Neutral Citation Number: [2020] EWHC 2235 (Fam)

Case No: FD13D05340

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2020

Before:

MRS JUSTICE KNOWLES

- -

Between:

TATIANA AKHMEDOVA — **Applicant**

- and –

(1) FARKHAD TEIMUR OGLY AKHMEDOV — **Respondents**
(2) WOODBLADE LIMITED
(3) COTOR INVESTMENTS SA
(4) QUBO 1 ESTABLISHMENT
(5) QUBO 2 ESTABLISHMENT
(6) STRAIGHT ESTABLISHMENT
(7) AVENGER ASSETS CORPORATION
(8) COUNSELOR TRUST REG
(9) SOBALDO ESTABLISHMENT
(10) TEMUR AKHMEDOV

- and –

(1) QUBO I ESTABLISHMENT
(2) STRAIGHT ESTABLISHMENT
(3) COUNSELOR TRUST REG
(4) WALPART TRUST REG
(5) SOBALDO ESTABLISHMENT
(6) DR ANDREAS IGNAZ SCHURTI
(7) URS DANIEL HANSELMANN
(8) DR ERNST JOSEPH WALCH
(9) DR BARBARA JOHANNA MARTINA WALCH
(10) DR MORITZ ROLF BLASY
Committal Respondents

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James Willan and Mark Belshaw (instructed by **PCB Litigation**) for the Applicant
Graham Brodie QC and Richard Eschwege (instructed by **BCL Solicitors**) for the Eighth and Ninth Respondents and First to Fifth Committal Respondents
Charles Howard QC (instructed by **Hughes Fowler Carruthers**) for the Tenth Respondent

Hearing dates: 15-18 June, 29-30 June, and 4 August 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.

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This judgment was delivered following a remote hearing conducted on a video conferencing platform and attended by the press. The judge has given leave for this version of the judgment to be published.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on Friday 14th August 2020.

Mrs Justice Knowles:

1. There are three applications before the court for determination:

   a) the Applicant Wife's ["the Wife"] application dated 15 November 2019 for disclosure from the Eighth and Ninth Respondents, Counselor and Sobaldo, in support of her claims under s.423 of the Insolvency Act 1986 ["the IA"] and s.37 of the Matrimonial Causes Act 1973 ["the MCA"];

   b) an application dated 28 November 2019 by the first five Committal Respondents (Qubo 1, Straight, Counselor, WalPart and Sobaldo) to be released from their obligations under the orders made by this court in December 2016, March 2018, and August 2019. In effect, they ask the court to set aside or vary those orders in their favour; and

   c) an application dated 26 February 2020 by the Eighth and Ninth Respondents, Counselor and Sobaldo, for a case management stay of the proceedings pending the outcome of proceedings in Liechtenstein.

2. The Wife is Tatiana Akhmedova and her former Husband, Farkhad Akhmedov, ["the Husband"] is the First Respondent. He appears to play no visible role in the ongoing litigation by the Wife to recover monies which this court ordered he should pay her in December 2016. The Tenth Respondent is their son, Temur Akhmedov ["Temur"]. He has played no active role in this hearing. I will explain who the other various Respondents are shortly.

3. I am grateful to counsel who appeared before me during the course of the hearing which, once more, took place remotely in accordance with the President's Protocol for Remote Hearings in the Family Court and in the Family Division of the High Court dated 23 March 2020. Their written and oral submissions were of great assistance to me.

Background

4. It is necessary to set out the background in some detail. Some of the details will be very familiar from judgments given in 2016 and 2018 by Haddon-Cave J (as he then was) and from judgments given latterly by me.

The Parties

5. The present proceedings have their origins in matrimonial litigation between the Wife and the Husband. On 15 December 2016, Haddon-Cave J ordered the Husband to pay the Wife £453,576,512 by way of financial remedies consequent upon their divorce. The Husband has not voluntarily paid a penny of that award and, to date, enforcement has realised only about £5 million. The litigation between the Wife and the Husband (alongside the other Respondents) is now concerned with the enforcement of the debt owed to the Wife by the Husband. Temur is alleged by the Wife to have played a key role in assisting the Husband to evade payment.

6. The Husband's main identified assets are (i) a superyacht known as the M/Y Luna ("the Yacht"), (ii) modern art valued in January 2016 at US$145.2 million ("the Artwork"), and (iii) cash and securities worth around US$650 million which were previously held

at UBS in Switzerland ("the Monetary Assets"). Collectively, these are the "Identified Assets".

7. Qubo 1 and Straight are establishments (Anstalten) formed under Liechtenstein law. Qubo 1 owns the Artwork and Straight owns the Yacht. WalPart is the sole director of Qubo 1 and Counselor is the sole director of Straight. The founder's rights to Qubo 1 and Straight are held by the Simul Trust and the Navy Blue Trust respectively, which are Liechtenstein registered trusts. Counselor is the trustee of those trusts. The named beneficiaries of those trusts are the descendants of the Husband's late mother. The Navy Blue Trust has resolved to grant the use of the Yacht to the Husband and his family. It appears that the protector of the trusts is a Liechtenstein foundation named Neue Artemis Stiftung, the majority of whose board is made up of the Husband and his brothers.

8. WalPart and Counselor are licensed trust companies in Liechtenstein, which work in close cooperation with (and largely share the same principals as) the Liechtenstein law firm of Schurti Partners (formerly Walch & Schurti). WalPart and Counselor establish and manage trust and corporate structures, advertising themselves as specialists in asset protection. The directors of WalPart and Counselor are/were Dr Schurti, Dr Blasy, Mr Hanselmann, Dr Ernst Walch and Dr Barbara Walch (but Dr Ernst Walch and Dr Barbara Walch, ceased to be directors on 3 July and 26 June respectively). All but Mr Hanselmann are/were partners of Walch & Schurti. The individuals named are also Respondents to the Wife's committal applications.

9. Sobaldo is another WalPart-related entity which provides trust services. Its registered address is "*c/o WalPart Trust Registered*" and its directors are Dr Schurti, Dr Ernst Walch and Mr Hanselmann. Both Counselor and Sobaldo conduct their business exclusively in Liechtenstein.

10. There are several further Liechtenstein trusts (including the Genus Trust, Arbaj Trust, Longlaster Trust, Ladybird Trust and Carnation Trust) which were established to receive and, the Wife alleges, launder the monetary assets. Counselor is the trustee of all those trusts, save for the Longlaster Trust whose trustee is Sobaldo.

11. It is important to note that, in December 2016, Haddon-Cave J found that Qubo 1 and Qubo 2 were no more than ciphers and the alter ego of the Husband. That finding has not been appealed and therefore stands. Further, in March 2018, Haddon-Cave J found that Avenger and Straight were mere ciphers of the Husband, being at the very least bare trustees for him. Likewise, that finding has not been appealed and therefore stands. The findings made on both occasions were incorporated into this court's orders. Those findings were premised on the basis that the Husband's instructions had caused the transfer of the relevant Identified Assets to Liechtenstein entities in an attempt to defeat the Wife's entitlement in the matrimonial litigation by making it more difficult to enforce the debt in her favour against those entities.

12. Previous judgments of this court have set out the circumstances in which the Identified Assets came to be held in Liechtenstein structures. I summarise what occurred as follows.

13. The Artwork was transferred from Cotor Investment SA (the Husband's nominee) to Qubo 1 in around mid-November 2016, that is shortly before the trial of the Wife's

claim for ancillary relief in December 2016. The Artwork was also physically moved from a freeport in Switzerland to the "*Treasure House*", a secure storage facility in Liechtenstein. Haddon-Cave J concluded that the transfer *"… was simply the latest part of H's attempts to avoid his liabilities by purporting to transfer his assets to new entities in a new jurisdiction and thereby making enforcement more difficult*".

14. The Yacht was transferred to Qubo 2 on the second day of trial, as part of what Haddon-Cave J described as "*a rapid series of further surreptitious steps to attempt to place his [the Husband's] yacht further beyond the reach of enforcement*". Neither the Wife nor the court were aware of the transfer at that time. After the Wife obtained a money judgment against Qubo 2 and had commenced enforcement proceedings in Liechtenstein on 28 December 2016, Qubo 2 transferred the Yacht to Straight to put it even further beyond the Wife's reach. Haddon-Cave J concluded that this was "*part of H's continuing campaign to defeat W by concealing his assets in a web of offshore companies*". This transfer was implemented by WalPart and Counselor (as directors of Qubo 2 and Straight) following a meeting with the Husband in Miami in February 2017. Dr Schurti admitted to the court in the Marshall Islands concerned with proceedings relating to the Yacht that he acted, in part, "*to shield the Yacht and The Simul Trust … from further efforts to enforce the judgment of the English court …*".

15. The Monetary Assets were held by Cotor (as nominee for the Husband) at UBS in Switzerland, before being transferred to LGT Bank in Liechtenstein on or about 5 December 2016, namely, during the hearing before Haddon-Cave J. It now appears, according to documents available to the Wife from a criminal investigation presently being conducted by the Liechtenstein State Prosecutor, that the Monetary Assets were initially transferred to the Genus Trust. After the Wife began proceedings in Liechtenstein, the monies were quickly moved into or through the Arbaj Trust and Longlaster Trust (and, from the Longlaster Trust, through the Ladybird Trust and Carnation Trust). In a judgment dated 21 February 2020 the Princely Regional Court of Vaduz in Liechtenstein observed that *"… the relocation of assets within a short period of time, as can be seen from the FIU reports and the relevant exhibits, supports the suspicion in this regard … that, from a legal aspect, these acts are in any case events to be classified and subsumed under the criminal act of fraudulent bankruptcy … or, at all events, as a punishable attempt to thwart enforcement…*".

16. The Husband has continued to enjoy the benefit of these assets since their transfer into the Liechtenstein trusts. He has been granted the use of the Yacht, whilst paying for its maintenance. Over US$148.7 million of the Monetary Assets has been paid out to him. I note that, in February 2018, there was an attempt to transfer US$120 million to the Husband which was blocked as a suspicious transaction by the State Prosecutor. In its judgment dated 14 May 2019, the Liechtenstein Constitutional Court held that the blocked transfer was "*obviously also initiated by [the Husband]*".

17. Finally, the Wife has made applications to commit (i) Straight for breach of the order dated 26 March 2019; (ii) Qubo 1 for breach of the order dated 20 December 2016; (iii) Straight for breach of the order dated 21 March 2018; and (iv) Counselor and Sobaldo for breach of the order dated 15 August 2019. The individuals identified in paragraph 8 above are Respondents to the committal applications by reason of their status as directors or former directors of Counselor and WalPart and Sobaldo.

The Variations Sought

18. The variations sought by Qubo 1, Straight and Counselor were as follows:

a) Qubo 1 sought to vary the financial remedies order granted by Haddon-Cave J on 20 December 2016 by removing Qubo 1's obligation, pursuant to paragraph 16, to transfer title to, and to deliver up, the Artwork to the Wife;

b) Straight sought to vary the order granted by Haddon-Cave J on 21 March 2018 by removing Straight's obligation to effect transfer of title to the Yacht to the Wife pursuant to paragraph 9 and, importantly, also to remove the concurrent judgment debt pursuant to paragraph 10; and

c) Counselor and Sobaldo sought to vary the freezing order which I granted on 15 August 2019 as continued in October 2019, by removing their obligations to give disclosure ancillary to the freezing order pursuant to paragraphs 20-22 of the August order.

19. The parties have been able to agree a variation to the order granted on 26 March 2019 which granted relief intended to ensure that the Yacht was not moved from Dubai. I approved a consent order on 1 May 2020 giving effect to that variation. As a result, Straight now accepts that it can comply with the March 2019 order.

Liechtenstein Proceedings

20. Both the Wife and the Respondents rely on certain Liechtenstein judgments and proceedings, so it is necessary briefly to identify these.

21. On 28 December 2016, the Wife commenced proceedings in Liechtenstein against Qubo 1 and Qubo 2 to enforce the order made by Haddon-Cave J on 20 December 2016. She relied upon that order as being a "*public deed*" to establish a prima facie title against Qubo 1 and Qubo 2. On 28 December 2016, the Liechtenstein court granted a freezing order against both establishments. Challenges to that order were ultimately rejected by the Liechtenstein Court of Appeal on 22 March 2018 and by the Liechtenstein Constitutional Court on 5 February 2019. The Artwork is therefore frozen.

22. It is important to recognise that, even if the Wife had obtained an enforceable order based on the prima facie title arising out of the December 2016 order, Qubo 1 and Qubo 2 would have had the option of filing a "*disallowance claim*". This would have required the Wife to prove her claims against Qubo 1 and Qubo 2 afresh before the Liechtenstein court according to its procedures and choice of law rules.

23. On 3 July 2017, the Liechtenstein Constitutional Court held that the December 2016 order against Qubo 1 and Qubo 2 infringed *ordre public* and therefore could not be relied upon to support a prima facie title in Liechtenstein. This was because, in that court's view, Qubo 1 and Qubo 2 did not have notice of the proceedings before judgment was entered against them. The breach of *ordre public* did not relate to the substance of the December 2016 order and judgment. The refusal to recognise the December 2016 order as a prima facie title meant that, on 19 September 2019, the Wife had no choice but to submit a fresh claim on the merits in Liechtenstein against Qubo 1 and Qubo 2. Had she not done so, the freezing order over the Artwork would have lapsed. She seeks in these proceedings to replicate the relief already granted against Qubo 1 and Qubo 2 in the December 2016 order.

