EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE CLAIM NO. BVIHC (COM) 44 OF 2015

IN THE MATTER OF SECTIONS 184B AND 1841 OF THE BVI BUSINESS COMPANIES ACT, 2004

AND IN THE MATTER OF SWISS FORFAITING COMPANY LTD

BETWEEN:

INDEPENDENT ASSET MANAGEMENT COMPANY LIMITED

Claimant/Respondent

AND

SWISS FORFAITING LTD

Defendant/Applicant

Appearances:

Mr James Collins QC and with him Mr Jonathan Ado for the Claimant/Applicant Ms Arabella di Iorio and with her Mr Simon Hall for the Defendant/Applicant

2016: January 12; 29

Application to discharge interim injunction obtained ex parte - Whether application properly made without notice -A/legations of breaches of duty of Full and Frank Disclosure -Meaning of "material'- Whether breaches warrant immediate discharge of injunction - Whether court ought to grant new injunction in the interest of justice.

JUDGMENT

The Applications

[1] FARARA J [Ag.] On 12 January 2016, I heard submissions on two applications in this matter. The first in time is the Defendant's application by Notice filed 30 October 20151 for the discharge of the injunction granted 14 May 2015 ("the injunction") on a without notice basis ("the Discharge Application"). The second is the Claimant's application by Notice filed 18 December 2015 for continuation of the injunction ("the Continuation Application"). This hearing was essentially the return date for the interim injunction, since the date given initially was, by agreement of the parties, adjourned. At the conclusion of the hearing on 12 January 2016, I reserved judgment and made an order extending the injunction pending my decision on the Discharge and Continuation Applications.

[2] Included in the Defendant's Notice of Application, but not heard that day at the request of counsel for the Defendant/Applicant, were applications for certain consequential costs orders against the Claimant and it lawyers, Harney Westwood & Riegels. Included in the Claimant's Notice of Application, but also not heard by me, is an application for specific disclosure of legal advice provided to the Defendant "upon which it relied in relation to the July Issuance of rights in 2014." A third application, also not heard that day, is the Defendant's Notice of Application filed 28 December 20152 seeking a declaration that neither these proceedings nor the injunction shall prevent the Defendant from commencing, continuing or defending any action or other legal proceedings, including on-going proceedings in Switzerland between the Defendant as claimant and SFC Swiss Forfaiting Ltd as respondent. ("the Swiss Proceedings") These applications not heard by me will have to be relisted for hearing by the Court Office in consultation with counsel for the parties.

[3] The Discharge Application is supported by the Affidavit of David Payne filed 30 October 2015 with Exhibit "DP-1"3• The Continuation Application is supported by the Affidavit of Marcia Macfarlane

1 See Tab 1

2 See Tab 8

3 See Tabs 4 and 4

filed 24 December 2015 with Exhibit "MM-1"4, by which the unswom Second Affidavit of Olga Lucia Schiffers in opposition to the Discharge Application, and in support of the Continuation Application and the specific disclosure application, is exhibited5.

The Interim Injunction

[4] The Claimant obtained *ex parte* on 14 May 2015 from Leon Jan interim injunction6 restraining the Defendant, its directors, officers, employees or agents from (i) diluting, disposing of or dealing with the Claimant's shareholding and interests in the Defendant; (ii) issuing new shares in the 'A' shares class or creating any new share classes with voting rights attached in the Defendant; and (iii) ordering the Defendant to permit, by 4pm on 18 June 2015, inspection by the Claimant's legal practitioners of the Registers of Members and Directors, and minutes and resolutions pertaining to the Amendment of the Memorandum and Articles and the issuance of shares on 10 July 2014, and the taking of copies thereof.

[5]The injunction obtained *ex parte*, was applied for by Notice of Application filed 24 April 2015 and supported by the Affidavit of Olga Lucia Schiffers filed the same date, together with Exhibit "OS-1"7. At the hearing of the application for the injunction, the Claimant also relied on its skeleton argument 13 May 20158. Also before me, is the transcript of the hearing before Leon J.9

The Claim

[6] This action was commenced on 24 April 2015 by Claim Form together with a statement of claim10. The Claimant claims that:-

(1) The further issuance by the Defendant of 'A' Class shares (the voting shares) on 15 July 2014 (the July Issuance) amounts to unfairly prejudicial conduct that contravenes

4 See Tabs 5 and 6

5 See Tab 7

6 See Tab 12

7 See Tabs 26 and 27

8 See Tab 29

9 See Tab 30

10 See Tabs 15 and 16

the BVI Business Companies Act, 2004 (as amended) and the Articles of the Company; and

(2) The July Issuance caused the Claimant's holding in the Voting Shares to be diluted. The issuance was therefore unfairly prejudicial and/or is likely to be unfairly prejudicial to the Claimant in its capacity as a member and as the investment manager of the Defendant;

(3) Alternatively, the conduct was unfairly prejudicial and therefore contrary to the BVI Business Companies Act, 2004 within the meaning of section 1848 of the Act and/or not in the best interest of the Defendant.

[7] Accordingly, the Claimant seeks the following reliefs:-

a. An order declaring that the July Issuance was unfairly prejudicial to the Claimant; and

b. An order pursuant to section 184(2)(h) setting aside the acts of the Company and/or its directors diluting the Claimant's shareholding;

c. An order pursuant to section 184(2)(b) of the Business companies Act that the Defendant compensate the Claimant for unlawfully and/or unfairly diluting its 100% 'A' Class shareholding to 16%;

d. An order pursuant to section 184(2)(c) removing the present board of directors and replacing them with independent directors to be appointed by the Claimant;

e. An order pursuant to section 184(2)(g) to rectify the records of the Company to reflect the restoration of the Claimant's 'A' Class shareholding to 100%;

f. Alternatively, permanent relief under section 1848(3) restraining the Company (whether by itself or its servants or agents or otherwise howsoever) from further issuances in relation to the 'A' Class Shares without prior notice and consultation with the Claimant; and

g. Permanent relief under section 1848(1) directing the Company to rescind or revoke the July Issuance.

