OUTER HOUSE, COURT OF SESSION

[2024] CSOH 51

P911/23

OPINION OF LORD SANDISON

in Petition of

MEX GROUP WORLDWIDE LIMITED

Petitioner

for an order in terms of section 1 of the Administration of Justice (Scotland) Act 1972

against

(FIRST) STEWART OWEN FORD; (SECOND) BRIAN ROBERT CORMACK; (THIRD) MELVILLE CONSULTING PARTNERS LIMITED; (FOURTH) MELVILLE CONSULTING ASSOCIATES LIMITED; (FIFTH) REGAL CONSULTANCY INTERNATIONAL LIMITED; and (SIXTH) CSM SECURITIES SARL

Respondents

Petitioner: Moynihan, KC, J Brown; Clyde & Co (Scotland) LLP
First to Fifth Respondents: McBrearty, KC, E Campbell; BTO Solicitors LLP

17 May 2024

Introduction

[1] On 18 October 2023 I granted the petitioner's *ex parte* application in terms of section 1 of the Administration of Justice (Scotland) Act 1972 for warrant to commissioners to enter the personal residences of the first and second respondents and the business premises occupied by the third, fourth and fifth respondents and to search for and seize material falling within the terms of a list of documents and types of document appended to the

petition. I did so after hearing relatively lengthy submissions from the Dean of Faculty on behalf of the petitioner and insisting upon certain revisions to the list of material to be searched for and seized. The court's commissioners subsequently carried out "dawn raids" at the relevant premises and seized a large number of documents in digital and paper form, which are presently in the custody of the court. In April 2024 the Scottish respondents affected by it moved me to recall the order granted on 18 October 2023.

Background

[2] The petitioner is incorporated in Hong Kong and is the ultimate holding company of a group of companies known as the Multibank Group, the ultimate beneficial owner of which is Mr Naser Taher. The group provides trading platforms for investors dealing in derivative trading, and is authorised to provide financial services in 14 jurisdictions, but not in the United Kingdom. The first respondent, Mr Stewart Ford, is a businessman whose unfortunate claim to fame is that he was fined £76 million and prohibited for life by the Financial Conduct Authority from being engaged in activities regulated by it, and who was essentially left without a character by the Upper Tribunal when he appealed against that prohibition: see [2018] UKUT 0358 (TCC). The second respondent, Mr Brian Cormack, is said by the petitioner to have close personal and business ties to Mr Ford, to control the company which holds title to Mr Ford's family home, and to control Melville Consulting Partners Limited, Melville Consulting Associates Limited and Regal Consultancy International Limited (the third to fifth respondents), through which Mr Ford is said to carry on business contrary to the FCA prohibition. The sixth respondent, CSM Securities SARL, is a company registered in Luxembourg. The petitioner maintains that, while it is nominally controlled by **C**olm Smith, an Irishman resident in Luxembourg, it is in reality

a joint venture between him, Stewart Ford and Michael Gollits, and that Mr Smith is a long-standing associate of Mr Ford and was complicit in the concealment of the activities on his part which led to the FCA ban.

[3] The section 1 petition was accompanied by a draft commercial summons which set out the basis of the case which the petitioner proposed to raise against the respondents and others in this court. The relevant summons passed the Signet on 19 October 2023 and the action remains in dependence before the court. The draft summons disclosed an extremely complex commercial background. It would be neither helpful nor appropriate to go into its allegations in great detail in this context, although a narration of its bare bones, at least, is necessary in order to understand the context in which the respondents' motion was heard and disposed of. The matters of primary fact asserted by the petitioner fall to be taken *pro veritate* for present purposes; their repetition here should not be taken as any greater endorsement of their validity by the court. In essence, the petitioner maintained that all of the respondents, and the other defenders in the action, had engaged in an unlawful means conspiracy directed at injuring its interests by causing Mex Securities SARL to seek to renege on a lawful and binding agreement recorded in a Consent Order granted by the High Court of Justice of the British Virgin Islands dated 14 December 2020, by *inter alia* causing a bribe or inducement to be paid to Colm Smith by the transfer of investment funds to CSM Securities SARL, to his benefit, in order to induce him to cause such a repudiation, and by making various false and damaging claims about the petitioner and companies related to it. The petitioner claims to have suffered loss in consequence of that conspiracy amounting to £85 million, primarily as a result of the failure of a planned bond issue due to the respondents' actions.

[4] Each of the respondents is also a defender in the action. The other defenders are Mr Gollits, a resident of Germany; Melville Consultancy Limited, a Scottish company sharing its registered office in Edinburgh with Melville Consulting Partners Limited; Von Der Heydt & Co AG, a German investment management company of which Mr Gollits is the managing director; Von Der Heydt Invest SA (a Luxembourgish company related at the material times to Von Der Heydt & Co AG and also said to be managed by Mr Gollits); Mex Securities SARL, another Luxembourgish company said to have been set up for the purpose of a proposed venture between the petitioner and Von Der Heydt & Co AG and to have been managed by Mr Smith at the instigation of Mr Gollits; and Viacheslav Volotovskiy, a resident of Luxembourg also said to be concerned in the management of Mex Securities SARL. Various litigations are pending before the courts of England and Wales, the BVI and Luxembourg in which some of the parties to the action are directly or indirectly interested.

[5] The draft summons narrated in great detail the commercial background leading to a situation whereby Mr Gollits sought in December 2020 on behalf of Von Der Heydt & Co AG to withdraw funds from notes issued by Mex Securities SARL, ostensibly for regulatory reasons, but in circumstances which the petitioner conceived rendered Von Der Heydt & Co AG in breach of previous undertakings given to it and formed the basis for a pecuniary claim by the petitioner against, *inter alios*, Mex Securities. On 4 December 2020 the petitioner’s solicitors intimated that claim to Mex Securities, which claim the petitioner then assigned to another company in its group, Mex Clearing Limited. On 10 December 2020, Mex Clearing raised a claim against Mex Securities and another company in the BVI, seeking repayment of the sum of €36,385,509.52. Between around 8 to 16 December 2020 Mr Smith (in conjunction with Mr Volotovskiy) on behalf of Mex Securities negotiated a settlement of

the claim with the petitioner's representatives at a series of meetings in Dubai. It was agreed that Mex Securities would enter into a settlement agreement and agree to a consent order in the BVI proceedings involving the payment by it of essentially all of the sum sued for, and that the petitioner's residual claim against Von Der Heydt & Co AG would be assigned to Mex Securities, which the petitioner would assist it financially to prosecute. A corresponding consent order was granted by Wallbank J in the BVI on 14 December 2020, and on 18 December 2020 Mex Clearing received the agreed settlement sum of €36,385,509.52 on the instructions of Mex Securities.

[6] The petitioner claims that in December 2020 it was unaware of the nature and extent of the ongoing business relationships between the respondents and other relevant parties. It claims that it only afterwards became aware of the precise nature of Mr Ford's difficulties with the FCA, and that Mr Cormack and Mr Smith were long-standing business associates of his, and had been used by him over many years to assist and conceal his dishonest activities. It maintains that (unbeknown to it) its own general counsel at the material times, Adam Duthie, was also an associate of Mr Ford and Mr Cormack, and assisted them and Mr Smith to set up CSM Securities, which in turn was engaged from August 2020 in issuing bonds and soliciting investment from the Von Der Heydt companies. It alleges that the Melville and Regal companies marketed those bonds and received commission on their sales. It points to communications amongst Mr Gollits, Mr Ford, Mr Smith, Mr Volotovskiy and Mr Duthie in December 2020 concerning Von Der Heydt & Co AG's wish to withdraw its investments from the note issue previously mentioned, and in particular to hotel telephone records showing lengthy calls having taken place between Mr Smith, while he was in Dubai between 7 and 17 December to discuss the proposed settlement, and Mr Ford, Mr Cormack, Mr Gollits and Mr Volotovskiy.