24. The Wife is not presently pursuing any civil proceedings against Straight, Counselor or Sobaldo in Liechtenstein.

25. On 12 May 2017, the Wife also lodged a criminal complaint with the Liechtenstein State Prosecutor against the Husband, Cotor and persons unknown for thwarting enforcement contrary to Section 162 of the Liechtenstein Criminal Code. The State Prosecutor opened judicial investigations before the Liechtenstein court. On 15 September 2017, the Wife asked the State Prosecutor to extend the investigation to Straight. On her own initiative and/or based on judgments of the Liechtenstein courts, the State Prosecutor extended the investigation to include the more serious offences of fraudulent bankruptcy contrary to Section 156 of the Criminal Code, and money laundering contrary to Section 165 of the Criminal Code. She also added further suspects including Qubo 1, Qubo 2, Dr Schurti and Dr Blasy. The Liechtenstein court has granted various protective measures, including asset freezes and document seizures. Both Counselor and Sobaldo's challenges to these measures have been rejected by the Liechtenstein Court of Appeal and the Constitutional Court, which upheld the measures on the basis that there was a suspicion that criminal offences had been committed. As regards Qubo 1, the Wife has been granted "*private party*" status pursuant to a judgment dated 21 February 2020, in which the Liechtenstein court concluded that the evidence revealed a suspicion of fraudulent bankruptcy and money laundering, leading to the Wife suffering damage from the non-fulfilment of her claims. The Wife has not been granted "*private party*" status with respect to any of the additional suspects added by the State Prosecutor. I observe that the criminal investigation is ongoing, and no suspects have been charged to date.

26. In response to the committal applications, on 14 October 2019, Counselor and Sobaldo filed an application with the Liechtenstein court for "*binding advice*" pursuant to Article 919(6) of the Liechtenstein Persons and Companies Act. This is a without notice procedure in which the Wife was not involved: she has only seen copies of the redacted application and the redacted judgment because they have been exhibited in these proceedings. The advice (Spruch) given by the court on 13 November 2019 was that the trustees - that is, Counselor and Sobaldo - should not transfer assets to the Wife before a final ruling had been given in ordinary domestic civil proceedings in Liechtenstein. The court's ruling, though not the Spruch, stated that "*this binding pronouncement applies with the proviso that compliance with this by the trustees is accepted by the English court. The trustees' obligation to comply with this binding pronouncement does not go so far that they have to accept personal hardship such as imprisonment*". In a subsequent email to and telephone call with the judge, the trustees sought to have this restriction clarified, informing the judge that the original ruling would "*place increased pressure on the trustees in England to comply with the English court decisions and not await the outcome of the Liechtenstein civil proceedings*". In his response, the judge confirmed that the proviso was not part of the binding verdict or Spruch, but pointed out that it "*states the self-evident fact that orders issued by a civil court in Liechtenstein may not have restrictive effects - including indirect ones - on the freedom of the individuals involved*".

The Wife's Contentions

27. I outline the Wife's contentions with respect to the Respondents' involvement with the Husband and the Identified Assets as these are an important part of the context in which I must determine the applications before me.

28. In his judgment of 20 December 2016, Haddon-Cave J found that the transfer of the Artwork and of the Husband's Assets to either Qubo 1 or Qubo 2 was "*simply the latest part of H's attempts to avoid his liabilities by purporting to transfer his assets to new entities in a new jurisdiction and thereby making enforcement more difficult*". Similarly, in his March 2018 judgment, Haddon-Cave J found, amongst other matters, that the transfer of the Yacht by Qubo 2 to Straight was undertaken with a real and substantial purpose, namely to place these assets beyond the reach of the Wife's claim as part of a wider pattern of conduct by the Husband designed to put his assets out of the reach of the Wife. These transactions formed part of the Husband's continuing "*deliberate and dishonest campaign to avoid his liabilities*" pursuant to the judgment of 15 December 2016 [paragraph 79].

29. It has been the Wife's consistent case that the Respondents knew of the English divorce proceedings and participated in the Husband's scheme to put assets beyond her reach. In this context, I observe that the Respondents have filed no evidence to support an alternative contention, namely that they received around US$1 billion of assets (the Artwork, the Yacht and the Monetary Assets) innocently and without notice of the Husband's dishonest scheme. On the contrary, the Wife submitted that the Respondents were well aware as to why they had been engaged by the Husband.

30. In a declaration dated 26 February 2019, Dr Schurti admitted to the court in the Marshall Islands concerned with litigation about the Yacht that he established a new trust structure and transferred the Yacht from Qubo 2 to Straight *"…to shield the Yacht…from further efforts to enforce the judgment of the English court*". Those steps appear to have been taken at a time when the Respondents had full knowledge both of this court's judgment against Qubo 2 and of pending proceedings in Liechtenstein to enforce the money judgement against Qubo 2. The Wife contends that this was a blatant attempt not only to avoid enforcement of this court's orders but also to frustrate the proceedings in Liechtenstein.

31. In that same declaration dated 26 February 2019, Dr Schurti swore that "*the first time [he] became aware of the English divorce proceedings*" was when Qubo 1 and Qubo 2 were served with the Liechtenstein District Court's freezing order on 29 December 2016. That sworn declaration is wholly at odds with a file note of a meeting between a lawyer, Mr Kerman (representing the Husband), and Dr Schurti/Dr Blasy on 20 July 2016 which has recently emerged in the Liechtenstein criminal investigation. This file note records that both Dr Schurti and Dr Blasy had been told before any transfer of assets that the Wife had started divorce proceedings in England a few months after the Husband became a billionaire through the sale of Northgas. The Wife contends that competent professionals (who are also lawyers) would have appreciated that the Husband was seeking to put his assets beyond the Wife's reach in the context of divorce proceedings and would not have taken nearly US$1 billion of assets without making proper inquiries about the claims being made to those assets in the divorce proceedings. The inference is that the Respondents knowingly participated in the Husband's schemes.

32. To support her contentions, the Wife relies on the conclusion reached by the Liechtenstein State Prosecutor and the Liechtenstein courts (first instance, appellate and constitutional) that there is a concrete suspicion that the Liechtenstein structures participated in the crimes of fraudulent bankruptcy and money laundering. The suspects in the criminal investigation include Qubo 1, Dr Schurti and Dr Blasy. The first instance

court which granted the Wife private party status in relation to the criminal investigation into Qubo 1 observed that those transferring the Artwork *"…should have easily recognised that the transfer of assets to Liechtenstein served the sole purpose of removing the assets from execution by Akhmedova…*" and that the creation of new trust structures "*…shortly after the English court decisions and the initiation of the Liechtenstein security and judicial settlement proceedings…*" gave rise to a suspicion that such steps were "*…undertaken solely for the purpose of preventing the enforcement of the judicially established claims of Ms Akhmedova…*". Likewise, the multiple transfers of the Monetary Assets within a short period of time supported the suspicion of fraudulent bankruptcy.

33. Though the criminal investigation is on-going, and no-one has been charged with any offence, the picture presented of the Respondents' professional behaviour is troubling. That impression is reinforced by comments made by the Respondents in legal proceedings elsewhere, indicative of an arrogant disregard for this court's orders and processes. Thus, Dr Schurti's sworn deposition in the Marshall Islands proceedings, to which I have already referred, described the English divorce proceedings as "*fake proceedings*". Paragraph 38 of my judgment dated 2 October 2019 under neutral citation [2019] EWHC 2651 (Fam) recorded Dr Schurti's description of the English financial remedy proceedings as a "*hostile attack on the trust structure … in a cynical attempt by the Husband's ex-wife to acquire a share of his post-marital success…*". Further, in unrelated proceedings, Dr Schurti has been found to have taken improper steps to frustrate English orders and then to have lied about it. In JSC VTB Bank v Skurikhin [2019] EWHC 1407 (Comm) at [141 ff], Patricia Robertson QC (sitting as a High Court Judge) found that Dr Schurti had given false evidence on oath that two resolutions were genuine, when in fact they had been backdated to bolster an untruthful version of events which was being advanced in order to have English freezing and receivership orders lifted.

34. Thus, the applications before me must be decided in the context of the findings made by Haddon-Cave J that the Liechtenstein structures were established and were being used by the Husband as his alter ego to evade this court's orders. Nothing in the above narrative serves to dilute those findings and, on the contrary, it reinforces the impression that there are many questions to be answered about the Respondents' conduct in apparently facilitating the Husband's dishonest schemes.

The Hearing: Expert Evidence

35. During the hearing I heard expert evidence from three experts on various aspects of Liechtenstein civil and criminal law. The Wife relied on evidence with respect to Liechtenstein civil law from Professor Dr Zollner who presently holds a chair at the Institute for Austrian and International Corporate and Commercial Law at the Karl-Franzens-University, Graz in Austria. Professor Dr Zollner also lectures at the University of Liechtenstein on courses concerning corporate law, foundation law and trust law. With respect to Liechtenstein criminal law, the Wife relied on the evidence of Professor Dr Wolfgang Brandstetter. Since 1988 Professor Dr Branstetter has been a professor of criminal law and criminal procedure law at the University of Vienna. He practised as defence counsel in Austria before embarking on an academic career. He was Federal Minister for Justice in Austria between 2013-2017 and in 2018 he was appointed as a member of the Austrian Constitutional Court.

36. The Respondents relied on the evidence of Dr Stefan Wenaweser, a partner at the law firm of Marxer and Partners in Vaduz, Liechtenstein. Dr Wenaweser was admitted to the Liechtenstein Bar in 2008. He has prepared expert reports in matters of Liechtenstein Law for two cases involving Liechtenstein entities in this jurisdiction.

37. All three experts collaborated to produce a joint statement, but there remained significant factual and interpretative differences between them. I found the evidence of all three experts helpful and, where I have preferred the evidence of one to that of another, I have indicated why that is so on matters which I consider to be of importance. Though Mr Brodie QC made much in cross-examination of Professor Dr Zollner's and Professor Dr Brandstetter's failure to include the expert's declaration pursuant to paragraph 9.1(i) of FPR Practice Direction 25B in their respective reports, he failed to persuade me that this was a matter of substance that had impacted upon their written and oral evidence.

38. What follows is a summary of the pertinent features of the expert evidence, which I accepted, arranged by topic. Where the expert evidence is relevant to my consideration of the applications before me, I have indicated this when addressing each application and I have made such findings about the expert evidence as were necessary in the context of each application.

The Liechtenstein Court's Spruch or Advice

39. Dr Wenaweser told me that the advice or Spruch from the Liechtenstein Court was non-binding advice which simply granted immunity from civil and criminal liability if followed. There was no sanction if the trustees chose not to follow it. It was not, however, irrelevant but was another matter which the trustees would need to consider when deciding whether to transfer assets. The court's advice did not determine the rights between the Wife and Counselor and Sobaldo. All three experts agreed that the only part of the Spruch, which granted immunity if followed, was the statement "*the assets totalling GBP 440 million from the trust property of the three trusts shall not be transferred to Mrs Tatiana Akhmedova until a legally binding judgment has been made within the framework of domestic civil proceedings (currently 05 CG.2016.483) concerning the existence of the asserted claims (of Mrs Akhmedova vis-à-vis the trusts and vis-à-vis the establishments held by the trusts)*". Professor Dr Brandstetter pointed out that the Spruch did not refer to the disclosure of information.

40. Dr Wenaweser accepted that the only reason the Liechtenstein judge found the trustees could not comply with the orders of the English court was because of the judgment of the Liechtenstein Constitutional Court in the Liechtenstein Qubo proceedings which was irrelevant to Straight. Professor Dr Zollner told me that the Liechtenstein judge was provided with all relevant details of the Wife's claim and, if he had considered it appropriate, the judge could have given a direction requiring the transfer of assets which would have provided the fiduciaries with civil and criminal immunity for doing so.

41. Dr Wenaweser accepted that the proviso in the Spruch [see paragraph 26 above] made clear that the judge did not expect compliance with his advice if the English court required compliance with its own orders. He also agreed that, if the English court required compliance with its own orders, the advice became obsolete. However, this would place the trustees in the invidious position described in their application, namely

that if they were to comply with the English orders, they would be exposed to criminal liability and civil liabilities under Liechtenstein law.

Breach of Professional Secrecy

42. Section 121 of the Liechtenstein Criminal Code stipulates the following:

> *1) Anyone who reveals or exploits a secret that has been entrusted to or made accessible to him*
>
> *… as a lawyer, legal agent, trustee, auditor, or patent attorney…*
>
> *and the disclosure or exploitation of which is likely to prejudice a legitimate interest of the person who has engaged in his activity or for whom it has been engaged, shall be punishable by imprisonment for up to six months or a fine of up to 360 daily rates.*
>
> *…*
>
> *5) The offender shall not be punished if the disclosure or exploitation is justified in terms of content and form by a public or legitimate private interest.*
>
> *6) The perpetrator is only to be prosecuted upon the request of the person violated in his or her interest in confidentiality (paras. 1 and 3).*

43. Dr Wenaweser accepted that one element of the offence is that a secret is "*revealed*" but a secret cannot be "*revealed*" to someone who already knows it. It was open to doubt whether section 121 protected the interests of anyone other than the trust, and whether anyone other than the beneficiaries and, potentially, the settlor had standing to initiate a prosecution. A secret was protected only if it served a legitimate interest. Dr Wenaweser agreed that the protection of secrets was relative to avoid the misuse of secrecy, and thus it was necessary for the trustees to weigh up and balance the interests in play. It was noteworthy that the category of cases in which disclosure might be justified was not closed, so section 121(5) could be construed broadly. Disclosure to third parties could be justified in extreme situations, for example, in relation to the rights of an unborn child. In cross-examination by Mr Willan, Dr Wenaweser accepted that disclosure to the Wife might be a legitimate private interest if the disclosure of secrets stemmed from a comprehensible and recognisable motive according to a law-abiding person. However, that had to be interpreted narrowly otherwise it would defeat the professional secrecy obligations altogether.

