Neutral Citation Number: [2024] EWHC 267 (Comm)

Case No: CL-2023-000005

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

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

Date: 08/02/2024

Before :

MR JUSTICE JACOBS

- -

Between :

MADISON PACIFIC TRUST LIMITED **Claimant**

- and -

(1) SERGIY MYKOLAYOVCH GROZA
(2) VOLODOMYR SERHIYOVCH NAUMENKO **Defendants**

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Nathan Pillow KC and James Sheehan (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Stephen Cogley KC and Kajetan Wandowicz (instructed by **Hill Dickinson LLP**) for the **Defendants**

Hearing dates: 5 – 6 February 2024

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Approved Judgment

This judgment was handed down at 11:00 am on Thursday 8th February 2024, in court, by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

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A: Introduction

The parties and the background

1. The claimant ("Madison") is a professional corporate debt and trustee service provider, which acted as Facility Agent and International Security Trustee for certain loans. The Defendants are the ultimate beneficial owners of a corporate structure, the GNT Group, which included the borrower under the loans. The borrowing company is a Cyprus company, GN Terminal Enterprises Ltd ("GNT"), and the repayment obligation arises under a restated "Facility Agreement" described below. The loans had an extensive security structure involving various pledges, guarantees and other securities. Each of the Defendants is a guarantor under the relevant loans under "Suretyship Deeds" described below.

2. There is no dispute that there has been a default by the corporate borrower, GNT, under the relevant loans. Madison has begun arbitration proceedings, under the auspices of the London Court of International Arbitration or "LCIA", in order to enforce claims against the Defendants as guarantors.

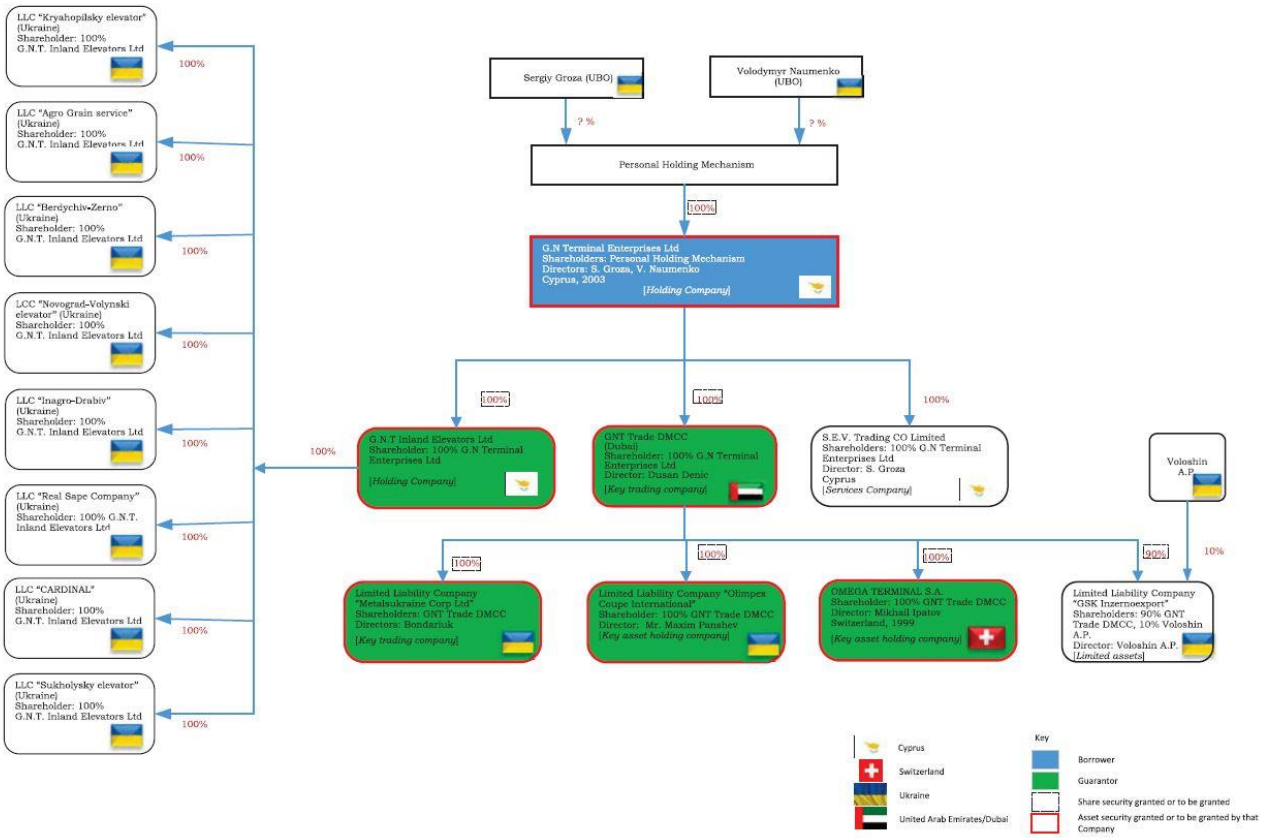
3. On 13 January 2023, HHJ Pelling KC granted Madison a worldwide freezing order ("WFO") against the Defendants in support of the arbitration that was commenced on 16 January 2023. The WFO was continued until further order by Foxton J at the return date on 27 January 2023. However, Foxton J's order permitted the Defendants to apply to set aside the WFO thereafter, and to do so without the need to show a change of circumstances. By application notice dated 24 March 2023, the Defendants applied to set aside the WFO on the basis that (1) there was no real risk of dissipation, and (2) it was not just and convenient to make or continue the WFO.

4. The application for the WFO, which was made without notice, was supported by a lengthy Affidavit of Mr John Caldwell Patton, a partner in Argentem Creek Partners ("Argentem"). A considerable amount of evidence has subsequently been served in relation to the Defendants' discharge application. The main witness statements, to which reference was made at the hearing of the application (which took place on 5 and 6 February 2024), comprised statements from each of the Defendants, and from Mr Dusan Denic, who is the Chief Financial Officer of the GNT Group. The First Defendant ("Mr Groza") has served one witness statement, the Second Defendant ("Mr Naumenko") has served three witness statements, and Mr Denic has served two. Mr Patton served a very lengthy responsive statement to the first round of evidence served on behalf of the Defendants.

5. Madison's claim in the underlying arbitration is a debt claim made under two suretyship deeds entered into by each Defendant with Madison ("the Suretyship Deeds"). The Defendants were sureties of the debt of GNT, which is the holding company for the GNT Group, whose business is the trade exportation of grain (including wheat, corn, barley, and sunflower seeds) from Ukraine, primarily from the port of Odesa. The Defendants were co-owners and directors of GNT, each ultimately holding 50%. Mr Groza's interest was held through a Dubai company, Waylink Assets Limited ("Waylink").

6. The corporate structure of the GNT Group is relevant to some of the arguments that arise in relation to whether there is a real risk of dissipation. Following a reorganisation which took place in early 2021, the corporate structure was simplified (from a far more complex structure) so as to be as set out below. This structure is taken from a contemporary document which described the earlier more complex structure and the proposed simplified structure which was then to be put in place.

7. It will be seen that there are a number of different companies in the GNT Group, and that (as can easily be seen in a colour version by looking at the flags) the companies were incorporated in different jurisdictions. The principal company, GNT, was Cypriot. There were also various Ukrainian, Swiss and UAE companies as well as further Cypriot companies.



8. Loans were made to GNT by three investment funds. Two were managed by Argentem, and the third by Innovatus Structured Trade Finance S.a.r.l ("Innovatus") (together, "the Lenders"). In this judgment, I will refer to both Madison and "the Lenders", although for present purposes, in the context of the issues to be resolved, there is no significant distinction between them.

9. The Argentem entities provided two loan facilities pursuant to a facility agreement dated 12 November 2019. That agreement was amended and restated with effect from 3 February 2021 ("the Facility Agreement"), at which point Innovatus joined as a lender. GNT was obliged to repay the loans in full at the Final Maturity Date, 5

December 2021. A series of security arrangements was provided for, including the Suretyship Deeds.

10. The Lenders lent a total principal sum of US$95m to GNT. It is not in dispute that GNT had a substantial history of default, starting in 2020 and continuing after the amendment of the Facility Agreement. This default therefore preceded the war in Ukraine, which commenced with the Russian invasion in late February 2022.

11. A number of waivers were agreed in 2021. A further conditional waiver was signed on 7 February 2022, but never took effect because the GNT Group failed to complete certain required steps, including the perfection of pledges over the shares in GNT Trade DMCC ("GNT Trade"), a Dubai company in the GNT Group ("the Dubai Security"). The failure to complete the pledge, and certain dealings or attempted dealings with the shares of GNT Trade, formed part of Madison's case on risk of dissipation.