[7] Mex Securities purported to renege from the settlement agreement made in Dubai and the corresponding consent order on 22 December 2020, claiming that it knew nothing about the matter and was directed only by Mr Volotovskiy, rather than Mr Smith. The petitioner infers and alleges that the telephone calls between 7 and 17 December already referred to involved discussions concerned with the facilitation of a conspiracy amongst the respondents and others, and the steps to be taken in furtherance of it. It claims that in late 2020 and early 2021 investment funds began to flow from the Von Der Heydt companies to entities associated with the respondents and others, in particular by way of investments in "Engenera Green Bonds", issued by a company owned 50% by Melville Consulting Partners Limited, and in a CSM Securities bond based on the purchase of non-performing consumer loans in the US.

[8] In March 2021, Mex Securities raised an action in the District Court for Luxembourg in Commercial Matters, alleging that the petitioner had pressured Mr Smith (who was said not to be authorised to act on behalf of Mex Securities) into the settlement agreement and consent order. Mex Clearing obtained anti-suit injunctions against these proceedings in the BVI and in the High Court in England and Wales. Von Der Heydt Invest SA then intervened in the original BVI proceedings, seeking a worldwide freezing order against Mex Clearing and Mex Securities. It has been held in those proceedings that a good arguable case of fraud has been made out against a company in the petitioner's group. Those proceedings are complicated and ongoing, but substantive procedure is, at least for now, paused pending the outcome of the proceedings in Scotland. On 20 October 2023 a worldwide freezing order was obtained *ex parte* from Lavender J in the High Court of England and Wales against the Scottish respondents and others, but that order was recalled on 15 December by Deputy High Court Judge Simon Tinkler on the grounds, *inter alia*, that it

had been obtained in consequence of material non-disclosure. Leave to appeal that decision has been granted by the Court of Appeal.

[9] Against that background, the petitioner claims that the respondents and the other defenders in the action have combined together to further their own commercial interests and to injure the commercial and economic interests of the petitioner by seeking to deprive it of the benefit of the settlement it reached in the form of the consent order, by causing Mex Securities to renege on that settlement and to create a false narrative about the petitioner's dishonest involvement in events, thereby creating a situation where the funds in question would be caught up in highly complex litigation for an extended period of time, leaving the respondents and others free to pursue and profit from their commercial interests, and in particular from the substantial flow of investment funds from the Von Der Heydt companies to bonds issued by CSM Securities and promoted and sold by it and Melville Consulting Partners Limited, to the benefit of Mr Ford, Mr Cormack, Mr Smith, Mr Gollits and Mr Volotovskiy.

[10] It is claimed that the means used by the respondents and others to pursue those purposes have been unlawful, and include the carrying on by Mr Ford, facilitated by the others, of illegal involvement in regulated financial activities contrary to the FCA Order; the causing of Mex Securities unlawfully to renege or to purport to renege on the settlement and consent order at the instigation of Mr Ford, Mr Smith, Mr Gollits, the Von Der Heydt companies and Mr Volotovskiy, the making of false assertions made about the circumstances of that renegement and the petitioner's involvement therein; and the provision of financial inducement or bribe by the Von Der Heydt companies, in the form of substantial investment in bonds issued by CSM Securities which, it may reasonably be inferred, was directly connected to the assistance provided to the interests of the Von Der

Heydt companies by the attempt of Mex Securities to renege on the settlement. The petitioner further alleges that the purported repudiation of the settlement agreement by Mex Securities was a breach of contract on its part, induced by the actions on the part of the other respondents already described.

[11] The petitioner finally claims that, but for the wrongful acts of which it complains, it would have secured the benefit of the settlement and consent order, that it has incurred expense in litigation, and that it has lost substantial profits and business due to the reputational issues it has encountered as a result of the false allegations made about and against it in relation to the affair, including from the postponement of a bond issue which would otherwise have taken place, but which did not occur due to the petitioner's inability to obtain a satisfactory rating due to the ongoing events.

Relevant statutory provisions

[12] Section 1(1) of the Administration of Justice (Scotland) Act 1972, as amended, is in the following terms:

> "**1.— Extended powers of courts to order inspection of documents and other property, etc.**
>
> (1) Without prejudice to the existing powers of the Court of Session, of the Sheriff Appeal Court and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order the inspection, photographing, preservation, custody and detention of documents and other property (including, where appropriate, land) which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith."

Respondents' submissions

[13] On behalf of the Scottish respondents, senior counsel submitted that the section 1 order had been obtained in material breach of the petitioner's duty of full and frank disclosure to the court at the *ex parte* hearing on 18 October 2023 and separately that the petitioner had no *prima facie* case in respect of those respondents. The order should be recalled for either or both reasons.

[14] There was a stringent professional obligation in an *ex parte* hearing to draw to the attention of the court all relevant circumstances, whether favourable or unfavourable to the application being made. Presentation of an *ex parte* application on an uncandid basis was a ground for recall: *Bell* v *Inkersall Investments Ltd* [2006] CSIH 16, 2006 SC 507 at [20]. Where it could be shown that the basis upon which an order for recovery of property had been obtained was false, the court could order return of the property in order to avoid what would be in effect an abuse of process: *JC Olsen* v *Forrest Estate Limited* (unreported) 14 June 1994 per Lord Osborne at p 27. By the same principle, obtaining a section 1 order on a false basis also provided a ground for recall. The court retained a discretion about what to do in the event of non-disclosure: *Archer, Petr* [2019] CSOH 15, 2019 SLT 267 at [42]-[43]. Whether the non-disclosure was innocent, or otherwise, was relevant to the exercise of that discretion: *Brink's-Mat Ltd* v *Elcombe* [1988] 1 WLR 1350 at 1357. The granting of a section 1 order was the equivalent of an Anton Piller order in England and Wales. Both orders were incredibly intrusive. An order to search a dwelling house was described by Hoffmann J as being at the "absolute extremity of the court's powers….with the humiliation and family distress which that frequently involves": *Lock International Plc* v *Beswick* [1989] 1 WLR 1268 at 1281G. The personal effect of such orders was clear and ought to be recognised. It was recognised by Scott J in *Columbia Pictures Industries Inc* v *Robertson* [1987] Ch 38 at 73C,

who observed: "The traumatic effect and the sense of outrage likely to be produced by an invasion of home territory in the execution of an Anton Piller order is obvious." Such orders involved an invasion of the usual rights of privacy. It had been recognized that in applications for such orders, due to their intrusive and extreme nature, the need for full and frank disclosure was paramount: *Thermax Ltd* v *Schott Industrial Glass Ltd* [1981] FSR 289 at 298. The law of England relating to the obligation to make full and frank disclosure in the context of seeking an *ex parte* order was summarised accurately by Carr J in *Tugushev* v *Orlov* [2019] EWHC 2031 (Comm) at [7]. The same principles ought to be applied as a matter of Scots law. In particular, immediate discharge (without renewal) should be the court's starting point, at least when the failure was substantial or deliberate. It would only be in exceptional circumstances, in cases of deliberate non-disclosure or misrepresentation, that an order would not be discharged: *Tugushev* at [7(x)]. Further, the court should discharge the order even if it would still have been made had the relevant matter(s) been brought to its attention at the *ex parte* hearing. That was a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abided by their duties: [7(xi)].

[15] Turning to the material non-disclosures in the present case, they were as follows:

1. In the summons which accompanied the petition, the petitioner averred that "It has never been the subject of regulatory discipline or penalty in the jurisdictions in which it operates." That was, at best, misleading. Since 15 March 2023 the Multibank Group had been subject to a published warning by the FCA, stating that

   > "This firm may be providing financial services or products without our authorisation. You should avoid dealing with this firm and beware of potential scams….This firm is not authorised by us and is targeting people in the UK."

The FCA's warning in respect of Multibank Group ought to have been brought to the attention of the court in compliance with the petitioner's obligation of full and frank disclosure, along with any explanation that it wished to advance, even if it considered that the warning was unjustified.