[8] A defence to the Claim was filed on 8 July 201511. It is denied that the Claimant is either the Investment Manager or the adviser of the Defendant12. It is also pleaded, that on 30 December

11 See Tab 17

2011, following an application by the Claimant to the Hong Kong Company Registry on 15 August 2011, the Claimant company was dissolved13; the said application by the Claimant was made on the grounds that it was not in business and was defunc1t4; the Investment Management Agreement (IMA) was accordingly terminated and/or repudiated and/or frustrated by the Claimant in 201115;

and, without prejudice to the plea at paragraph 6.4, the IMA was terminated by notice from the Defendant on 27 May 201316; and, accordingly, there was no dilution of the Claimant's voting

power on 10 July 2014 because the Claimant had none, or alternatively, the dilution was not wrongful nor unfair.17

[9] The Claimant's Reply on was filed on 23 July 201518. It is pleaded, *inter* alia, that the Company could only terminate the IMA with the approval of the Claimant19; the Claimant was, pursuant to an order made 30 October 2014, restored to the Hong Kong Companies Register, and the effect of such restoration is that the Claimant*"is to be regarded as having continued in existence as if it had not been dissolved":* section 768 of the Hong Kong Companies Ordinance (Cap 622)20; and that the investment management services were provided by and on behalf of the Claimant without interruption. 21

[10] Various other documents, including several requests by either party for further information and the responses thereto, have also been filed in these proceedings.

Background

[11] The background facts are summarised in the skeleton arguments of both counsel. The main factual matters are not in dispute. The Defendant, which was incorporated on 11 October 2006, was a BVI regulated private Fund, until it was de-registered on 26 January 2015. A copy of the Investment Management Agreement ("IMA") dated 8 January 2007 was exhibited to the First Affidavit of Ms

12 **See Defense, para. 2** 13 See Defence para. 6.2 14 See para 6.3

1s See para 6.4

1, See para. 6.6

17 See para. 7.1 and 7.2

18 See Tab 18

19 See para. 3.1 (3)

20 See paras 3 and 4 (1)

21 See para 3.4 (2)

Schiffers22. The Claimant, a Hong Kong company, was the Defendant's Investment Manager. SFC Swiss Forfaiting Company ("SFC") was its broker and, on the advice of the Claimant, purchased the Defendant's investments and held them on trust for the Defendant.

[12] Clause 16 of the IMA provides for its termination in certain circumstances. In particular, clause 16.1

(B) provides that the IMA may be terminated forthwith by the Fund where the Investment Manager is "liquidated or dissolved...." Clause 16.2 states: "Termination of this Agreement by the Fund is subject to the approval of the holders of the voting shares." These are very important provisions in the context of this matter.

[13] The registered agent of the Company in BVI was previously Circle Partners, but it is now administered by the AMS Group. The Claimant is the holder of 100 'A' Class non-redeemable non participating voting shares in the Company. Ms di Iorio, learned counsel for the Defendant, asserts that these shares are of no value. The only shares with monetary value are the 'B' Shares which are redeemable and participating shares in the Company. It is not disputed by Mr Collings QC, learned counsel for the Claimant, that the Claimant's shares, being non-participating, are of no monetary value. However, he submits that the value of the Claimant's 'A' shares really lies in their voting power, which was 100% of the Defendant prior to the July Dilution. At paragraph 8 of the Second Affidavit of Ms Schiffers, she puts it this way:-

"This [the July Dilution] has had a highly detrimental effect on the [Claimant] in that it is no longer in control of the [Defendant]. It is unable to exercise a majority vote in any resolution and has in effect been stripped of its membership worth. The 'A' Class shares were non participating shares that carried voting power of one vote per share."

[14] The Defendant case is that when it became clear by late 2012 or early 2013 that the Company could no longer continue to accept subscriptions or make redemptions, and would need to be wound up with funds being returned to investors, the Company needed, amongst other things, confirmation from the Claimant, as the Investment Manager, of the Company's net asset value ("NAV"). However, the Claimant failed to provide the NAVs and ignored the Company's requests.

22 See Tab 28 page 1

In early 2014, the Company discovered, for the first time, that the Claimant had applied on 12 August 2011 to de-register itself from the Companies Register in Hong Kong, on the ground that it was defunct, and that it had been dissolved. These actions left the Company without an Investment manager, which it was required to have under BVI law as a regulated private fund, and without a holder of any of its voting shares.23

[15] In July 2014 {while the Claimant was still de-registered and dissolved under the laws of Hong Kong) the Company issued 500 voting shares to CTS Nominees Ltd, a company which is part of the AMS Group {the July Issuance). These shares were subsequently transferred on 17 February 2015 (after the Claimant had been restored to the Companies Register in Hong Kong on 30 October 2014) to Sunimar Private Limited, whose ultimate beneficial ower is said to be Mr. Rinaldo lnvernizzi

The Parties position regarding the July Issuance

[16] The Defendant argued that despite the fact that the Claimant was dissolved when the July

• Issuance was made, and that issuance was necessary because the Claimant no longer existed, the Claimant, having subsequently been restored to the register, now claims that the July Issuance, which reduced its voting shareholding in the Company to 16.6%, was unfairly prejudicial to it.24

[17] The Claimant case is that the Defendant could not terminate the IMA without its express agreement, which was not given, and the Defendant's July Issuance of 500 new voting shares to CTS Nominees Ltd, a company associated with the directors of the Fund, unfairly prejudiced it, even though at the time of the July Issuance and consequential dilution, the Claimant had been dissolved. They contend that the legal effect pursuant to the laws of Hong Kong of its subsequent restoration on 30 October 2014 to the register, is that it is to be regarded as if it had continued in existence and had never been dissolved.

23 See Defendants skeleton argument para 7

24 See Defendants skeleton argument para 10

[18] The trial of this Claim is listed for the week commencing 6 June 2016. It is common ground that there is a serious issue to be tried2.5

[19] It is the position of the Claimant that, in the interim pending the trial, it has applied for relief to preserve the *status quo,* and that the injunction did precisely that. It has not sought to have its shareholding restored to 100%, but only to preserve its existing 16.6% shareholding in the Company. Likewise, the Claimant has not sought to have any of the powers and control that its 100% shareholding conferred, restored to it. Accordingly, the Company and its directors remain free to conduct its business and to manage on-going disputes without restriction. Moreover, to the extent that the injunction may inhibit some step which the Company legitimately wants to take, it could seek the agreement of the Claimant pursuant to paragraph 9 of the Injunction Order, or apply to the COLIrt.26

[20] The Claimant also points out that this "was not an application for a Freezing Injunction or any other kind of draconian injunction that demanded an enhanced duty of disclosure2.7"They also submit that there is no prejudice to the Defendant by virtue of the injunction, and it is desirable in claims of unfair prejudice for the court to 'hold the ring'. Furthermore, there is a serious issue to be tried, and the Claimant cannot be adequately compensated in damages. They also submit that the balance of convenience lies in maintaining the *status quo* up to trial, and in any event, the Defendant could give an undertaking until the trial. It is also the Claimant's submission that there was no deliberate attempt to deceive the court during the *ex-parle* hearing for the injunction, and any failure on the part of the Claimant as applicant in its duty of full and frank disclosure was innocent, and simply a failure to bring the deregistration and dissolution of the Claimant adequately to the attention of the court.

