IN THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 193 OF 2018 (IKJ)

BETWEEN:

(1) FRONTERA RESOURCES CORPORATION

(2) FRONTERA INTERNATIONAL CORPORATION

Plaintiffs

-and-

(1) MR STEPHEN HOPE

(2) OUTRIDER MASTER FUND, L. P.

Defendants

IN CHAMBERS

Appearances:	Mr Peter Hayden and Mr Nicholas Fox, Mourant Ozannes, on behalf of the Plaintiff Mr Fraser Hughes and Ms Roisin Liddy Murphy, Conyers Dill & Pearman, on behalf of the Defendants
Before:	**The Hon. Justice Kawaley**
Heard:	**11 February 2019**
Draft Ruling Circulated:	**19 February 2019**
Ruling Delivered:	**27 February 2019**

HEADNOTE

Ex parte application of defendants to vary ex parte interim injunction obtained by plaintiffs-application by plaintiffs to set aside variation-whether variation amounted to grant of fresh injunction to defendants-whether legal requirements for grant of quia timet injunction met-material non-disclosure

JUDGMENT

Introduction and Summary

1. The present case is emblematic of the sort of commercial dispute where, from the earliest interlocutory skirmishes, it is clear that the Court will find it difficult to impose neat legal order on a particularly rambunctious commercial contest.

2. On October 11, 2018, following an ex parte hearing, I ordered that:

> "*1. The Defendants be restrained from taking any steps to enforce against property which is the subject of the Equitable Mortgage dated 20 December 2016 between the Second Plaintiff and the Third Defendant*[1], *whether pursuant to rights under that agreement or otherwise.*"

3. The Defendants applied ex parte to vary paragraph 1 of the October 11, 2018 ex parte Order ("Interim Injunction") on December 5, 2018 (although the Order was signed on and erroneously dated December 7, 2018 (the "Variation Order")). I granted that application by inserting the following new paragraphs in the Interim Injunction:

> "*1A. The Plaintiffs shall not cause Frontera Resources Caucusus Corporation to incur any further indebtedness or obligations in excess of US $500,000 until 18 December 2018, or such other time as the return date in respect of the Injunction can be heard.*
>
> *1B. The Plaintiffs shall not create any liens or security interest in respect of, or otherwise encumber (directly or indirectly), the shares or property of the Plaintiff or any of their subsidiaries until 18 December2018, or such other time as the return date in respect of the Injunction can be heard.*"

[1] The Third Defendant, Maples FS Limited, as of December 18, 2018 is no longer a party to the proceedings.

4. Following a hearing on December 18, 2018 at which Variation Order was not properly addressed, the Interim Injunction was on December 21, 2018 discharged on the grounds that:

   (a) it was obtained at an ex parte hearing on the basis of affidavit evidence and submissions which failed to disclose material facts and/or to fairly present the merits of the case; and

   (b) the Plaintiffs' case based on the evidence available at this stage has no real prospects of success and/or fails to raise a serious question to be tried.

5. The Plaintiffs appealed the discharge of their Interim Injunction as of right[2] and applied orally on December 21, 2018 for a stay pending appeal. I granted an interim stay until an application for a stay of the discharge of the Interim Injunction pending appeal could be heard. The December 21, 2018 Order, which was only recently perfected following contention as to its form, continued the Interim Injunction as modified by the December 7, 2018 Order.

6. The Defendants in the event did not oppose the stay pending appeal application which I granted on February 11, 2019. The effect of the stay which I granted was to keep the Interim Injunction in effect until the end of the April 2019 session of the Court of Appeal. This was on the understanding that the Plaintiffs will seek to have their appeal listed for hearing in the next session of the Cayman Islands Court of Appeal (or where that is not possible, at a special sitting of the Court of Appeal if possible).

7. The present application by the Plaintiffs to set aside the variation of the Interim Injunction is not otiose. It seeks to determine whether their ability to raise operating capital and grant security will continue to be impaired pending appeal. For the reasons which are set out below, I find that the ex parte December 7, 2018 Order (the "Ex Parte Variation Order") should be set aside on the following principal grounds:

   (a) it was obtained at an ex parte hearing on the basis of affidavit evidence which failed to disclose material facts and/or fairly present the merits of the case; and

   (b) the Defendants' December 5, 2018 ex parte Summons was in substance an application for an interim *quia timet* injunction and the legal requirements for the grant of such relief were not met.

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[2] Court of Appeal Law section 6(f)(ii), which contains the same wording construed as conferring an appeal as of right by the English Court of Appeal in Atlas Maritime Co. S.A.-v-Avalon Maritime [1991] 1 WLR 633 (Lord Donaldson MR) and the Eastern Caribbean Court of Appeal in Danone Asia Pty –v- Golden Dynasty Enterprise Ltd. Et al [2009] HCVAP 2009/002 (unreported, Judgment dated September 28, 2009 (George-Creque JA, as she then was).