44. Both Dr Wenaweser and Professor Dr Brandstetter agreed that the financial interests of a third party would not be a legitimate private interest justifying the disclosure of private information. However, Dr Wenaweser accepted that disclosure to avoid a criminal penalty would be a legitimate interest and Professor Dr Brandstetter noted that this would also apply where the criminal penalty was imposed by a foreign court in absentia. Dr Wenaweser drew my attention to the most recent version of the Vienna Commentary on Criminal Law (applicable in Liechtenstein) which stated that, where there were conflicting duties arising in two jurisdictions, the trustees must comply with domestic law. The threat of committal in another jurisdiction would not provide a defence to the unlawful disclosure of information in Liechtenstein.

45. Dr Wenaweser accepted that trustees would have a legitimate private interest in disclosing information for the purpose of enforcing the trust's legal rights in civil proceedings, that is defending themselves in proceedings where the trust was being sued for a large sum of money. That would, however, put them in a very difficult position because they would have to decide whether the disclosure of information in such proceedings would be a valid defence if a prosecution was brought against them. If a judgment were made against them in those proceedings, it would not be directly enforceable in Liechtenstein so they would have an opportunity to defend themselves in subsequent proceedings in Liechtenstein. I infer that his evidence was that trustees would not disclose information to defend proceedings abroad and thus expose themselves to a possible private prosecution when all they needed to do was file a disallowance claim against the enforcement of a foreign judgment in Liechtenstein.

46. Dr Wenaweser accepted that disclosure by trustees might be permissible where secrecy was being used to hide assets or conceal wrongdoing from a third party who required that information to pursue their civil rights. That acceptance flowed from a decision of the Liechtenstein Supreme Court. However, Dr Wenaweser noted that this case was the only one in a civil law context which dealt with professional secrets being used to conceal wrongdoing and ought not to be seen as a precedent for the interpretation of the Criminal Code.

47. There had not been a single case of a prosecution being brought pursuant to section 121 for disclosing documents pursuant to a foreign court order.

The Offence of Embezzlement

48. Section 153 of the Liechtenstein Criminal Code reads as follows:

> *1) Anyone who knowingly abuses his authority to dispose of another's property or to oblige another to do so, thereby damaging the other person's property, shall be punished by imprisonment for up to 6 months or a fine of up to 360 daily rates.*
>
> *2) Anyone who unjustifiably violates rules which serve to protect the assets of the beneficial owner is abusing his or her authority.*
>
> *3) Anyone who causes a loss exceeding CHF 7,500 through the act shall be punished with a custodial sentence of up to 3 years, and anyone who causes a loss exceeding CHF 300,000 with a custodial sentence of between one and 10 years.*

49. According to Dr Wenaweser, the abuse must be "*knowing*" that is, certain and must be unjustified by any reasonable argument. There must also be an intention to cause harm. That intention is established if the fiduciaries foresee that damage will arise, resign themselves to that risk, and decide to proceed in any event.

50. Dr Wenaweser said that a breach was "*unjustifiable*" if it were outside the range of what could reasonably be argued by a prudent man of business. He considered that the suggestion that assets should be transferred in the current circumstances of this case would be incomprehensible to any professional man of business. If the directors of the establishments were in doubt as to the position of the creditor such as the Wife, it was obvious that they must not transfer assets.

51. Dr Wenaweser opined that a debt does not need to be 100% likely and thus a prudent man of business could exercise his own judgment. He agreed with Mr Willan that, if a director received a foreign judgment, what they had to do was to consider it and decide whether, as a prudent man of business, the sensible course was to fight the judgment and relitigate the issues (taking into account the prospects of success and the risks to which they would expose the establishment by not complying with the order), or whether to accept it and pay it. Given that the Liechtenstein legal system did not recognise and enforce foreign judgments, Dr Wenaweser noted that the prudent man of business would consider whether the outcome of the litigation in Liechtenstein would be the same if the matter was relitigated in that jurisdiction. If that were the conclusion, it would make no sense to force relitigation in Liechtenstein as this would incur unnecessary costs. The key issue was not whether the liability was enforceable in Liechtenstein but whether a prudent man of business would pay, this being the question of judgment for the directors. The business judgment rules undoubtedly applied to establishments according to Professor Dr Brandstetter. Although Professor Dr Zollner told me that this rule would not apply to a decision to transfer assets to the Wife because this was a matter of law rather than judgment, I prefer the evidence of Professor Dr Brandstetter and Dr Wenaweser on this issue given the former's knowledge of the relevant criminal law and the latter's experience as a practising lawyer in Liechtenstein.

52. According to Dr Wenaweser, the director of an establishment was not required to act contrary to foreign criminal laws, but a threat of quasi criminal contempt proceedings in a foreign jurisdiction did not provide a defence and could not be taken into account. However, Professor Dr Brandstetter stated that the director was entitled to, and indeed should, take into account the risks under Liechtenstein criminal law and, in that regard, the fact that there was a criminal investigation presently afoot in that jurisdiction was centrally important.

53. An establishment could, in appropriate circumstances, satisfy an obligation under foreign law even if that obligation were not enforceable in Liechtenstein, for example a tax liability in this jurisdiction. However, according to Dr Wenaweser, an establishment would always need to take account of the specific circumstances. Where there was a clear disagreement with respect to the underlying facts (in this case, the liability of the establishments) payment should not be made.

54. Dr Wenaweser told me that there had not been a single case of a person being prosecuted for breach of section 153 by complying with a foreign judgment. Professor Dr Brandstetter noted that Liechtenstein operated a principle of mandatory prosecution so, where a public prosecutor receives evidence of an offence against the Criminal Code, there is a mandatory requirement prosecute.

Civil Liability to the Wife: Intentional Harm from Immoral Acts

55. Article 1295 of the Liechtenstein Civil Code reads as follows:

> *1) Anyone is entitled to demand compensation for damages caused by the damaging party which he or she has incurred as a result of culpability of the latter; the damage may have been caused by transfer of a contractual obligation or without relationship to a contract.*

2) Even those who intentionally inflict damage against good morals may be responsible for this, but if this happened when exercising a right, only if exercising right obviously had purpose of damaging the other.

3) If a contractual obligation of the debtor directed at forbearance is violated and the debtor continues the contractually unlawful behaviour despite the agreement, then the creditor can claim for elimination of the unlawful behaviour (ceasing) and forbearance of future illegal behaviour and in the event of culpability for damages.

56. Dr Wenaweser confirmed that liability in tort arose where a person knowingly thwarted the performance of another's claim rights with sufficient knowledge of those rights. Professor Dr Zollner said that it would be necessary to distinguish between the directors' purpose and whether they knew that their acts would thwart performance of another's claim rights. Intentional harm required knowledge of a serious possibility of harm and the acceptance of that risk [Dr Wenaweser]. Whether the directors had sufficient knowledge was a question of fact [Dr Wenaweser] and it would be a matter for the Lichtenstein court to determine whether (i) the fiduciaries, (ii) the Husband and (iii) Walch & Schurti had sufficient knowledge to give rise to tortious liability [Professor Dr Zollner]. That court would take into account an alternative explanation or an alternative set of facts presented by the fiduciaries.

57. The knowledge of an establishment is that of its directors or the person who established it if it was established for the purpose of defeating creditors and that person continues to exercise influence [Dr Wenaweser]. Dr Wenaweser accepted that, pursuant to Austrian law (which is generally followed in Liechtenstein), where a person established an entity for the purpose of withdrawing assets from his creditors and continued to exercise influence over that entity, that person's intention was attributed to the entity. In principle, the same inference would be drawn under Liechtenstein law, but the Austrian Supreme Court noted that, in normal circumstances, a founder's influence would not be decisive.

Civil Liability of Directors of an Establishment

58. Dr Wenaweser confirmed that the essential duty of a director was to promote the establishment within the framework of its legal obligations and the opportunities available to it whilst complying with the principles of careful management and representation. Professor Dr Zollner suggested that, if a prudent man of business could conclude that the establishments had a liability to the Wife, the directors of the establishments would not be civilly liable when making a payment to her even if it later turned out that there was no such liability. However, he confirmed that fiduciaries would become liable for the sum paid to the Wife if they were unable to persuade a court (in any case brought against them) that, at the time they transferred the assets, they had good reason to believe they were liable to the Wife.

59. The trustees' liability arose from the transfer of the assets from Switzerland. If the Wife were unable to enforce her rights in Switzerland, she suffered nothing in consequence of the transfer of the assets to Liechtenstein. She has been unable to get satisfaction in Switzerland to date and the question of whether there is a clear liability of the trustees to the Wife depended on the outcome of litigation in Switzerland. In the alternative, if the Liechtenstein court were to find that the transfer of assets to the fiduciaries was invalid, the transfer would be reversed, and the assets would return to Cotor. Finally, if

the fiduciaries transferred assets to the Wife, but a Liechtenstein court, considering the Husband's matrimonial liability to the Wife and thereafter the fiduciaries' consequent liability to the Wife on the basis of a piercing of the trust veil, determined that the Wife was entitled to less than the value of £350 million and the Artwork, then the fiduciaries would be liable for the difference [Professor Dr Zollner].

Breach of Execution

60. Dr Wenaweser agreed that if the Wife and Qubo 1 executed an agreement to transfer the Artwork, the civil freezing injunction in Liechtenstein could be lifted. He also accepted that it was likely that the State Prosecutor would lift the criminal asset freeze in Liechtenstein if Qubo 1 agreed to transfer the Artwork to the Wife.

The Approach to Foreign Law and Considerations of Comity

61. These themes pervade the applications before the court, and it is pertinent to address the law at this point in my judgment.

62. It is well-established that an English court can, applying English law, order a party to do something which is or may be contrary to a foreign law (including criminal law). In Masri v Consolidated Contractors International Co SAL [2008] EWCA Civ 1367 ["Masri Receivership"] the Court of Appeal upheld a receivership order which arguably involved the commission of a criminal offence in the debtor's home jurisdiction of Lebanon. Lawrence Collins J (as he then was) held that the English court "*has a flexible discretionary approach when faced with the suggestion that compliance with its requirements would involve incrimination under another system of law*" (paragraph 31). Subsequently, on a committal application, Christopher Clarke J (as he then was) observed that the existence of this flexible discretion "*contemplates that an order of the court may require non-compliance with a foreign law, including a foreign criminal law; not that, if it does or might, the order cannot be made; or that, if it is made, no contempt sanction can or should apply to its breach*" (see Masri v Consolidated Contractors International Co SAL [2011] EWHC 1024 (Comm) at [249] ["Masri Committal"]).

63. The existence of this flexible discretion reflects the fact that, as the Privy Council held in Brannigan v Davidson [1997] AC 238 at pp.249-250 per Lord Nicholls, "*different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege [against self-incrimination], established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own proceedings*". That was a case in which the relevant person would, by giving evidence, commit a criminal offence in his home jurisdiction. Thus, English courts must have regard to their own interests in making the relevant order and do not and cannot simply assume that foreign law takes priority.

64. Naturally, the English court does not lightly make orders which require breach of a foreign criminal law, but it is not in any sense precluded from doing so (Bank Mellat v HM Treasury [2019] EWCA Civ 449 at 63(iii)). In Bank Mellat, the Court recognised that the court would balance the risk of prosecution against the legitimate interest which the English court was seeking to achieve by its orders. It concluded that it had jurisdiction to order the production of documents "*regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in*

the 'home' country of the party the subject of the order … foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law" [63(i) and 63(ii)]. In Morris v Banque Arabe [2001] I.L.Pr. 37 Neuberger J (as he then was) ordered disclosure notwithstanding that the experts agreed that, doing so would involve the defendant infringing the French Blocking Statute, and that this would be a criminal offence (with penalties including up to six months' imprisonment). In Byers v SAMBA Financial Group [2020] EWHC 853 (Ch) Fancourt J refused to vary an order for disclosure on the basis that to comply with that order would force the Respondent bank to act contrary to Saudi Arabian law.

65. Once the court has decided to make the order, the fact that compliance would or might constitute a breach of a foreign law does not excuse non-compliance with that order. This is necessarily the case because, where the court has decided to exercise its flexible discretion to make the order, the court must then be able to enforce its decision. This issue was the subject of detailed consideration by Christopher Clarke J (as he then was) in Masri Committal at [156] and [251-261]. At [249] he noted that the existence of a flexible discretionary approach to make orders which required a breach of foreign criminal law did not contemplate that no contempt sanction could or should apply to the breach of that order. In [251-261] he analysed how a conflict of jurisdiction should be resolved, that is, where the court had ordered that a foreign company should do X but, if the foreign company had done X, it would have been a breach of the order of the court or of the criminal law of the foreign state in question. He rejected the proposition that the English court could not exercise its contempt jurisdiction if the foreign company owed its primary allegiance to the foreign jurisdiction, and held that the court would consider a wide range of circumstances, both in deciding whether to make the order and what action to take in response to any breach:

"*In my judgment, the Court should, in relation to [committal] applications in the case such as the present, adopt a flexible approach in determining, as a matter of discretion, what action, if any, to take - just as it does in relation to the question whether to make an order in the first place. That will involve taking into account all the circumstances, including the nature of the order made by the English and the foreign court, the circumstances in which the relevant orders were obtained, the consequences of breach of the foreign order and any other relevant considerations*."

Thus, one relevant consideration is the risk of prosecution and sanction in the foreign state. Another is the nature of this court's orders and the circumstances in which they were made.