[21] As to the injunction being necessary to preserve the status quo, the Defendant counters that this is not the applicable test for the grant of interim relief, and the Claimant completely misled the court in its *ex parle* application which ought not to have been made on a without notice basis. They also submit, quite forcefully, that the allegations in the application and in the statement of claim with

25 See Claimant's skeleton argument para. 7

26 See Claimant's skeleton paras 8.1, 8.2 and 8.3

27 See Claimant's skeleton argument para 9

regard to the alleged dilution2,8 to the effect that the Defendant acted covertly, in bad faith and in secret. without giving notice of the July Issuance to the Claimant and hence where somehow guilt of skulduggery, were made dishonestly and are baseless, unsubstantiated and deliberately misleading. As they see it, the clear and uncontroverted fact is that at the time of the July Issuance which is said to have unfairly prejudiced the Claimant, it did not exist as a legal person and did not exist for a period of about 3 years, a fact which was not disclosed to the judge. Because the Claimant was dissolved, no notice could have been given to it, even if this was legally required of the Defendant, which is not accepted. Furthermore, the Defendant submits that the Claimant failed wantonly in its duty to give full and frank disclosure upon the ex parte application, including failing to put before the judge any of the possible defences, not just to the application, but to the Claim itself. These are very telling submissions.

[22] As to the allegation that if the Defendant was given notice of the application it would take steps to further dilute or extinguish the Claimant's shareholding, the Defendant submits that there was absolutely no evidence or no cogent before the judge to substantiate this allegation, and indeed the evidence was to the contrary, since the Defendant had previously been made aware of the Claimant's intention to commence these proceedings when it was provided with a copy of its Claim Form attached to the defence in the Swiss Proceedings. Accordingly, the Defendant, if that were its intention, would have had ample opportunity to do so, but it has not.

[23] Regarding the allegation by the Claimant of it suffering a catastrophic loss to its business as investment manager of the Defendant company, as a result of the dilution of its voting point and termination of the IMA,29 the Defendant submits that this was patently wrong, and completely misleading to the court, since that the Defendant is not a trading company, as the Claimant and its legal adviser well knew or could easily have found out. The Defendant had previously suspended subscriptions and redemptions, and had been de-registered as a private Fund by the Financial Services Commission in BVI. Accordingly, there is no existing business for the Claimant to act as

28 See paras. 7 to 9 SOC

"See para 20 Ms Schiffers First Affidavit, B2 Tab 27

investment manager under the IMA, and no possibility of its suffering a catastrophic loss or any loss at alI.30

The De-registration and Restoration of the Claimant

[24] It is common ground that the Claimant was de-registered from the Companies Register in Hong Kong as a direct result of its own application. The application was filed with the relevant authority in Hong Kong on 12 August 2011 and is headed 'Application for Deregistration of a Defunct Private Company3'1. This was approximately 4.5 years after the parties had entered into the IMA.

[25] The grounds stated at section 'D' of the deregistration application were: (i) all members of the company agree to the deregistration of the company; and (ii) the company has no outstanding liabilities; and (iii) "either the company has never commenced business or operation or the company has ceased to carry on business or ceased operation for more than 3 months immediately before this application."

[26] It is clear that these are the standard grounds included on the printed form, which, presumably, an applicant for de-registration is required to delete or cross out, as being not appropriate to its circumstances and grounds for requesting deregistration. That being said, the Claimant, or those filling out this form on its behalf, did not delete any of the stated grounds. Presumably, the first ground did apply to it as the application must have been made with the agreement of the members of the Claimant. In fact, the application was signed by someone on behalf of the director of the Claimant32. Likewise, at least one of the two alternate limbs stated in the third ground must have been applicable to the Claimant, more likely the second limb, since it could not have been correct to say that it had never commence business or operation as it had acted as the investment manager of the Defendant for over 4 years.

[27] The actual deregistration of the Claimant was published in the Official Gazette for Hong Kong on 30 December 2011. As a consequence, the Claimant was dissolved and ceased to exist as a legal

30 See paras. 16 and 17 of Mr Payne's First Affidavit 82 Tab 31

31 See Tab 4 pages 15 and 18

32 See page 17

entity under the laws of Hong Kong.33 It seems clear to me that when the Defendant discovered in early 2014, that the Claimant had been dissolved, and that this had been effected as a direct result of the Claimant's own application, it could not have assumed that the Claimant would ever have been restored to the Register of Companies in Hong Kong.

[28] It appears to be common ground that the Claimant was restored to the register in Hong Kong by an order dated 30 October 2014. However, a copy of this order has not been made available to the court nor has the Claimant produced any expert evidence of the legal effect of section 768 of the

Hong Kong Companies Ordinance (Cap 622). We only have the statements in the Affidavit of Ms Schiffers34 and in the statement of claim, that upon restoration it was as if the Claimant had never

been dissolved.