12. Madison contends that, with interest, the sum due now exceeds US$150m. There is no dispute that GNT failed to make repayment when due. The Suretyship Deeds contain extensive anti-avoidance provisions. The Defendants dispute liability in the arbitration. Madison contends that there is no substance to any of the defences which have been advanced. Indeed, one of the defences advanced – based on an alleged promise by Mr Patton to Mr Naumenko not to enforce Madison's security – is now acknowledged to be unmaintainable.

13. That particular defence was based upon a telephone call which took place between Mr Patton and Mr Naumenko on 15 December 2022, shortly before steps were taken (starting on 20 December 2022) by the Lenders to enforce various securities which were created by the security structure which supported the loans. Mr Patton has, relatively recently, produced a transcript of the call, which was recorded. I have read the transcript and there is nothing which supports a case that Mr Patton made a promise not to enforce, which is no doubt why the argument is no longer maintained. The call will, however, be relied upon at the arbitration in support of an argument based on estoppel by acquiescence, but Mr Cogley KC (who appeared for the Defendants) was keen to emphasise that it was not necessary for the court to express any view about the merits of that (or any other) defence, since that would be a matter for the arbitrators.

14. Although the 15 December 2022 call is no longer relied upon in support of the argument based on Mr Patton's alleged promise, it did feature heavily in the arguments of Mr Cogley in relation to the freezing injunction. He submitted that a proposal made by Mr Naumenko in that call, as to how matters should move forward, was very significant in relation to the question of whether there was a real risk of dissipation. He also argued that there had been material non-disclosure by Madison on the without notice application before HHJ Pelling KC, in that an inadequate account of the call had been presented to the judge and he had not been shown the transcript which Mr Patton had available. He submitted that, in the light of these and other non-disclosures, the WFO should not be maintained. I will deal with those arguments in Section E below. I note at this stage that the grounds of the discharge application did not include material non-disclosure, and that when the evidence was served in March 2023 in support of the application to discharge, there was nothing which clearly heralded that material non-disclosure was a point which would be advanced.

December 2022 and January 2023

15. The immediate background to the application for the WFO were various steps which were taken from 20 December 2022, by Madison, at the Lenders' direction, in order to try to enforce the debt which was owed by GNT. Those steps included: (i) formally demanding repayment under the Facility Agreement, and (ii) exercising its rights under various agreements within the security structure which supported the loans. Thus, the Lenders contend that they are contractually permitted, as they sought to do: to replace the directors of three Ukrainian operating companies in the GNT Group; to enforce pledges over the shares in GNT held by Waylink Assets Limited ("Waylink"), through which Mr Groza holds his 50% shareholding in GNT; to appoint a receiver over GNT's assets pursuant to a fixed and floating charge; and to replace the directors of other companies within the GNT Group, including GNT Trade.

16. The Lenders took those steps in December 2022, on the evidence of Mr Patton, in the context of continuing default by GNT in making payments which were due, and against the background of a number of concerns. Two particular concerns featured heavily (on Mr Patton's evidence) in relation to the decision to take enforcement action, as well as the case as to risk of dissipation. These can be summarised as follows.

17. First, there had been an apparent disappearance of substantial quantities of stocks of wheat, corn and barley, worth around US$ 100 million. Questions had been asked by the Lenders over a considerable period during 2022, and (on Madison's case) the answers given were inconsistent and evasive. Mr Cogley used the word "chaotic" in his submissions to describe the information which was given, or at least some aspects of it, but the Defendants' case is that any such chaos is to be ascribed to the war in Ukraine. Madison says that the war does not provide an adequate explanation.

18. Secondly, Mr Patton and the Lenders' lawyers had repeatedly pressed Mr Denic to take the necessary steps to perfect the pledge over the shares in GNT Trade. Indeed, this was (as the transcript records) a particular concern which Mr Patton expressed to Mr Naumenko during the call on 15 December 2022. However, although the perfection of the pledge should have been relatively easy to accomplish in a short space of time, it had never been done.

19. In summary, the Lenders no longer trusted GNT and the Defendants, and thus initiated the various steps taken in December 2022.

20. The Lenders did not, on 20 December 2022, apply for a freezing order. The application was in fact made very soon afterwards, at the start of the January legal term following the court's Christmas break, and it was granted on 13 January 2023. In the course of his opening submissions, Mr Cogley laid considerable emphasis on this delay, in support of the argument that Madison lacked belief that there was a real risk of dissipation by the Defendants of their assets.

21. Even in the case of substantial delays, such an argument has its difficulties: see *Ras Al Khaimah Investment Authority v Bestfort Development LLP* [2017] EWCA Civ 1014, in particular para [55]. In the present case, however, it has no substance at all. The evidence served by the Defendants had not referred to any such point on this period of alleged delay, and thus Mr Patton had not had an opportunity to respond to it. However, Mr Patton's original Affidavit had explained that the Lenders had taken their

enforcement steps in December 2022 somewhat earlier than they had been planning, because they had learned of the possibility of the Defendants themselves initiating certain pre-emptive steps which would potentially have made enforcement problematic. He explained in his Affidavit that Madison had moved shortly before Christmas, and that this was more quickly than they had wanted, because of concerns that the Defendants had learned at least some of Madison's plans.

22. It is also apparent from the length of Mr Patton's Affidavit, and the obvious care with which it (and the skeleton argument in support of the WFO) had been prepared, that steps must have been well in hand some time before 13 January 2023 in relation to the WFO application.

23. Furthermore, the supposed "delay" in this case was a matter of less than 4 weeks, the majority of which comprised the Christmas break. There was therefore no substantial delay, and certainly none where any inference could be drawn that Madison did not believe that there was a risk of dissipation. The question of whether there is sufficient evidence of a real risk is addressed in Section C below.

24. After HHJ Pelling KC granted the WFO, there were various delays in the hearing of the present application, including because it appeared at one stage that the Defendants would offer undertakings. In fact, the question of whether such undertakings should replace the WFO, in the event that the court considers it appropriate to continue it, is a matter to be argued hereafter. However, it is not necessary to describe in detail the course which the set-aside application has taken, and the reasons why it has taken some time to come on.

Litigation elsewhere

25. The Lenders' attempts to enforce their security have given rise to litigation in a number of jurisdictions, and in particular Cyprus, Switzerland and Ukraine. The Defendants, and the various companies affected by the enforcement measures, argue that the steps taken by the Lenders are impermissible. The enforcement measures are therefore being very firmly resisted. The Defendants intend, in the arbitration proceedings concerning the claim on the guarantees, to rely upon arguments to the effect that, in various ways, the Lenders have acted improperly in relation to the enforcement of the security which they obtained under the security structure.

26. The evidence indicates that the Defendants have had a degree of success in relation to the resistance which has been mounted: for example, an injunction was granted in Cyprus, and judgment is awaited (in relation to a hearing that took place in November 2023) on the question of whether it should be discharged. There is no evidence before me that indicates that the attempts by the Lenders to enforce their security have actually borne any fruit, in terms of reducing the indebtedness of the borrower, GNT. Whether or not the Lenders' efforts will in fact bear any fruit, and if so at what stage, is not a matter which can be predicted with any degree of confidence.

Good arguable case and the merits of the claim

27. The Defendants accept that Madison has established that there is a good arguable case on the merits, which is a necessary requirement for a freezing order (including a WFO). In circumstances where there is an admitted default by GNT, and there are Suretyship

Deeds which were clearly executed by the Defendants (and whose validity is not, as I understand it, challenged), it is obvious that the claim easily crosses the "good arguable case" threshold.

28. Indeed, now that the Defendants no longer pursue the argument based upon a promise (on 15 December 2022) not to enforce, it is not at all easy to see how the Defendants can resist Madison's claim on the Suretyship Deeds. An argument based on estoppel by acquiescence, based on the 15 December 2022 call, will be advanced by the Defendants at the arbitration. In view of the point taken by the Defendants on full and frank disclosure, I have to some extent to consider that point and do so in Section E below. However, I cannot express a final view on the point, which will be a matter for the arbitrators. It suffices to say, in the context of non-disclosure, that a reading of the transcript of the 15 December 2022 call does not, at least to my mind, give rise to any obvious argument based on estoppel by acquiescence. If that argument fails, then I am not aware of any other defence to the claim on the Suretyship Deeds. However, I have not examined the pleadings in the LCIA arbitration, and do not express any view on the overall merits, which will include a counterclaim.

The issues

29. The applicant for a freezing injunction must establish (i) a good arguable case on the merits; (ii) a real risk of dissipation of assets; and (iii) that it is just and convenient to grant the injunction. The Defendants do not dispute (i), but argue that neither (ii) nor (iii) is satisfied in the present case. They contend that the evidence relied upon by Madison, when viewed in the context of their own evidence, does not establish the necessary real risk of dissipation of assets. In relation to (iii), the Defendants' principal argument concerning justice and convenience arises from the existence of the security which was provided as part of the security structure. They contend that Madison is more than adequately secured for their claims, in particular since GNT (over which they have security) is a very valuable company worth far more than its current indebtedness to the Lenders.