66. Comity is a term of very elastic content (Dicey, Morris and Collins on 'Conflict of Laws' at para.1-008). From my perusal of the caselaw, comity is the legal doctrine under which courts in different jurisdictions recognise and enforce each other's decisions as a matter of courtesy and respect based on the need for reciprocity, but not necessarily as a matter of law. It involves self-restraint in refraining from making an order which more properly appertains to the jurisdiction of a foreign state. It is also a two-way street requiring mutual respect between courts in different states. As Males LJ said in paragraph 111 of SAS Institute Inc v World Programming Limited [2020] EWCA Civ 599 ["SAS v WPL"], *"… This need for mutual respect means that comity requires a recognition of the territorial limits of each court's enforcement jurisdiction, in accordance with generally recognised principles of customary international law…"*. He stated in paragraph 112 that:

"*112. Just as it is inconsistent with comity for an English court to purport to interfere with assets subject to the local jurisdiction of another court, so it is inconsistent with comity for another court to purport to interfere with assets situated here which are subject to the jurisdiction of the English court.*"

67. In Joujou v Masri [2011] EWCA Civ 746, Toulson LJ commented that, "*while comity involves self-restraint in refraining from making an order on a matter which more properly appertains to the jurisdiction of a foreign state, the courts of one country may legitimately wish to state plainly how they see the issues in a case in which they have a legitimate interest, in the hope that their perspective may assist the foreign court in its judgment of the matter. That is not the same as trying to dictate to a foreign court how it should decide a matter within its own jurisdiction…*". That comment is of particular importance in this case for reasons which I will, in due course, explain.

68. The Court of Appeal in SAS v WPL has given very recent guidance on the territorial enforcement of judgments. In SAS v WPL the court was concerned with whether an anti-suit injunction against SAS (an American company) should be continued. That injunction restrained SAS from taking steps to obtain orders from courts in the United States requiring WPL (a UK company) to assign debts owed to WPL from its customers either now or in the future and to turn over to a United States Marshal payments from customers which it had already received. Those orders would apply to debts owed from WPL customers anywhere in the world except the United Kingdom. The dispute between these two companies had a long history including an action brought by SAS against WPL in this country in which SAS's claims were dismissed; a decision by WPL to submit to the jurisdiction of the court in North Carolina and to fight the action there on the merits; a judgment in favour of SAS from the North Carolina Court; an attempt by SAS to enforce the North Carolina judgment in this jurisdiction which failed; and a judgment from the English court in favour of WPL which SAS had chosen to ignore. The Court of Appeal decided that the widely drawn injunction prevented SAS from seeking an order for the assignment of debts due from WPL customers in the United States. These were debts situated in the United States and there was no good reason why the English court should seek to prevent SAS from enforcing the North Carolina judgment against United States assets of WPL. To do so would itself represent an exorbitant exercise of jurisdiction by the English court contrary to the principles of comity. However, the court granted a menu of injunctive and other relief with respect to debts due from WPL customers elsewhere and in this jurisdiction. Males LJ gave the leading judgment.

69. In paragraph 64, he observed that "*it is recognised internationally that the enforcement of judgements is territorial. When a court in State A gives judgment against a defendant over whom it has personal jurisdiction, it is for that court to determine in accordance with its own procedures what process of enforcement should be available against assets within its jurisdiction. But for a court in State A to seek to enforce its judgment against assets in State B would be an interference with the sovereignty of State B…*" He cited with approval the principles deriving from the decision of the House of Lords in Societe Eram Shipping Co Ltd v Cie International de Navigation [2003] UKHL 30, [2004] 1 AC 260. In that case, the House of Lords held that it was not open to the English court to make a third party debt order against a debt situated in Hong Kong which infringed Hong Kong sovereignty. Though the court had personal jurisdiction over the judgment

debtor, it did not have subject matter jurisdiction over the debt due from the bank situated in Hong Kong. That was fatal to the application for a third-party debt order.

70. In paragraph 70, Males LJ held that:

"*70. It is important to note that these principles do not depend upon the nature of the claim or the nature of the loss suffered upon which the court in State A adjudicates. They are concerned with the location of the assets against which enforcement of that judgment is sought. It is, therefore, nothing to the point that the conduct of which the claimant complains occurred, or the losses which it suffered were incurred, in State A where the trial on liability takes place. Those matters may justify the exercise of personal jurisdiction over the defendant by the courts of State A if the defendant is resident elsewhere, but do not confer enforcement (or subject matter) jurisdiction on the courts of State A over assets located in other jurisdictions.*"

71. Thus, English courts will, in some circumstances, make an enforcement order against a defendant over whom there is *in personam* jurisdiction which affects property situated abroad. But they will only do so subject to such orders being recognised and enforced by the courts in the state where the property is situated. In this way English courts ensure that their orders do not have exorbitant effect and do not infringe the sovereignty of the state concerned [paragraph 74]. So, an *in personam* order against a person/entity subject to English jurisdiction may be contrary to international comity because of its extra-territorial effect, in which case it would not be permissible to make such an order as a matter of international law.

72. The distinction between *in personam* orders which did infringe these principles and those which did not was to be determined by having regard to the following: (a) the connection of the person who was the subject of the order with the English jurisdiction; (b) whether what they were ordered to do was exorbitant in terms of jurisdiction; and (c) whether the order had impermissible effects on foreign parties (see paragraph 79, quoting Lawrence Collins LJ in paragraph 59 of Masri v Consolidated Contractors International (UK) (No.2) [2008] EWCA Civ 303, [2009] QB 450).

The Application for a Stay

Introduction

73. On 26 February 2020 Counselor and Sobaldo issued their application for a case management stay of these proceedings "*pending the final determination in Liechtenstein of Case no 05 CG.2016.483*". The application was only concerned with the pending claims against Counselor and Sobaldo under s.423 of the IA and/or section 37 of the MCA. It had no impact on the claims against Temur or the orders already made against Straight and Qubo 1, as well as the pending committal applications to enforce those orders.

74. The Wife's claim against Counselor and Sobaldo concerns the Monetary Assets. She alleged that in December 2016 Cotor transferred monetary sums from an account at UBS in Switzerland to an account at LGT Bank in Liechtenstein and that, thereafter, transfers were made to five Lichtenstein trusts (Genus Trust, Arbaj Trust, Longlaster Trust, Ladybird Trust and Carnation Trust) of which Counselor and Sobaldo are trustees. The Wife contended that the alleged transfers were undertaken for the purpose

of putting assets beyond her reach and thus that she was entitled to relief under s.423 IA and, if necessary, also under s.37 of the MCA. On 30 July 2019, the Wife applied without notice to join Counselor and Sobaldo to these proceedings and sought relief under the s.423 claim.

75. On 20 January 2020 I gave directions inter alia for the s.423 claim and on 31 January 2020 the Wife filed and served her Particulars of Claim and so set out for the first time the pleaded basis on which she sought relief from Counselor and Sobaldo. On 21 February 2020 Counselor and Sobaldo served their Defence which averred, amongst other matters, that the court should stay the claim against them. Shortly thereafter, on 26 February 2020, Counselor and Sobaldo issued their stay application. The matter is listed for trial commencing on 30 November 2020 with a time estimate of three weeks.

76. The Liechtenstein case number referred to in the stay application, namely Case no. 05 CG.2016.483, does not concern proceedings against Counselor and Sobaldo. It refers to civil proceedings commenced in December 2016, by which the Wife sought relief against Qubo 1 and Qubo 2 [see paragraphs 20-22 above]. Those proceedings seek relief in respect of the transfers to Qubo 1 and Qubo 2 of the Artwork and, initially, the Yacht. Those proceedings cannot result in any relief being granted against Counselor or Sobaldo in respect of the Monetary Assets.

The Parties' Submissions

77. I summarise the parties' positions as follows.

78. Counselor and Sobaldo submitted that the Liechtenstein civil proceedings materially overlapped with the matter that the court was due to determine in the s.423 claim. Substantially, the same factual, legal, and evidential issues fell to be considered in both this court and the court in Liechtenstein. The Wife's assertion of a civil claim against Counselor and Sobaldo in the Liechtenstein criminal proceedings was also relevant because, ultimately the Wife sought substantially the same relief both here and in Liechtenstein. There was plainly a risk of inconsistent findings and/or decisions in the two jurisdictions, that risk arising regardless of the identity of the parties in the two sets of proceedings.

79. Further, it was inherently appropriate for the Liechtenstein court to determine the relevant issues as the dispute between the parties ultimately concerned assets in Liechtenstein held by Liechtenstein entities under Liechtenstein law. Counselor and Sobaldo had been advised that they would require a binding judgment from the Liechtenstein court before they would be permitted to transfer any assets to the Wife. Considerations of comity strongly favoured a stay because the court should not exercise its powers exorbitantly in respect of assets located abroad.

80. Counselor and Sobaldo submitted that the s.423 claim was futile because the outcome of that claim would not be determinative of the dispute. Even if the Wife were to succeed in her s.423 claim, she would ultimately have to obtain a judgment from the Liechtenstein court on the merits if she wanted to recover any of the sums that she claimed. Thus, there would need to be litigation in Liechtenstein in any event. It was thus a waste of time, cost and resources for both parties and the court for the Wife's s.423 claim against Counselor and Sobaldo to proceed in these circumstances. There would be material prejudice to Counselor and Sobaldo in having to defend the s.423

claim in circumstances in which the Wife would, in any event need to obtain a binding judgment against them in Liechtenstein. In contrast, there was no real prejudice to the Wife in pursuing the proceedings she herself had commenced in Liechtenstein. It was oppressive and unreasonable of her to pursue two sets of parallel proceedings in respect of the same or substantially the same allegations and/or relief.

81. The Wife contended that the application for a stay was made too late and should be rejected for that reason alone. Counselor and Sobaldo were notified of these proceedings in August 2019 and had known about the Liechtenstein civil proceedings since September 2019. To seek a stay of these proceedings in February 2020 was unconscionable delay which should not be permitted.

82. The Wife submitted that the central pillar of Counselor and Sobaldo's argument - that there were already parallel proceedings in Liechtenstein which sought the same or substantively the same relief and gave rise to a risk of inconsistent judgements - was misconceived. There were no such parallel proceedings as the English and the Liechtenstein proceedings sought different relief against different parties in respect of different transactions. The proceedings in Liechtenstein could not result in a judgment which awarded the Wife any of the relief which she sought in the present proceedings. Furthermore, English and Liechtenstein courts would be applying different laws and considering different grounds for granting relief. There was no useful purpose to be served in waiting for judgment from Liechtenstein.

83. Any difficulties faced by the Wife enforcing an order made by this court in Liechtenstein were not a good reason to stay the adjudication of her claims in this jurisdiction. If anything, that factor weighed in favour of proceeding to judgment in England as soon as possible so that the Wife might start the process of enforcement, if that proved to be necessary. In any event, a judgment from this court would provide substantial and legitimate benefits to the Wife.

84. Finally, the Wife submitted that there were compelling reasons why granting a case management stay would be manifestly inappropriate in this case. First, it would be undesirable to hear the proceedings against Temur in November 2020, but then hear the closely related claims against Counselor and Sobaldo separately and at a later date. That was a recipe for inefficiency and inconsistent judgements. Second, the Wife would be exposed to substantial disadvantages if she were required to litigate in Liechtenstein, including the risk of having to relitigate whether she was entitled to financial remedies from the Husband.

Legal Principles

85. The court's power to stay proceedings is an ancient common law remedy (see Metropolitan Bank v Pooley (1884-1885) L.R. 10 App. Cas. 210, HL at 220-221 per Lord Blackburn) and is expressly preserved by s.49(3) of the Senior Courts Act 1981 which provides:

"(3) Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings."

Rule 4.1(3)(g) of the Family Procedure Rules 2010 contains a similar case management power to stay the whole or part of any proceedings either generally or until a specified date or event. In applying that rule, the court must have regard to the overriding objective to deal with cases justly (r. 1.1(1)) and to the factors listed in r. 1.1(2).

86. Guidance as to the exercise of power is found in Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173. In Reichhold the claimant was in dispute with a counterparty to a sales agreement. Before the claimant commenced Norwegian arbitration proceedings against the counterparty, the claimant also commenced a claim in the English Commercial Court against the counterparty's financial advisers for negligent misstatement in relation to the sale. Moore-Bick J stayed the claim pending the outcome of the arbitration: [1999] 1 All ER (Comm) 40. The learned judge said at p.47:

"*choosing whom to sue is one thing; choosing in what order to pursue proceedings against different defendants may be another, especially when two related sets of proceedings are being, or could be, pursued concurrently. In such a case the court itself has a greater interest, not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other*".

87. The Court of Appeal upheld the stay. Lord Bingham of Cornhill CJ said at 186A-C as follows:

"… Mr Pollock did not suggest that this would be the only such application of its kind if the judge's order were upheld, and he would have had difficulty making such a submission since another application has already been successfully made. He did, however, suggest that the court was well able to control its own business, and he accepted the grant of stays such as this would be a rarity, account always being taken of the legitimate interests of plaintiffs and the requirement that there should be no prejudice to plaintiffs beyond that which the interests of justice were thought to justify. It is plain that in exercising this jurisdiction the court would have to be mindful of the effect of article 6.

I for my part recognise fully the risks to which Mr Carr draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances. Should the upholding of the judge's order lead to the making of unmeritorious applications, then I am confident that judges will know how to react."

88. A relevant factor which the court may take into account when it considers whether to stay English proceedings is the risk of inconsistent decisions. The possibility of inconsistent findings can also be a powerful reason in favour of a stay even where the defendant was not party to the foreign proceedings such as not to be bound by them (see Curtis v Lockheed Martin UK Holdings Ltd [2008] 1 CLC 219 at [17]). The authorities indicate that it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary, by granting a temporary stay. Minimisation of the risk of inconsistent decisions and the avoidance of unnecessary duplication and expense is amply supported in the case law.