The Interim Injunction

8. The Interim Injunction contained the following central terms:

> "*1. The Defendants be restrained from taking any steps to enforce against property which is the subject of the Equitable Mortgage dated 20 December 2016 between the Second Plaintiff and the Third Defendant, whether pursuant to rights under that agreement or otherwise.*"

9. Most significantly for the Interim Injunction, the Plaintiffs seek a declaration that the 2nd Defendant ("Outrider") is not entitled to enforce the security it has in the form of an equitable mortgage over the shares of Frontera Resources Caucusus Corporation ("FRCC"). Pivotal to the Plaintiff's case is the assertion that the events of default upon which the 2nd Defendant relies as a basis for enforcing its security were caused by the misconduct of the 1st Defendant ("Mr Hope") in his role as a director of the 1st Plaintiff ("FRC") acting in concert with Outrider.

10. The Indorsement of Claim on the Plaintiffs' Writ asserts the following claims against the 1st Defendant:

> "*(1) Damages arising from his breaches of fiduciary duty owed to the First plaintiff in his capacity as director, to the detriment of the Plaintiff as the owner of the share capital of the Second Plaintiff. Such breaches include, inter alia:*
>
> *(a) attempting to deprive the First Plaintiff of assets for his own benefit and/or for the benefit of the Second Defendant;*
>
> *(b) promoting his own interests over, and in conflict with, the interests of the First Plaintiff;*
>
> *(c) failing to act in what he believed to be in the best interests of the First Plaintiff;*
>
> *(d) acting for an improper purpose;*
>
> *(e) failing to exercise independent judgment;*
>
> (f) *failing to act with loyalty, honesty and good faith.*"

11. There is a close connection between Mr Hope's position on the FRC Board and Outrider's security rights. Those arise under a Note Agreement dated December 20, 2018 in relation to the Frontera International Corporation ("FIC ") 2020 Notes, which provides, *inter alia*, as follows:

> "*7.2 ...(b)so long as no Default has occurred and is continuing, the Company and its Company Subsidiaries shall be entitled to Incur all Permitted Indebtedness or Permitted Noteholder Indebtedness....*
>
> ***SCHEDULE I***
>
> ... ***'Permitted Indebtedness'*** *means any or all of the following:*
>
> (1) *Indebtedness of up to $200 million Incurred pursuant to a Credit Facility, with interest not to exceed LIBOR plus 1500 basis points, provided that any such indebtedness may only be incurred with the unanimous written consent of the members of the board of directors of FRC, and further provided that, absent such unanimous consent of the board of directors of FRC, any transaction incurring such indebtedness shall be void...*"

12. Without beginning to undertake a comprehensive analysis of the relevant security documentation upon which I have never been fully addressed, the best preliminary view I was able to form of the role of Mr Hope on the FRC Board following the December 18, 2018 *inter partes* hearing was as follows. He is contractually entitled on behalf of Outrider to veto any proposed borrowing that FRC proposes to approve. The Note provided that FRC was not permitted to borrow without unanimous Board approval; a Settlement Agreement between the parties entitled Outrider to have its nominee on the FRC Board. The Plaintiffs' case is in effect that Mr Hope in exercising (or threatening to exercise) his veto power on the grounds that a restructuring rather than more debt financing was required in the best interests of the Frontera Group was improperly motivated and seeking to achieve collateral benefits for himself and Outrider. The security documents strongly suggest that the contractually and explicitly agreed basis for Outrider's nominee being on the FRC Board is to be able to veto transactions the nominee director considers are inimical to Outrider's security interests.

13. It was against this background that I ruled on December 21, 2018 that the Plaintiffs' claims that the Defendants were not lawfully entitled through Mr Hope to exercise the veto power by refusing to approve further indebtedness and triggering an Event of Default entitling the enforcement of the security did not have realistic prospects of success. I discharged the Interim Injunction on this merits ground alone although I found that the requirement of proving a risk of irreparable harm was met. I ruled:

"35. The only coherent allegation advanced by the Plaintiffs is the broad complaint that Mr Hope has blocked the Company's legitimate attempts to raise debt financing with a view to he and Outrider benefitting from a default by FIC and taking control of its assets. This requires the Plaintiffs to establish that the proposed debt financing ought to have been approved instead of some form of restructuring. The Plaintiffs also have to prove that the Mr Hope in contending that a restructuring was a better option having regard to the interests of creditors was motivated not by the interests of the Group's creditors, with which interests Outrider's were arguably aligned. The Plaintiffs have to prove that, instead, Mr Hope and Outrider were to a material extent motivated by the desire to earn restructuring fees. At this stage, based in part on FRC's own accounts and its admitted liquidity problems, it appears strongly arguable that FRC is insolvent and that the directors' primary regard ought to have been to the best interests of creditors. This lends more credence to the propriety of Mr Hope's general stance in opposing more debt financing and calling for decisive action than it does to the majority directors' position that debt financing was the obviously appropriate business judgment to make."

The merits of the Variation Order

<u>The listing of the application and the perfection of the Variation Order</u>

14. As the Plaintiffs' counsel complained about a lack of clarity about how the application was administratively dealt with and heard[3], it seems desirable that I summarise the email record which may be regarded as notionally forming part of the electronic file in this matter.