30. In addition to these points, the Defendants advance an argument based on the alleged absence of full and frank disclosure on the without notice application.

B: Legal principles

Risk of dissipation

31. The principal issue which arises on the present application concerns whether there is a real risk of dissipation.

32. There was no dispute as to the legal principles which apply in that context. They have been authoritatively stated in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203, based upon an earlier judgment of Popplewell J in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm). The following are the principles.

(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

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

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

(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

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

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

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

33. Paragraph (7) above shows that it is permissible, indeed necessary, to look at relevant factors cumulatively. At some points in his submission, Mr Cogley tended to suggest that each individual point relied upon must, standing on its own, justify the conclusion that there is a risk of dissipation, and is otherwise to be disregarded. I disagree. It is not in my view right to look at each factor in isolation. The facts relied upon may have a cumulative impact. For example, a conclusion that particular features of the facts provide clear evidence of a risk of dissipation may colour the court's conclusions in relation to other facts which, had they been considered in isolation, might have been regarded as less significant or more equivocal.

34. The court is necessarily assessing the risk of dissipation at an interlocutory stage. The court is not expressing a concluded view as to whether assets will or will not in fact be

dissipated. The focus is therefore on whether there is a "real risk" of an unjustified disposal of assets.

35. In that regard, just as in the context of deciding whether a claim or defence has a "real prospect of success" under Part 24, the court does not have to take at face value everything that a party says. The court will therefore consider, as it does in many contexts, what the documentary evidence reveals, and the extent to which responsive evidence is consistent with that. However, the court is not conducting a mini-trial, but is ultimately having to decide, in accordance with the above principles, whether there is sufficiently solid evidence of a real risk of dissipation.

Claims for breach of contract

36. The underlying claim in the present case is for breach of contract: failure to make payment of sums due under the Suretyship Deeds. The underlying claim is therefore not based on allegations of fraud. Madison does not need to allege fraud in the context of its cause of action, and can advance a straightforward contractual claim.

37. Mr Cogley submitted, in his skeleton argument, that it was unusual to seek a WFO where fraud was not alleged. He submitted that an ordinary contractual dispute should be left to the arbitrators to decide. In his oral submissions, he accepted that the court had jurisdiction to grant a WFO in support of a contractual claim, but said that such a case required particular scrutiny.

38. I disagree. It is indeed common for parties to seek freezing orders in support of underlying claims of fraud. However, it is also common for orders to be sought in support of contractual claims, and indeed the original freezing order then known as a "Mareva" injunction was developed in the context of ordinary claims under charterparties. A claimant in a fraud case may be in an advantageous position, to some extent, in that the allegations of dishonesty are relevant not only to the existence of the cause of action, but also to the risk of dissipation. However, this does not mean that a claimant with a contractual claim is in a fundamentally different position. It means that such a claimant will not simply be looking at the facts which give rise to the breach of contract, but at a range of other facts as well. The nature of the breach, and its circumstances, may however be relevant even in the context of a contractual claim. Ultimately, however, whether one is dealing with a fraud claim, or a contractual claim, or some other claim, the applicable principles concerning risk of dissipation are the same and are as set out in *Lakatamia.*

C: Is there a real risk of dissipation

C1: Actual and attempted transfers of assets away from the GNT Group and the Defendants

39. Madison relies upon a number of actual and attempted transfers of assets away from the GNT Group, and from the Defendants themselves, in the immediate aftermath of the enforcement measures commenced on 20 December 2022. Madison has been able to obtain such evidence as a result of various matters, including monitoring of publicly available information following the commencement of enforcement measures, and also information which has become available in consequence of some of those measures.

40. The first of the matters discussed below (dealings with the shares in the elevator companies) was relied upon before HHJ Pelling KC on the without notice application, but evidence in relation to the other matters has come to light subsequently. It was common ground that the court's assessment of whether there is a real risk of dissipation can and should take into account evidence which is now available, and that this includes evidence from the Defendants themselves as well as evidence obtained by Madison subsequent to the original grant of the WFO. In other words, the court is concerned with the evidence as it now stands, and is not simply considering whether HHJ Pelling KC was correct to make the WFO on the evidence before him at the time. The position as it stood at the time of the without notice application is, however, relevant to the full and frank disclosure argument addressed in Section E below.

The elevator companies

41. As can be seen on the left hand side of the structure chart (above), there were 8 Ukrainian companies which, as part of the simplifying 2021 reorganisation, were owned by a holding company. These 8 companies owned and operated the GNT Group's grain storage elevators in Ukraine. As can be seen on the structure chart, their immediate parent company was GNT Inland Elevators Ltd ("Inland"), a Cyprus company, which itself was a subsidiary of the principal borrower under the Facility Agreement, namely GNT. As the chart correctly records, Inland was itself a guarantor under the security structure.

42. Very shortly after enforcement steps were commenced on 20 December 2022, the shares in each of the eight Ukrainian subsidiaries were transferred out of the ownership of Inland and away from the GNT Group. Mr Pillow identified the relevant dates when this happened as 31 December 2022 to 7 January 2023. There was no dispute that these transfers had indeed happened. There was also no dispute that there was no consideration for the transfer. Mr Groza's evidence, pursuant to the WFO asset disclosure order, was that the inland grain elevators owned by these various companies were worth US$ 14.5 million. This is, obviously, a substantial sum. The company to which the shares were transferred is GNT Europe SA ("GNT Europe"). Notwithstanding its name, that company is not part of the GNT Group. Its corporate documents show that it is owned by Mr Dusan Denic, who (as previously described) is the CFO of the GNT Group and, on the evidence, a close associate of the Defendants. However, the Defendants' asset disclosure states that the Defendants, rather than Mr Denic, are each beneficial owners as to 50% of that company.

43. In my view, this appears (at least in the absence of a satisfactory explanation from the Defendants) to be a classic case of dissipation of assets, albeit that it is a dissipation of the assets of Inland, which is within the GNT Group, rather than the assets of the Defendants themselves. There is no dispute that the Defendants, whose GNT Europe company received these assets, were involved in this transfer. It was a transfer without any consideration being paid. It went to a company whose ownership was not apparent from available corporate documents. It is only as a result of the Defendants' asset disclosure that it is now known (or at least asserted) that GNT Europe is owned by the Defendants. There are no documents which record the arrangements whereby the shares in GNT Europe are in fact owned by Mr Denic on trust for the Defendants. The effect of the transfer is to divest a company (Inland) which is within the security structure, and which had provided a guarantee to Madison, of valuable assets for no consideration. Furthermore, the transfer by Inland was a clear breach of a contractual obligation of

Inland not to dispose of its assets: see clause 21.23 of the Facility Agreement. The loss of those assets would potentially affect Madison's ability to enforce any claim against Inland. Furthermore, the opaque nature of the ownership of GNT Europe would – absent the asset disclosure that has only taken place as a result of the WFO - make it difficult for Madison to contend, in an enforcement context, that the shares in that company were owned by the Defendants.

44. The Defendants submit, however, that Madison's case falls flat. They argue that the transfers were part of an orderly reorganisation, related to companies whose assets were not part of the security under the relevant facility documents. The transfers were not concealed, and the GNT Group obtained consents from certain banks which had security in the underlying assets owned by the 8 elevator companies. Even if there was a technical breach of any provisions of those facility documents, that did not give rise to a risk of dissipation. In his oral submissions, Mr Cogley emphasised that the transfers remained within companies ultimately owned by the Defendants: prior to the transfer, they were within the GNT Group ultimately owned by the Defendants, and now they were outside it but nevertheless in a company owned by the same ultimate beneficial owners ("UBOs"). They had not therefore moved out of the Defendants' control. Moreover, there was a legitimate purpose for the transfer: the idea was that GNT Europe would be able to borrow money in Switzerland for the purposes of refinancing the group's indebtedness and repaying the Lenders. The idea was that GNT Europe, with its subsidiaries, would in due course be transferred into the GNT Group.

45. I did not consider that this provided any satisfactory response to the case that this was a classic act of dissipation. It was wrong to contend that the assets comprising the shares in the 8 companies originally fell outside the security structure. Those were assets of Inland, a guarantor under that structure. Clause 21.23 of the Facility Agreement expressly prohibited various companies, including Inland, from selling or transferring all or a substantial part of its assets. Here Inland had transferred all of the shares in its subsidiaries, and Mr Cogley accepted that there had been a breach. This was, as Mr Pillow submitted, a clause which was designed to prevent dissipatory behaviour. He made the powerful point that where a person has promised not to transfer certain assets, and then does so in breach of that promise, there is every reason to think that that will happen again (unless restrained) when that person is confronted with legal proceedings.

