry into the loan agreements. The alleged advice concerned the volatility of the ship recycling business, and that external factors outside North Star's control (including oil price fluctuations, geopolitical factors and other matters) meant that lending on a six-month cycle was unworkable and should not be advanced. Nevertheless, Ali and Hasan say, Mr. Weisz went ahead with additional facilities on a rolling 6-month basis. Mr. Cook submitted that the court should have been told that the Claimants had been warned by their specialist adviser that this kind of lending was extremely risky and potentially unworkable. This was, he submitted, information that "would have provided the Court with an alternative explanation for why North Star and its subsidiaries had been unable to make repayment, rather than the Claimants' implication that this was due to fraudulent conduct by the Defendants".

152. Again, there is no substance in this argument. Mr. Buss's witness statement did disclose the possibility that the Defendants would say that they were struggling to fund an over-extended business; i.e. that they might say that business drivers other than fraud had played a part in the story of the defaulted loans. The same point was made in their skeleton argument. I do not think that the pre-loan advice said to have been given to the Claimants is materially different to the possible argument that was disclosed.

153. Furthermore, the case which the Claimants advanced was that fraud had been committed in a number of different ways, which were set out in detail in the evidence. It was not a case where the Claimants were inviting the court to infer a risk of dissipation from non-payment of the loans. Had that been so, then evidence as to business reasons why there might be difficulties in repaying the loans might have been more important. However, those business reasons could not provide any justification for the fraudulent devices which the Claimants relied upon in support of their case.

G5: Discretion

154. Even if I had been persuaded that there was any substance in any of the points advanced by Ali and Hasan, I would have considered it appropriate to continue the WFO. The points advanced were, in my view, points of fine detail in the context of an application which was fairly presented. Each of the points relied upon concerns issues which were raised by the Claimants themselves: the different roles of Tahir, Hasan and Ali; the possibility of "tipping off"; and a possible argument that business drivers other than fraud played a part in the story. Whilst these points might have added to the detail, they would have done nothing materially to damage the strength of the case for a WFO. Nor is this a case where, as I understood Mr. Cook's argument, it is said that there was culpable non-disclosure. If that were being said, then I would reject the argument.

155. Furthermore, the consequence of discharging the injunction would be that Ali and Hasan would then be free to dissipate their assets. In my view, that would not be a consequence which the court should contemplate, particularly in circumstances where (as a result of my conclusions on the summary judgment application) there is no real prospect of a successful defence to the claim so that the Claimants are entitled to summary judgment.

156. Indeed, an unusual feature of the present case is that judgment is to be given against Ali and Hasan. It is well-established that a court will more readily grant a freezing order after judgment. In circumstances where Ali and Hasan no longer rely upon the absence of a risk of dissipation, I consider that this is an appropriate case in any event (i.e. even if there had been material non-disclosure) to grant a post-judgment WFO.

H: Notification to third parties and abuse of process

H1: Factual background

157. The WFO contained standard form wording relating to its application to persons outside England and Wales. In the order granted following the return date, this was as follows:

> "19. Persons outside England and Wales

> (1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this Court.
>
> (2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this Court— (a) the Respondent or his agent appointed by power of attorney;
>
> (b) any person who–
>
> (i) is subject to the jurisdiction of this Court;
>
> (ii) has been given written notice of this order at it, her or his residence or place of business within the jurisdiction of this Court; and
>
> (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this order; and
>
> (c) any other person, only to the extent that this order is declared enforceable by or is enforced by a Court in that country or state."