2. Mr Naser Taher owned 100% of shareholding of the petitioner. He had a history of abusing court processes. In *Marketmaker Technology (Beijing) Co Ltd* v *CMC Group Plc* [2004] EWHC 2208 (QB) Stanley Burnton J held at [80] that Mr Taher's "application was for extravagant and unjustified relief". Full and frank disclosure had not been given. In another episode of the same case, to be found at [2008] EWHC 1556 (QB), and which concerned an application to commit Mr Taher for contempt, Teare J explained that the application ought not to have been brought *ex parte* and the reason given for urgency was known by Mr Taher to be false. Mr Taher had used the improperly obtained injunctions as a powerful negotiating tool or weapon so as to give rise to a concern that they were being abused, used anonymous communication to seek to place extraneous pressure on the defendants, and had made unjustified claims amounting to an abuse of process. In a further judgment, [2009] EWHC 1445 (QB), Teare J identified seven separate and continuing breaches by Mr Taher of undertakings to disclose financial and other information for the purposes of enforcing costs orders against him, amounting to contempt of court. That finding of contempt had been set aside by the Court of Appeal on the agreement of parties, but still should have been disclosed and explained to this court. The underlying situation which led to the finding of contempt being made, namely that Mr Taher had previously sought *ex parte* orders on a false basis, and had repeatedly failed to

obtemper court orders, should in any event have been disclosed, standing the similarity in the processes being undertaken and the fact that the petitioner sought to persuade the court to accept a number of adverse inferences against the Scottish respondents.

3. The petitioner had misrepresented to the court the nature and timing of its awareness of the sanctions imposed by the FCA on Mr Ford. Documentation from November 2018, when the Upper Tribunal's decision on Mr Ford's appeal against those sanctions had been published, showed that the matter had been discussed fully with Mr Taher by his then adviser, Irish barrister Oliver Connolly. At a meeting in Hong Kong in May 2019, Mr Taher, Mr Connolly and Mr Ford had openly discussed the FCA regulatory issues and the Upper Tribunal decision in the context of Mr Ford's ongoing role as a consultant to the petitioner, and it had been agreed that an opinion should be obtained from a barrister on the issue of whether Mr Ford was permitted, in light of the FCA decision, to provide certain services to the petitioner without contravening the prohibition imposed upon him by the FCA. Mr Ford had then obtained an opinion from Ms Saima Hanif of counsel dated 2 August 2019 and had emailed it to Mr Taher on 9 August 2019. It had then been briefly discussed between Mr Ford and Mr Taher in London in August 2019. Yahya Taher (Naser Taher's son and closely involved in the petitioner's business) had stated in an affidavit before the court in October 2023 that he had been informed in 2019 that the opinion existed. His further position, that his father had never read it, should be regarded as extraordinary and unbelievable. A statement made by Mr Gollits in the English proceedings supported the suggestion that Naser Taher was aware in 2019 of

Mr Ford's history, and contemporaneous correspondence issued by Mr Ford also lent it further credence. It was plain from the material now before the court that the petitioner had been aware at all material times of the FCA Order and Upper Tribunal decision in relation to Mr Ford, but falsely and deliberately represented to the court that it had not been so aware. That was a clear example of the petitioner's willingness deliberately to misrepresent the position in order to achieve its goals.

4. The petitioner's allegation about a bribe paid to the benefit of Mr Smith had been examined in the proceedings for recall of the worldwide freezing order before Deputy Judge Tinkler in the English High Court. The amount paid to CSM Securities had been a genuine investment which had generated profit for investors, and Judge Tinkler had recorded that such had been effectively conceded before him. The alleged bribe was a key part of the petitioner's theory of the case. The entire landscape of its claim changed when it was appreciated that the claimed bribe was a genuine investment which made returns for investors, and that any collateral benefits flowing from them could only amount to fees and charges on those investments.
5. There had been insufficient disclosure of the extent and nature of proceedings involving the same subject matter currently ongoing in the BVI. The Court of Appeal of the Eastern Caribbean Supreme Court had held that there was a good arguable case of fraud against the petitioner's subsidiary in respect of the same circumstances narrated in the petition. The alleged fraud was that the whole process of the raising of proceedings in the BVI by Mex Clearing and then settling them days later by way of a consent order was a fraud, designed to

transfer funds on a speciously lawful basis to the Multibank Group. Trial of that issue had been set down for March 2024 and had only been postponed (after previous refusal to do so) after the raising of the present proceedings. Had this court been informed of these matters, it might not have granted the section 1 order.

6. A report, known as the "Project Saxony" or "K2" report, dated 16 October 2023, had been before the court in October 2023, to support the suggestion that the application was urgent, and making certain claims about when the petitioner was aware of the claimed relationships between parties. However, the content of the report had been severely criticised by Deputy Judge Tinkler. Further, quite apart from its content, it had in fact been available since March 2022.
7. It had not been made clear to the court in October 2023 that since at least April or May 2022 it had been in the mind of Naser Taher to bring proceedings against Mr Ford. He had said as much in his statement in the BVI proceedings, despite making a different representation to the High Court in England, and contemporaneous communications from Mr Ford and Mr Duthie supported that position. Had the court been made aware of this, it would have put into question the possible motives for suddenly seeking a section 1 order in October 2023.

[16] In conclusion, there had been substantial and deliberate non-disclosure by the petitioner on issues key to the court's consideration of the section 1 order. The non-disclosure could not be characterised as inadvertent. The petitioner had acted dishonestly in its presentation to the court. The respondents did not need to demonstrate that the court would not have granted the order had full and frank disclosure been made,

but it was plain that the matters which were not disclosed would have been material to its consideration of the proposed order. In particular, disclosure of Naser Taher's previous approach to litigation would have put the court on notice that he had previously sought extravagant and unjustified *ex parte* relief based on bad claims, had acted in abuse of process and had been held in contempt of court (albeit that finding had subsequently been set aside on the invitation of parties). That would plainly have been material to the court in considering whether to grant a section 1 order. It would have put it on notice that every aspect of the motion for a section 1 order required to be subjected to even more rigorous scrutiny than would normally be the case. Similarly, the failure to disclose the FCA's statement relating to Multibank would have been highly material to the court and was plainly deliberate. The petitioner had painted Mr Ford as having deliberately concealed the history of the prohibition order and fine imposed by the FCA. Proper disclosure would have revealed that there was no such concealment. Had the issue of the "bribes" been properly explained, it would have called into question a critical aspect of the petitioner's case - on what basis was it being suggested that there was an adequate motive for entering into the conspiracy? That should be seen together with what appeared to have been at best partial disclosure regarding the proceedings in the BVI. Had there been full disclosure regarding those proceedings, the allegations of conspiracy could have been placed in their proper context. They were being made in the context of there already being in existence a claim in which allegations of fraud were being made against the petitioner's subsidiary, and where that subsidiary was adopting the same position as was now being adopted by the petitioner in Scotland. It was also material that the petitioner did not come to this court as a matter of urgency as appears to have been suggested, but had apparently been contemplating proceedings since May 2022. All of these issues would not only have been

material in their own right, but they would also have served to put the court on notice as to the veracity of the *prima facie* case and the motivation behind proceeding in Scotland, when the whole issue of fraud was set down for trial in the BVI in March 2024, and where a discharge of that trial had been sought but refused.

[17] It was also notable that the specification granted as part of the section 1 order was extremely wide in its terms. On any view, it was wider than would have been appropriate had full disclosure been made, whether an order for recovery were being made under section 1, or as part of a normal commission and diligence motion had proceedings been initiated without a section 1 order preceding them. For all of these reasons, the section 1 order should be recalled and the property seized should be returned to the respondents. The non-disclosure was deliberate and substantial. Faced with the full facts, the court would have been bound to consider the order in a different light. The court's starting point should be that recall was the proper remedy. Even if it was possible that the petitioner, having made full disclosure, could have persuaded the court to grant a section 1 order, it would nevertheless be appropriate to recall the order in order to underline the importance of full and frank disclosure and to ensure that future applicants abided by their duties.