46. There is no documentary evidence that Madison's consent was sought for this transfer. Furthermore, when the transaction was first explained (in an Affidavit of Mr Gorbunov for the Cypriot injunction proceedings), it was not suggested that Madison had consented to the transfer, nor that the transfer was the completion of an earlier restructuring. Nor was there any documentary evidence which supported the proposition that this transfer formed part of a simplification exercise. The evidence indicates that that exercise had been discussed much earlier and (subject to the complaints which Madison had about aspects, such as the Dubai Security, not being completed by the GNT Group) accomplished by 2021. Furthermore, it was entirely unclear as to why it was necessary for these companies to be transferred out of the GNT Group for the purposes of raising money in Switzerland. There was also something of a disconnect between the evidence of Mr Groza – that the reason for the transfer out was in order to obtain trade finance facilities in Switzerland – and the submission of Mr Cogley that the transfer was connected with raising money in order to repay the

Lenders. It may be that the transfers were agreed to by other Ukrainian banks, but there is nothing which shows any agreement by Madison.

47. This aspect of real risk of dissipation was relied upon before HHJ Pelling KC, and I consider that it provides solid evidence in support of the real risk which Madison must show.

Transfers of Prista-Oil, Vtormetexpoert and Ferko

48. This aspect of Madison's case concerned three companies which were owned by the Defendants themselves, rather than the GNT Group. At the time of the WFO, Prista-Oil Ukraine Ltd ("Prista-Oil"), Vtormetexport LLC ("Vtormetexport") and Ferko LLC ("Ferko") were ultimately owned by the Defendants. Mr Patton's witness statement describes the ownership of these companies, on the basis of the publicly available Ukrainian register.

49. Madison contended that a week after the WFO was served, a Mr Chebotar was registered as the new beneficial owner of Prista-Oil; and a Mr Pozdnyakov was registered as the new beneficial owner of Vtormetexport and Ferko. Madison submits that the timing, on 20 January 2023, was an attempt to remove the assets from its reach. They submit that there is no good reason for the sudden transfer, following the WFO, of the ultimate beneficial ownership of these companies from the Defendants to those particular individuals. The obvious inference, they submit, is to protect those assets from enforcement. Furthermore, in correspondence with the Defendants' former solicitors, Kobre and Kim, Madison had been told that the only nominees who were used to hold any of the assets of the Defendants were Mr Denic and Mr Gorbunov, who is Mr Groza's stepson. It is now accepted, however, that Mr Chebotar and Mr Pozdnyakov are also their nominees. The statement made, in prior correspondence, that there were no nominees other than Mr Denic and Mr Gorbunov was therefore incorrect.

50. Although these matters were relied upon in Mr Patton's first witness statement, they have not been explained by the Defendants. Unsurprisingly, in the light of the absence of evidence, Mr Cogley did not address these transfers in either his written or oral submissions.

51. In my view, they do provide further solid evidence of a risk of dissipation. There was a documented transfer of the ultimate beneficial ownership of these companies into the names of these two individuals. The only apparent purpose of this purported transfer, which was shortly after the WFO, would be to conceal the continued ownership of the relevant assets by the Defendants. No other business reason for the purported transfer has been provided, and indeed it is now accepted that (notwithstanding what the Registry reveals) there was no actual transfer of the ultimate beneficial ownership. It is, however, only the process of asset disclosure, pursuant to the WFO, which has revealed that the ultimate beneficial ownership of these companies has not in fact changed.

52. I consider that these matters provide further solid evidence of a real risk of dissipation.

GNT Trade

53. This company, as shown on the structure chart, is a direct subsidiary of GNT. It is the pledge of the GNT's shares in this company that Madison, including via their solicitors

Hogan Lovells, were anxious to complete. Madison submitted that GNT Trade was a key GNT Group trading company, and I did not understand that proposition to be disputed.

54. Mr Patton's evidence, in his witness statement, was that liquidators were appointed on 16 May 2023. The liquidators were from FTI Consulting and included a Mr Nathan Stubing. Subsequent to their appointment, the liquidators were able to gain access to the electronic portal of the DMCC (Dubai Multi Commodities Centre), and were able to review all of the administrative requests made to the DMCC Registry in relation to the company. This revealed that one request which had been made by Mr Denic was to ask the DMCC registry to update GNT Trade's register to reflect the transfer of all 50 shares in GNT Trade to Mr Denic personally. The proposed share transfer was, according to the registry records, supported by a resolution of GNT (as shareholder of GNT Trade) purportedly dated 1 December 2022. Mr Patton said that neither Argentem nor Madison had ever consented to this purported transfer. In the event, the request was apparently rejected by the DMCC registry.

55. Mr Patton's conclusion was that this provided another illustration of the efforts of the Defendants and their associates to move a very significant asset out of the GNT Group and away from Madison's reach. He also said that Mr Denic would in all likelihood have been acting on the instructions of the Defendants.

56. The evidence served in response to Mr Patton's witness statement, including from Mr Denic, did not address this part of the case. The point was also not specifically addressed in the Defendants' skeleton argument for the hearing. In oral submissions, however, Mr Cogley submitted that scrutiny of the critical document relied upon by Madison showed that the relevant entries (which were shown on a computer print out from the DMCC system) were all created by Mr Stubing himself, on 20 December 2022. The effect of his submission, therefore, was that it was Mr Stubing who had attempted to make the transfer on 20 December 2022, or (perhaps) subsequently.

57. Mr Pillow accepted that there was a puzzling feature of the record, in that it has an entry which says: "Created by" Mr Stubing with a date of 20 December 2022. However, it is very obvious that Mr Stubing could not have created that entry on that date. He had no access to the system until May 2023, and the print-out shows that he accessed the system on 30 May 2023. Furthermore, the record shows that various documents, which would not have been available to Mr Stubing, were uploaded to the system. These included Mr Denic's passport and proof of his residence address. The portal user's email was that of Mr Denic, and the mobile number was also that of Mr Denic. I can see no basis on which it can plausibly be suggested that the changes which were sought to be put into effect on 20 December 2022, and the entries on that day, were made by Mr Stubing. They must have been made by Mr Denic, and indeed his witness statement does not deny the factual points made by Mr Patton in that regard. I agree with Mr Pillow that the obvious explanation for the reference to Mr Stubing is that this was a reflection of the fact that in May 2023, Mr Stubing now had access in place of Mr Denic. The computer programme then seems to have made a retrospective change, thus showing that the entry on 20 December 2022 was created by Mr Stubing. But that makes no sense at all given that he had no access at the time, and could not have uploaded the various documents referred to.

58. I consider that this is a significant point in relation to risk of dissipation. It was an attempt, almost immediately after enforcement actions started, to remove an important company from the GNT Group structure. It therefore fits with the successful move of the elevator companies accomplished a few days later. The attempted transaction has not been explained, and in my view the most plausible explanation is an attempted dissipation of assets by Mr Denic at the behest of the Defendants.

Other points

59. Mr Pillow on behalf of Madison made a number of other points in connection with other transfers and attempted transfers of trading companies in the GNT Group. For example, there is (as Mr Pillow described it) a very suspicious story concerning the disposal of certain assets of Olimpex. I do not consider it necessary to examine these other points. In my view, the above points are sufficient in themselves to provide solid evidence of a real risk of dissipation. Further solid evidence is provided by the evidence in relation to the failure to complete the pledge of the shares of GNT Trade, and the inventory loss, discussed below.

C2: The GNT Trade pledge

60. It is clear from the correspondence that, in the second half of 2022, Mr Patton and Madison were pressing for the completion of the pledge of the shares in GNT Trade (the Dubai company). On 22 July 2022, Mr Patton emailed the Defendants and Mr Denic, amongst others, highlighting:

> "one really important thing that have not been done and need to be sorted out as a pre-curser to the granting of a new waiver The registration of the share security in UAE which is something that the company needs to do. The restructuring finished in February 2021, we finally had notarised share pledges done 1 year later. It is now July and they still haven't been registered. I have confirmed with two sets of lawyers that this is a process which is to be done by the company. If you are unwilling or unable to do this, then you can give your power of attorney to us – or whatever process works to transfer that capability – and we will do it. We will not accept any more delays with this. It's a simple requirement and it has taken far too long – there is no war in the UAE either so nothing to stop us from sorting this out properly"

61. The email then identified Hogan Lovells, and the individuals concerned, who were Madison's new lawyers.

62. It is plain that this registration had still not been accomplished by the time of the 15 December 2022 call, when it was a matter that was clearly continuing to exercise Mr Patton.