However, it is plain from the authorities that, though the jurisdiction to grant a stay is a broad one, its exercise is cautious.

89. A recent authority has conveniently summarised the relevant factors. In Bundeszentralamt fur Steuern v Heis [2019] EWHC 705 (Ch) the court considered, in the context of a liquidation process, whether to stay appeals as to proofs of debt arising out of tax refunds in order to permit the underlying claim which formed the subject of the proof to be resolved by the specialist German fiscal court. Hildyard J granted the stay. Three factors weighed heavily with the judge:

a) First, the judge noted, at [112] the obvious risk of inconsistent, indeed conflicting, judgments where, broadly, the same issues would fall to be considered by the court here and the court there at the same time and between the same parties. The court further observed that if the two sets of proceedings went forward to adjudication at first instance, then whatever the sequences, practical conundrums would develop.

b) Secondly, the court said at [115-116] that the legal issues were plainly matters of German law and referred to the preference in VTB Capital v Nurtritek [2013] AC 337 at [46] per Lord Mance for a case to be heard by the courts of the country whose law applies. Hildyard J held at [117] that the jurisdiction likely to be most affected by the result was Germany.

c) Finally, there was the question of prejudice and the fact that the claims in Germany were to be determined in any event such that the Administration could not finally be brought to an end until those matters had been concluded.

Discussion

Delay

90. I am not persuaded that I should reject the application by reason of relevant delay. Counselor and Sobaldo issued the stay application shortly after they filed their Defence and issued it before the close of pleadings. It was therefore issued at the earliest reasonable juncture in the context of the s.423 claim. Even if I accept the Wife's contention that Counselor and Sobaldo were notified of the present proceedings on 22 August 2019 and served on 23 September 2019, the Wife did not serve her Particulars of Claim which set out the pleaded allegations in the s.423 claim until 31 January 2020. The stay application was issued within three and a half weeks. There was, in my view, no delay. Even if there had been delay, I would have had to assess the stay application on its merits in any event.

Risk of inconsistent and/or conflicting findings and decisions

91. Analysis of the Wife's pleaded claim in the Liechtenstein civil proceedings and the s.423 claim suggests substantial legal, factual, and evidential overlap between both claims. Thus:

a) Both claims plead and rely on the initial transfers of the Artwork, the Yacht and the Monetary Assets before the December 2016 Haddon-Cave order.

b) Both plead and rely on the further transfers of the Yacht to Straight and the Monetary Assets to the five Liechtenstein trusts after the December 2016 Haddon-Cave order.

c) Both claims ultimately seek the transfer of monies to the Wife in satisfaction of the Haddon-Cave order. The s.423 claim is premised on the basis that the Husband entered into, or caused, transactions to put assets beyond the Wife's reach when she made her claim against him and the sums were awarded to her by the Haddon-Cave order. That is also the basis of the Liechtenstein proceedings. The same alleged schemes of evasion are advanced in both sets of parallel proceedings.

92. Though the Wife places reliance on the fact that the parties in both sets of proceedings are different, it is not necessary for there to be concurrence of the parties in both sets of proceedings to justify a stay. Reichhold (see above) concerned different parties in two sets of proceedings. However, Counselor is connected to the Liechtenstein proceedings as the owner of Qubo 1 and 2 in its capacity as trustee of the Simul Trust. Qubo 1 and 2 are thus trust property of which Counselor is the trustee.

93. I am not persuaded that the subject matter of the proceedings is entirely different in the way that the Wife contends. The Liechtenstein proceedings contain allegations about the transfer of the Monetary Assets into the Liechtenstein trusts. They also contain a claim in respect of the transfer of the Monetary Assets to Qubo 1 and Qubo 2 in late 2016. Mr Willan submitted that it was now known from recent inspection of files (I infer obtained via the Liechtenstein criminal investigation) that no Monetary Assets were transferred to Qubo 1 and Qubo 2 so that part of the Wife's claim was effectively redundant. If that is correct, steps should be taken without delay to amend the Wife's claim in the Liechtenstein proceedings. Though the transfers of assets to Qubo 1 and 2 feature heavily in the s.423 proceedings, I note that they are matters about which Haddon-Cave J has already given judgment.

94. The Wife is on stronger ground in asserting that the purpose of the Liechtenstein proceedings is different. The Liechtenstein proceedings seek to replicate the relief already granted by Haddon-Cave J in 2016, namely, to preserve and recover the Artwork which is the only remaining asset of Qubo 1 and Qubo 2. The s.423 proceedings seek to recover the Monetary Assets. However, merely having different purposes does not mean that there is not significant factual overlap between both sets of proceedings.

95. However, whilst much of the same material may well be deployed in both sets of proceedings by way of evidence, the facts which each court must determine are different. Thus, the Liechtenstein court might be able to determine whether the transfers of the Artwork and the Yacht to Qubo 1 and 2 were intended to defraud the Wife without making any factual determination about the transfer of the Monetary Assets. This court has already determined that the Qubo 1 and Qubo 2 transfers were intended to defeat the Wife's claim so inconsistent findings by the Liechtenstein court about those matters will have no traction in this jurisdiction. Whilst the Liechtenstein court might make findings about the Monetary Assets even though that is apparently no longer a core issue in those proceedings, that would not, on its own, necessarily justify a stay of the s.423 claim.

96. There is no dispute between the parties that the Liechtenstein criminal proceedings also overlap with the s.423 claim. In her Reply, the Wife acknowledges that her criminal

complaint in Liechtenstein "*concerns the same broad schemes of evasion as are described in the Particulars of Claim*". However, Counselor and Sobaldo are not under criminal investigation. Though Mr Brodie QC submitted that the Wife's assertion of a civil claim for damages against Counselor and Sobaldo within the criminal complaint was significant, I do not accept this whatever case is advanced by the Wife in that respect. Her claim in that regard is theoretical – not even embryonic - in circumstances where neither entity has been charged with an offence or is even under criminal investigation.

Appropriate Forum

97. Counselor and Sobaldo argued that it was inappropriate for this court to determine questions of Liechtenstein law. The Wife's claim is, however, made pursuant to two English statutory provisions because, on her case, the transfer of the Monetary Assets was intended to frustrate this court's orders and to deny her the remedies to which she was entitled under English law. The fact that the assets are held in Liechtenstein does not mean that her claims are governed by Liechtenstein law. This court must first determine whether the Wife is entitled to the relief she seeks based on the facts and the applicable English law principles. If she is, the court must then exercise its discretion as to the relief which would then be appropriate in circumstances where the assets are located outside the jurisdiction. In this case, where this court has already found the Husband to have engaged in a dishonest scheme of evasion by moving assets abroad to defeat the Wife's claim, a devolution of the responsibility for the primary determination of the Wife's entitlement to a court in Liechtenstein, applying different legal principles, would run counter to the interests of justice.

98. Both Counselor and Sobaldo submitted that the English court should not grant relief which would require a breach of Liechtenstein law, having taken the view that they were forbidden by Liechtenstein law to transfer assets to the Wife unless she established a right to those assets under Liechtenstein law. The question of relief is a consideration which would engage this court once entitlement has been established. Counselor and Sobaldo can make those submissions at trial when there can be a full investigation of the facts and relevant law.

99. It is pertinent here to consider whether the hearing should be stayed because the court may, in determining liability and making consequential orders, seek to exercise its jurisdiction over assets situated abroad and then seek to enforce those orders in a manner inconsistent with comity or exorbitantly. It is crucial to note that SAS v WPL is not authority for the proposition that this court cannot determine liability against the respondent who has submitted to this court's jurisdiction but whose assets are situated abroad. However, the enforcement of this court's eventual orders arising from the determination of liability may be circumscribed in the manner described in SAS v WPL if those assets are situated elsewhere and where recognition and enforcement is not available in Liechtenstein where the assets are situated. I do not accept that determination of the liability under English law of Counselor and Sobaldo to the Wife should be abandoned merely because an outcome in the Wife's favour might present her with enforcement difficulties in this jurisdiction and elsewhere. In fact, I would expect – as comity requires and as anticipated in Joujou v Masri [see paragraph 67 above] – the court in Liechtenstein to have regard to this court's view on the issues in this case in the hope that this perspective might assist the Liechtenstein court in its judgment of the matter.

Practical Sense

100. Counselor and Sobaldo submitted that this court's orders would not be determinative of the Wife's claims because she would need to seek further relief in Liechtenstein. There was thus no practical sense in continuing with the English proceedings. The logic of that submission suggests that this court should abandon any attempt to determine entitlement of a claim properly before it. That strikes me as misconceived since this court should not refuse to determine matters properly before it simply because it might be necessary to take steps to enforce any relief granted abroad.

101. The Wife submitted that an order against Counselor and Sobaldo would have practical benefit. First, it would entitle the Wife to obtain a payment order against the Liechtenstein trusts in summary proceedings. Even though it seems virtually certain that Counselor and Sobaldo will file a disallowance claim, the Wife may take other steps to enforce her entitlement such as applying for injunctive relief by way of an anti-suit injunction. A judgment of this court would also confer procedural advantages in Liechtenstein on the Wife in that she would not be required to make a deposit of CHF 1-3 million simply to commence proceedings there. In that regard, I note that, were I to accede to the submissions of Counselor and Sobaldo, the Wife would indeed be required to commence new proceedings in Liechtenstein. That would, in fact, create parallel proceedings as the Liechtenstein Qubo proceedings would, on any factual analysis, not determine the issue of the Wife's entitlement to relief against Counselor and Sobaldo in respect of the Monetary Assets.

102. These proceedings also concern Temur. The claims against him cannot be heard in Liechtenstein and will continue here in any event. The Wife's claims against Temur are premised on his alleged behaviour as the Husband's lieutenant in devising and executing the schemes of evasion which resulted in the Artwork, the Yacht and the Monetary Assets being relocated secretively to locations which would present serious obstacles to the enforcement of the Wife's claim. At trial it is inevitable that there will be an investigation of the passage of the Monetary Assets from UBS in Switzerland to Liechtenstein and it is unrealistic to suggest otherwise. There is also no good reason to stay the proceedings against Temur. In fact, a stay of these proceedings involving Counselor and Sobaldo would be a recipe for considerable procedural inefficiency in the management and adjudication of the Temur claim, giving rise to a real risk of inconsistent judgments.

103. Practically, a stay of the proceedings involving Counselor and Sobaldo would delay for years the Wife's efforts to obtain the sums awarded to her in December 2016. The Liechtenstein Qubo proceedings (if relevant at all) are a long way from judgment – no defence has been filed, no case management has taken place, and no hearings have been fixed. Any new proceedings the Wife would be obliged to bring against Counselor and Sobaldo would likely take years to resolve given the repeated appellate challenges already evident within the existing Liechtenstein civil proceedings and within the Liechtenstein criminal investigation.

104. Whilst the continuance of these proceedings would undoubtedly put Counselor and Sobaldo to additional expense, I cannot discern any additional prejudice to them which bites on the adjudication of the Wife's claim. They are free to defend it whereas, if the stay were permitted, the Wife would be faced with significant obstacles affecting, for

example, the properly brought claim against her son and be compelled to incur significant additional expense in initiating proceedings in Liechtenstein.

Conclusion

105. Balancing all the factors identified above and for the reasons already given, I have decided to refuse the application by Counselor and Sobaldo for a stay of the proceedings against them. The circumstances of this case - when considered in the light of the overriding objective and the relevant case law which requires a cautious approach to be taken to the exercise of the power to stay properly brought proceedings - are insufficient to be described as rare and compelling. This is a very different case to Bundeszentralamt v Heis as the above analysis makes clear.

The Variation Application

The Nature of the Orders

106. With respect to the Artwork, paragraph 16 of the December 2016 order under the heading "*Transfer of Property*" required Qubo 1 and Qubo 2 to transfer the legal and beneficial ownership of the Artwork to the Wife and to deliver up the Artwork to the Wife. With immediate effect, she was declared to be the legal and beneficial owner of each picture in the collection comprising the Artwork. Pursuant to the court's general civil and commercial jurisdiction, Qubo 1 and Qubo 2 were declared to be the Husband's nominees and the assets held in their names belonged to the Husband. That declaration flowed from the finding by Haddon-Cave J in his judgment dated 20 December 2016 that Qubo 1 and Qubo 2 were "*no more than ciphers and the alter ego*" of the Husband [paragraph 7]. A declaration was also made to the effect that the purported transfer of the Artwork from Cotor Investment SA to Qubo 1 and Qubo 2 was a transaction (a) at an undervalue for the purposes of s. 423 of the IA and (b) had been made by the Husband for the purpose of putting assets beyond the reach of a person who was making a claim against him or otherwise for prejudicing the interests of that person in relation to the claim which she was making. That declaration found expression in paragraph 18 of the order which reversed the transfer of the Artwork pursuant to s.423 of the IA and, pursuant to s. 423(2) and s. 425(1)(a), vested the Artwork in the Wife with immediate effect in the manner articulated in paragraph 16 of the order.

107. Although it did not explicitly say so, it is plain that the December 2016 order was a final financial order, namely a property adjustment order within the meaning of s.24 of the MCA. It was also an order which granted relief pursuant to the IA and so might be described as a hybrid final financial order.

108. Paragraph 9 of the March 2018 order transferred the Yacht into the Wife's name pursuant to s. 24(1) of the MCA, s. 423(2) and s.425(1)(a) of the IA, such that the Wife held absolute beneficial title to the Yacht. By that paragraph, the Husband and Straight were to effect all necessary steps and formalities for the proper vesting of the Yacht in and the transfer of the title to the Wife. The Wife was declared to be the legal and beneficial owner of the Yacht with immediate effect. That order also declared that Straight was the alter ego of the Husband, alternatively his privy, and through the Husband, it had submitted to the court's jurisdiction. Straight was also declared to be the Husband's nominee and the assets previously held in Straight's name belonged

beneficially to the Husband. Further, pursuant to s. 423 (2) and s. 425(1)(a), paragraph 10 of the March 2018 order provided that, if the Yacht was not transferred within seven days of the date of the order, Straight was to pay a cash sum to the Wife representing its capital value.