158. The WFO was notified to a number of individuals, companies and financial institutions outside the jurisdiction. By way of illustration, Mr. Lars Jorgensen (who worked for the companies associated with the Defendants) received a letter from WFW dated 27 April 2020. The letter enclosed a copy of the injunction, which "you will see restrains the Respondents from removing assets (whether owned legally or beneficially) up to the value of US$ 76.7 million from the Court's jurisdiction or otherwise dealing with such assets worldwide". The letter went on to state:

> "We direct your attention in particular to paragraphs 16-20 of the Injunction, which makes clear, inter alia, that it is a contempt of Court for any third party knowingly to assist in or to permit a breach of the Injunction, subject to the terms of paragraph 19 regarding persons outside England and Wales. That is reinforced by the Penal Notice on the first page of the Injunction which provides as follows:
>
> **IF YOU (1) MUHAMMAD ALI LAKHANI, (2) MUHAMMAD HASAN LAKHANI, OR (3) MUHAMMAD TAHIR LAKHANI DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.**
>
> **ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS**

> **THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**
>
> We also draw your attention to paragraph 3 of Schedule B wherein the Applicants undertake to pay the reasonable costs of anyone other than the Respondent incurred as a result of the Injunction including the costs of finding out whether that person holds any of the Respondents' assets.
>
> Please contact Charles Buss (cbuss@wfw.com) and Kelsey Tollady (ktollady@wfw.com) of this office with any queries you may have."

159. There were three categories of persons who were notified; employees resident out of the jurisdiction at foreign companies owned and controlled by the Defendants; agents out of the jurisdiction employed by such companies; and various banks and financial institutions which have no presence in England and Wales.

160. This letter led to correspondence concerning the propriety of the terms of the letter, in the light of paragraph 19 of the WFO. This led to WFW writing to Mr. Jorgensen (and the other individuals who had received letters in similar terms to that set out above). WFW's letter of 28 May 2020 stated:

> "We write further to our letter dated 27 April 2020.
>
> By that letter, we notified you of the worldwide Freezing Injunction (the "Injunction") dated 22 April 2020 made against Muhammad Ali Lakhani, Muhammad Hasan Lakhani and Muhammad Tahir Lakhani (the "Respondents"), which restrains the Respondents from removing assets (whether owned legally or beneficially) up to the value of US$76.7 million from the English Court's jurisdiction or otherwise dealing with such assets worldwide.
>
> In that letter, we also drew your specific attention to paragraph 19 of the Injunction which makes clear that it is not binding on persons who are resident outside of the jurisdiction of the courts of England and Wales. To be clear, we notified you of the Injunction to help you to avoid giving any assistance to the Respondents, knowingly or otherwise, to breach the terms of the Injunction. We also sought to make clear to you the consequences of such a breach for the Respondents to whom the Injunction does apply. Assuming that you are not resident within the jurisdiction of the courts of England and Wales, the Injunction, including the penal notice in the Injunction, will not apply to you. However, we trust that you would want, as would any reasonable and responsible person, to take steps to avoid

> assisting in the breach of an English court order, even if you would not be prima facie in contempt of court by doing so.
>
> If you have any further queries as to the nature and effect of the Injunction, please do not hesitate to contact Charles Buss (cbuss@wfw.com) or Kelsey Tollady (ktollady@wfw.com) of this office."

H2: The parties' arguments

161. Mr. Cook submitted that the original communication to third parties, in the terms of letters such as that sent to Mr. Jorgensen on 27 April was an illegitimate and oppressive use of the WFO.

162. First, there was no legitimate reason to send the WFO to these third parties, who were all outside England and Wales. The WFO, in accordance with paragraph 19, did not have extra-territorial effect in relation to third parties unless they are served with the order in England and Wales, which did not happen here. Furthermore, the WFO applied only to the Defendants and not to their companies, and "therefore a third party dealing with a company connected to the Defendants is clearly not subject" to a WFO. The WFO did not apply to companies under the control of the Defendants. Such companies were free to continue conducting their business in the ordinary course.

163. Secondly, it was misleading to refer to the possibility of contempt of court, or to say that this was reinforced by the penal notice to which reference was made. Although paragraph 19 of the WFO was referred to, the message conveyed by those letters was that there was a risk of contempt. A recipient may well not take the trouble to analyse paragraph 19 of the WFO.