63. In the intervening period between July and December, there were a number of chasing messages from Hogan Lovells. On 7 September 2022, Alex Kay (a partner in Hogan Lovells) emailed Mr Denic asking, now that the latter was back in Dubai, to finalise the registration process for the share pledges. The documents refer to a discussion which took place on the morning of 14 September 2022. It is clear from the subsequent

correspondence, however, that Hogan Lovells did not consider that they were in a position to finalise matters themselves.

64. Thus, on 17 September 2022, Alex Kay sent a request to Mr Denic for certain documents. On 18 September 2022, Mr Kalafat (who worked in Hogan Lovells' Dubai offices) emailed Mr Denic to say that he had not heard from him in relation to the registration of the UAE share pledges. He said that they wanted to expedite the process, and offered to meet at Mr Denic's offices and go to the free zone authority together to carry out the registration. Another chaser was sent by Mr Morris of Hogan Lovells on 17 October 2022. Yet another chaser was sent on the following day, when Mr Kalafat said that their team was available that week to carry out the share pledge registration, and again offering to meet. No responses were sent by Mr Denic to any of these requests.

65. The documentary evidence therefore shows an unwillingness on the part of Mr Denic to engage with Hogan Lovells on this point, which was clearly regarded by Madison as a matter of importance. Although Mr Denic's witness statements advance a case that Hogan Lovells had all that they needed, that was not a point which Mr Denic made at the time. It could easily have been made. It is not plausible that Hogan Lovells would have been sending the various messages, pressing for the completion of the registration, if they were actually in a position to do it themselves, and did not need anything further from Mr Denic.

66. Mr Pillow submits that this consistent failure to take basic and agreed steps to secure assets for the benefit of a lender in itself evidences a risk of dissipation. I agree. It is no answer to the point that, as Mr Cogley submitted, Madison had security in companies above and beneath GNT Trade in the structure. That does not provide a reason for the failure to provide the security over the shares in GNT Trade which had been contractually promised. Furthermore, even if that point had any force in principle, it has none in the circumstances of the present case where the Defendants are mounting forceful challenges to the exercise of security rights in relation to the companies above and beneath GNT Trade in the structure.

67. I also consider that the evidence of this very real risk is strongly reinforced by the matters described in Section C1 above in relation to GNT Trade. The evidence indicates that, more or less immediately after enforcement processes were started, an attempt was made to transfer the GNT Trade shares to Mr Denic personally. If there was indeed a resolution to that effect passed on 1 December 2022 (as the DMCC record indicates), it would seem that this transfer had been planned even before enforcement processes started. It is therefore not surprising that there was a failure to respond to and co-operate with Hogan Lovells in relation to the emails described above, since the Defendants did not wish to perfect the security.

C3: The grain stocks

68. The issue here concerns the alleged destruction of an inventory of stocks worth approximately US$ 100 million. Mr Patton addressed this issue in some considerable detail in his first Affidavit. His evidence was that, in August 2022, Mr Denic advised Mr Ivin of Ziff Ivin, a consultant engaged by Madison, that almost all of the GNT Group's grain inventory had been lost and written off, with the total value of that inventory being well over US$ 100 million.

69. In his Affidavit, Mr Patton summarised the position in paragraphs 182 – 186. In particular, he said:

> "[183] Stepping back, GNT had been in default since June 2021, over 8 months before the war began. It has barely made any payments under the Facility and (again beginning before the war) its representatives have repeatedly refused to take even basic steps to cause the Dubai Security to be perfected. Those same representatives also did not facilitate inspections of the Group's inventory, even where this stock was pledged (this applied both before and during the war). Then some very considerable transactions were undertaken by the Group at some point during Q1/Q2 2022 without the knowledge or oversight of me or the independent directors appointed to represent the creditors' interests.
>
> [184] If there were some compelling and innocent explanation for this, I would have expected that to have been forthcoming immediately and with relative ease; I would certainly not have expected the transactions to be covered up. In my view, there is no fair basis on which it could be said that Argentem, Innovatus and the independent directors have not been supportive and understanding of the GNT Group to date. We stood by the GNT Group when previous lenders left during the early pandemic in 2020, restructured the debt in 2021 around the Defendants' preferred corporate restructuring, released certain elements of security and included Innovatus in our security package along the way to support working capital injections from banks, all at the Group's request and have granted numerous waivers. We all want the Group to succeed, not just for itself and our own benefit, but also in recognition of its significance as a Ukrainian-based business selling one of Ukraine's major export goods via the Odesa port.
>
> [185] However, instead of compliance with our loan documentation, with our required and long discussed expectations on transparency and with our agreed upon governance structures, we have had obfuscation after obfuscation, including three different explanations of what happened to the Group's inventory (including pledged inventory) in as many months, along with a refusal to provide any of the documents that would support any of those explanations, and the continued failure to register the Dubai Security in the UAE. That is not, in my opinion, remotely co-operative, helpful or open behaviour, and I cannot honestly say that I believe any of the explanations provided so far.
>
> [186] In light of all of the above, Argentem has very considerable concerns that the Defendants - including through Mr Denic - have been taking steps to conceal information from us in relation to the GNT Group's assets. In circumstances where it appears

> that inventory has left the Group for no, or very little money received in return, and with very little explanation of how the sale proceeds were applied or where the inventory went, it seems to me at least possible that the inventory and/or the proceeds ultimately ended up under the control of the Defendants, somehow. It certainly would appear to be the case that they are trying to hide something. At the very least, I believe that this sequence of events created a very real risk that if left unchecked, the Defendants will take steps to dissipate their own assets in the face of the impending arbitral proceedings that will shortly be commenced by Madison Pacific on behalf of the secured lenders. As I describe elsewhere in this affidavit, we appear to be seeing asset dissipation in action over the last week or two."

70. Mr Pillow took me through many relevant documents relating to the alleged destruction or disappearance of the GNT Group's inventory, and his skeleton argument contained a full summary of the sequence of events. In broad summary, the evidence focused on three broad categories of inventory.

(1) There was a large volume of corn, wheat and barley which was pledged to Innovatus. This comprised approximately 116,000 metric tons of grain which was held at GNT's port facilities in Odesa. Its value was around US$ 20 million. The loss of that grain led to a criminal complaint by Innovatus for embezzlement, and certain materials emanating from the police investigation formed part of the documents which I was shown.

(2) Secondly, there was a substantial volume of grain, not pledged to Innovatus, which was also held at the GNT's port facilities in Odesa.

(3) Thirdly, there were substantial stocks which were held at inland facilities.

71. I did not understand Mr Cogley to submit that the documents in fact revealed, contrary to Mr Pillow's submission, a coherent and consistent story in relation to what had happened to this very large volume of stock. Rather, he submitted that the evidence showed (as he put it in the Defendants' skeleton argument) (1) a more casual business culture than Mr Patton would have preferred, and (2) a degree of administrative chaos and lack of reliable information to be expected in a company trading grain in the middle of a live war theatre. He submitted that neither gives rise to an inference of a risk of dissipation, and that the gist of Mr Patton's complaint is that the Lenders were not receiving comprehensive information about GNT's inventory in the first year of the war. He accepted that Mr Patton had been provided with certain information which later proved inaccurate, and had to be corrected. He also submitted that there was no plausible benefit to the Defendants misappropriating grain from the GNT Group.

72. I do not consider it necessary to describe the full story of the missing grain, and each of the inaccurate explanations which were provided over time to Madison. I have no doubt that the evidence relating to the missing grain story is sufficient in itself to enable me to conclude that there is a real risk of dissipation, and that this conclusion is reinforced by the other matters to which I have already referred. I will refer to some of the more striking features of the evidence which lead me to that conclusion, and it is not necessary to cover all of the points made by Mr Pillow in his submissions.

73. In relation to the Innovatus security, and indeed in relation generally to the grain which was at GNT's port facilities at Odesa, the Defendants' case is that this grain was all destroyed, because it was damaged. The arrangements for its destruction were carried out by a company called Safe Utilization Technologies LLC ("Safe Utilization"). The Defendants have produced a contract with Safe Utilization relating to the removal of the grain, and various documents – signed and sealed both by Safe Utilization and Olimpex (one of the companies in the GNT Group). These documents, headed "Acceptance and Transfer Act" are daily records of the transfer to Safe Utilization of various quantities of waste, described as "Spoilt wheat (unpleasant smell, sprouted grains)". Other documents have a similar description and refer to spoilt barley. Other documents certify the destruction of the grain. For example, they show that 615 tons were destroyed on 21 May 2022, being the same quantity as that transferred on the previous day. The place of destruction is the Sumy region, which is approximately 11 hours' drive from Odesa. The documents run from 20 May 2022 through to 24 August 2022.