109. Paragraph 9 of the March 2018 order transferring the Yacht into the Wife's name was plainly a property transfer order pursuant to s.24 of the MCA. Paragraph 10 was made pursuant to the IA and so, once more, the whole order was a hybrid final financial order.

110. The August 2019 order provided, ancillary to a freezing order, that Counselor and Sobaldo should provide, to the best of their ability, information to the Wife's solicitors within seven days of service of the order. That order was made at a without notice hearing to Counselor and Sobaldo and paragraph 28 permitted them to apply to the court to vary or discharge the order at any time. On 2 October 2019, at a hearing on notice to Counselor and Sobaldo, the court upheld the requirement for Counselor and Sobaldo to provide the information set out in paragraphs 20-22 of the August 2019 order and paragraph 19 of the October 2019 order so provided. Once more paragraph 26 of the October order provided the right to seek variation or discharge at any time.

The Present Application

111. Qubo 1 and Straight ["the Applicants"] have now applied to be released from their obligations to execute transfers to the Wife of the Artwork and the Yacht respectively. Haddon-Cave J transferred those assets to the Wife having concluded that they had been transferred to these Liechtenstein entities pursuant to the Husband's dishonest scheme to put his assets beyond the Wife's reach. I was told by Mr Willan that these tangible assets represent the bulk of the Husband's present wealth since the Wife's inspection of the criminal files in Liechtenstein has revealed that the Liechtenstein trusts have lost just under US$300 million through poor investment, in addition to the sum of US$75 million which Temur claims to have lost. Thus, the Monetary Assets appear to have been very significantly depleted. The sole basis for the variation application is that it was asserted that the orders would "*require the Applicants to act in violation of the law of Liechtenstein*".

112. The application by Qubo 1 and Straight was made in November 2019 after the Wife had issued her committal applications and following an observation from Mostyn J to the committal respondents that "*your defence looks hollow if it [is] not backed up by an application to vary the order*". Prior to then, the Applicants had not participated in the English proceedings but instead had opposed enforcement against them abroad, including in Liechtenstein, the Marshall Islands, and the United Arab Emirates. Mr Brodie QC made plain to me that, absent the committal application, Qubo 1 and Straight would not have involved themselves in these proceedings. I note that, at the time it was made, the application did not seek to argue that the orders made against Qubo 1 and Straight should be varied on the basis that they were unjustified on the facts or wrong in law. Those orders have also never been appealed.

113. The applicants seeking to vary the August 2019 order, affirmed in October 2019, were Counselor and Sobaldo. I have referred to them by name throughout to distinguish them from the Applicants seeking variation of the December 2016 and March 2018 orders.

The Parties' Submissions

114. The parties had initially failed to appreciate the true nature of the December 2016 and March 2018 orders. On my request, the parties submitted further written submissions prior to 29 June 2020 and made oral submissions. However, when judgment writing, I found myself insufficiently persuaded about the parties' submissions on the law which I should apply to the variation of both these orders and the October 2019 order. In fairness to them, I asked them to respond in writing to a series of questions I posed by email sent on 27 July 2020 and, having received their written submissions in response to my questions, I heard from them orally on 4 August 2020.

115. I outline the parties' positions as follows.

116. The Applicants accepted that the December 2016 order was a financial order made by reference to the MCA. They also accepted that the March 2018 order was made in part by reference to the MCA but was also made by reference to the IA. They submitted that, because paragraphs 9 and 10 were made by reference to the IA, the application to vary the March 2018 order was largely not concerned with set aside or variation of orders made as financial remedy orders. FPR r. 9.9A was merely one procedural route for setting aside orders and did not restrict the Court's underlying jurisdiction or disturb its previous approach to setting aside such orders, namely via FPR r. 4.1(6) and on the well-established common law principles in play in Sharland v Sharland [2016] AC 871. A party **may** apply under FPR r. 9.9A but should only do so where no error of the court was alleged (otherwise it should consider whether to make an application for permission to appeal). FPR r. 9.9A did not supersede or otherwise revoke the jurisdiction pursuant to FPR r. 4.1(6) to set aside or vary a financial remedy order. Further, as they sought to adduce fresh evidence that was not before the court when the original final orders were made, the appropriate course was not to appeal but to apply under r. 4.1(6).

117. The Applicants submitted that, with respect to the December 2016 order, the court had erred by making an order which violated the principles against exorbitant extra-territoriality. The court knew or had reason to suppose that the assets were either in Liechtenstein or out of the jurisdiction. An application pursuant to r. 9.9A was not appropriate. The Applicants sought to invoke r.4.1(6) as they relied on evidence as to Liechtenstein law which was not before the court when it made the order. With respect to the March 2018 order, the provisions made pursuant to the IA could be varied pursuant to r. 4.1(6). However, the same submissions made with respect to the December 2016 order also applied to the March 2018 order. With respect to the August 2019 order, FPR r. 4.1(6) applied.

118. The Applicants submitted that the proposed variations were necessary and in the interests of justice. The orders made against them would require them to act in ways which would be contrary to Liechtenstein law and would expose them to a real risk of prosecution under the criminal law of Liechtenstein. The expert evidence of Dr Weneweser to that effect should be accepted. Further, considerations of comity favoured the proposed variations. They gave effect to the flexible approach that the court should adopt in relation to these orders. The orders could not be enforced in Liechtenstein against Liechtenstein entities and thus the court should not maintain orders which were otherwise futile. The Spruch from the Liechtenstein Court had made clear that no assets could be transferred to the Wife without a final and binding judgment of the Liechtenstein Court.

119. Finally, the proposed variations arose in the context of a committal application. Where committal was the remedy of last resort, the court should strive to fashion orders which directed acts which a party was legally entitled to perform.

120. The Wife accepted that the August 2019 order could be varied pursuant to r. 4.1(6) as this was an interim remedy even though it had been continued at the return date in October 2019. She submitted that the court should not vary that order unless there had been a significant change of circumstances – an attempt by a party to run arguments that it could have made at an inter partes return date was an abuse of process.

121. The orders made in December 2016 and March 2018 were made on two bases, namely the MCA and the IA. The court had jurisdiction to set them aside pursuant to r. 9.9A but that power could not be exercised in this case as none of the established grounds for reviewing a financial order were satisfied. However, the orders could not be set aside under the MCA alone. An order made pursuant to the IA could only be challenged by way of an appeal. If the court had any jurisdiction outside FPR r. 27.5 (application to set aside judgment or order following failure to attend), it should be exercised by analogy to r. 27.5 and should only be exercised in the most exceptional circumstances. The interest in finality of orders would almost always trump any other considerations.

122. The Wife submitted that the variation application had been made far too late. The Applicants had chosen to ignore these proceedings and the orders made against them for a very long time. It would be an abuse of process for them to engage with the proceedings only at a time of their choosing and then to expect the court to reconsider the relief which it has already granted on the merits.

123. If the court was, however, willing to entertain this late application, the Wife submitted that it should be refused. This court had a flexible discretion to make an order even if that might or would involve a party in a breach of foreign law. In doing so, the court would need to consider amongst other factors (a) its interest in making the order, (b) the extent of the risk in practice of a breach of foreign criminal law and of prosecution and (c) comity – including the strong expectation that a foreign criminal court will not seek to impede orders made here to unravel dishonest schemes directed at its process. Further, this court was obliged to protect its own procedures and take steps to ensure that its orders were not thwarted by dishonesty.

Relevant Legal Principles: Variation

124. The application made by Qubo 1 and Straight was an application to set aside the final orders made in December 2016 and March 2018 and, on so doing, to vary them in favour of Qubo 1 and Straight.

125. Rule 9.9A of the FPR makes provision for an application to set aside a financial remedy order of the type made in December 2016 and March 2018. The orders made clearly fell within the definition of financial orders in FPR r. 2.3(1).

126. Rule 9.9A provides as follows:

1) In this rule –

a) 'financial remedy order' means an order or judgment that is a financial remedy, and includes –

i) part of such an order or judgment; or

ii) a consent order; and

b) 'set aside' means –

i) in the High Court, to set aside a financial remedy order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule;

ii) in the family court, to rescind or vary a financial remedy order pursuant to section 31F(6) of the 194 Act.

2) A party may apply under this rule to set aside a financial remedy order where no error of the court is alleged.

3) An application under this rule must be made within the proceedings in which the financial remedy order was made.

4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.

5) Where the court decides to set aside a financial remedy order, it shall give directions for the re-hearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application.

127. Rule 9.9A is supplemented by paragraph 13 of PD9A. As relevant, it states as follows:

…

13.5 An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.

…

13.8 In applications under rule 9.9A, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation that it was obtained by, e.g., non-disclosure, is not sufficient for the court to set aside the order. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application for a financial remedy. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily disposed of an application to set aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so, especially

if there are third-party claims to the parties' assets. Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full hearing to redetermine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order.

128. The language of r. 9.9A and the Practice Direction does not signal a relaxation of the rigour of the principles in Barder v Calouri [1988] AC 20, [1987] 2 WLR 1350. Lord Brandon's four conditions must still all be met before any application on the basis of new events can succeed. Those conditions are:

a) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.

b) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases, it will be no more than a few months.

c) The application to set aside should be made reasonably promptly in the circumstances of the case.

d) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

129. In Sharland v Sharland [2015] UKSC 60, [2015] 2 FLR 1367 the Supreme Court definitively set out the applicable principles when an application was made to set aside an order on the ground of fraud. In DB v DLJ [2016] EWHC 324 (Fam), the court set out the principles in play when it is sought to set aside an order on the ground of mistake. I have not detailed the principles in Sharland or DB as neither party sought to persuade me that either fraud or mistake was the basis of the variation application.

130. Finally, in US v SR [2018] EWHC 3207 (Fam), Roberts J considered the position where there had been a failure to implement the terms of a final order. She reviewed the authorities and specifically the case of Bezliansky v Bezlianskaya [2016] EWCA Civ 76. In paragraph 39 of Bezliansky McFarlane LJ listed the five circumstances which could trigger a review of a final financial remedy order. These were: (i) if there had been fraud or mistake; (ii) if there had been material nondisclosure; (iii) if there had been a new event since the making of the order which invalidated the basis, or fundamental assumption, upon which the order had been made; (iv) if and insofar as the order contained undertakings; and (v) if the terms of the order remained executory. Insofar as (v) was concerned, the approach to determining whether or not to set aside or vary the order was based upon it being inequitable to hold to the terms of the original order in the light of a significant change of circumstances. Roberts J in US v SR noted that the power in s. 31 of the MCA to vary and discharge orders had been tightly confined by Parliament. The only capital award that could be varied was a lump sum payable by instalments and, though an order for sale under section 24A could be varied, the underlying capital award to which it was attached could not. In that context and in the light of Bezliansky, she held that there should be a cautious and conservative approach to the reopening of an order where there had been both a failure to implement its terms and some material change in the basis on which the original order had been

made [52]. In so doing she relied on dicta in a decision by Munby J (as he then was) in L v L [2006] EWHC 956, [2008] 1 FLR 26, stating that:

"…. His Lordship was careful to contain the principle by reference to the absence of "any general or unfettered power to adjust the final order … merely because it thinks it just to do so". He confirmed that the essence of the jurisdiction is that "it would be inequitable not to [vary its terms] because of or in the light of some significant change in the circumstances since the order was made".[paragraph 52]

131. Whilst the categories of cases in which r. 9.9A can be exercised are not closed and limited to those identified in paragraph 13.5 of PD9A, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of judgements, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues.

132. I note that, whilst the wording of r. 9.9A(2) is permissive – "*a party **may** apply under this rule to set aside a financial remedy order where no error of the court is alleged*" - that permissiveness is not intended to suggest that, absent an appeal, other routes of challenge to a financial remedy order remain available. PD9A paragraph 13.5 makes clear that an application to set aside should only be made where no error of the court is alleged. If an error of the court is alleged, the correct route of challenge is an application for permission to appeal. PD30A paragraph 4.1B makes clear that an application to set aside pursuant to r. 9.9A would be appropriate where no error of the court was alleged on the materials that "*were before the court at the time the order was made*". However, by way of exception, permission to appeal might still be given where "*a litigant alleges both that the court erred on the material before it and that a ground for setting aside under rule 9.9A exists*". Thus, careful reading of these recently inserted provisions demonstrates that there is no reference in PD30A or in PD9A to other rules which might provide a procedural route for the setting aside or variation of final matrimonial remedy orders. Thus, it is highly doubtful on the strict wording of the FPR that the use of r. 4.1(6) is appropriate to set aside a final matrimonial order since the coming into force of r. 9.9A and the insertion of paragraph 4.1B in PD 30A on 3 October 2016.

133. There is no equivalent to r. 9.9A in the Civil Procedure Rules 1998 ["the CPR"] which might apply to the setting aside of orders made under the IA. Within the civil jurisdiction the power to set aside a final order could only be exercised pursuant to CPR 3.1(7) and is confined only to "*very rare*" (see Terry v BCS Corporate Acceptances Ltd & Ors [2018] EWCA Civ 2422 at [75], though probably obiter) or "*exceptional"* cases (see Madison CF UK (t/a 118118 Money) v Various [2018] EWHC 2786 (Ch)). In the latter case Hildyard J acceded to a lender's application to set aside a large number of judgements obtained against borrowers in default, and on admissions, where the unpaid loans were at all material times unenforceable because of defects in the lender's compliance with the Consumer Credit Act 1974. In Sangha v Amicus Finance Plc [2020] EWHC 1074 (Ch) at [34]-[52], Zaccaroli J considered in what circumstances a possession order (which he regarded as a final order) could be set aside under CPR r. 3.1(7). Applying Terry, he held that the power could only be exercised in very rare circumstances, not including a change of circumstances or misstatement of the facts; and that the importance of finality would be a critical consideration [paragraph 59].