The Grounds for Discharge

[29] Essentially the Defendant seeks the discharge of the injunction order on two grounds. The first is that the Claimant/Applicant and their legal counsel failed in their duty of full and frank disclosure to the court, upon the hearing of the ex parte application for the interim injunction. The second ground is that the material non-disclosures were so serious as to justify the immediate discharge of the injunction by the court, and to not grant a fresh injunction. In particular, the Defendant contends that the Claimant and their legal representatives misled the court as to the need for the application to be heard *ex parte*, despite the judge who heard the application expressing concerns about this. They also contend in the Notice, that the Claimant as applicants for the injunction, failed to disclose to the court or to bring to the court's attention at the hearing that-

(a) On 8 July 2011, the Claimant had applied for deregistration on the basis of it never having commenced business or operation, or that it had ceased to carry on business for more than 3 months;

(b) Following its application for deregistration, the Claimant was dissolved on 31 December 2011, did not exist at the time of the July Issuance, and was not restored to

33 See Tab 4, page 21

34 See Second Affidavit of Schiffers paras. 46 and 47

the Hong Kong Companies Register until 6 November 2014 (a period of almost 3 years)

[30] The Defendant also contends, as a ground for discharge of the injunction, that "the Claimant's counsel made assertions and submissions which had no foundation in the evidence, made misleading submissions by allowing the Court to adopt a line of thought that was incorrect, and/or failed to bring matters to the Judge's attention in a balanced manner."

[31] And "[t]he conduct of the Claimant and its legal representatives has been deliberate, improper, unreasonable and/or negligent. An order for indemnity costs is appropriate in the circumstances. It is also appropriate to order either that the Claimant and the Claimant's legal representatives be jointly and severally liable for the costs incurred, or to make an order for wasted costs against the Claimant's legal representatives."

[32] These are serious allegations which ought not to be made lightly.

Duty of Full and Frank Disclosure -The law

[33] Ms di Iorio, learned counsel for the Defendant/Applicant, relies on the principles relating to the duty of full and frank disclosure on an applicant and his legal advisers when proceeding ex parte for interim relief, as summarised by Bennett JA

in**Commercial Bank - Cameroun v Nixon Financial Group Limited** HCVAP 2011/005. At paragraph [17] of the judgment of the Court of Appeal, the learned judge states-

(1) A person applying for relief upon an application made *ex-parte* must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application;

(2) The test of materiality is "...whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application...";

(3) Materiality is to *be* decided by the Court and not by the assessment of the applicant

or his legal advisers;

(4) The duty of candour is a heavy one. The duty of disclosure extends not only to material facts known to the applicant, but to additional facts that he would have known had he made proper inquiries. Moreover, the applicant is under a duty to present fairly the facts so disclosed. The rationale for the duty is that the court is being asked to grant relief in the absence of the Defendant and is wholly reliant on the information provided by the Claimant. Other parties do not have the opportunity to [correct] or supplement the evidence which has been put before the Court. Observance of the duty is essential to secure the integrity of the Court process and to protect the interest of those potentially affected by whatever order the Court is invited to make.

(5) The general principles about disclosure on applications made *ex parte* for injunctions and other interim relief, apply to applications made ex parte for permission to serve out of the jurisdiction but the context is different.

[34] The approach to be taken by a court where there has been proven non-disclosure, were also helpfully summarized by Bennett JA at paragraph [20] of the judgment as follows:-

(1) If there is a breach of the duty to make full and frank disclosure on an application for service out, the Court may discharge the order obtained even though the applicant may be able to make another application which would succeed.

(2) The rule that an [order made *ex parte]* will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrong doer of an advantage improperly obtained, but it also serves as a deterrent to ensure that persons who make *ex parte* applications realise that they have this duty of disclosure and are made aware of the consequences (which may include a liability in costs) of failing in that duly.

(3) A balance must be maintained between marking the Court's displeasure at the non disclosure and doing justice between the parties.

(4) In exercising its discretion the Court should assess the degree and extent of any culpability on the apart of the applicant, having regard to the matters which it was necessary for the Court to consider on the ex parte application. Also relevant is any prejudice to the defendant. Whether the fact not disclosed is of sufficient materiality to justify setting aside the order for service out will depend on the importance of that fact to the issues which were to be decided on the application. A material question may be

- if the full facts had been before the Court, would the Court have given permission?

(5) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the Court, and a negligent failure to state certain facts which should have been stated.

(6) If the Court is satisfied that there was a deliberate intention to deceive the Court, the order is likely to be discharge.

(7) Even if there is no deliberate intention to deceive the Court "...the question, as I see it, is essentially one of degree. The negligence may be so serious as to justify the Court in discharging the order even though it is satisfied that the deponent had no intention to deceive the Court. On the other hand, if the judge is satisfied that there was no intention to deceive and that the misstatement is not grossly negligent, he may think it better not to visit it with a penalty which may fall as heavily on the Defendants as the Plaintiffs, since the Plaintiffs can, ex hypothesi, make a fresh application which will succeed..."

[35] These principles are also authoritatively summarised by Alan Boyle QC sitting as a Deputy Judge in the Chancery division in the often cited case **The Arena Corporation Limited v Peter Schroder** [2003] EWHC 1089, at paragraph 213, as follows:

(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial;

(2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order;

(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public inters! in requiring full and fair disclosure;

(4) The court should assess the degree and extent of the culpability with regard to non disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction;

(5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In

making this assessment, the fact that the judge might have made the order anyway is of little if any importance;

(6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle;

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice;

(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence; and

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances.

The Parties Submissions on Material Non-Disclosure

[36] At paragraph 19 of the Defendant's skeleton argument, Ms di Iorio encapsulates the Defendant's complaints in these words:

"The manner in which this injunction was obtained against the Company was a dereliction of duly, not only on the part of the [Claimant] but also its counsel. These allegations are not made lightly; the catalogue of failures to place relevant information before the Court is extensive and the willingness of [the Claimant's] counsel to make positively and deliberately misleading submissions, some without any foundation whatsoever in the evidence placed before the Court, is astonishing. [The Claimant] and its counsel have

• acted with total disregard for their duties and obligations to this Court."

[37] And at paragraph 20-

"[The Claimant's] legal practitioner had a personal responsibility to take all reasonable steps to ensure that there was full and frank disclosure to this Court."

No need for the application to have been made without notice

[38] It is the Defendant's submission, that the Claimant's Notice of Application issued 24 April 201535 for the interim injunction was not marked (and consequently not issued} without notice or *ex parle* and, further it states that it was to be served on the Defendant at its registered office in BVI and also in care of its lawyers, Maples & Calder. This is all clear on the face of the notice itself. It is to be observed also that neither is the matter of urgency or the need to proceed on a without notice basis, addressed in the lengthy

grounds stated in the application or in the skeleton argument.36 In fact, a date for the hearing of the Application on 14 May 2015 (3 weeks later) was inserted by the Court Office. It is therefore passing strange how this application came to be considered on a without notice basis, an issue which Justice Leon was live to at the commencement of the

hearing3.7 Furthermore, counsel for the Claimant informed the judge that his skeleton argument

stated that the application was made on notice3a, but there was a typographical error as the word 'not' is missing.