74. Madison's case, in a nutshell, is that these documents were created after the event, and that there was no operation whereby very large quantities of grain were transferred to Safe Utilization and then destroyed. There is in my view a very considerable amount of plausible evidence which supports that case, and very considerable difficulties with the documentation that has been produced.

75. First, although the Lenders were obviously concerned throughout 2022 about the position in relation to the GNT Group's inventory, there is no contemporaneous evidence that they were ever told about the agreement which had been reached with Safe Utilization for the destruction of the grain, and that work towards its destruction had started on 20 May 2022. Indeed, the first reference to Safe Utilization came in Mr Naumenko's evidence served in response to the WFO in March 2023.

76. Secondly, it is clear that the Lenders were not told anything about the destruction of the grain, by Safe Utilization, at or around the time that it allegedly started. Thus, on 14 June 2022, Mr Denic stated that concerns over the quality of the grain were "materializing", and that the manager of Olimpex had "started to undertake all analysis and necessary measures to secure the wellbeing of all our assets". Similarly, at the 6 July 2022 board meeting, at which point the destruction of the grain by Safe Utilization had allegedly been going on for many weeks, Mr Patton and the other board members were told nothing about it. Reference was made to a third party report which had reported damage to the grain. The board was told that the operational staff were "undertaking all necessary measures to safeguard the physical assets of the Company".

77. Thirdly, there is no independent evidence that the entire quantity of grain at the Odesa port facilities was in such a poor condition that it needed to be destroyed. There is a relatively short Bureau Veritas ("BV") "Inspection Report". BV had clearly not inspected all of the grain at the port. There is a finding of an unpleasant smell and sprouting grains. But there is nothing to suggest that the entire quantity of grain at the port needed to be destroyed.

78. Fourth, the removal of all the grain from the port facilities would have been a major operation, involving literally thousands of trucks. Mr Patton calculated that it would require at least 4,500 trucks, and probably many more, which would need to be loaded constantly. It would have required considerable work on the part of the Olimpex staff

who, under the alleged contract, were responsible for loading operations. There is a complete absence of independent evidence that this operation was actually carried out.

79. Fifth, the place of alleged destruction is 11 hours' drive away. I was shown photographs which show that it is a derelict factory. There is a very strong case that it is implausible that, if destruction were required, the grain would have been transported such a great distance, and to such a site. Mr Patton's evidence, based on various investigations, is that the site was not connected to the gas network, and consumed very limited amounts of electricity during the relevant period.

80. Sixth, the registered director of Safe Utilization, whose signature is on the disposal documents, has told the Ukrainian criminal authorities that he does not actually work for the company, and just signed documents when asked to do so. Another representative of the company said that he was contacted by Olimpex with a view to possible engagement, and that an advance payment of US$ 5,000 was made in December 2022. There is no other record of any payment to Safe Utilization for the major logistical operation that they allegedly carried out. If, indeed, contact was only made in December 2022, and the only payment was of US$ 5,000, that would strongly suggest that the company was paid simply for signing documents.

81. Seventh, the documents produced do not cover all the grain which would have to have been destroyed. They cover only less than half the volume of the Innovatus security. They cover wheat and barley, but do not refer to corn. The quantities in the signed documents tie in with the quantities referred to in the report of BV, which seems a strange coincidence. There are no documents relating to the destruction of the remainder of Innovatus' security, and this was itself only a small part of the grain stored at the terminal.

82. Eighth, it is difficult to see why, if the destruction documents had existed at the time, they could not have been given to the Lenders at the time that they were seeking information.

83. Ninth, there was here – and I do not understand this to be disputed – a clear dealing with Innovatus's pledged assets in breach of the pledge. That is in itself an act that could be viewed as dissipatory, in circumstances where there is no documentary evidence that Innovatus were told that their security had been taken off to be destroyed. Mr Cogley submitted that the position had subsequently been restored. It is not clear to me how that could have happened: as Mr Pillow pointed out, it had been asserted on behalf of the Defendants (by Hill Dickinson in their letter dated 8 November 2023) that the pledgor company, Black Sea Commodities, had been wound up by October 2022.

84. Tenth, the Safe Utilization destruction case is inconsistent with a slide presentation, which Madison contend was prepared by Ziff Ivin on the basis of information provided by Mr Denic, dated 5 October 2022. That presentation describes the spoiled grain as having been sold at scrap value, mainly to VA Trading FZE.

85. I have reviewed the witness evidence of Mr Groza, Mr Denic and Mr Naumenko in relation to the disappearance of the inventory. I am not persuaded that that evidence negates, or provides a counterweight of any strength to, the above points.

86. I cannot of course reach any final conclusions as to what actually happened. It seems to me to be very plausible that the grain left the terminal on vessels which were connected with the operations of GNT Europe, as to which Mr Peter Heston has given various witness statements concerning, for example, losses suffered in consequence of the WFO. For present purposes, I need only decide whether the evidence concerning the disappearance of the grain is solid evidence of a real risk of dissipation. I have no doubt that it is.

87. Accordingly, and without needing to address various other points relied upon by Mr Pillow, many of which had considerable force, I conclude that there is indeed a real risk of dissipation such as to justify the grant of a WFO.

D: Justice and convenience

88. It is well established that the court must consider, as a separate requirement for the grant of a freezing order, whether it is just and convenient to grant the order. In most cases, however, once the court has decided that there is a good arguable case on the merits, and that there is a real risk of dissipation of assets, this will lead without much difficulty to the conclusion that it is just and convenient to grant the injunction. However, as Madison accepts, there may be a specific factor – for example one which has not previously been considered in the context of arguments on good arguable case or real risk of dissipation – which falls for consideration in the context of justice and convenience.

89. In the present case, the Defendants argue that there is a highly relevant specific factor here. They identify as the most fundamental point their case that Madison is substantially over-secured and that it has realised that security. They refer to the comprehensive security package which exists, which includes: the Suretyship Deeds; the pledges granted by Waylink (i.e. Mr Groza's vehicle) and Mr Naumenko over their entire shareholding in GNT (referred to as the "Topco Pledges"); a fixed and floating charge over all of GNT's assets (the "Topco Charge"); pledges over the shares of Olimpex and MetalsUkraine LLC, which were the two GNT Group subsidiaries which own the facilities in the Odessa port, including the Terminal (the "Asset Holding Co Pledges"). They also refer to the three Corporate Agreements in relation to Olimpex, MetalsUkraine, and another GNT subsidiary, which gave Madison a broad authority to exercise various shareholder powers, such as appointing directors, when there is an event of default under the Facility Agreement. They also referred to other aspects of the security, and described its purpose as to provide the means to recoup the advance and associated interest and enforcement costs in the event of the facility being terminated and demand made.

90. The Defendants submit that the security package means that the Lenders were significantly over-secured: the value of the package exceeds the value of the facility several times over. Various valuations of the GNT business, or aspects of it, had been given in recent years. For example, in May 2020, PriceWaterhouseCoopers valued the Odessa terminal at between USD 321 million to USD 366 million. Most recently, the Defendants have instructed Crowe Ukraine to value Olimpex and its immediate parent for the purposes of the Defendants' counterclaim in the underlying arbitration. Their valuation is between US$ 250 million and US$ 325 million in round terms.

91. The Defendants then refer to the enforcement steps which were commenced on 20 December 2022, albeit that some of the steps are being disputed in the relevant supervisory courts. They submitted that by 20 December the Lenders had what they describe as "formal control" of various assets: the entire share capital of GNT, having exercised rights under the Topco Pledges; all of the assets of GNT, having appointed a receiver pursuant to the Topco Charge; and Olimpex and MetalsUkraine, the subsidiaries which own the Odesa terminal facilities, having exercised their rights under the Corporate Agreements. In addition, by the time of the WFO, Madison had replaced directors of other key GNT companies.

92. There was, therefore, as they submitted, ample cover in the security which existed.

93. On behalf of Madison, Mr Pillow made three principal points. (1) The existence of and value of other security was irrelevant in principle, both as to the risk of dissipation and justice and convenience. (2) The Defendants were denying the value of the security, and were actively taking steps to prevent its enforcement. (3) The suggestion that Madison and the Lenders were now in 100% control of the GNT Group and its trading assets was not supported by any evidence, and was contradicted by the evidence.

Discussion

94. I have no doubt that it is just and convenient to grant the injunction. This is a case in which Madison has cleared the "good arguable case" hurdle by some margin. It is also a case where there is in my view very powerful evidence of a real risk of dissipation: see Section C above. Indeed, I regard the present case as one where the evidence is as strong as any that I have ever seen. Against that background, I would need to be persuaded that there was some very powerful factor which militated against the grant of an injunction, bearing in mind the consequence of declining to continue to grant the WFO: namely that the Defendants would then be free to deal with their assets as they wished, and to dissipate them with a view to prejudicing Madison's ability to recover on the arbitration award which they hope to obtain. I have not been persuaded that any of the matters relied upon by the Defendants provide any substantial reason as to why no injunction should be granted, and I consider that any balancing exercise involved in considering "justice and convenience" comes down firmly in favour of continuing the WFO. Indeed, I see every reason in the present case, against the background of the very real risk of dissipation, why the court should not countenance a situation where the Defendants are free to dissipate their assets.