[18] Turning to the presence or absence of a *prima facie* case, an order under section 1 should not be granted where there was no reasonable basis for the proceedings to be brought. Ill-founded, irresponsible and speculative allegations, or allegations based merely on hope, did not provide a reasonable basis for the grant of a section 1 order: *Friel* v *Chief Constable of Strathclyde* 1981 SC 1, 1981 SLT 113; *Parks* v *Tayside RC* 1989 SC 38, 1989 SLT 345. The petitioner required to have an intelligible *prima facie* case: *Pearson* v *Educational Institute of Scotland* 1997 SC 245, 1998 SLT 189.

[19] The petitioner's case against the Scottish respondents relied upon inaccurate statements of fact and sinister and strained inferences, and was advanced on a false basis. At a time when Naser Taher and the petitioner were facing an imminent trial of fraud allegations in the proceedings brought in the BVI, the petitioner had applied for and obtained the section 1 order and had successfully used these proceedings as its reason for seeking to delay that trial. Almost all of the petitioner's substantive factual averments were in dispute.

[20] The conspiracy that the petitioner alleged was difficult or impossible to understand. Insofar as it could be understood, it made no sense. The alleged conspiracy was said to have been commenced at some point on or after 18 December 2020 and must have had effect no later than 22 December 2020, when Mex Securities first disputed the consent order. That order (and part of the settlement underlying it) had been implemented on 18 December, when €36 million or so was paid to the petitioner's subsidiary, said to be in implement of the consent order signed on 14 December 2020. It was the repudiation of the consent order and the raising of proceedings thereafter in Luxembourg and the BVI which formed the substantive actions said to have been taken in implementation of the alleged conspiracy. Bearing that in mind, the telephone calls between 7 and 17 December did not relate to the correct period. It made no sense to suggest that the respondents were conspiring to renege on the consent order at a stage where it would still have been possible to avoid it being granted, or when the €36 million still had not been paid over.

[21] In any event, there was no proper basis to infer that the calls were sinister. The Scottish respondents, Mr Gollits and Von Der Heydt AG had business dealings with each other unconnected to the petitioner. In particular, they were each connected to investments being made in the Engenera Green and US NPL Bonds. The petitioner had asserted in its

ex parte application in October 2023 that a €7 million bribe had been paid to Mr Smith to induce him to cause Mex Securities to challenge the consent order, but it now transpired that that sum represented investments made by Von Der Heydt AG into those bonds. The petitioner had conceded as much before Deputy Judge Tinkler. It was therefore only the fees on the investment transactions which could theoretically constitute a bribe. However, the Engenera Green Bond investments all significantly predated the alleged conspiracy. Documents and correspondence relating to the Engenera Green Bonds demonstrated the involvement of Mr Gollits on behalf of Von Der Heydt AG since at least October 2019. They did not involve Mr Smith or CSM Securities. On no view could they be related to the alleged conspiracy. The US NPL investments did involve Mr Smith, in his capacity as director of CSM Securities, but those investments also commenced before the alleged conspiracy. They were therefore irrelevant to December 2020 and the alleged conspiracy, yet the sums invested appeared to be relied upon by the petitioner as part of the alleged bribe. Discussions regarding investments had occurred during December 2020.
Mr Cormack's telephone contact with Mr Smith occurred on 15 and 16 December 2020, at which time Mr Smith was settling investment trades of around $250,000 into the US NPL Bonds. Contemporaneous emails supported that. Mr Cormack had been in communication by email and phone with Mr Smith to discuss this trade. These emails are entirely consistent with the position of Mr Cormack.

[22] In relation to Mr Ford, it was accepted that Mr Gollits participated in limited communication with him regarding the dispute between the Multibank Group and Von Der Heydt AG in December 2020, but that was limited to being asked by Mr Gollits to assist with trying to find a commercial solution, a role which Mr Naser also subsequently asked him to undertake. Once the relationships amongst the respondents, apart from those with the

petitioner, were appreciated, there could be no proper basis to infer that telephone calls made between 14 and 16 December involved the alleged conspiracy. The timing of phone calls was the only vague connection between the alleged conspiracy and the actions of the Scottish respondents. They had no interest in the dispute between the Multibank Group and the Von Der Heydt companies, or in involving themselves therein. The conspiracy allegation was fantastical. The petitioner's hypothesis required the fees associated with the investments after 17 December 2020 to be the basis of a complex conspiracy involving numerous parties and leading to expensive and lengthy proceedings in the BVI. That was beyond inherently unlikely. The much more plausible position was simply that the investments made after December 2020 represented a continuation of the established business between some of the respondents. There was no basis for any implication that the genuine investments in the Engenera Green and US NPL Bonds were dependent upon anything that happened in relation to the consent order.

[23] The petitioner further claimed that part of the purpose of the alleged conspiracy was to conceal Mr Ford's interest and involvement with investment business in light of the FCA proceedings. However, Mr Ford had been open regarding his history with the FCA and the petitioner failed to specify any particular unlawful activity on his part. The petitioner also claimed that it was unaware that Mr Cormack was an associate of Mr Ford, but contractual documentation dating from June and July 2018 made their connection clear.

[24] As to the petitioner's claimed losses, the legal and other costs incurred in litigations furth of Scotland could not properly form the basis of a proper claim in Scotland. The remainder of the losses claimed in the petitioner's action was said to flow from the fact that it was required to postpone the launch of a new bond on account of the reputational issues which arose as a result of the consent order having been reneged on. The Scottish

respondents contended that the bond in question failed as a result of lack of interest in the market by February 2020, long before the consent order. The petitioner had not produced any documentary evidence to vouch the propositions that it made in support of its claim. It failed to provide even the most basic specification of the work said to have been done in order to issue the bond, when that work was done, the reasons for the abandonment of the bond, or the date at which it had to be abandoned. There had been no attempt to claim the losses alleged by the petitioner in the BVI. The irresistible conclusion was that this was not a genuine claim, but one which had been advanced for ulterior, strategic reasons connected to the BVI litigation, consistent with how Mr Taher had conducted litigation in the past.

[25] Taking these matters into account, there was no *prima facie* case, and the section 1 order should be recalled.

Petitioner's submissions

[26] On behalf of the petitioner, senior counsel submitted that an order under section 1 of the 1972 Act could be granted *ex parte* if the court was satisfied that the documents sought to be recovered were essential to the petitioner's case and were at risk of destruction or concealment: *British Phonographic Industry* v *Cohen* 1983 SLT 137 at 138, per Lord President Emslie. Where the order was sought to recover documents in relation to prospective proceedings, the petitioner had to demonstrate a stateable or *prima facie* case for those proceedings: *Pearson*. That was not judged by the standards of relevancy and specification applied at procedure roll, the test being whether there was an intelligible *prima facie* case: *Ted Jacob Engineering Group Inc* v *RMJM* [2014] CSIH 18, 2014 SC 579 at [60]-[62] and [76], per Lady Paton. Where an order was sought in connection with an existing action before the closing of the Record, it might be granted where it could be shown that the

documents were necessary to make averments more specific: *Moore* v *Greater Glasgow Health Board* 1978 SC 123, 1979 SLT 42. Where it was contended that there was no proper basis for the necessary averments, the court proceeded on the inference that responsible counsel who drafted the pleadings did have evidence that warranted the making of those averments: *Moore*. It was common ground that when any *ex parte* application was made there was a duty of full and frank disclosure on the applicant: *Bell*. Lord Osborne had said in *Olsen* that a section 1 order could be recalled before final determination of the petition where it could be "summarily and conclusively shown that the basis upon which the original order for recovery had been obtained was false" but the operative words were "summarily and conclusively". That coincided with the summary of English law on the approach to be taken to alleged non-disclosure by Carr J in *Tugushev*. Three of the propositions in that case were germane to this case. The first was that there must be sensible limits to what could be put before the court on an *ex parte* application, and the ultimate question was not whether there could have been more disclosure but whether the court was misled by the non-disclosure. Secondly, a dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits. Thirdly, it was inappropriate to set aside an order of this kind on the ground of non-disclosure where proof of the non-disclosure depended on proof of facts which were themselves in issue in the case; rather, the order would be set aside only where "the facts are truly so plain that they can be readily and summarily established".