[39] There is somewhat of an explanation given by the Claimant's counsel at page 11 of the transcript of the *ex parle* hearing. There he states, in part-

35 See B2 Tab 1

36 See Tab 29

"...the Claimant sought advice as to its rights and position and given that no notice had been given prior to this act in July of amending and further issuing of shares not after, we took, ***and this is very much linked to the reasons why we have gone without notice,*** taken the decision that the only inference that could be drawn from the conduct is an adverse one and so to approach the directors and ask them why this happened, we suspect would have alerted the wrongdoers to potentially squeeze us out of existence." (emphasis added}

37 See Transcript Tab 30 page 3

38 See Claimant's skeleton para 3

[40] The matter of proceeding *ex parle* is addressed in the Affidavit of Olga Lucia Schiffers filed 24 April 2015 in support of the application for the injunction3.9 At paragraphs 31 to 33 she deposes-

"31. As is to be expected based on the information set out above, I am highly suspicious of the Board of Directors of the Respondent and those behind who either beneficially own the Respondent or now control it through the July Issuance. I do not trust them to act honestly in relation to the applicant or its interests in the Company."

"32. Moreover, their intentions in relation to the July Issuance are very clear and the Respondent is clearly capable and willing to take steps that are irreversible and which would be immensely damaging. I therefore propose not to provide notice of this application to the Respondent, for fear that it could take further steps on the basis of information set out in the application itself which could cause irreversible harm."

"33. I respectfully ask the Court to hear this application ex parte on the basis that the sensitive circumstances of this case and the urgency of this application justify that course."

[41] Ms di Iorio submits that there was no urgency justifying the application being heard without notice. The only allegation of urgency, which is to be found in the Affidavit of Ms Schiffer 0, was that the July Issuance and consequential dilution was only recently discovered when on 29 January 2015 the Claimant's BVI lawyers, Harneys, "were able to conduct a search of the BVI Registry of Corporate Affairs." Ms di Iorio contends that there has not been any explanation of the delay between the supposed discovery by Harney on 29 January 2015 and the filing of the application on 24 April 2015, a period of approximately 3 months. In this regard, I would point out, as a matter of principle, that delay is but one factor which a court will take into account when exercising its discretion whether to grant interim relief, and delay in of itself, even a long delay, does not automatically lead to the court deciding not to grant the relief. The court must look at all the circumstances, including the length of the delay in bringing the application, and any explanation offered by the applicant for the delay, when deciding which way to exercise its discretion.

39See Tab 27

40 See para. 27

Mezhdunarodniy Promyshlenniy Bank and Anor v (1) **Sergei Vikforoviah Pugachev** (2) **Kea Trust Company Limited and others** [2008] EWCA Civil 906.

[42] Ms di Iorio also submits that there was no explanation of what was considered "sensitive circumstances" at all. As to the alleged threat of further dilution, she submits that this was wholly without foundation as, had the company wished to do so, it could have issued further voting shares in July 2014 or at any time. This she asserts was not a matter to which the court's attention was drawn under the duty to make full and frank disclosure. Also, the company had been aware since 23 March 2015 that the Claimant was intending to bring these proceedings in BVI, since a copy of the Claim Form had been exhibited to the defence filed by Swiss For/ailing Company Limited, (a related company of the Claimant), in proceedings in Switzerland ("the Swiss Proceedings") brought against it by the Defendant4.1 This fact was not brought to the attention of Justice Leon either.

[43] However, Mr Collings QC, learned counsel for the Claimant, contends that, as this Claimant was not a party to the Swiss Proceedings, it may not have been aware that the commencement of these proceedings in BVI by Claim Form had been foreshowed. For my part I find it difficult to accept this as a plausible explanation. Firstly, Swiss For/ailing Company Limited is a related company of the Claimant and is also represented in proceedings in the BVI by Harneys. It is obvious, and this was accepted by Mr Collings, that they must have gotten a copy of the signed, but untiled, Claim Form in these proceedings from Hamey in BVI. Yet this fact was not disclosed to the learned judge either by Ms Schiffers in her affidavit or by counsel for the Applicant/Claimant.

[44] In my view, this is an important and material fact or matter which ought to have been disclosed by the Claimant and its legal representatives who had charge of the application for the injunction. It goes to the question, not only of whether the court should hear the matter without notice to the Defendant, but to the veracity of the reasons

given by Ms Schiffers in her affidavit as to why the court ought to accede to the Claimant's request to hear the application without notice to the Defendant. I believe I am accurate in saying, that during his oral submissions Mr Collings finally accepted that this was certainly a matter which the Claimant/ Applicants ought to have disclosed to the judge.

41 See Bl Tab 4 pages 24 to 28

[45] However, Mr Collings submits in response to this line of complaint, that "even if the [Defendant] knew that the dilution would likely be challenged by [the Claimant], applying *ex parte* was still the appropriate course of action. It is knowledge of the intended injunction, not knowledge of the intended claim, which is relevant."42 In my view, this is also not a satisfactory explanation. The simple point is that this was a material fact which ought to have been disclosed to the judge, and it was not. I say this mindful of the principle that materiality is not a matter to be decided by the applicant or their legal advisers, but is one for the court. Thus, it behoves applicants and their legal advisers, to put before the court all relevant facts, information and documents, and leave the matter of their materiality ultimately to the court's determination.

[46] Also, regarding the matter of whether the Claimant was justified in proceeding *ex parte,* Mr Collings points to the fact that after the Claimant had been restored to the register in Hong Kong, the new shares were transferred from CTS Nominees Limited to Sunimar, "thus effectively delivering voting control over the Fund to an investor."43 He also submits that the Defendant has not been able to identify any 'commercial imperative' for the discharge or variation of the injunction or identified any prejudice and this, "leads to the obvious inference that the [Defendant] now does (or may) wish to take further steps to dilute or eliminate [the Claimant's] shareholding." In my view, this submission is highly speculative and cannot be sustained. It is tantamount to saying that the court should conclude from the very fact of an application to discharge the injunction being made, (on grounds of material non-disclosure by the applicant), that the Defendant must have in mind further dilution of the Claimant's shareholding or even extinguishing it all together. In my assessment, there is nothing before me to countenance or support such a conclusion.