15. At 3.35 pm on December 4, 2018, the Defendants' counsel (Conyers) made a request by email for an urgent hearing ex parte hearing which forwarded draft application papers. That email was forwarded to me (in Bermuda) the same day at 4.00pm. It attached a draft Order seeking relief in terms of the subsequently filed Summons, a draft Ex Parte Summons, a copy of the First Affidavit of Stephen Hope (sworn in response to the Interim Injunction) and a covering letter to the Court. At 7.42 pm I informed my Personal Assistant of my availability and at 8.27 pm she promised to update me the following morning.

16. The following day at 6.42am, my Personal Assistant advised Conyers that I could hear counsel at 4pm on December 5, 2018 or at 9.00am on December 6, 2018. At 9.01am Conyers confirmed they would attend at 4.00pm that day (December 5, 2018). My Personal Assistant at 9.28am requested Conyers to submit a hearing bundle, pay the filing fee and also provide a Word version of the proposed form of Order which was being sought. At 9.38 am this correspondence was forwarded to me and was received when I landed at Miami International Airport *en route* to Grand Cayman[4]. I landed in

[3] These concerns were in part based on the Defendants' delay in producing a hearing transcript, the fault for which apparently lay at the door of the Court, which experienced technical problems with the recording device.
[4] As I recall, it was only while in transit that I read the electronic version of the First Hope Affidavit and discovered that it did not, as I had assumed, support the ex parte application it had been forwarded to the Court with.

Grand Cayman at around 2.00pm on Wednesday December 5, 2018, returning to my Chambers at around 3.15pm. At 3.57 pm Conyers forwarded an amended version of the draft Order. At 3.59pm, my Personal Assistant emailed me a Word Version of the draft Order which was substantially (in terms of content) in the form of the Variation Order as eventually formally made, although it envisaged that the First Hope Affidavit would be sworn that day[5]. As I can find no electronic record (in my own inbox) of a draft of the Second Hope Affidavit being forwarded to me in advance of the hearing, I believe that Mr Hayden was correct in his interpretation of page 2 of the unofficial Transcript of the December 5, 2018 hearing (Mr Hughes did not seek to correct him). I find that Mr Hughes only supplied a copy of the Second Hope Affidavit to the Court at the beginning of the hearing.

17. Following the hearing on December 5, 2018, I was required to turn my attention to an unrelated but substantial *inter partes* multi-party hearing listed for a full day hearing on December 6, 2018. At 5.15 pm that day I requested my Personal Assistant to forward a revised draft Order to Conyers which contained my own proposed changes to paragraph 1. The Defendants' wording proposed adding two unnumbered paragraphs to the Interim Injunction. I proposed numbering the two additional paragraphs as "1A" and "1B". I failed to notice that paragraph 4 of the draft Order incompletely provided "*The First and Second Defendants costs of this summons*" and did not, so far as I now recall, consciously address what the appropriate costs order should be. The costs should obviously have been reserved.

18. The Variation Order was administratively signed on December 7, 2018 in the form approved by me the previous day with the recitals still asserting that the Second Affidavit of Mr Hope had been sworn on December 5, 2018, as the Defendants' counsel represented that it would be by seeking an Order in those terms. The Second Affidavit was not in fact sworn until December 10, 2018.

Was the application in substance an application for a freestanding interim injunction in favour of the Defendants?

19. Mr Hayden's withering criticism of the way in which the ex parte hearing was conducted by the Defendants' counsel assumed that it was obvious that the Variation Order effectively granted the Defendants freestanding injunctive relief. Mr Hughes, with a surprising degree of sangfroid, submitted that it was obvious that all that the Defendants had achieved was to vary the scope of the Interim Injunction. However, Mr Hayden in reply made two compelling points:

(1) the Interim Injunction's ambit was to restrain what the Defendants could do. The Variation Order's main target was not the scope of the restraints initially imposed on the Defendants' security enforcement rights.

[5] It is unclear when this email was actually reviewed by me. It is also unclear if the unofficial Transcript is correct in asserting that the hearing scheduled for 4.00pm commenced at 3.30pm.

Rather, the aim of the 'amendments' sought was, most directly, to constrain the conduct of the Plaintiffs in relation to their borrowing activities;

(2) the Second Hope Affidavit under the heading "*F. CROSS UNDERTAKING AS TO DAMAGES*" in the very last paragraph of the Affidavit stated as follows:

> "*33. In the event that the Court requires a cross undertaking as to damages in respect of the amendments sought to the Injunction, I and the Second Defendant give an undertaking that, if the Court later finds that the proposed amendments to the injunction has* [sic] *caused loss to the Plaintiffs, and decides that the Plaintiffs should be compensated for that loss, the First and Second Defendants will comply with any order that the Court might make.*"

20. To extend the chess match metaphor I used in the course of the ex parte hearing on December 5, 2018: "Check; checkmate". I am bound to accept the Plaintiffs' argument that the relief sought by the Defendants on December 5, 2018 was in substance an application for a fresh injunction in their favour as against the Plaintiffs. The Defendants were legally required to meet the usual requirements for the grant of such relief.

Was the application sufficiently urgent to require a hearing on little more than 6 hours' notice to the Plaintiffs?