[27] Those legal propositions could be applied here. There was no proper basis to rebut the assumption that responsible counsel who drafted the pleadings had evidence that warranted the averments in the draft summons before the court when the section 1 order was granted. The draft summons did present a stateable or *prima facie* case. The court could, further, be satisfied that the documents were essential to the petitioner's case and were at

risk of destruction or concealment. On the latter point, the Upper Tribunal decision in *Ford* v *Financial Conduct Authority* provided more than adequate vouching. The grounds on which the Scottish respondents were seeking recall of the order were inept because they depended on proof of facts which were part of the merits of the action and would require the court to conduct a mini-trial. The motion for recall on the ground of failure to disclose was irrelevant. A recall of the section 1 order having been sought, the court should simply consider the material presented to it in the context of that motion and decide the question *de novo* without considering again what had gone before. In any event, the court could allow the petitioner access to the documents recovered in its capacity as pursuer in the commercial action, to enable its existing averments there to be made more specific. There was a considerable degree of artificiality in the apparent position of the Scottish respondents that the court should recall the order made in the petition, return the seized documents to them and then separately deal with the inevitable motion the pursuer would then make in the action for commission and diligence for the same documents.

[28] In any event, none of the allegations of non-disclosure, even if well-founded, reached the level where any omission resulted in the court being misled. As to the FCA warning, the petitioner's averment that it had not been the subject of regulatory discipline or penalty in the jurisdictions in which it operated was true. It did not operate in the UK. The FCA wrongly suspected that a website gave access to UK consumers to services provided by the petitioner. The petitioner agreed to block access by UK consumers to its website. The FCA had withdrawn the warning as of 28 March 2024.

[29] In relation to Mr Naser Taher's reputation and character, the respondents' criticisms related to proceedings 20 years ago that led to a first instance finding of contempt in 2009, 15 years ago. That had been set aside by the Court of Appeal. A first instance finding of

contempt that had been discharged on appeal 15 years ago was not material. In any event, the contempt finding had been referred to in copies of judgments in the BVI produced to the court in October 2023.

[30] The petitioner's averment that it was only in April 2022 that it was given to understand the true nature and extent of Mr Ford's regulatory prohibitions was not material to its case. That case was based on the undisclosed business relationship amongst Mr Ford and the other Scottish respondents, Mr Smith, CSM Securities and the Von Der Heydt companies. It was that undisclosed business relationship that was at the heart of the conspiracy. The petitioner had never suggested that it was unaware of there being an FCA issue with Mr Ford, or that it did not have the means of finding out the detail had it chosen to investigate. It said only that the gravity of the finding was downplayed by Mr Ford and that it did not in fact learn the full detail until 2022.

[31] As to the alleged "bribe", reliance on what had been said by Deputy Judge Tinkler in his judgment was misplaced when that judgment was under appeal to the Court of Appeal. The petitioner denied having made any relative concession before the judge. It maintained that the Engenera Green and US NPL Bonds were not genuine and profitable investment schemes. In any event, the matter of the "bribe" went to the merits of the case and would require a mini-trial to resolve. The petitioner averred that one of the motivating factors in the conspiracy was to protect the ability of CSM Securities to receive funds from the Von Der Heydt companies. The precise figure was not critical, and might in any event be informed by the recoveries under the section 1 order. Mr Ford had provided a statement to the court in which he accepted that he had a contingent interest in two fiduciary estates of CSM Securities, without giving any detail. The nature, extent and value of that interest was highly material to the petitioner's case. Further, in the proceedings in the BVI, Von Der

Heydt Invest SA alleged that Mr Smith was part of the fraudulent conspiracy that produced the consent order. Despite that, Von Der Heydt & Co AG, an associated company, continued to make investments in or through CSM Securities, which was run by Mr Smith. Continuing a business relationship with someone whom one suspected had defrauded you was extraordinary. The fact that the relationship had continued despite apparent allegations of fraud against Mr Smith was evidence that the conspiracy had had the result that the petitioner alleged, namely protecting the ability of CSM Securities to receive funds from the Von Der Heydt companies.

[32] The existence of the proceedings in the BVI had been referred to in the draft summons accompanying the summons. The Scottish respondents were not party to the proceedings in the British Virgin Islands and thus made no allegations in them against the petitioner. Only Von Der Heydt Invest SA and Mex Securities were also party to those proceedings, the latter taking no active part in them. The principal reason for Wallbank J having discharged the scheduled trial was that the available evidence was likely to be limited because so few of the relevant persons were party to the proceedings and more information was likely to emerge in Scotland because of the wider inclusion of parties here.

[33] Submissions made in the English proceedings relative to the “Project Saxony” or “K2” report dated 16 October 2023, and the Deputy Judge’s findings relative thereto, were irrelevant to this case. Urgency in the sense of proximity between the date of discovery of the grounds of action and the commencement of proceedings was not relevant to the application considered by this court in October 2023. No submission was made regarding urgency. The submissions related to the *prima facie* case and to the risk of documents being lost or destroyed. A copy of the K2 report was produced with the section 1 petition and its

relevance was that it summarised evidence about the relationships among the respondents which was part of the *prima facie* case.

[34] Nothing turned in these proceedings on the date when Mr Taher first had suspicions about what was going on. It was obvious from the material presented to the court that considerable work had been done in advance of the presentation of the petition.

[35] As to *prima facie* case, it was accepted that the petitioner had to satisfy the court in that regard. The petitioner sought to recover documents that would enable it to make the averments in its summons more specific. The respondents' contention that the existing averments in the summons provided a weak basis for inferences had to be viewed in that light.

[36] In essence, the petitioner's case involved the proposition that it and the Von Der Heydt companies had been jointly involved in investment notes issued by companies controlled by a company known as Oaklet. By 2019 a dispute had broken out with Oaklet and it was in consequence decided to swap the Oaklet notes for new notes issued by Mex Securities, a company which the petitioner maintained was a Von Der Heydt company. The petitioner obtained revenue from the trading activity on investment of the funds raised by the notes. Mr Ford and Mr Smith had been involved in that note swap and remained involved with Mex Securities thereafter. Von Der Heydt & Co AG gave an undertaking to the petitioner not to advise noteholders to withdraw funds from the new notes and to use its best endeavours to introduce investment of at least €10 million. From September 2020 Von Der Heydt Invest SA was under intense regulatory pressure. One particular problem was that it was not allowed to invest in gold and that formed part of the asset class held in the new notes. On 2 December 2020 Mr Gollits told the petitioner that Von Der Heydt & Co AG had to withdraw funds from the new notes, saying untruthfully that this was due to a

new regulation. On 4 December 2020 he issued instructions to Mex Securities on behalf of Von Der Heydt & Co AG to transfer a total of €12.3 million out of the new notes. That stated wish and the intention to withdraw the funds was an anticipatory breach of Von Der Heydt & Co AG's undertaking to the petitioner. From this point there was a dispute between the petitioner on the one hand and Mr Gollits and the Von Der Heydt companies on the other. Mr Gollits had already been in contact with Mr Ford and Mr Smith on 1 December 2020. On 7 December 2020 he copied to them (and Mr Volotovskiy) his demand for the transfer of the funds. Mr Smith told him that he was in transit to Dubai to have discussions with the petitioner and would be in contact when he had an update. He was representing Mex Securities in those discussions. On 10 December 2020 Mex Clearing Limited (as assignee of the petitioner) commenced an action against Mex Securities in the BVI for payment of €36.385 million and Mr Smith was in email contact with Mr Volotovskiy about that. On 14 December 2020 the petitioner and Mr Smith (on behalf of Mex Securities) reached a compromise agreement that was incorporated into a consent order granted that day. It was Mr Smith who instructed the solicitors acting for Mex Securities to sign the consent order. The compromise agreement involved an assignation to Mex Securities of a claim by the petitioner against Von Der Heydt & Co AG for breach of its undertaking. The result was that of the €43 million or so held by Mex Securities, €36.4 million was paid to Mex Clearing. Approximately €7 million was left in Mex Securities to fund an action by it against Von Der Heydt & Co AG. That was inadequate to meet the demand of Von Der Heydt & Co AG and Von Der Heydt Invest SA to withdraw €12.4 million and had the result that their investors' funds were effectively lost. A letter was received from a firm of solicitors, Conyers, bearing to act for Mex Securities and dated 22 December 2020, disputing the validity of the putative settlement. Litigation ensued in several jurisdictions and the

agreement in Dubai had not been implemented beyond the payment of the €36.385 million due by Mex Securities to Mex Clearing.