134. The August 2019 order, affirmed in October 2019, was a freezing order which is, by its very nature, an interim remedy as defined in r. 20.2(1)(f). The court thus retains

jurisdiction to set aside or vary a freezing injunction and the orders ancillary to it, not least to adapt it to changes in circumstances over the period that the order remains in force. An application to set aside an interlocutory order in family proceedings must still be made under FPR r. 4.1(6).

135. The court's general power to vary such orders can be found in FPR r 4.1(6): "*A power of the court under these rules to make an order includes a power to vary or revoke the order*". I note that the provision in FPR r 4.1(6) mirrors the power conferred in the CPR r 3.1(7): "*A power of the court under these Rules to make an order includes a power to vary or revoke the order*".

136. In Norman v Norman (No 2) the Court of Appeal held at [57]:

"… an application to set aside a consent order by way of an application under FPR r 4.1(6) will be considered against the Tibbles criteria against the backdrop of the desirability of finality in litigation, the undesirability of permitting litigants to have "two bites at the cherry" and the need to avoid undermining the concept of appeal. Having borne those matters in mind, the court can thereafter set aside an order following a "promptly made" application, but only in the following circumstances:

"(i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order."

137. Norman v Norman (No 2) pre-dated the advent of FPR r. 9.9A but the limitations on the use of FPR r. 4.1(6) – and CPR r. 3.1(7) - are well established in the case law. The use of either provision is not unbounded, and the Tibbles criteria quoted in the passage from Norman v Norman (No 2) cited above remain good law [see paragraph 39 of Tibbles v SIG Plc [2012] EWCA Civ 518].

138. In Thevarajah v Riordan [2015] UKSC 78, [2016] 1 WLR 76 the Supreme Court considered what might amount to '*a material change of circumstances*'. It held that when a court has made an interlocutory order, it is not normally open to a party subsequently to ask for relief which effectively requires that order to be varied or rescinded, whether the application was made under CPR r. 3.1(7) or otherwise, unless there has been a material change in circumstances.

139. Finally, FPR r 27.5 permits a party who did not attend a hearing at which the court gave judgment or made an order against him to apply for that order to be set aside. Rule 27.5(3) provides that the court may only do so where three conditions are satisfied: the applicant must (a) have "*acted promptly on finding out that the court had exercised its power to enter judgment or make an order against the applicant*", (b) had a good reason for failing to attend the hearing, and (c) had a reasonable prospect of success on the merits. Rule 27.5(3) must be read conjunctively, that is all three limbs of the rule must be met for an applicant to succeed. It cannot apply to an application to set aside a final financial remedy order as specific provision has been made for that circumstance in r. 9.9A. However, it applies to circumvent the application of r.4.1(6) when a party has not attended a hearing as that rule can only apply "*except where these rules provide otherwise*" (FPR r. 4.1(3)).

Discussion

140. I propose to address first the application relating to the orders made in December 2016 and March 2018. Though expressed as an application to vary those orders, it is in reality an application to set them aside and then to invite the court to exercise its discretion so as to redetermine the original application by the Wife for ancillary relief by making orders in Qubo 1 and Straight's favour insofar as the Artwork and the Yacht are concerned. Given that both Qubo 1 and Straight have been found to be the Husband's nominees and/or alter egos, those unappealed findings entitle me to approach this application on the basis that it is made by the Husband himself.

141. Does the nature of these orders have any bearing on the procedural route which should be applied to this application for set aside and variation? The December 2016 order was, in large part, a financial order but it also granted relief pursuant to the IA. The mandatory injunction which required the transfer of title to and the delivery up of the Artwork was made on two separate grounds, one of which was a financial order and one of which was not. The position was much the same with respect to the March 2018 order. Paragraph 9 was made pursuant to s. 24(1) of the MCA and sections 423 and 425 of the IA. Paragraph 10, which provided for the payment of a cash sum if the Yacht was not transferred within a certain timeframe, was made pursuant to s. 425(1) of the IA. I reject Mr Brodie QC's submission that the March 2018 order was not a financial remedy order. It was but was more than just that alone.

142. I find myself troubled by the nature of these two orders and the implications thereof for the correct procedural route to determine the application for set aside and variation. Absent any error of law being alleged, the correct route for a final financial remedy order is an application to set aside pursuant to r. 9.9A. That approach has the merit of simplicity as these orders were made within financial remedy proceedings consequent upon the breakdown of a marriage. However, a key component of both orders is the application of the IA, but the final orders made pursuant to that jurisdiction do not fall within the meaning of FPR r. 2.3(1). The particular circumstances of this case have resulted in these final, hybrid orders which, I do not envisage, will be the types of orders common in most financial remedy proceedings. I have decided that I should look first to the jurisdiction pursuant to r. 9.9A and then, only insofar as it is necessary to do so, apply the jurisdiction (if any) to set aside the orders made under the IA. That approach has the merit of logic given the nature of the proceedings in which the orders were made and I am also satisfied that it will be vanishingly unlikely that the application of either route will produce inconsistency of outcome in this case. That may not be the same in other cases.

143. For completeness, I am quite satisfied that FPR r. 4.1(6) is not the correct procedural route applicable to set aside/variation applications pertaining to final financial remedy orders. Dicta in Norman v Norman (No 2) settle this issue conclusively since King LJ stated at [49] that:

> "*As the new FPR r 9.9A provides specifically for the power of the court to set aside a financial remedy order (as opposed to any other type of order) then it rather than FPR r 4.1(6) should, as of 3 October 2016, be invoked where such relief is sought. FPR r 4.1(6) will continue to govern any other applications to set aside which are governed by the Family Procedure Rules.*"

144. I am entirely satisfied that the application to vary the two final orders made in December 2016 and March 2018 has not been made promptly. The delay is far outside that contemplated by Barder.

145. With respect to the December 2016 order, Qubo 1 had unquestionably become aware of it no later than 29 December 2016. It was formally served on 4 January 2017 and served again, through Liechtenstein judicial channels, on 14 June 2018. Qubo 1 took no steps to challenge the order in this jurisdiction. Instead, it took a deliberate stance that it would seek to prevent the order being relied upon in Liechtenstein, rather than engaging with the merits of the English proceedings. It only applied to set aside the judgment against it on 28 November 2019, nearly 3 years later. I do not accept the submission made by Mr Brodie QC that the Applicants only appreciated the need for variation when faced with the committal applications. His submission was unclear as to exactly when the Applicants realised the need for variation though I suspect it was a great deal earlier than at the hearing before Mr Justice Mostyn in November 2019. Leaving aside the question as to the Applicants' knowledge of the final orders, they are entities with access to expert legal and financial advice. The suggestion that they did not apply for a variation of the English orders because they did not appreciate the need to do so until at the earliest May/June 2019 (when the Wife applied to commit Qubo 1 for breach of the December 2016 order) and at the latest November 2019 is wholly unpersuasive.

146. The March 2018 order is a final order granting judgment against Straight on various legal grounds, including under s.423 IA 1986. Straight was served with the application to join it and for relief, receiving the documents on 2 March 2018 (with a deemed date of service of 5 March 2018). The March 2018 order was therefore made at a hearing on notice to Straight. Straight was then served with a copy of the March 2018 order by judicial channels on 18 May 2018 with an amended version (with a penal notice) re-served by judicial channels on 31 July 2019. Straight has not put forward any reason for its failure to attend the hearing on 21 March 2018, and, further, it did not act promptly but waited over 18 months before applying to set aside the March 2018 order even though it had, in the meantime, been resisting enforcement in the Marshall Islands.

147. Mr Brodie QC sought to persuade me that neither Applicant had received proper notice or service of the December 2016 and March 2018 proceedings. I found those submissions unpersuasive in circumstances where both were held to be the Husband's alter egos and nominees. Haddon-Cave J found in December 2016 that Qubo 1 had constructive notice of the claims made by the Wife and in March 2018 he declared, as he was entitled to do for the reasons spelled out in his April 2018 judgment, that service by the means endorsed in that order had taken place on 5 March 2018. Even if I extended the benefit of the doubt to the Applicants for their failure to attend the relevant hearings, there was no convincing explanation at all for their failure to apply much earlier for the relief they now seek.

148. Mr Brodie QC submitted that the fact that this court's orders were not recognised as enforceable in Liechtenstein was a good reason for not engaging in litigation outside Liechtenstein, where the assets were also located. I simply do not accept that constitutes a sufficiently good reason by these entities to ignore legal proceedings outside Liechtenstein. In fact, the existence of the final English orders has allowed the Wife to challenge the Applicants in the other jurisdictions to which the assets were transferred thereby incurring cost to them. If the Applicants were convinced the proceedings in this

jurisdiction were, as Dr Schurti described, "*fake proceedings*", it would have made commercial sense to have applied at the earliest opportunity in this jurisdiction for permission to appeal or to vary or set aside the orders causing the Applicants so much trouble in litigation elsewhere in the world.

149. The delay with respect to the above orders is a most serious obstacle to their variation. Barder emphasised the need for promptness in making an application to set aside. This is because, with the passing of time, there is likely to be prejudice for a party who is entitled to go forward in reliance on the order that the court has made. The delay in making the application sits alongside the Applicants' behaviour in choosing to ignore English proceedings yet litigating in other jurisdictions to avoid the effects of the December 2016 and March 2018 final orders.

150. Further, the Applicants cannot bring themselves within any of the criteria in paragraph 13.5 of FPR PD9A in respect of either order. There was no fraud or material non-disclosure by the Wife or mistake by the court as defined in DB v DLJ. The fact that the order remains executory is insufficient to set it aside in circumstances where the Applicants cannot point to an unforeseen supervening event which invalidated the basis of those orders. The fact that they have now chosen to submit to this court's jurisdiction and to make their arguments is not a relevant supervening event.

151. Mr Brodie QC submitted that, in December 2016 and March 2018, the court made orders with which the Applicants could not comply as a matter of Liechtenstein law. Those orders were made without the court having had an opportunity to consider or take account of the expert evidence about that topic which is before this court. Accordingly, there had been a material change of circumstances between the date when the orders were made and the new evidence now before this court.

152. I regard that as an extraordinary submission in circumstances where (a) Straight was declared to know about the hearing in March 2018 but chose not to attend and (b) the Husband absented himself from these proceedings in December 2016, Qubo 1 being found to be his alter ego and cipher. Were I to accede to it, any applicant might challenge a final order properly made years after the event on the basis that they now chose to involve themselves in the proceedings and to place evidence before the court which they ought to have placed before the court years earlier either at the hearings itself or ancillary to an application for permission to appeal. In any event, the material change of circumstances must, in my view, relate to the Applicants' circumstances and not how they now choose to present their case. It must also be unforeseen – that is simply not the case here. In my view, those submissions provide no justification whatsoever for applying or extending the jurisdiction pursuant to FPR r. 9.9A.

153. It will be apparent that Mr Brodie QC also suggested that the court had erred in December 2016 and in March 2018 by making orders which it knew would have an impermissible and exorbitant extra-territorial effect. That development in his case was understandable given the difficulties he had invoking the jurisdiction pursuant to r. 9.9A. However, this refinement to his submissions did not assist him since it begged the inevitable question – why did the Applicants not apply for permission to appeal even out of time if the court erred on the materials before it? If the Applicants are faced with committal proceedings for breaches of the December 2016 and March 2018 order, it seems to me that this should prompt further consideration by them of an application out of time for permission to appeal. It is their conduct in failing to comply with this

court's orders which exposes them to the risk of committal. The prudent man of business in Liechtenstein should have foreseen that a possible consequence of failure to comply with this court's orders might prompt an application for enforcement and taken steps to lessen that risk, for example, by applying for permission to appeal or seeking much more promptly to set aside and vary this court's orders.

154. Thus, the Applicants cannot bring themselves within the criteria applicable to FPR r. 9.9A with respect to either the December 2016 or March 2018 orders. The fact that the orders were executory does not afford the Applicants a different route to setting them aside and varying them. In that regard, I wholly endorse the reasoning of Roberts J in US v SR (see above) at paragraphs 48-52. The circumstances in which variation of an executory order will be permitted are constrained by the need to demonstrate a significant change in circumstances since the order was made, such that it would be inequitable to hold to the terms of the original order. This case is far removed from the circumstances in US v SR where the terms of the original order were impossible to implement as originally envisaged because of the near collapse of the Russian property market. Here it is wholly possible for the Applicants – or better, the Husband (for they are his alter egos) – to transfer the Yacht and the Artwork to the Wife. He has simply chosen not to do so. Equity will not furnish him with a remedy in those circumstances.

155. Turning to the relief granted pursuant to the IA, the Applicants cannot bring themselves within the "*exceptional*" or "*very rare*" circumstances which pertain to an application to set aside a final order within the ambit of CPR r. 3.1(7). Finality is a crucial consideration in the application of that rule and the delay here was without sensible justification. The fact that the orders were made without the benefit of the expert evidence available to this court is neither here nor there in circumstances where the Applicants – or more correctly, the Husband – chose not to involve themselves/himself in proceedings of which they/he had proper knowledge and now apply after exorbitant and unjustifiable delay for set aside/variation.