21. When the evidence is critically analysed, it readily becomes clear that there was no real urgency justifying the application for the Variation Order being listed in the way it was. This conclusion can perhaps be justified on a number of grounds, but it is only necessary to consider the most decisive one. It is a ground which also supports most directly (a) the complaint that the imminent threat requirements for obtaining a *quia timet* injunction were not met, as well as indirectly (b) the material non-disclosure complaint, both of which complaints are considered below.

22. Mr Hayden's main submission was that there is no credible evidence of any imminent threat to the Defendants' security from any fresh borrowing or any fresh security. He described the following averment in the Second Hope Affidavit as a "*huge mischaracterisation*":

> "*6. Since the Injunction hearing on October 11, 2018 and the directions hearing on November 20, 2018 the Plaintiffs have threatened to impose new debt obligations upon FRC in excess of US$50 million. Since this is debt of the*

company in which OMF holds security over shares, this debt would have effective priority over OMF's secured interest."

23. The deponent then proceeds to describe the Durham Proposal, considered at a Board meeting on November 27, 2018, and asserts, *inter alia*, that:

    (a) "*it was ambiguous whether the term sheet...was binding or non-binding*" (paragraph 14);

    (b) the other directors may proceed to approve the Durham Proposal without telling him because they have opined that he is conflicted and should abstain from voting (paragraph 15 - no particularity is given as to when this discussion occurred);

    (c) the term sheet purports to grant a "*1st lien on all Frontera assets*" (paragraph 21). Mr Hayden described the averment in paragraph 21 of the Second Hope Affidavit as "*one of the most blatant falsehoods he makes*".

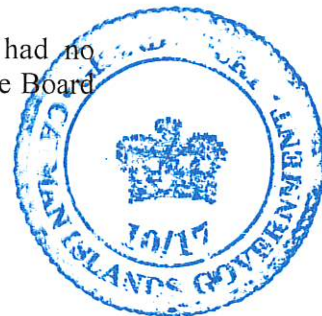
24. Firstly, the Term Sheet was exhibited and referred to by counsel during the hearing to substantiate the words quoted by Mr Hope about the security interest which was under consideration. But, carefully read, it is impossible to find any ambiguity about the Term Sheet's non-binding status. Secondly, a November 25, 2018 email from Mr Hope was properly exhibited to his Second Affidavit, but not (apparently) referred to by his counsel during the ex parte hearing. The Plaintiffs relied in particular on Mr Hope's acknowledgement in that email that:

    "...*Given that Durham's proposal will take several additional days or weeks of diligence and documentation and they will be paid to do it all....I can't understand that their side would have any urgency to complete the deal...*"

25. Secondly, the draft Minutes for the November 27, 2018 Board meeting, which Mr Hope did not exhibit although he had apparently received them, recorded the following resolution under paragraph 3.1:

    "*(c) Any definitive agreements referenced in the Term Sheet as may be required for the Transaction to come into effect, shall be approved by unanimous resolution of the board of directors of the Company in due course.*"

26. This document provided even clearer confirmation that the Term Sheet had no immediate binding effect while also suggesting that the official position of the Board



was that unanimous approval for any future binding agreements would be required. This was not the only document which undermined the Defendants' case for urgent relief which was not disclosed. More pertinently still, Mr Hope exhibited an email chain leading up to the Board meeting but failed to disclose the complete chain including communications he had with the Board after the meeting. He deposed that he abstained at the Board meeting on approving the Durham Proposal:

> "*14.The outcome of this meeting was that my fellow three directors indicated their verbal approval for the Durham Proposal and I abstained on the basis that I required additional information on the terms….and in particular answers to the nine questions I posed prior to the Board meeting which remained unanswered. I also requested that a written resolution be circulated to the Board for consideration, so I could understand precisely what was being agreed as it was ambiguous whether the term sheet in respect of the Durham Proposal was binding or non-binding.*"

27. The undisclosed post-meeting portion of the email chain produced by the Plaintiffs' Mr Nicandros in the exhibit to his Second Affidavit revealed that two versions of a Board minute were circulated after the meeting. The first was unsatisfactory to Mr Hope, and then Vice–President, General Counsel and Corporate Secretary Mr Bakhutashvili sent the version of the Minutes quoted from above noting: "*I think it addresses your concerns.*" So if at one point there was lack of clarity about the need for future binding agreements and a concern about Mr Hope's ability to vote, the apparently ultimately agreed form of draft Minutes put those issues to bed.

28. The last email in the chain exhibited to the Second Nicandros Affidavit also seriously undermined the case that there was a need for urgent relief to address the imminent risk to the Outrider security from a precipitous consummation of the borrowing contemplated by the Term Sheet. On November 28, 2019, Mr Hope emailed Mr Bakhutashvili:

> "*I am happy for the company to advance discussions with Durham, including funding due diligence by Durham in an amount up to $150,000…HOWEVER…I am happy to hear specifically how the company intends to provide that junior capital in a way that certainly does NOT breach the Note Agreement…*"

29. All of the above strongly suggests that Mr Hope well understood that the risks to Outrider's security were <u>potential</u> risks which might crystallize into <u>real or actual</u> risks should a transaction, which was not even at the due diligence stage, come to fruition. Moreover these concerns arose in circumstances where any final agreements would properly be subject to unanimous FRC Board approval. No evidence was adduced of a major shifting of the tectonic plates between November 28, 2018 and the request for an urgent hearing on December 4, 2018.