164. The overall purpose of the letters was said to have been to give the WFO a practical effect beyond its terms and the jurisdiction of the English court, and to intimidate counterparties of companies owned by the Defendants in order to cause the maximum possible damage to the Defendants.

165. Mr. Cook therefore submitted that the injunction should be discharged, relying upon the judgment of Males J. in *Euroil v Cameroon Offshore Petroleum* [2014] EWHC 52 (Comm) paragraph [13]. In that case, Males J. said that there was a "clear misrepresentation" of the effect of the injunction, in circumstances where the claimant had asserted that the injunction was "conclusive proof" that the defendants in that case were in breach of contract. He said that this was completely unacceptable and in effect an abuse of the court's process which was sufficient to discharge the injunction, although there were other grounds on which Males J. intended to do so. Mr. Cook submitted that the present case was analogous: the Claimants were seeking to use the injunction in a way that was not intended.

166. On behalf of the Claimants, Mr. Waller submitted that there was nothing akin to the misconduct in the *Euroil* case. When allegations were made in correspondence about the terms of the notification, the Claimants promptly sent letters (e.g. the letter dated 28

May 2020) highlighting the point that Ali and Hasan wanted to make more prominently. These letters had been sent before the WFO discharge application had even been commenced.

167. He referred to Mr. Buss's evidence, in his seventh witness statement, which said that the reason that the letters had been sent had nothing to do with oppression or seeking to damage the Defendants or their business. The sole aim was to make the WFO effective. The court had been told, in evidence served prior to the return date of the WFO, who had been notified at that stage. There was therefore no obvious problem with the notifications.

168. Furthermore, it had never been the Claimants' intention to mislead anyone as to the jurisdictional reach of the English court, or the non-liability of third parties abroad in contempt proceedings. However, in Mr. Buss's experience, it was fairly common practice among solicitors' firms to give notice of a WFO to at least some third parties abroad, because some third parties will want to know about it: they will not want to assist a breach, even if as a matter of law they face no liability for doing so. Mr. Buss also referred to the specific reference in his original letters to paragraph 19 of the WFO, as well as to the subsequent letters sent promptly in May once the point had been raised. Letters of that nature had not been sent to the notified financial institutions, because it was not considered that there was any prospect of their having misunderstood the previous letters, given the legal resources to which they have access. Mr. Buss said that if "anything has been done [which] meets with the Court's criticism, then of course I sincerely apologise for the mistake that was made. However, nothing was done in the knowledge that it would be met with criticism".

H3: Discussion

169. No authority was cited to me in support of the proposition that it is improper to notify third parties, who are outside the jurisdiction, of a worldwide freezing order which has been granted against a defendant. I do not see any reason why that is improper, as part of a legitimate aim of trying to make a WFO effective. The purpose of a WFO is to prevent the unjustifiable dissipation by a defendant of his or her assets. The WFO does not bind third parties outside the jurisdiction, except in the circumstances set out in the standard form wording, here contained in paragraph 19. However, a claimant is entitled to take the view that third parties may not wish to assist a defendant to breach a WFO which the English court has granted.

170. This will be a matter on which a notified third party will have to form its own view. If it has contractual obligations to the defendant, then it may take the view that it will comply with an instruction by the defendant to perform those obligations. Indeed, paragraph 20 of the WFO, contains (again) standard form wording which makes clear that, in relation to assets outside England and Wales, nothing prevents a third party from complying with obligations under the law of the country where the assets are situated.