[37] The petitioner's case was that Mex Securities was in breach of contract, that having been brought about by the respondents and others, who conspired to induce Mr Smith to bring about the breach by Mex Securities. The unlawful means conspiracy had continued into the ensuing litigation beginning with the action brought by Mex Securities in Luxembourg and that brought by Von Der Heydt Invest SA in the BVI, in which false allegations of fraud were made against the petitioner. The competing positions of the parties relative to control of Mex Securities were key to the case. The respondents maintained that it was controlled by Mr Taher, but he denied that. The Deed of Settlement of the Oaklet dispute in September 2020 defined Mex Securities as a Von Der Heydt party rather than as a party associated with the petitioner. That deed was signed by Mr Volotovskiy for Mex Securities, witnessed by Mr Smith. That was consistent with common sense. If, as the respondents maintained, Mex Securities was under the control of Mr Taher, there would have been no point in him meeting Mr Smith in Dubai and having protracted negotiations with him. It was not in dispute that at the beginning of the meetings Mr Volotovskiy was the sole director of Mex Securities, but Mr Taher could - if he had truly been in control of the company - have used that control to oust him and replace him with his own nominee. He could have used his own nominee to put in place an agreement with Mex Securities at will. Instead, Mr Smith not only negotiated with Mr Taher, but engaged with Mr Volotovskiy. Formalities were gone through to secure the resignation of Mr Volotovskiy and his replacement by Mr Smith. The events from 17 December 2020 also made no sense if Mr Taher was in control of Mex Securities. All the acts on the part of the petitioner and Mr Taher were consistent with the fact that Mex Securities was under the control of others

and it was clear that Mr Smith was himself the one who was ostensibly exercising control. As Mr Smith set off for Dubai he was in contact with Mr Gollits by email copied to Mr Ford. Given the regulatory pressure that the Von Der Heydt companies were under because they had entered into an unauthorised class of investment and urgently needed to withdraw the funds, it was only to be expected that Mr Smith would update them as negotiations progressed, as he had said he would do in his email. His hotel bill showed that he was in communication while in Dubai with Mr Ford, Mr Cormack, Mr Gollits and Mr Volotovskiy. Given the terms of his last communication to Mr Ford and Mr Gollits as he left for Dubai, an available inference was that Mr Smith did discuss with them the issues surrounding the petitioner, Mr Gollits and the Von Der Heydt companies.

[38] It was Mr Smith who had raised the need for a new board to be appointed to Mex Securities in connection with the Oaklet note swap. In the event Mr Volotovskiy, an old friend of Mr Smith, had been appointed. The shares in Mex Securities were held by a Dutch foundation or Stichting and it was Mr Volotovskiy who asked for it to sign the resolution necessary to change the directorship from him to Mr Smith on 14 December 2020. Between 14 and 16 December 2020 Mr Smith and Mr Volotovskiy liaised to change the directorship. That was all consistent with Mr Smith having control of Mex Securities and having acted with Mr Gollits in the initial appointment of Mr Volotovskiy. On 14 December 2020 Mr Smith instructed solicitors on behalf of Mex Securities on the basis that he had taken over as manager from that day. On 15 December 2020 Mr Volotovskiy had emailed copies of the BVI claim to Mr Gollits saying that he had been instructed to do so by "the new company director" and stating that he had been replaced as a director.

[39] Von Der Heydt & Co AG was already in regulatory trouble. A claim by a company associated with the petitioner against Mex Securities for €36.385 million, leaving only

€7 million in that company, was potentially very serious. The prospect of a further claim against Von Der Heydt & Co AG was even more serious. The natural inference was that the telephone calls that admittedly took place over this period between Mr Smith and the others did include discussion of the dispute with the petitioner. By the time that Mr Volotovskiy sent a copy of the claim to Mr Gollits on Mr Smith's instructions, the deal had been struck and the consent order entered. By that stage, if the respondents wanted to protect the position of the Von Der Heydt companies and their own personal interests, they had to stop implement of the agreement, which is what the petitioner maintained that they did, by getting Mex Securities to maintain that it had never been validly entered into. The close business associations amongst Mr Ford, Mr Cormack, Mr Smith and Mr Gollits and the companies with which they were concerned, and the flow of funds from the Von Der Heydt companies to them, gave all of those parties motivation to ensure that Mex Securities withdrew from the agreement. Any delay in securing the return of money to the Von Der Heydt companies would further exacerbate their regulatory problems. It was in their interests to ascribe that delay to the petitioner, which is what was done in the Luxembourg proceedings brought by Mex Securities and the BVI proceedings brought by Von Der Heydt Invest SA. The business connections amongst the defenders had continued notwithstanding that Von Der Heydt Invest SA accused Mr Smith of fraud. All of that was consistent with the existence of a conspiracy amongst the respondents to protect their own interests at the expense of the petitioner.

[40] The petitioner's *prima facie* case had been set out responsibly in the level of detail that the available evidence permitted. The section 1 order was necessary to enable further specification to be provided. Mr Ford had regulatory problems of his own and was seldom in plain sight, with the outward sign being mentions of "Stewart" in emails. His surname

seldom if ever appeared, which was no surprise. Mr Cormack was a director and shareholder in Melville Consulting Partners Limited, Melville Consultancy Limited and Regal Consultancy International Limited, and maintained that he was their sole shareholder and director. However, by his own admission Mr Ford was a consultant to Melville Consultancy Limited by dint of a consultancy agreement dated 17 June 2018. He was not named in that agreement. The inference was that Mr Cormack was allowing himself and the company he nominally controlled to serve the ends of Mr Ford. That inference was consistent with the ownership of Mr Ford's family home being in trust with the trustee being a company nominally controlled by Mr Cormack. Mr Duthie was now a director of Melville Consulting Partners Limited. All of the individuals were linked together in business and that extended to Regal Consultancy International Limited doing business with CSM Securities. Mr Cormack, through his company Regal Gibraltar, did business with CSM Securities and Von Der Heydt & Co AG. Mex Securities was the common link to the petitioner and the induced breach. CSM Securities was the common link that the respondents were known to have for the present. Mr Gollits, CSM Securities (nominally controlled by Mr Smith) and Von Der Heydt & Co AG, along with Mr Cormack's Regal Gibraltar, did business together in relation to NPL Bonds. In addition, Mr Ford, Mr Cormack, Mr Gollits, Regal Consultancy International Limited and Von Der Heydt & Co AG did business together in relation to the Engenera Green Bonds. One project was a €5 billion bond scheme issued by CSM Securities with Von Der Heydt & Co AG as the adviser and an issue date in August 2022. By that time Von Der Heydt & Co AG's associated company, Von Der Heydt Invest SA, was accusing Mr Smith of fraud in the BVI and yet CSM Securities and Von Der Heydt & Co AG were in business together to a scale of €5 billion. That was highly suspicious. Hovering above all of that were the links between

Mr Ford, Mr Cormack and Mr Smith laid out in the Upper Tribunal judgment and Mr Ford's contingent interest in two fiduciary estates of CSM Securities. That all linked to the petitioner's averment that Mr Ford's motivation to put pressure on Mr Smith to renege on the Dubai settlement agreement was to protect the ability of CSM Securities to receive funds from the Von Der Heydt companies. The interweaving web of links among the respondents and the obvious need to protect the Von Der Heydt companies, which were already in regulatory trouble, provided a rational explanation for the other respondents causing Mex Securities to renege on the deal struck in Dubai.