156. Finally, if FPR r. 4.1(6) could theoretically be used to set aside an order made pursuant to the IA, the Applicants cannot in any event bring themselves within it. They fail on any analysis to meet the Tibbles criteria. There has been no prompt application; no material or significant change in circumstances; no mis-statement of the facts on which the original decision was made; and no mistake in formulating the order. This was certainly not a case where the Applicants had become aware of facts which they could not have reasonably known or found out at the time of the original hearings. Moreover FPR r. 27.5(3) must apply in the special circumstances where a party fails to attend a hearing. The provisions of that rule must be read conjunctively, that is, the Applicants must satisfy all the criteria in that rule. They – or more, correctly, the Husband - cannot as they/he failed to act promptly and had no good reason for not attending the hearings. Whether they had a reasonable prospect of success at the hearing is thus not a matter which I need consider as it cannot trump the other criteria in r. 27.5(3)(a) and (b).

157. Thus, the application to set aside and vary the final orders made in December 2016 and March 2018 is refused.

158. Turning to the August 2019 order affirmed in October 2019, the delay by Counselor and Sobaldo in applying to vary the order is significant. That order was an interim order and therefore does not enjoy the same high degree of protection as the final orders. However, even for interim orders, "*... a party must bring forward an argument on all*

points reasonably available to him at the first opportunity … to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions" (see Orb v Ruhan [2016] EWHC 850 (Comm) at [81]-[82]).

159. The court fixed a return date of the August 2019 order on 2 October 2019. Given that the first affidavit filed on behalf of the Applicants, supported by voluminous expert evidence, is dated 15 October 2019, I can safely infer that, at this stage, Counselor and Sobaldo had already instructed English lawyers to oppose the existing committal proceedings. However, despite being (a) notified of the freezing order promptly, (b) formally served with the freezing order on 23 September 2019, and (c) provided with a copy of the draft judgment from the without notice hearing on 27 September 2019, Counselor and Sobaldo did not appear at the return date. That was, in my view, a deliberate decision – indeed there is no suggestion otherwise.

160. Both Counselor and Sobaldo knew that the court had decided that they should give disclosure notwithstanding the risk that it might constitute an offence in Liechtenstein. They chose not to appear at the hearing fixed to reconsider that order on notice to the parties and gave no reason for their non-attendance. The delay in applying for the variation - nearly 2 months after they fell into contempt of court - does not justify another opportunity for them to argue about whether they should have been required to give disclosure pursuant to the freezing order.

161. Thus, Counselor and Sobaldo cannot bring themselves either within FPR r. 27.5(3) or r. 4.1(6). They cannot meet all the criteria in r. 27.5(3). Moreover, they cannot demonstrate either a material change in circumstances, manifest mistake on the part of the judge or mis-statement of facts in accordance with the Tibbles criteria. Thus, their application to set aside or vary the August 2019 order is refused.

The Wife's Application for Disclosure

162. By her application notice dated 15 November 2019, the Wife applied for disclosure from Counselor and Sobaldo in support of her claims under s. 423 IA and s.37 MCA. Both entities are likely to hold documents relevant to the proceedings which relate to the establishment, assets and administration of the Liechtenstein trusts which received the Monetary Assets. Such documents are likely to show, for example, how and for what purpose the trusts were established; what control the Husband retains of the trust assets in practice; and who has received payments out of the trusts. The Wife seeks a direction for standard disclosure within the meaning of FPR PD21A para. 2.1 and will submit to a direction giving reciprocal standard disclosure. This will ensure that documents relevant to the proceedings are disclosed. The Wife also seeks an order for specific disclosure pursuant to FPR PD21A para. 2.4 requiring a reasonable search for the classes of document identified in paragraph 12(b) of the draft order accompanying her application. The categories of documents sought are, in broad terms, (a) trust accounts, bank statements, instructions and decisions for each of the trusts, (b) communications with the Husband, Temur, Mr Kerman and/or Mr Devlin from 2015 to date relating to the transfer of the Monetary Assets and the Husband's use of the Liechtenstein trusts, and (c) documents showing what has become of the Monetary Assets.

The Parties' Positions

163. The Wife submitted that the disclosure sought was necessary for the court to properly determine her claim with respect to the Monetary Assets. This court has a strong and legitimate interest in requiring the disclosure of documents to fairly determine the proceedings. Counselor and Sobaldo should not be permitted to participate in the proceedings and deny the claims against them while simultaneously refusing both the court and the Wife access to the information and documents in their possession which would be necessary to test those denials. The Wife contrasted their position with that taken by Straight in the Marshall Islands proceedings. There, Dr Schurti put forward a witness statement in which he gave considerable evidence about the Simul and Navy Blue Trusts; how they came to be established; and their dealings with assets. The Wife submitted there was a strong impression that the trustees were picking and choosing when it suited them to reveal information and when it suited them to rely on professional secrecy to hide the truth. This should not be permitted.

164. There was no doubt that this court had the jurisdiction to order disclosure even if that would involve a breach of foreign law. The Wife submitted that the risk of a prosecution or conviction for violation of professional secrecy was very low. In fact, in this context, the risk was even lower because Counselor and Sobaldo also had a legitimate private interest in being able to defend these proceedings so as to avoid the trusts being made subject to what they contend would be an unjustified liability; and they could not realistically defend the proceedings without giving disclosure.

165. The Wife rejected the submission that directions for disclosure had become unnecessary in these proceedings because she would be able to obtain the relevant information from the criminal file. That was a misconceived submission because, if the Wife already knew the information from inspecting the criminal file, then the trustees could comply with their disclosure obligations without committing any offence under Liechtenstein law because a person does not "*reveal*" a secret by telling the other person something which they already know. Accordingly, if the trustees were correct that the Wife could find all the information which they had been ordered to provide in the criminal file, there was no basis for not ordering disclosure because the trustees could comply with it. In addition, the Wife submitted that it was doubtful she would be able to obtain all the necessary information from the criminal files. Whilst the review of the files which had recently been made available to her was ongoing, it appears that the criminal files contain significant gaps. For example, critical documents, such as the trust deeds themselves, are not on the files; the criminal files appear to contain almost no records of the communications between the Liechtenstein entities and the Husband/his representatives (it being noted that such documents must exist because the trustees could not have paid out vast sums to the Husband without some communication); the criminal files do not appear to contain a full analysis of the relevant bank accounts; and finally, new schemes were emerging from the criminal files - for example, the existence of the Goosefish Trust - about which almost no information was available.

166. Finally, the Wife contended that it was doubtful that she would obtain all relevant communications with the trustees from Temur. The trustees had not confirmed in evidence that they had had no communications with the Husband or his representatives which were not copied to Temur. In any event, Temur had pleaded that he was unable to admit or deny what the Husband received from the Liechtenstein trusts which could only be because he denied being privy to the arrangements for such transfers.

167. By contrast, Counselor and Sobaldo submitted that the Wife's application was unnecessary because the Wife was likely to obtain the same documents from either Temur or in consequence of her access to files in the Liechtenstein criminal investigation.

168. Further, Counselor and Sobaldo submitted that, given that the Wife sought disclosure of information about assets situated in Liechtenstein, the appropriateness of ordering such disclosure should be assessed in the light of the underlying dispute as to the enforcement of any award against those assets in Liechtenstein. It was further submitted that, given the proceedings in Liechtenstein commenced on 19 September 2019 by the Wife, it was inappropriate for this court to make orders for disclosure about assets in Liechtenstein in respect of which the Wife had herself applied to the Liechtenstein court for substantive relief. This court should not make orders in respect of assets in a foreign jurisdiction unless there was clear evidence that such an order would likely be enforced by the foreign court and it was common ground that any English disclosure order would not be enforceable in Liechtenstein. Any such orders would be exorbitant in terms of jurisdiction and would have impermissible effects on the entities under Liechtenstein law.

Discussion

169. Having decided that there should be no stay of the Wife's claim against Counselor and Sobaldo and that my order made initially in August 2019 but subsequently affirmed in October 2019 should not be varied, I approach the issue of disclosure in this way. First, are orders for disclosure directed at Counselor and Sobaldo necessary in order to dispose of the proceedings justly and fairly? Second, if they are, should I exercise my discretion to order such disclosure in respect of Liechtenstein-based entities holding the assets in dispute in Liechtenstein? The answer to that second question will require me to take account of the real - in the sense of the actual - risk of prosecution in Liechtenstein and to balance that factor against the importance of the documents of which disclosure is ordered to the fair disposal of these proceedings.

170. In my judgment dated 2 October 2019 at [57], I held that the balance of interests came down in favour of ordering disclosure given the importance of the disclosure sought to (a) the Wife obtaining effective relief in respect of a dishonest campaign of evasion, and (b) a fair disposal of her avoidance claims. That conclusion has not been challenged by Counselor and Sobaldo, both of whom have chosen to submit to this jurisdiction and to involve themselves in these proceedings. In those circumstances, their denial of the Wife's claim should properly be accompanied by the disclosure of material which would allow their denials to be tested and evaluated by this court.

171. Practically speaking, disclosure from Counselor and Sobaldo is necessary because they alone hold a complete set of documents from which this court would be able to discern how and for what purpose the trusts were established, the control which, in practice, the Husband still retained of the trust assets, and to whom payments were made from the trusts. I do not find the submission that disclosure is unnecessary because the Wife can obtain the relevant material from other sources to be persuasive. The criminal files appear, on the submissions I have heard (and which, I note, have not been challenged on behalf of Counselor and Sobaldo) to contain significant gaps as outlined in paragraph 165 above. On Temur's pleaded case, he is unlikely to be able to disclose relevant information about what the Husband has received from the trusts. Further, in answer to

the disclosure order I made at the conclusion of the hearing in May 2020, Temur has asserted that he does not possess a single document of relevance to the activities of the trusts. For completeness sake, the availability of documents within the material produced by Mr Kerman under subpoena in December 2016 is also limited. Mr Kerman was only ordered to produce certain categories of documents relating to Cotor's accounts at UBS and LGT Bank with the consequence that he did not disclose documents relating to the Liechtenstein trusts.

172. The submission that the Wife had in September 2019 commenced proceedings in Liechtenstein and would thus obtain disclosure within that litigation is misconceived. Though there is some overlap, the proceedings are not directed at Counselor or Sobaldo and thus would be highly unlikely to result in the disclosure of the categories of documents identified at paragraph 162 above. That material is obviously of prime relevance in the determination of the Wife's claim.

173. Thus, it seems to me that orders for disclosure directed at Counselor and Sobaldo are necessary to justly and fairly determine the Wife's properly brought claim.

174. In the exercise of my discretion, I am satisfied that I can make orders against Counselor and Sobaldo which may be contrary to civil and criminal law in Liechtenstein. I should conduct a balancing exercise, weighing on the one hand the actual risk of prosecution and, on the other hand, the importance of the documents of which disclosure is ordered to the fair disposal of the proceedings before me. I note, in accordance with Bank Mellat (see paragraph 64 above), that the existence of an actual risk of prosecution in Liechtenstein is not determinative of the balancing exercise which is a factor of which I should be very mindful. For completeness, I am not persuaded that SAS v WPL is authority which cuts across the principles established in Bank Mellat given that it is directed against enforcement orders rather than orders made to assist in the determination of a claim on liability.

175. The expert evidence about the criminal offence of breach of professional secrecy contrary to paragraph 121 of the Liechtenstein Criminal Code makes clear that there is no defence to the unlawful disclosure of information covered by the obligation of professional secrecy even in situations where trustees have conflicting duties arising in different jurisdictions. Disclosure of professional secrets might be justifiable where secrecy is being used to hide assets or conceal wrongdoing from a third party who required that information to pursue their civil rights. In that respect, I adopt the cautious approach advocated by Dr Wenaweser to the interpretation of the recent Liechtenstein Supreme Court case which permitted disclosure of business secrets in the face of apparent but unproven impropriety to enable the contribution claim to be brought in connection with foreign proceedings (see paragraph 46 above).

176. However, I regard it (at best) to be doubtful whether there is an individual who has the standing to initiate a prosecution for this offence, which can only be pursued by the person identified in section 121(1). It is doubtful whether a member of the class of discretionary beneficiaries would be able to initiate a prosecution and it cannot be assumed the Husband would have standing to do so either. Though Mr Brodie QC suggested that, if the trustees breached their obligation of professional secrecy, the Husband would be a man with a big grudge and likely to seek to hold them to account, his own case was that there was no evidential basis for that assumption and, so far as the evidence reveals, the Husband was not the named settlor who engaged the services

of the trustees. Counselor stated in correspondence dated 2 May 2018 that the settlor of the Navy Blue Trust was Eurofirm Trust Establishment (which is an affiliate of WalPart). Finally, it appears nobody has ever been prosecuted or convicted in Liechtenstein for disclosing documents pursuant to a foreign court order.

177. Given the expert evidence on this issue, I have concluded that the risk of prosecution in Liechtenstein is little more, and indeed is probably no more, than purely hypothetical.

178. The balancing exercise in this case given the above conclusion falls squarely in favour of making orders for disclosure against Counselor and Sobaldo. The absence of the material in question would very substantially interfere with the Wife's ability to pursue her claim and would clearly hamper this court's ability to determine the proceedings fairly.

179. For the avoidance of doubt, the behaviour of Dr Schurti in disclosing within the Marshall Islands proceedings information about the trusts which was subject to the obligation of professional secrecy has played no role in my decision on this issue. As I observed in exchanges with counsel, Dr Schurti may well have had the permission of those entitled to bring any prosecution to disclose this information. His behaviour in that regard was consistent with the approach of the trustees in litigating only in other jurisdictions where the relevant assets might be located or registered (in the case of the Yacht).

Conclusion

180. That is my decision.