[47] In my judgment, there was no real justification for the Claimant, as applicant, proceeding on an *ex parte* or without notice basis when applying for the injunction. The reasons advanced by Ms Schiffers in her affidavit where not supported by any real or cogent evidence. Furthermore, any risk of further dilution by the Defendant of the voting power of the shares currently held by the Claimant, was not made out on the materials before the learned judge. Most significantly, evidence which both the Claimant and its legal advisers were aware of or must have been aware of at the

42 See Claimant's skeleton argument para 29.2

43 See Claimant's Skeleton argument para. 30.1

time, and which was material to the judge's consideration of whether to hear the application on a without notice basis, was not put before the judge or brought to his

attention in any way. This includes the fact that a copy of the Claim Form to be filed in BVI by the Claimant had been disclosed to the Defendant in the Swiss Proceedings, thereby putting the Defendant on notice of these proceedings being about to be commenced. This notwithstanding there has been no further dilution of the Claimant's shareholding in the Defendant. This matter is compounded by the response by the Claimant's counsel to a question from Justice Leon as to whether the Claimant, upon discovering the July issuance, had approached the directors of the Defendant about the dilution of their shares. He responded *" ...no, the Claimant did nof'* because to do so would have *"alerted the wrongdoers to potentially squeeze as out of existence. 4" 4*

Failure to bring the fact of the Claimant's dissolution to the Court's attention

[48] This is perhaps the main contention of material non-disclosure relied on by the Defendant/ Applicant. As Ms di Iorio puts it45, the Certificate of Continuation of Registration issued by the Registrar in Hong Kong was 'buried' at page 11546 of the exhibit to Ms Schiffers affidavit in support of the application. This document was not in English. However, the complete set of the relevant documents relating to the Claimant's deregistration and dissolution in 2011 had previously been exhibited to an affidavit filed by the Defendant on 27 April 2015 in other proceedings BVIHC (COM) 46 of 2015 filed in BVl,47 in which the same lawyers for the Claimant act for SFC Swiss Forfaiting Company Limited ("SFC"). It seems clear therefore, that both the Claimant and its counsel were aware that the Claimant has been dissolved by virtue of its own application in Hong Kong at the time when the July Issuance took place, leading to the alleged dilution of the Claimant's shareholding in the Defendant. One of the most significant and material aspects of these documents, which required the fullest disclosure to the judge in my view, is that not only were these facts unquestionably known to the Claimant/Applicant since it had applied for de-registration and consequential dissolution, but that the Claimant remained dissolved (not in existence as a legal person) for approximately 3 years before its restoration back to life. As Ms di Iorio puts it, and

44 See 82 Tab 30 pages 526 line 14 onwards " See Defendant's skeleton para. 31

"See 82 Tab 28

47 See 82 Tab 31 page 557 and 81 Tab 4 page 53

with this I am entirely in agreement, "this fact is the epitome of relevant material" in the context of a claim for unfair prejudice. Furthermore, this is the kind of information which might have caused the learned judge justifiably to pause and to be reluctant to grant interim injunctive relief.

[49] What then is the explanation proffered by or on behalf of the Claimant for this glearing non disclosure? Ms Schiffers in her Second Affidavit48 denied the allegations of material non-disclosure. She refers to page 16 of exhibit "OS-1"49 to her First Affidavit, where she provided the court with a copy of a 'company name search' of the Claimant on 31 March 2014, which shows that the company had been 'dissolved by deregistration'.

She goes on at paragraph 46, to contend that *"this* was *not* a*material disclosure for the purposes of the injunction* as*it could not form* a *counter argument to an application seeking to preserve the* status *quo and no more."* Not only was it wrong for Ms Shirffers or the Claimant to determine what is 'material' for the Court to take account of in hearing the application, but this statement is purely opinion coming from a lay person in an attempt to justify a clear breach or failure by the Claimant in their duty of full and frank disclosure.

[50] Mr Collings, during the course of his oral submissions on the Discharge Application, accepted that this information and the documents were material, that there had been a failure on the part of the Claimant to fully disclosed all the documents and pertinent information regarding the deregistration and dissolution of the Claimant, and also the fact that, at the time of the July Issuance, it had been dissolved. This was a significant concession but, in my opinion, one made correctly and properly by learned counsel.

[51] However, Mr Collings goes on to take issue with certain statements made by Mr Payne in his Affidavit.50 At paragraph 15, Mr Payne states that the Defendant discovered that the Claimant had been dissolved in early 2014 and went on at paragraph 16 to state that "the Company was therefore faced with the realization that it had no functioning investment manager since at least May 2011..." He submitted that this statement is inconsistent with the pleading at paragraph 11 of the defence where it is alleged that the IMA was terminated by notice on 27 May 2013. If the latter is correct, then discovery of the dissolution could not have led to the realisation that the Defendant

48See B1 Tab 7

49 See B2 Tab 28 page 16 so See B1 Tab 3

had no functioning investment manager.51 He also submits that there is no obvious connection between the alleged non-functioning of the Claimant as investment manager, and the July Issuance to CTS Nominees5. 2

[52] This may be a convenient point for me to mention that. subsequent to the hearing having concluded and my reservation of judgment, a letter was sent from Harneys, the legal practitioners representing the Claimant's in this matter, to the Registrar of the High Court attaching some 50 pages of documents. In the letter it is stated that it was copied to Maples & Calder, the legal practitioners for the Defendant. These 50 pages of documents are said to have come to their attention as a result of disclosure in these proceedings, and it was requested that they be brought to this court's attention. This letter and attached documents, are not properly before me for consideration on the merits of the Defendant's Discharge Application. They were not exhibited to an affidavit in these proceedings, which is the only way they could be properly considered by the Court, unless their production in this manner was with the open consent and agreement of counsel for the Defendant. No such consent has been communicated to the Court. I return to the submissions by counsel for the Claimant's on this aspect.

[53] In my view, these submissions, while they may show some discrepancy between what Mr Payne said in his affidavit and what is pleaded in the defence, are matters which will have to be explored through the arsenal of cross-examination at the trial, to the extent that it may be relevant to the claim of unfair prejudice.