[41] Mr Smith's position was at the very least consistent with a *prima facie* case. He stood accused of fraud by both sides. He was accused by Von Der Heydt Invest SA in the BVI of being party to the petitioner's conspiracy. Mr Ford, Mr Cormack and Mr Smith had all provided witness statements to the court, which were more interesting for what they did not say than for what they did. There was ample basis on the existing material to cross-examine them and the section 1 order might provide further specification of the case against them. The statements were self-serving, designed to prevent the section 1 recoveries being provided to the petitioner.

[42] The petitioner's claim to have suffered loss and damage as a result of the respondents' activities were challenged, but that was simply a factual question and thus a matter for proof. There was an adequate *prima facie* case to allow the section 1 recoveries to be disclosed. There was no challenge to the proposition that there was a sufficient risk of loss of evidence to merit a section 1 order.

Decision

Failure to disclose

[43] It is common ground that any party seeking an order of the court on an *ex parte* basis requires to inform the court with all due candour of any matter known to it and reasonably capable of affecting the decision to be made. In no circumstances can that duty be more intense than in the case of an application for a "dawn raid" (especially on residential premises) under section 1 of the 1972 Act. The observations made by Hoffmann J in *Lock International* and by Scott J in *Columbia Pictures* about the likely impact of Anton Piller orders apply equally in the context of that section. Other than in exceptional cases, however, it may be difficult to determine whether a known but undisclosed matter truly ought to have been recognised as one reasonably capable of affecting the court's decision, or was simply omitted in consequence of a responsible exercise of judgment by the pleader (even when that judgment can subsequently be justifiably criticised as erroneous).

[44] I have considered what was said on this subject by Carr J in *Tugushev.* Although there is, as one would expect, much wisdom in her Ladyship's observations, I consider that it is more consistent with the general approach of Scots law to deal with these matters by way of broad and simple principles, rather than by attempting to formulate detailed rules to be applied presumptively to particular narrow sets of circumstances. First and foremost, where a question of failure to disclose arises in this context, the overriding question is what reaction by the court is required in the interests of justice. Those interests, in this connection as in many others, are not necessarily limited to the proper conduct and disposal of the litigation at hand, but may include wider considerations as to whether or not a particular decision might serve a useful purpose *pour encourager les autres*. Thus, in cases where there has obviously been a deliberate or reckless withholding of material which was or ought to

have been appreciated to be material to the court's decision, it may well be appropriate, in order to avoid any potential reward for an abuse of the processes of the court, to recall the order which was granted and to decline entirely to consider any fresh application to the same or a similar end. If, on the other hand, it is less than clear that any undisclosed matter was deliberately or recklessly withheld, or whether it should have been seen as clearly material to the court's decision, then it is likely that the appropriate reaction will simply be to consider *de novo* the whole application, which is what would in any event be done when an application for recall is made. It has long been recognised that for the court to enter in this context into any attempt to resolve issues of fact disputed on reasonable grounds would be entirely inappropriate even if it were possible. Should such issues ultimately be resolved as the litigation proceeds, and reveal that an order was indeed obtained in circumstances where it should not have been, the court has wide powers in relation to expenses which may be deployed to address that situation.

[45] Turning against that background to the particular allegations of non-disclosure made in the present case:

1. I do not regard the failure to mention the FCA warning against the background of the claim that Multibank had not been the object of regulatory discipline or penalty in the jurisdictions in which it operated as a failure to disclose anything of materiality; the FCA does not in point of fact regulate Multibank and the statement which was made was neither untrue nor misleading. In any event, in determining whether or not to grant the section 1 application, I was very conscious that the story disclosed by the petition and summons was highly likely to be controversial, that there would be another side or other sides to be related, and that much more information was probably going to emerge as time went on.

Against that background, I did not pay very much regard to the claims made about either the good regulatory record of the petitioner or the supposedly bad character of the respondents, with the exception of what the Upper Tribunal had had to say in the exercise of its judicial functions about Mr Ford - and even then, bearing acutely in mind that what he did many years ago might well not represent an accurate guide to his conduct today. Rather, I concentrated on the primary facts which I was required to take *pro veritate* and which were alleged to constitute the evidence from which the existence and nature of the claimed conspiracy could be inferred. The regulatory status of Multibank was not one of those facts.

2. The previous litigation history of Naser Taher falls into the same category. In determining the section 1 application I did not proceed on the basis that he was or was not someone with any relevant litigation history; the only assumption I made (one which the court is entitled if not bound to make in these situations) is that the factual situation set out in the pleadings was one which responsible counsel had decided there was a proper basis to state. Even had the choice been made to disclose the criticisms made of Mr Taher's behaviour in previous litigations, I would have been very doubtful as to what use I could properly have put that information in determining the motion. Just as in the case of Mr Ford, I would have been conscious that historic behaviour might not constitute a reliable guide to present conduct, and would have been inclined to give the matter very little weight overall.

3. Having considered the material laid before me on the recall motion as to the extent of the petitioner's awareness of Mr Ford's regulatory difficulties, I am

left in some doubt that an entirely true and accurate account of the matter was provided to me on the application for the section 1 order; that material plausibly suggests otherwise. However, the petitioner's explanations as to why that conclusion should not be drawn remain untested and it cannot safely be concluded as matters stand that any attempt deliberately to mislead the court was undertaken. Moreover, even if the application had been presented on the basis that the petitioner knew of Mr Ford's history fully from the outset, that would not have detracted from the analysis of the primary averred facts which led to the grant of the section 1 order; the claimed existence of a conspiracy was not dependent on whether Mr Ford was known by the petitioner to have a regulatory history from the outset, or whether it only found that out after the event.

4. In relation to the alleged "bribe" for CSM Securities, it appears on closer analysis of the draft summons that that has always been a somewhat hyperbolic interpretation of what is frankly described in Article 36.3 of the draft summons as being a financial inducement in the form of investment in bonds issued by that company. The petitioner maintains that the bonds are part of a fraudulent scheme rather than being genuine and profitable investments, and that is said to furnish the disreputable element to the inducement, justifying the ascription of the word "bribe" to the whole situation. The petitioner does not accept that anything different was said to Deputy Judge Tinkler. Although the petitioner's position about the nature of the financial inducement offered to CSM Securities could have been expressed more clearly (or perhaps more moderately) than it

was, ultimately there was no material failure to disclose, or misrepresentation, in this connection.

5. The history of legal proceedings in the BVI (or indeed elsewhere) was of little relevance to the decision on the application for the section 1 order. The respondents' suggestion that these proceedings were calculated to derail the scheduled trial in the BVI is difficult to accept without more given that the question of a discharge of that trial remained a matter for the discretion of Wallbank J, who might easily have refused it notwithstanding the existence of these proceedings. Separately, decisions made by judges in other jurisdictions in litigation between different parties and dealing with different material can have but very limited weight in informing the decisions of this court, especially in procedural matters such as section 1 applications. I would have been surprised then to have been presented with the level of detail about the foreign proceedings which the respondents now desiderate.

6. I have no recollection or note of having been referred to the Project Saxony/K2 report in the course of the hearing of the section 1 application. Since that hearing was conducted by way of WebEx, I had thought that a recording of it would be readily available, for the use of myself and, more importantly, the respondent in preparing its recall motion. However, it transpired that no recording is routinely made. I have directed that future *ex parte* hearings before me be recorded so as to avoid this issue arising in future, but for present purposes it is necessary to proceed on the basis of my notes and recollection, which indicate that neither the content nor the date of the report in question had any relevance to my decision.