30. The Conyers letter of November 28, 2018 on behalf of Outrider to Mourant sought undertakings that its security would not be impaired "*on the basis that a Default has occurred, but without prejudice to your clients' position that it has not occurred.*" The letter did not on its face make out any case for urgency yet sought a confirmatory response the following day, concluding:

> "*If we do not obtain such confirmation, Outrider intends to seek an urgent attendance before the Hon. Mr. Justice Kawaley to amend the 11 October injunction accordingly.*"

31. Mourant responded robustly on November 30, 2018, concluding:

> "*In the circumstances, there is no basis for your clients to seek an injunction. Furthermore, we note that notwithstanding your assertion that this issue is urgent, your clients have previously raised no complaint about the injunction until the day before last week's directions hearing....*
>
> *If notwithstanding the above, your clients intend to persist in this misguided application, we reserve all our position as to all appropriate relief including costs and ask that any application be made on notice to our clients and listed for a date on which our clients leading counsel can attend.*"

32. Mr Hayden rightly argued that there was no justification against this background for the Defendants to make no reasonable efforts to schedule their application for a mutually convenient date. Mr Hughes could only seek to argue that the Mourant request for a date convenient to the Plaintiffs' leading counsel did not call for a response. As I indicated in the course of argument, the Defendants could at a minimum have requested the Court to fix an early hearing without regard to the Plaintiffs' convenience on the basis that a mutually convenient date could not be agreed. That is the sort of request which the Court routinely accommodates, particularly in circumstances where the Court cannot form a reliable preliminary view of the real urgency involved.

33. Based on an objective view of the relevant facts, there was simply no tangible justification (beyond Mr Hope's subjective and somewhat abstract concerns) for the Defendants fixing and notifying the Plaintiffs of a hearing just after 9.00am listed for 4.00 pm that same day. There was no evidential foundation for a finding that there was an imminent risk of harm.

<u>Were the legal requirements for the grant of a quia timet injunction met?</u>

34. In the Plaintiffs' Skeleton Argument, the nature of the relief sought by the Defendants was described as follows:

"16. A quia timet injunction is:

> *'an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong*[6]*'.*

17. A quia timet injunction ought only to be granted if the normal American Cyanamid requirements for an interim injunction are met and, in addition, the Court is convinced that there is a strong probability that, unless restrained, the Plaintiffs will do something which will breach the Defendants' rights and cause them irreparable harm."

35. The settled governing principles were not contested by the Defendants' counsel. Mr Hayden referred the Court to two passages *Vastint Leeds B.V.-v- Persons Unknown* [2018] EWHC 2456 (Ch) in the judgment of Marcus Smith J. Firstly:

> "*29. Gee, similarly, suggests that the circumstances in which a quia timet injunction will be granted are relatively flexible:*
>
> > *'There is no fixed or "absolute" standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, the more the court will be reluctant to consider the application as "premature". But there must be at least some real risk of an actionable wrong.'*
>
> *30. However, in London Borough of Islington v. Elliott [2012] EWCA Civ 56, Patten LJ, with whom Longmore and Rafferty LJJ agreed, formulated an altogether more stringent test:*
>
> > *'29 The court has an undoubted jurisdiction to grant injunctive relief on a quia timet basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on American Cyanamid principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant*

[6] *'Gee on Commercial Injunctions'*, 6th edition, paragraph 2-035.

has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted."

36. The second passage in Marcus Smith J's judgment which counsel relied upon was the following (at page 9 of the transcript):

> "*(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test:*
>
> > *(a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?*
> >
> > *(b)Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of <u>actual</u> infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?*"

37. The tests relied upon by Mr Hayden were formulated, both by Patten LJ and Smith J in the context of permanent injunctive relief being considered at trial. For present purposes (an interim injunction initially sought for approximately 14 days), I prefer to adopt (as regards the degree of risk which must be established) the minimum standard formulated by Stephen Gee (and quoted by Marcus Smith J at paragraph 29), namely that "*there must be at least some real risk of an actionable wrong.*" That risk requirement must of course be accompanied by proof that damages would not be an adequate remedy for any loss occasioned by an actual breach of the applicant's rights.

38. It follows from my findings in relation to the lack of urgency justifying the hearing being listed when it was, that I am also bound to find that there was not a "*real risk of an actionable wrong*" made out on the material put before me on December 5, 2018. This speaks to the risk of imminent harm element without addressing the "*actionable wrong*" limb of the requirement (i.e. the requirement of establishing a realistic prospect of proving that the conduct sought to be restrained would constitute an interference with the Defendants' rights). In all the circumstances of this aspect of the present case, the crucial issue was not whether or not depriving Outrider of its contractual security rights would be unlawful; to my mind it obviously would be unlawful. Rather the central question was whether there was a sufficiently tangible and imminent risk of this occurring at all.