95. The principal argument against this conclusion concerns the existence of the overall security package. I do not consider that, in the abstract, the existence of a package of security available to a party seeking a WFO, is always irrelevant to the question of what is "just and convenient". There is, in principle, no limit to the factors that could be prayed in aid when considering what is just and convenient. However, I do not consider that it is a factor of any weight in the circumstances of the present case.

96. It is important to recognise, at the start, that part of the Lenders' security package is the very Suretyship Deeds provided by the Defendants, and which form the basis of the claim in the LCIA arbitration. Assuming that Madison's claim in those proceedings is well-founded (and it is accepted that there is a good arguable case to that effect), then the position as at January 2023, when demand was made by Madison for payment under those guarantees, is as follows. The Defendants were required to honour their

obligations as independent obligors, and therefore to pay the sums in respect of which there had been a default by the principal debtor, GNT. Madison had an unfettered right to claim those sums from the Defendants, and it was not constrained from doing so by reason of the existence of other security which they might have held as part of the overall security package. The reason for the present WFO is the real risk of dissipation of assets by the Defendants, and therefore the prejudice that Madison may in due course suffer if that real risk were to materialise when it comes to the enforcement of the award. I do not see how the possibility that Madison may in due course possibly be able to make recoveries, pursuant to various securities which it holds, provides a reason why the Defendants should in effect be permitted to dissipate their assets in the period between now and the time when Madison will seek to enforce an award against them.

97. Furthermore, it is not difficult to see why, in the circumstances of the present case, the Lenders are pursuing, as they are entitled to do, their claim under the Suretyship Deeds as a primary route to recovery of the monies to which they say that they are entitled. The dispute is to be resolved in an LCIA arbitration, and (if Madison succeeds) will result in a readily enforceable New York Convention award which will have international currency. London arbitration proceedings will often come to a final determination relatively quickly, and in that regard they may have an advantage over court proceedings. There is nothing which requires Madison to delay the prosecution of its claims under the Suretyship Deeds because of the existence of its other potential claims, under other security documents, which are subject to court proceedings in different jurisdictions. Those potential claims similarly provide no reason, in justice and convenience, why Madison should not obtain a WFO in order to prevent the materialisation of the real risk of dissipation in support of the claim under the Suretyship Deeds which is presently being advanced.

98. That conclusion is reinforced in the present case where it is clear, from the evidence as a whole, that the Defendants are fiercely resisting the steps which Madison has taken or is trying to take in order to enforce its securities and other rights. The parties are embroiled in litigation in Cyprus, Ukraine and Switzerland. It is not possible to say what the outcome of the various court proceedings will be, or when the outcome will be known. The proceedings involve a number of different corporate parties. I can see that there may be cases where the existence of security, even security held by other parties, may be relevant to the exercise of the court's discretion to grant a freezing order: for example, a case where there was no dispute as to a claimant's entitlement to enforce a valuable security, and where it was only a matter of time before it was sold. In practical terms, however, a claimant which is holding undisputed valuable security which can be easily realised, particularly security provided by the defendant, will not seek a freezing order. That, however, is a long way from the present case, where there is already heavy litigation in different jurisdictions concerning the entitlement of the Lenders to enforce.

99. There is nothing in the authorities which suggests that the matters relied upon by the Defendants in this case are of significance to the exercise of the court's discretion when considering what is just and convenient. *Gee: Commercial Injunctions* 7th edition, paragraph 12-034 states:

> "The claimant may have an independent right to proceed on his claim against some other party as well as against the defendant in question. If so, that is likely to be a material matter to be taken

> into account by the court in the exercise of its discretion, and will fall to be dealt with as one of the circumstances of the particular case."

100. However, there is no clear authority that supports that proposition. The decision of Robert Goff J. referred to by *Gee*, is a very early case, in which the central issue was the court's ability to grant disclosure orders in support of freezing injunctions: *A v C (No 1)* [1981] 1 QB 956. The judge said that the proper exercise of the court's jurisdiction meant that it was necessary to know how much money was standing in a particular bank account, and that therefore this was a reason to make the disclosure order. He gave the example of the possibility that there was unencumbered money in the account which was in excess of the plaintiffs' claim. I can see that, in an appropriate case, that may be a relevant consideration. But against the background which I have described, I do not consider that the existence of the Lenders' other security is a factor which militates against the grant of an injunction.

101. Mr Cogley emphasised, in his reply submissions, that there was really a single dispute here: the essential point being run in different jurisdictions, and part of the defence in the LCIA arbitration, is that the Lenders have acted improperly in relation to the enforcement of their rights. If the Defendants lose at the end of the day, then the Lenders will be able to enforce their rights. If the Defendants win, there will be no entitlement to enforce anyway.

102. I consider that this oversimplifies matters, and that it deflects attention from a central point. In the present case, if Madison wins the LCIA arbitration – and defeats all the Defendants' arguments based on the alleged improper exercise of its security – then Madison will have an enforceable arbitration award against the Defendants. That award will, as a New York Convention award, have an international currency and will be readily enforceable against the Defendants' assets wherever they are. Madison seeks the WFO in order to preserve assets against which to enforce that award, to avoid their dissipation in the meanwhile.

103. It is far from clear whether the result of that arbitration will also determine the outcome of the various disputes which are currently being litigated in different jurisdictions, and which involve different parties. Issues may well arise as to whether the LCIA arbitration decision, if adverse to the Defendants, is in some way binding as a res judicata or by reason of a similar principle. I do not understand the Defendants to have offered any undertaking that they will accept the outcome of the LCIA arbitration as determinative of those various proceedings, and will procure that they will no longer be contested. Even if such an undertaking were offered, questions may arise as to whether it would be effective in practical or legal terms, bearing in mind that the overseas litigation involves other parties. I therefore reject the argument based on the "single dispute" proposition.

104. I also do not accept other aspects of the foundation on which the Defendants' argument was built. In particular, the Defendants' skeleton asserts that the Lenders took "formal control" of the GNT Group on 19 December. It seems to me that, in the context of the disputes that have arisen and the litigation relating to the Lenders' entitlement and ability to enforce, there is a considerable gap between (whatever is meant by) "formal control" and complete practical control. In paragraphs 374 and 375 of his witness statement, served in September 2023, Mr Patton referred to the various challenges made

by the Defendants and their associates which were making it difficult for the new management of Olimpex to conduct its business (Olimpex is the company which operates the Odesa terminal). He referred to the Defendants' "continued efforts to prevent us taking operational control of the business through the enforcement process", and that it was therefore difficult for him to comment on Olimpex's trading activities. I did not understand the Defendants' evidence to suggest that the Lenders were now in full operational control of the GNT Group. Indeed it seems to me that the litigation is aimed at avoiding that result, and that the Defendants have enjoyed a measure of success in that regard, for example through the injunction obtained in Cyprus.

105. I therefore conclude that it is just and convenient to continue the WFO.

106. As a fallback position, Mr Cogley submitted that the WFO should be limited to certain assets; essentially assets in the security structure. He referred to very real difficulties which the Defendants had had in paying their legal fees. I see no reason to limit the ordinary scope of the WFO, so as to confine it to assets in the security structure, and thereby leaving the Defendants free to deal with all of their other assets. Indeed, I would regard this as wholly inappropriate in light of the existing litigation that surrounds the security structure.

E: Full and frank disclosure

Legal principles

107. I sought to summarise the relevant legal principles concerning full and frank disclosure in *The Public Institution for Social Security v Amouzegar* [2020] EWHC 122 (Comm), and the following is based on that summary.

108. The duty of full and frank disclosure that without notice applications imply was summarised by Lawrence Collins J in *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, at [180] as follows:

> "On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) 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; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350,1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present."

109. Materiality therefore 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].

110. 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 non-disclosure 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."

111. When an allegation of material non-disclosure is made, an important principle is stated in *Gee on Commercial Injunctions* (7th edition) paragraph 9-032:

> "A party seeking to have without notice relief discharged for non-disclosure must give adequate notice that this ground is relied upon together with sufficient particulars enabling the other party to understand the case to be advanced. An allegation of non-disclosure is potentially serious both for the other party and his legal advisers and the party complaining of non-disclosure must give sufficient notice of his complaint so that there can be a fair hearing, and it should be made without unnecessary delay."