7. The suggestion that the petitioner had it in mind for some time to raise these proceedings or something similar to them may or may not be correct, but section 1 applications, unlike most interim interdict motions, do not usually proceed on a narration that relief is required against a wrongful act which is happening or is apprehended to occur imminently. Rather, the suggestion is that were notice of the application to be given to the respondent, it is likely that advantage would be taken of the resultant hiatus in order to destroy or conceal the targets of the exercise. The point at which the petitioner first conceived that it might take the action which it ultimately took in October 2023 was not, accordingly, a matter which I would have regarded as of any moment in the disposal of the application, and I would not have expected to have been informed about that matter.

[46] It follows that none of the criticisms advanced in relation to the supposed lack of candour of the petitioner in presenting its application for the section 1 order, whether individually or in conjunction with others, meets the legal criteria already identified for justifying recall of the order on that ground. The recall motion falls to be considered on its substantive merits, with the onus again resting on the petitioner to demonstrate, on the material now available and taking into account what is said and shown by the respondents, that it should continue in effect.

***Prima facie* case**

[47] When considering the concept of a *prima facie* case in the context of a section 1 order, it is important to bear in mind that the 1972 Act made available, amongst other things, the facility for the court to order the seizure and detention of documents in relation to which it

appears that a question may relevantly arise in civil proceedings which are likely to be brought. The minimum requirements for the grant of an order under section 1 are, therefore, that civil proceedings are likely to be brought and that, in those proceedings, a question may relevantly arise as to the material at which the section 1 order will be directed. In relation to the first requirement, it is assumed that no proceedings are likely to be brought without a proper evidential basis, but - crucially - that some element of that evidential basis may be found in the material at which the section 1 order will be directed. The question thus becomes how closely the court should examine the sufficiency of the material already available to the prospective pursuer before determining that an action is, indeed, likely to be brought. That bar has necessarily been set relatively low; the prospective pursuer need not show a *prima facie* case which could confidently be expected to pass muster against the standards which would be applied at procedure roll, but merely an "intelligible" such case - *Pearson*, *Ted Jacob Engineering*. To demand a higher standard of the prospective pursuer at the point of application for the section 1 order would risk stultifying the facility which Parliament has determined should be available to persons in that position. Since averments of primary fact made by an applicant for a section 1 order fall to be taken *pro veritate*, in consequence of the presumption identified in *Moore*, that responsible counsel who drafted the pleadings had evidence that warranted the making of those averments, the scope for looking behind such averments is decidedly limited. There may be occasions, in the context of a recall motion, where material provided by a respondent sufficiently undermines the plausibility of the petitioner's averments so as to justify a departure from that general principle, but the mere fact that there is a dispute about one matter or another on apparently reasonable grounds does not warrant such a course of action. The position is different in relation to matters of possible inference from primary factual averments; in that situation

the court is free to assess for itself the validity of the suggested inference, but always against the background, just explained, that what is being looked for is intelligibility rather than any more exacting standard. That form of describing the test is now to be preferred to such criteria as the "speculative" or "hopeful" nature of the case, which were deployed in the earlier cases such as *Friel* and *Parks*, but appear to me imperfectly to express the approach more recently endorsed at appellate level, especially in *Ted Jacob Engineering*. In particular, the fact that the court thinks, on the basis of the material available at the time of application for or recall of a section 1 order, that a suggested inference necessary to the prospective case is one which is unlikely ultimately to be drawn, ought not to be regarded as a sufficient reason to refuse or to recall that order.

[48] Applying those principles to the present case, it became apparent in the course of the hearing of the recall motion that there were real difficulties with the supposed unlawful means by which the petitioner contended that the respondents had given effect to their alleged conspiracy to advance their own interests to its detriment. Firstly, the averment that those unlawful means involved Mr Ford carrying on, facilitated by the other respondents, supposedly illegal involvement in regulated financial activities, contrary to his lifetime FCA ban, appears in context to describe (and inspecifically at that) something that was a benefit of the alleged conspiracy rather than a means of giving effect to its aims. Secondly, the allegation that another of the unlawful means deployed to give effect to the conspiracy was the provision of "bribes" by the Von Der Heydt companies loses much if not all of its force once it is appreciated that what is actually being described is investment in bonds. While it was made clear on behalf of the petitioner in the course of the hearing that it did not regard those investments as genuine (in the sense that it contends that they will, by design, provide no return to investors and that the money invested will be appropriated by some or all of the

respondents), neither the petition nor the summons goes so far as to allege that in terms. It follows that the court could not, at least as matters currently stand, proceed on the basis that there is any unlawful quality about the investments, disqualifying them from representing unlawful means by which the alleged conspiracy was given effect.

[49] There does, however, remain the petitioner's allegation that Mex Securities was caused to renege on a binding settlement agreement and to repudiate a relative consent order in furtherance of a scheme to benefit the respondents and harm the interests of the petitioner. That it did renege on what was at least an apparently binding such agreement, and attempt to repudiate the consent order, does not appear to be in real dispute amongst the parties. The suggestion that it did so in furtherance of the alleged conspiracy remains a matter of inference (as would be the case in most instances where a conspiracy is alleged). The suggested inference is by no means one which will necessarily be drawn at the end of the day. There are clear difficulties with it (at least as matters currently appear), which counsel for the respondents highlighted in the course of his submissions, as already noted. The petitioner's theory of the case may have to surmount the hurdle of a procedure roll debate, when the test to be applied to its sufficiency will not be limited to one of mere intelligibility. It will ultimately, if necessary, be tested at proof and a judgment made at that stage will proceed on the basis of a far richer seam of evidence (for all parties) than could possibly exist at this stage. For now, applying the intelligibility criterion alone, and deliberately expressing matters in very general terms so as to avoid any suggestion of prejudgment at later stages of the litigations, the petitioner sets out a background of long-standing business relationships amongst the respondents and the Von Der Heydt companies, and the regulatory difficulties which those companies experienced and which might be thought to have brought their interests into conflict with those of the petitioner

and its group. It narrates the benefits which it apprehends flow to the respondents from the maintenance of investment by the Von Der Heydt companies in the bonds described above, and thus a potential motive for the respondents to assist those companies in their difficulties. It describes the communications which took place amongst at least some of the respondents while Mr Smith was in Dubai negotiating on behalf of Mex Securities the settlement of the action raised by Mex Clearing and the disintegration of the apparent agreement shortly thereafter. All of that amply provides an intelligible basis upon which an inference of the existence of the alleged conspiracy might proceed. The ways in which loss is said to have been caused to the petitioner in consequence of that conspiracy are clearly expressed and not obviously without a basis in fact and law. Taken as a whole, all that is required in order for the *prima facie* case element of a section 1 application to be satisfied is present.

[50] The other requirements for a section 1 order to be made, *viz*, that there is a risk of destruction or concealment of the material at which the order is to be directed, and that a question may relevantly arise in the intended proceedings as to that material, were not seriously put in issue by the relevant respondents. There was a mild suggestion, narrated above, that the section 1 order was too wide in its scope, but that was not developed by counsel, perhaps for fear of detracting from the principal relief sought, namely recall of the order *in toto*. The scope of the order was gone through extensively at the *ex parte* hearing, and I required some changes to be made to what was originally sought before approving a narrower version. The facts narrated in the Upper Tribunal's judgment on Mr Ford's appeal against his FCA penalties would have rendered it inexpedient for the respondents to mount any argument that the targeted material was not at risk of destruction or concealment in the absence of a section 1 order, and no such argument was made.

[51] I add finally that I would not have refused to recall the section 1 order, had circumstances indicated that that was otherwise appropriate, on the basis that the petitioner could have recovered them by way of commission and diligence in the commercial action. The legal tests to be satisfied in that context differ considerably from those to be applied in an application for a section 1 order, and it is by no means obvious that all of the documents properly made the subject of the latter process would be recoverable by way of the former. However, had I been otherwise persuaded to recall the section 1 order, I would in the particular circumstances of this dispute have directed that the material already seized remain in the custody of the court for such short period as might be necessary to enable a motion for commission and diligence by the pursuer in the action to be enrolled and decided.

Conclusion

[52] I refused the respondents' motion to recall the section order for the reasons stated.