171. If a claimant wishes to give local force to a WFO, and thereby give it coercive effect against a third party who is outside England & Wales, then it will need to obtain an

order from a local court as contemplated by paragraph 19 (c) of the WFO. However, there is in my view nothing improper in a claimant seeking to notify a third party of a WFO, without seeking a further court order, albeit that in such circumstances the claimant will be relying on what might be termed the "soft power" of the court's order rather than its coercive effect. In the present case, there is no reason to conclude that the Claimants had some ulterior and improper purpose behind the notifications given to third parties. Mr. Buss's evidence was that this was done simply for the purpose of making the WFO effective, and I see no reason to doubt that evidence or to conclude (as was at one stage suggested in the evidence of Ali and Hasan) that the Claimants were seeking to destroy the Defendants or their business.

172. However, it is important that the effect of the order should not be misrepresented. I consider that a stark reference to contempt and the penal notice, such as that contained in the original notification letter, is not appropriate. It is true that there may be circumstances in which contempt and the penal notice would become directly applicable to a third party who is outside the jurisdiction: i.e. if a third party were thereafter to come within the jurisdiction, and then assist with a breach of the order. However, such circumstances would be unusual and would not justify a stark reference to contempt and the penal notice such as that set out in WFW's letters to the individuals. If the possibility of contempt, or the penal notice, is to be referred to in a notification to a third party, then a clearer explanation of the effect of the order, and the circumstances in which a contempt of court might arise, should be provided.

173. Although I consider that the terms of WFW's original letters therefore went too far, I do not think that it is appropriate to discharge the injunction on that basis. I consider that this criticism of the terms of the letter is a long way from the "oppression" which Ali and Hasan originally sought to establish. There was no deliberate misrepresentation of the terms of the order: the criticism in the present case is not in my view comparable to the misrepresentation in *Euroil.* WFW in their original letter did draw specific attention to the terms of paragraph 19 of the WFO. Any reasonable recipient was therefore directed to the operative and critical paragraph. The original letter also invited any third parties to raise any queries, and the email addresses of two individuals at WFW, including Mr. Buss, were given. I was not shown any correspondence where third parties had raised queries with WFW as to any difference between paragraph 19 of the order and the terms of WFW's letter. Furthermore, WFW promptly sent out letters on 28 May 2020, once the point had been raised by the Defendants. No criticism has been directed towards the terms of these corrective letters.

174. I would also consider it unjust, in all the circumstances of the case, to discharge the WFO, in view of the real risk of dissipation and, now, the fact that the Claimants have successfully obtained summary judgment.

175. I also do not accept that there is any impropriety in notifying third parties who may be dealing with companies owned by the Defendants. Whilst it is true that the injunction did not prevent the companies from carrying on their ordinary course of business, there is the potential for unjustified dispositions of assets by the companies – if directed by the Defendants themselves – to be in breach of the injunction on the basis that they diminish the value of the Defendants' shareholdings and therefore the assets which they held.

176. Ali and Hasan seek details of all third parties who were notified of the injunction. I do not consider this necessary or appropriate. The Claimants do not wish to reveal this information, since it would enable the Defendants to know which institutions had not been notified and thereby, potentially, make it easier to deal with their assets through those institutions. This is a legitimate concern. Furthermore, I do not consider that there is any good reason why the identity of all third parties should be revealed to the Defendants: it would be sufficient, given the Claimants' concern as described above, that the Claimants should be ordered (or undertake) to write to third parties correcting what they had previously said.

177. In view of my decision that the original notification letters went too far, I consider that it is appropriate to require the Claimants to send 'corrective' letters (i.e. similar to those sent on 28 May 2020) explaining the position to all third parties who have not hitherto received such letters. It may be that such corrective letters are not essential: financial institutions may well be familiar with freezing orders, and they will likely have legal departments who can advise as to their effect, including the effect of paragraph 19. However, I consider that any doubt should be removed by the sending of further letters.

I: Costs.

178. Butcher J. gave the Defendants liberty to apply to vary his order that they should pay the costs of the without notice and return date applications for the WFO. In circumstances where (i) the WFO was justified, (ii) the grounds of challenge have failed, and (iii) judgment has been obtained against all Defendants, I see no reason to disturb that order.