112. Authority for this proposition is to be found in *Bracken Partners Ltd. v Gutteridge* (unreported but available on Westlaw 2001 WL 1560833), where Burnton J. said:

> "Claimants and their lawyers have a serious responsibility to the Court on any application made without notice to put all material facts and issues before the Court. That responsibility is the more onerous when the injunction sought and obtained is an asset freezing injunction.
>
> Correspondingly, an allegation that a Claimant or his lawyers have failed in that duty is a serious allegation involving misconduct or default on the part of the Claimant or his lawyers. If it is to be made, adequate and clear notice of it must be given and full details provided of the non-disclosure or misrepresentation alleged."

113. To similar effect is my statement in *Amouzegar*:

> "In my view, where non-disclosure is alleged it is indeed incumbent on the party making the allegation to give proper particulars of the case being advanced, so that it can be fairly responded to by the other party."

I referred to the non-disclosure argument in that case as being a moving target.

The Defendants' argument

114. In their written submissions, the Defendants identified three alleged non-disclosures.

115. First, they submitted that Madison had not fairly presented the position in relation to the value of its security.

116. Secondly, they submitted that the absence of evidence from Innovatus was particularly surprising.

117. Thirdly, they relied upon the conversation between Mr Patton and Mr Naumenko on 15 December 2022. The Defendants made a number of points in that regard in their written argument. They submitted that Mr Patton's evidence in relation to the telephone call between him and Mr Naumenko had been "disingenuous at best". Although Mr Patton had addressed that call in his Affidavit, he had not told the whole truth about it. It was submitted that the "overall tenor of the conversation accords with Mr Naumenko's recollection that Mr Patton agreed to refrain from immediate enforcement action". Whilst Mr Naumenko had wrongly remembered an express promise to that effect, on any fair reading of the transcript, it was reasonable for Mr Naumenko to walk out of the conversation with the understanding that there was such a promise. There was a failure by Mr Patton to disclose to HHJ Pelling KC the fact that there was an arguable defence of estoppel by acquiescence to any claim upon the Suretyship Deeds. Mr Patton should also have revealed that there was a transcript of the call.

118. In his reply submissions, I understood Mr Cogley to have in substance abandoned the first two grounds, but to have pressed the third. It was not clear to me whether he was still relying on all aspects of the points made in the written argument, and in particular, the failure by Mr Patton to identify the arguable defence of estoppel by acquiescence. There was something of a retreat from that particular line of argument, because of concerns that anything that I said might then be relied upon before the arbitrators. Mr Cogley's submissions therefore focused on the significance of the 15 December 2022 conversation in the context of the question of whether there was a risk of dissipation. The substance of the argument was that the judge should have been told that Mr Naumenko was making sensible proposals to move forward, and that this was not consistent with the alleged risk of dissipation.

119. In his oral opening, Mr Cogley also made a similar point in relation to a letter which had (on the Defendants' case) been sent on 24 December 2022 by Mr Groza. This letter had not featured in the Defendants' skeleton argument in the context of non-disclosure, but it became a point on which Mr Cogley relied. The 24 December 2022 letter had referred to the agreement reached on 15 December, and had proposed that a payment by the borrower of US$ 98.367 million be made within 30 days.

Discussion

120. No case of non-disclosure was advanced in the application to set aside the WFO. No proper particulars were provided of the case that was to be advanced, which only emerged in the Defendants' skeleton argument. Madison was in my view given no fair opportunity to respond to the case in witness evidence, because it emerged so late. Even after it had emerged, and liberal reference had been made to aspects of material non-

disclosure in Mr Cogley's oral submissions, aspects of the case were then in substance abandoned in the course of Mr Cogley's oral reply.

121. This is not a promising starting point from which to allege a case of material non-disclosure, let alone a case of culpable non-disclosure which would persuade the court to set aside the WFO in its entirety. In fact, I consider that the point was raised far too late, and that I should reject it on that ground. However, I do not consider that there was any substance to the argument in any event. Even if there had been any substance, I do not think that there was any culpable non-disclosure such as would justify setting aside the WFO, which would in my view cause a very significant injustice to Madison which is out of all proportion to the non-disclosure alleged.

122. In considering the various arguments now advanced by the Defendants, I should state at the outset that, having read Mr Patton's first Affidavit in detail, and having reviewed the 43-page skeleton argument submitted for the without notice application, it is very apparent that this was an application which was prepared with immense care and professionalism. It is clear that every effort was made to put matters fairly to the judge, and indeed that is confirmed by the absence, until a very late stage, of any suggestion of a lack of full and frank disclosure.

123. By way of example, and relevant to the Defendants' first argument (now no longer pursued as a separate point), there was a section of the skeleton argument which specifically identified the Defendants' potential arguments relating to security, and Madison's responses were given.

124. In relation to the second point, I cannot see how the absence of evidence from Innovatus was a material non-disclosure. The factual position relating to Innovatus, and in particular the events concerning the missing pledged stock, were fully addressed.

125. As far as the 15 December 2022 call is concerned, Mr Patton in his first Affidavit did refer to that call in paragraphs 199 – 201. He described the background to the call, which concerned information that had emerged on a Youtube video, and how this was discussed on the call. He then said this at 201:

> "The Second Defendant also made an offer to resolve the significant difficulties between Argentem, the GNT Group and the Defendants (which I explained above). I will not repeat that offer here because, in the context, I understand that it may be said that the offer was made on a without prejudice basis (although the Second Defendant did not state that expressly). I will say, however, that no agreement was reached on the basis of this offer. My personal view is that the offer is very unlikely to have been a genuine offer and is much more likely to have been an attempt to buy some time, with some other objective in mind."

126. I have now read the full transcript of the call. I do not consider that there was any matter, in that call, which was material to the application. Mr Patton did disclose that an offer had been made, and he said that no agreement had been reached. It is plain from the transcript that no agreement was reached, and the case previously advanced by Mr Naumenko – as to an alleged promise not to enforce – has now clearly been shown to be false. I also do not accept that Mr Patton, or indeed anyone who read a transcript of

the call, would appreciate that it gave rise to a defence based on estoppel by acquiescence. Whether or not it does so will be a matter for the arbitrators to decide in due course, but the Defendants' written argument does here require me to express a view as to whether there was material non-disclosure because of a failure to mention estoppel by acquiescence. It is difficult, as Mr Pillow submitted in his written argument, to identify any specific assumption of fact on which the parties were proceeding. In summary, Mr Naumenko was referring to the possibility that the parties might enter into a subsequent written agreement reflecting the terms of a proposal that he was putting forward, but there was clearly (as Mr Patton correctly said in his Affidavit) no agreement reached at that stage. Indeed, Mr Patton made clear that he remained concerned about various matters, and in particular the continuing failure to put the Dubai Security into place. I do not consider that any obvious estoppel by acquiescence point emerges from this transcript.

127. I also do not consider that there is anything in the proposal made by Mr Naumenko which casts any light on whether there was a real risk of dissipation. The basis of Madison's case in that regard had been set out in great detail earlier in the Affidavit, and to my mind clearly established a real risk which would likely persuade any commercial judge to grant a WFO. It was a very strong case. It was not in any way negated by the fact that Mr Naumenko had made a proposal to pay US$ 2 million a month, in circumstances where significantly more money was then due and owing under the loans; nor by his proposal that the parties should later co-operate in relation to a sale. Nothing that Mr Patton said in the call indicated that that proposal was accepted, or indeed would be accepted. He made the point on a number of occasions that he was not the sole decision-maker, and that others (apart from himself) were unhappy with what had been happening.

128. In short, I see no reason why Mr Patton should have gone into any greater detail about this call than he did. Nor do I see any reason why he should have exhibited a transcript of the call.

129. In so far as a separate point is made on the letter alleged to have been sent on 24 December 2022, the position is in my view no different. There is a curiosity about this letter, in that it is in fact dated 24 December 2021 (not 2022). Mr Pillow indicated that it might not actually have been sent or received. But even assuming that it was, a proposal by the borrower – which had long been in default – to pay US$ 98 million within 30 days, casts no doubt on the very strong case of risk of dissipation. Indeed, the letter itself referred to a supposed agreement to pay US$ 2 million a month, which had been discussed the previous week. However, it is no longer suggested that any agreement had been reached.

130. Mr Patton referred in his Affidavit to his personal view that the proposal made on 15 December 2022 was not genuine and may have been an attempt to buy time. That is an understandable view, and I note that by the time of the WFO around 4 weeks after the call, no money had actually been paid, and there is strong evidence (described in Section C above) that the Defendants had started to take steps to dissipate various assets.

131. Accordingly, there is no substance in the arguments of material non-disclosure, and they provide no basis for setting aside the WFO.

CONCLUSION

132. Accordingly, the WFO should remain in place and is not discharged.

133. I will hear the Defendants' argument that it should in effect be replaced with confidential undertakings, and other consequential matters.