39. The interlocutory test for irreparable harm is also somewhat different to that which applies at permanent injunction stage. The question is would "*damages be an adequate remedy for the* [applicant] *in the event of his succeeding at trial*": *American Cyanamid*

v-Ethicon Ltd [1975] A.C. 396 at 408C-D. Only if the Defendants established a risk of loss for which damages would not be an adequate remedy would the Court have to consider the corresponding loss that the Plaintiffs might suffer and the adequacy of the Defendants' cross-undertaking.

40. Neither of these important requirements for obtaining interim injunctive relief was addressed adequately in the course of the ex parte hearing. On one hand, the Defendants' evidence was that the Frontera Group was cash-flow insolvent and the harm which was threatened involved impairing Outrider's security. The Plaintiffs' case implicitly admitted cash-flow insolvency. Based on the material before me on December 5, it was self-evident that damages would not likely be an adequate remedy (a) because it would be difficult to quantify losses flowing from a loss of priority and (b) because the Plaintiffs' admitted liquidity problems cast doubt on their ability to meet any significant damages award. On the other hand, the adequacy of the Defendants' cross-undertaking and the balance of convenience required more even-balanced assessment and these issues were not even implicitly addressed. (In my Ruling on the *inter partes* hearing, I did not find it necessary to consider the balance of convenience in relation to the Interim Injunction at all: see paragraph 46).

41. In short, the Defendants failed to make out a case for the Variation Order at the ex parte hearing on December 5, 2018 and it is liable to be set aside on these grounds.

Is the Variation Order liable to be set aside on the grounds of material non-disclosure?

Governing principles

42. There could be real dispute on the governing legal principles on material non-disclosure. The same legal terrain had been traversed at the December 18, 2018 *inter partes* hearing at which the Defendants' counsel persuaded me that the Interim Injunction should, in part on material non-disclosure grounds, be set aside. In *Frontera Resources Corporation and Frontera International Corporation-v- Stephen Hope and Outrider Master Fund LP*, FSD 193 of 2018, Judgment dated December 21, 2018 (unreported), I adopted the principles commended to the Court by Mr Hughes on behalf of the Defendants:

> "*19.The Defendant's counsel primarily relied on Stephen Gee, 'Commercial Injunctions', Sixth Edition, paragraphs 9.001-9.012*[7]*. The statement of general principles set out in paragraph 9. provides*:
>
> > '*Any applicant to the court for relief without notice must act with the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, or on short notice...*

[7] Although these paragraphs were cited in the Defendants' Skeleton Argument, only paragraphs 9.001-9.002 were placed before the Court.

It applies not just to disclosure of facts but to absolutely anything that the judge should consider. It is part of the duty of the applicant for without notice relief to present the application fairly. Incorrect submissions or arguments, including erroneous legal submissions, will not amount to non-disclosure or material misrepresentation provided that such errors do not deprive the court of knowledge of any material circumstances. This is on the basis that the applicant has acted fairly and is entitled to advance his arguments as he wishes provided that the court receives a fair presentation of the case.'

20. In the Defendants' Skeleton the following additional principles extracted from Gee were set out as follows:

'*g) If material non-disclosure is established, the Court should be astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by the breach of duty.*

f) Although the Court has discretion notwithstanding proof of a material non-disclosure which justified or requires the immediate discharge of the ex parte order, to continue the order, or to discharge the order and immediately re-impose it, or to make a new order on terms, this jurisdiction should be exercised 'sparingly'."

43. Having been on the wrong end of that material non-disclosure complaint, Mr Hayden, candidly admitting this was to some extent a case of "pots and kettles", did not pull any punches in launching his reciprocal assault. The Plaintiffs' counsel cited persuasive authority on the importance in ex parte injunction applications of the applicant's counsel expressly inviting the court to consider whether to require a cross-undertaking in damages. In *Frigo-v- Culhaci* [1998] NSWCA 88 (unreported), the New South Wales Court of Appeal opined as follows:

"*The onus was on the plaintiff through his counsel to ensure that the undertaking was offered and that the judge be reminded of his intention, if he had such an intention, to include such undertaking in any continuation of the existing orders.*

We regret to add that the failure to have drawn this matter to the attention of a busy judge who may have been inexperienced in matters of equitable jurisdiction represented a serious breach of counsel's obligations to the Court. See generally Ipp, 'Lawyers Duties to the Court' (1988)114 LQR 63. His Honour should have been reminded of the legal principles, known to counsel, about an undertaking being the 'price' of interlocutory relief at the suit of a private plaintiff…

Before us, counsel for the plaintiff offered the undertaking nunc pro tunc. In the circumstances of the case, where the omissions to give the undertaking at the

outset and on 5 June were not an oversight, we would dissolve the injunction this ground alone."