[54] Mr Collings also submits that, if this was indeed a material non-disclosure, it was innocent and not deliberate. The trouble with that submission is that no explanation has been offered by Ms Schiffers for this failure of duty. In her Second Affidavit, she merely denies that there were any material non-disclosures, and argues that this information was not material to granting an injunction to maintain the status quo. This is not an explanation or certainly not a satisfactory explanation, as to why these documents were not disclosed and the fact that the Claimant did not exist as a legal entity at the time when the July Issuance occurred.

51 See Claimant's skeleton para. 33.2

52 See Claimant's skeleton para. 34

Non-Disclosure of the alleged termination of the /MA

[55] The third point of complaint by the Defendant is that in the affidavit evidence of Ms Schiffer at paragraph 24, under the heading 'Damages not an adequate Remedy', she falsely represented to the court that- "If the injunction is not granted, there is a strong possibility that the Respondent may be able to amend the articles in a manner adverse to the [Claimant]' ....terminate the IMA and extinguish the [Claimant's] share-holding." In fact, the Claimant failed to disclose to the court that the IMA had either been terminated or had been repudiated when deregistration had been sought and it was dissolved. There is in my view some merit in this complaint. Of particular significance is the fact that there was no disclosure, and the court was not told, that clause 16.1(8} of the IMA provides that, in circumstances where the investment manager has been 'dissolved', the Defendant may immediately terminate the IMA. The Claimant ought also to have informed the court that the Defendant may be in a position to defend any action on the basis that the IMA had terminated either upon the dissolution of the Claimant or by repudiation of the IMA.

[56] To this Mr Collings submits, that the Claimant could not have been aware of any such defence since, up to 27 April 2015, the Defendant did not treat the IMA as having been terminated. Furthermore, there is no evidence that the Defendant took any steps to appoint a new investment manager or to obtain an exemption from the Financial Services Commission.53 While this may be correct, in my view these are possible defences which the Claimant and its legal advisers ought to have anticipated could be raised. This is especially so where the Claimant had been dissolved for approximately 3 years, and where it was the investment manager of a regulated Fund. It is also apparent the Claimant's the application for, and resulting dissolution, were all done secretly, and without notice to, or the knowledge of, the Defendant, at a time when the Defendant had stop accepting subscriptions and making redemptions, and was in danger of having to be wound up. These matters led ultimately to it losing its status as a private Fund.

[57] Finally, on this issue, Mr Collings submits that, in any event, whether the IMA had been terminated or not, was not material to the grant of the injunction, as the claim to relief was predicated on protection of the 16% shareholding of the Claimant. In my view, the termination or possible termination of the IMA was material to any possible defence which the Defendant may have to the

53 See para. 42.1 Claimant's Skeleton argument

claim, and thus material to the grant of the injunction, and ought to have been disclosed by the Claimant on the *ex parte* application.

What are Material facts and how ought the court to assess materiality?

[58] The focus of Mr Collings submissions, however, was on the principles as formulated by Ralph Gibson LJ in**Brink's Mat Ltd *v* Elcombe** [1988] 1WLR 1350 at 1356. The learned judge made clear that the duty is to disclose 'material facts', that is, "facts which it is material for the judge to know in dealing with the application as made." As such, the duty does not extend to every fact and the extent of the burden on an applicant will depend on the context and the type of relief sought. Mr Collings referred me to this passage from Hobhouse J in **The Jay Bola** which was cited with approval in **Arab Business Consortium *v* Banque Franco-Tunisienne** [1996] 1 Lloyd's Rep 485:-

"There is a duty of disclosure on all ex parte applications but the extent of the duty and the gravity of any lack of frankness will depend in any given case on the character of the application. At one end of the scale there are Anton Piller orders and mareva injunctions where the consequences of the order may be unpredictable and irremediable and very possible most serious for the proposed Defendant: there the very fullest disclosure must be made so as to ensure as far as possible that no injustice is done to the defendant. At the other end of the scale are minor procedural applications where there may be no risk at all of prejudice, or at least none that cannot be fully made good by an order in costs. Where the application is, as in the present instance, one of a character which would not prejudice the relevant party's position (i.e. that of Armstel) and would not cause them any loss or inconvenience that would not fully be made good by an order in costs, the duty of disclosure does not have such an extreme extent."

[59] Mr Collings also relied on this salutary passage from the judgment of Slade LJ in Brinks Mat at page 1359-

"By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v Kensington Income Tax Commissioners* [1917]

1KB 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

[60] It is **Mr** Collings submission54, that this sums up what the Defendant is doing. With respect, I do not agree. I say so, not least taking into account the concessions of material non-disclosure made by learned counsel for the Claimant during his oral argument.

[61] The next and related submission made by Mr Collings, is that even where material non-disclosure has been established, this does not lead to the injunction being automatically being discharged. Again, he relies on an extract from **Brinks Matt,** this time in the judgment of Balcombe LJ at page 1388, which I need not set out in *extensio* here. Suffice ii to be said that the Lord Justice, after referring to the two purposes why there is a rule that an injunction obtained on the basis of material non-disclosure will be discharged, went on to point to the important principle that such a rule cannot be allowed to become "an instrument of injustice", and there must be a discretion in the court to continue the injunction or to grant a fresh one in its place.

[62] Mr Collings also relies on the principle that, even where there are several instances of material non-disclosure, the court ought not to discharge the injunction (or not grant a fresh one in its place) where the refusal to continue or to renew the injunction would work a real injustice **Alternative Investment Solutions (General) Ltd v Valle De Uco Resort & Spa and others** [2013] EWHC 333 (QB). In that case Mr Justice Cranston, at paragraph 50 of his judgment, referring with approval to the dicta of Christopher Clarke J in *Re* OJSC *Ank Yugraneft (also known* as *Millhouse Capital UK Ltd v Sibir Energy Pie)* [2008] EWHC 2614 (Ch) states-

54 See para 21 Claimant's Skeleton Argument

""Christopher Clarke J added that they were subject to the overriding principle that the question of whether, in the absence of full and frank disclosure, an order should be set aside and, if so, whether it should be renewed in some way, was pre-eminently a matter for the court's discretion. Relevant in that regard were whether the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed. The court, like Janus, looked both backwards and forwards, back as the need to secure the integrity of the court's process and to protect the interests of those potentially affected by the order [ofj the court, forward to the situation now before the court. The court strongly inclined towards setting its order aside and not renewing it with **serious breaches,** but the court could not be blind to the fact that a refusal to continue or renew an order **may work a real injustice."** (emphasis added)

[63] There is also this extract from *Commercial Fraud in Civil Practice* by Paul Mc Grath QC, 2nd Edition, at 23.53-

"In summary the reality of any serious application to discharge based upon material non disclosure is that it is generally unlikely to succeed unless one of two things is established in addition to the fact of non-disclosure: (i) that full disclosure reveals facts which undermine the merits of the application; and/or (ii) that the non-disclosure can be shown to have been deliberate or at least, exhibits a clear and wanton disregard for the respondent's duties. Even if (i) and (ii) is also established in addition to the non-disclosure, whether discharge follows is very much dependent on the extent to which the merits are undermined and/or the extent to which the non-disclosure represented a deliberate attempt to mislead the court."