44. The Plaintiffs' counsel also referred the Court to the following important statement of principles taken from the judgment of Balcombe LJ in *Brink's Mat Ltd.-v- Elcombe* [1998] 1 W.L.R. 1350 at 1358[8]

> "*The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrongdoer 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 of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained.*"

Findings on material non-disclosure

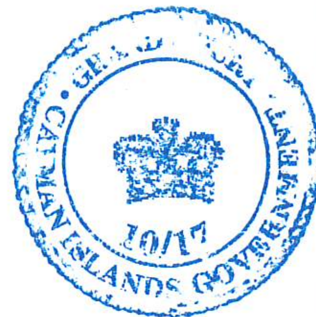
45. There was and could be no coherent answer to these clear-cut material non-disclosure complaints, only mitigation. Mr Hughes insisted that he had not said anything to the Court which was inconsistent with any documents which were not disclosed. I accept that he did not seek to deliberately mislead the Court. But he and his clients sailed very close to the wind. The Defendants' counsel was, perhaps, heady with a zeal inspired by his clients' apparent conviction in the sanctity of the rights of secured creditors.

46. Be that as it may I find that the Variation Order is liable to be set aside on the grounds of what in cumulative terms amounts to a serious case of material non-disclosure in relation to an ex parte hearing which was unjustifiably listed on an urgent basis. The most egregious points may be summarised as follows:

   (a) I was persuaded to list the application on the afternoon that I returned to the Island from overseas to accommodate what I assumed was genuinely a case of serious urgency;

   (b) there was no justification for seeking a hearing so urgently that the applicants' opponents were given roughly 6 hours' notice of the hearing and the Court was deprived an opportunity to properly prepare for the hearing;

[8] Cited in *Behbehani-v-Salem* [1987] 1 W.L.R. 723 at 727G.



(c) the application was prepared in a way which accentuated the importance of the duty of full and frank disclosure. The supporting draft affidavit was not made available in advance but was brought to the hearing by counsel;

(d) Mr Hope in his Second Affidavit failed to disclose and/or refer to and Mr Hughes in his presentation failed to refer to facts which would have made it obvious that there was no need for the application to be heard on such an expedited basis;

(e) Mr Hope in his Second Affidavit failed to disclose and/or refer to and Mr Hughes in his presentation failed to refer to facts which would have made it obvious that there was no imminent risk of one or other of the Plaintiffs entering into binding borrowing and/or security agreements which would potentially interfere with Outrider's security rights;

(f) Mr Hughes failed to address the relevant law, in particular, to identify the substantive effect of the application as being to seek injunctive relief;

(g) Mr Hughes failed to remind me at the end of the ex parte hearing that Mr Hope in the final paragraph of his Second Affidavit had offered a cross-undertaking in damages.

47. The last point is (in the unique factual matrix of the present case) the least serious one, in and of itself, despite its importance as a matter of general principle. The true factual position, which emerged in the course of the present hearing, was that there was no real risk of damage being caused to the Defendants between December 5 and 18, 2018, the anticipated duration of the Variation Order. It was, in substance terms, accurately submitted at the ex parte hearing that the relief sought would merely maintain the status quo. Moreover as I stated in the course of the hearing when discussing the form of the Order, the variation was not intended to impair the ability of the Plaintiffs to continue progressing their capital-raising activities[9]:

> *"Yes, I mean if you were to say restraining the plaintiffs from incurring any further indebtedness that would prevent them from actually consummating any agreement but it wouldn't stop them from, you know, negotiating, preserving any agreements in principle…and that would seem to me to be less intrusive."*

48. In the event, because of time constraints, the Variation Order stayed in place long after December 18, 2018 because the best view I could form without full argument was that the *quid pro quo* for the Plaintiffs being granted a stay of my Order discharging the Interim Injunction was that the Variation Order should also stay in place. The unanticipated extension of the duration of the Variation Order illustrates how important

[9] Page 21 of the draft ex parte hearing transcript

it is that applicants for ex parte relief consistently comply with their duties of full and frank disclosure to the Court.

Should the Variation Order be continued or the Defendants' granted a fresh injunction in similar terms?

49. Mr Hughes bravely sought to persuade the Court to continue the Variation Order even if I found it was liable to be discharged. I am unable to find that justice requires such a course. I accept Mr Hayden's submission that the Defendants have failed to establish a tangible risk that their rights under the Note Agreement will be infringed by the Plaintiffs. There are two strands to the relevant analysis.

50. Firstly the Note Agreement itself has extensive protections for the Defendants. These protections required the Defendants to demonstrate how the Plaintiffs were likely to infringe their contractual rights to justify any judicial restraint on the Plaintiffs' contractually constrained borrowing activities. No reference was made to the relevant contractual wording by the Defendants' counsel at all. The key provisions are as follows:

(a) clause 7.2 (b) provides that Permitted Indebtedness may be incurred only "*so long as no Default has occurred and is continuing*";

(b) clause 7.6 prohibits any liens, apart from "*the Notes Liens and Permitted Liens*";

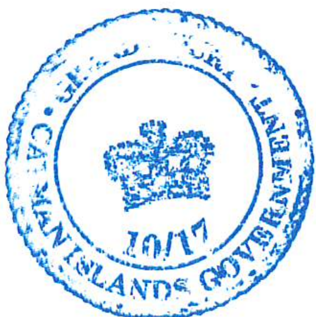
(c) as noted in paragraph 11 above, Schedule 1 to the Note Agreement lists eleven forms of "*Permitted Indebtedness*", the first of which provides, *inter alia*, that:

> "*any such indebtedness may only be incurred with the unanimous written consent of the members of the board of directors of FRC, and further provided that, absent such unanimous consent of the board of directors of FRC, any transaction incurring such indebtedness shall be void...*";

(d) Schedule 1also defines "Permitted Liens" and lists 20 qualifying examples, one of which ((8)) is liens to secure Permitted Indebtedness, which is a category subject to an express requirement that permitted liens be subordinate to the Notes;

(e) a December 20, 2016 Side Letter formed part of the Note Exchange Agreement ("NEA") pursuant to which the Note Agreement in relation to the 2020 Notes was executed. By this Side Letter, FRC and FIC agreed with Outrider that:

"1.11...any action that could be taken by FIC that requires Board of Directors approval under the NEA means approval by the Board of Directors of FRC <u>but only after Stephen Hope is fully approved for the Board of Directors in</u>



accordance with paragraph 1.10 and thereafter only if a designee of Outrider remains on the Board of Directors otherwise such action or attempted action shall be void ab initio" [Emphasis added];

(f) Section 18 contemplates that Outrider will have security in the form of the "Mortgaged Shares", which it is common ground are shares in the FIC wholly owned subsidiary, FRCC.

51. These contractual protections for Outrider's security appear on their face to be unusually strong indeed. Mr Hughes made somewhat vague allusions to steps which could be taken at the subsidiary level to erode the value of Outrider's security. However, he did not explain on what legal basis, if this did not infringe his client's existing contractual rights, such erosion would be legally actionable.

52. This legal lack of substance was significant because Mr Hayden secondly submitted without any challenge that the Court could not in this contractual context grant injunctive relief which went beyond the Defendants' existing contractual rights. He relied upon the following statement of principle found in the judgment of Kay LJ in *Medina Housing Association-v- Case* [2002] EWCA Civ 2001:

> "*7. In my judgment this is to misunderstand the purpose of an injunction in such circumstances. An injunction is granted in order to prevent future breaches of contract. The court has no power to grant an injunction which provides rights to a party that are not contractual rights unless a claim in tort can properly be made by that person. It is not suggested, nor could it be suggested, that the respondent would be entitled to an injunction in tort in respect of these matters. Therefore it seems to me that once one reaches the stage where the contract comes to an end (as it would do with the grant of possession) there is no right in the respondent to be protected by the grant of an injunction. The remedy in relation to a breach of contract will include an injunction to protect future breaches. It would extend up to the time when the possession order became effective. But it cannot extend beyond that time. In my judgment there simply was no proper basis at all for the grant of an injunction in these circumstances.*"

53. Mr Hughes adroitly identified one potential legal gap. His clients contend that a Default has occurred, the Plaintiffs do not. If the Plaintiffs prevail in the present action, their entitlement to incur Permitted Indebtedness and Permitted Liens until trial and thereafter will be vindicated. If the Defendants prevail the undoubted interference with Outrider's enforcement rights by the Plaintiffs will not be vindicated. Where does the balance of convenience lie? In these circumstances, it seems to me, the short broad merits answer to the Defendants' application for injunctive relief at this juncture is as follows:

(a) there is no credible evidence presently before the Court which supports a finding that there is an imminent risk of the Plaintiffs consummating lending and security agreements and overriding Outrider's FRC Board veto rights, <u>without</u> prior notice to Mr Hope;

(b) any lender seeking to validly gain priority over Outrider's seemingly bionic security rights would do so on notice, by virtue of these proceedings, that the Plaintiffs' corporate authority to approve borrowing without Mr Hope's consent as an FRC director is subject to doubt;

(c) in these circumstances it seems doubtful that the Plaintiffs will be able take any legally efficacious action without prior notice which seriously prejudices the 2nd Defendant's contractual rights prior to the determination of the appeal; and

(d) the parties appeared to me when I discharged the Interim Injunction on December 21, 2018 to have foolishly fought their way into a stalemate position. This is why I concluded my judgment with the following words (which in fairness, the parties have not entirely ignored[10]):

> "*The present dispute cries out for a commercial compromise rather than a final judicial resolution.*"

Conclusion

54. The Variation Order is accordingly discharged and, in the exercise of my discretion, I decline to continue or replace it with a fresh injunction until the end of the April session of the Court of Appeal, so as to run with the Plaintiffs' own stay of my Order of December 21, 2018 discharging the Interim Injunction. That stay was granted on February 11, 2019 on the grounds that the Plaintiffs' appeal against that decision had realistic prospects of success and that if the stay was not granted the appeal would be rendered nugatory. I saw no inconsistency between my robustly finding that the Plaintiffs' substantive breach of fiduciary claim had no realistic prospects of success, on the one hand, and on the other hand accepting that the Plaintiffs' core appellate complaint that it was not properly open to me to reach that conclusion at the interlocutory stage, had realistic prospects of success before the Court of Appeal.

55. Unless any party applies by letter to the Court within 14 days to be heard as to costs, the costs of the present discharge application shall be paid by the Defendants and taxed on the indemnity basis, if not agreed.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

[10] I was told that without prejudice discussions have been taking place.