[64] This is a most helpful distillation of the applicable principles.

Are the non-disclosures sufficiently material to warrant the immediate discharge of the injunction?

[65] Mr Collings submits that this is not a mareva injunction or some other kind of draconian remedy, and while the injunction cannot be said to be at the other end of the scale, it is somewhere in the middle. Accordingly, this ought to inform the court's consideration of the materiality of the non disclosures, which have been identified (and found by the court), and the exercise of its discretion. While the duty of full and frank disclosure was clearty there, this was not a matter or application which called for an enhanced duty of full and frank disclosure, such as with mareva injunctions.

[66] He also relies on the fact that, subsequent to the grant of the injunction, the Claimant found out from paragraph 6 the defence that the shares had been transferred from CTS Nominees Ltd to Sunimar Private Ltd on 17 February 2015. This, he submits, was after the Claimant had been restored to the register in Hong Kong. Accordingly, the injunction was clearty required when it was made. This submission is somewhat illogical in my view. At the time when the transfer of the 500 shares was made from CTS Nominees to Sunimar, there was no injunction in place and hence no breach of the injunction. This cannot, in my view, be a ground for now saying, that notwithstanding the clear instances of material non-disclosure by the Claimant, this transfer of the shares to Sunimar Private, or the Claimant subsequently finding out about it, is justification for maintaining the injunction. In this context Mr. Collings also submits that it must be borne in mind that the injunction is to 'hold the ring,' to preserve the status quo. It is not to restrain, in any way, and does not apply to the 500 shares themselves, the July Issuance.

[67] Mr Collings also submits that the injunction is not causing any prejudice to the Defendant and, in

the absence of prejudice, it ought not to be discharged, but ought to be continued pending trial and determination of the claim. Furthermore, the Defendant took no steps for over 5 months to have the injunction discharged, and the trial is less than 5 months away.

[68] In my judgment, and as I have already found above, the Claimant has been guilty of material non disclosures to the court on its application *ex parte* for the injunction. These were clear breaches of its duty of full and frank disclosure. In my assessment, these breaches were not innocent, they were deliberate, at least on the part of the Claimant. The entire approach to the application on the Claimant's part seems to have been to put its case for the injunction in the most favourable light in order to have it succeed, paying little or not enough regard to the discharge if its duty of full and frank disclosure. It did so by, in some instances, deliberately withholding from the court matters which were clearly within their knowledge, and documents that were in their custody or control, in order to create a certain impression favourable to the grant of the injunction. This was, in my view misleading. In this regard, I note that no explanation or apology has been forthcoming from the Claimant or those who advise them. Accordingly, the court is left with no alternative but to conclude that these non-disclosures were not innocent.

[69] On the issue of 'materiality', I regard these non-disclosures, particularly with regard to the deregistration of the Claimant and its none existence for about 3 years as a legal entity, in circumstances where it initiated the deregistration apparently without any notice being given to the Defendant, and in circumstances where it was the investment manager of the Defendant, a then regulated private Fund, as being very material to the determination of the application by the Court. Likewise, the failure to inform the court of the termination provisions in the IMA, and the possible defences to the claim, in circumstances of the Claimant had been dissolved at the time of the July Issuance and thereafter, was most material. These were all matters material to the grant of the application for the injunction, which also restrains the Defendant from issuing any further shares. In this regard, I respectfully do not accept Mr Collings submission that there is no prejudice to the Defendant by the injunction being in place. Indeed, the very fact that paragraph 9 of the injunction order provides for the Defendant to have to seek the permission of the Claimant if it requires to do certain things, is indicative of some possible prejudice to the Defendant by having the injunction in place..

[70] In my view, the Defendant/Applicant has established not only that there were material non disclosures, but that full disclosure of the facts would undermine the merits of the injunction. The non-disclosures exhibited a clear and wanton disregard for the Defendant and its interests.

[71] In the circumstances, the non-disclosures are so grave as to warrant the immediate discharge of the injunction. Accordingly, I so order.

[72] The nest question for me to consider, having discharged the injunction, is whether in the interest of justice I ought to impose a fresh injunction. I am mindful of the position in **Alternative Investment Solutions** where the court refused to discharge an interim injunction even though there had been found to be a series of material non-disclosures, on the basis that to discharge the injunction or not continue it, would work a real injustice. In this regard, I have taken into account the type of injunction applied for and obtained, which essentially seeks to preserve the current 16.6% shareholding of the Claimant in the Defendant pending trial which is a mere 5 months away, In my view, the injunction order if re-imposed afresh ought to be limited to this relief only. I am therefore

prepared, notwithstanding the_ serious conduct of th_e Claimant, and its failure to offer an explanation or apology for it, to impose a new injunction in the interest of justice solely for the limited purpose of holding the ring as regards the Claimant's 16.6% shareholding in the Defendant, pending the trial of this claim which is scheduled for June 2016 before the Commercial Court.

[73] Accordingly, I make an order in terms only of paragraph 1 of the injunction order at Tab 12 of Hearing Bundle, modified to read as follows:-

"Until the trial and determination of this matter or until further order of this Court, the Defendant by its directors, officers, employees or agents is restrained and shall not in any way dilute, dispose of or deal with the Claimant's shareholding in the Defendant."

[74] The DefendanVApplicant shall have its costs of the Discharge Application to be assessed if not

agreed.

Gerard St. C Farara QC

Commercial Court Judge (Ag)