



Neutral Citation Number: [2021] EWHC 1667 (Comm)

Case No: CL-2013-000975

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24/06/2021

**Before :**

**CHRISTOPHER HANCOCK QC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

**AZZAM FAISAL KHOIJ**

**Claimant/**  
**Applicant**

**- and -**

**(1) ACROPOLIS CAPITAL PARTNERS LIMITED**  
**(2) ACROPOLIS CAPITAL MANAGEMENT**  
**LIMITED**

**Defendants/**  
**Respondents**

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**George McPherson (instructed by HMA Law) for the Claimant**  
**Ian Croxford QC and James Walmsley (instructed by Cooley) for the Defendants**

Hearing date: 23 April 2021  
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**Approved Judgment**

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

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**CHRISTOPHER HANCOCK QC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be 24 June 2021 at 10:30 AM”

## Christopher Hancock QC:

### Introduction and general background.

1. This is an application by the Claimant for an order that the Defendants, Acropolis Capital Partners Limited (“**ACP**”) and Acropolis Capital Management Limited (“**ACM**”), tender their officer, Mr Vinod Vaghadia, for cross-examination in relation to the contents of (selected parts of) his fourth affidavit dated 29 March 2021, and in particular paragraph 23 of that affidavit, which deals with the circumstances in which the ASFL Shares (as defined below) were transferred to Mrs Kurdi by reference to the eight issues identified in paragraph 18 of a letter dated 17 April 2021 from HMA Law, the Claimant’s legal representatives, to Cooley (who represent the Defendants).
2. The Claimant is the Administrator of the Estate of Mr Abdulrahman Mansouri (“Mr Mansouri”), who died on 5 June 2010. The Defendants managed certain of Mr Mansour’s substantial assets during his lifetime. The relevant individuals employed by or connected with the Defendants were:
  - 1) Mr Vaghadia: a director of the Defendants and their Finance Director;
  - 2) Mr Nabil Chartouni: the founder of ACM and an adviser to and co-investor with Mr Mansouri; and
  - 3) Ms Carol Lapwood: Company Secretary of the Defendants and Office Administrator.
3. In 2013 the Claimant brought a claim for declaratory relief that the Defendants (1) were agents of Mr Mansouri and (2) owed the Claimant a duty to account in respect of transactions and other business conducted by the Defendants on behalf of Mr Mansouri during this lifetime. One of those transactions related to Mr Mansour’s shares in an investment fund run out of the Cayman Islands (the “**Fund**”) by Acropolis Select Funds Limited (“**ASFL**”). There is a significant dispute about whether these shares (the “**ASFL Shares**”) were effectively transferred by Mr Mansouri to his niece, Mrs Shahzaman Kurdi, before his death. In December 2010, the ASFL Shares were allegedly worth US\$5,138,130.61. It is with this transaction that the current application is concerned.
4. In May 2016 there was a 5 day trial before Knowles J, which resulted in the Claimant obtaining wide-ranging declaratory and other relief in accordance with the terms of an Order dated 19 August 2016.
5. The Claimant succeeded at that trial and obtained the declarations sought. At the trial, Mr Vaghadia was the main witness to give evidence for the Defendants. Knowles J was not impressed with the evidence of Mr Vaghadia. In his judgment, he said the following:

“38. Save where there was other confirmatory material I did not have confidence in Mr Vaghadia’s reliability as a witness. His evidence was marked by an approach that showed no concern for or interest in Mr Mansouri on the one hand and determined loyalty to Mr Nabil Chartouni on the other. This

informed his view of corporate and investment arrangements that on any objective view were of questionable coherence.

39. Mr Vaghadia's partisanship and the lengths to which he would go in that connection were shown by his readiness to make a false representation in an attempt to obtain information for Mr Nabil Chartouni and Mrs Kurdi's husband in connection with a private jet that Mr Mansouri had (directly or indirectly) owned. He admitted this under cross examination from Mr Sutcliffe QC and I consider the representation to have been deliberately false.

40. In the case of the Park Lane Flat there are the two copy letters. In the case of the Multi-Strategy Fund there are the copy stock transfer forms. There is not similar contemporaneous confirmatory material in relation to the private equity investments, and I do not trust Mr Vaghadia's formulation (quoted in paragraphs 33 to 35 above) of how he says Mr Mansouri described these.

41. I wish to emphasise that it is only for the purpose of the claims made at this trial and as between the parties to this litigation that I accept the letters and the stock transfer forms as authentic, including their dates, and that there was a meeting. At this trial I did not have the benefit of forensic expert evidence or of disclosure or evidence from Mr Nabil Chartouni or Mrs Kurdi. In light of these limitations my acceptance at this trial of authenticity and that there was a meeting is unlikely to carry weight in any different context and in any future proceedings involving parties other than or additional to Mr Khouj, ACP and ACM, and for my part I would not wish it to carry weight.

42. Mr Vaghadia also gave evidence in these terms:

"At a later date Nabil Chartouni explained to me that Mr Mansouri had gifted these assets to Mrs Kurdi because she and Mr Mansouri were very close and she and her husband had been helping him, both personally and in his businesses, particularly in his later years. I also understand, from Nabil Chartouni, that Mr Mansouri believed he had to gift assets to Mrs Kurdi before he died because he believed she would not inherit anything from him due to Saudi forced heirship rules."

I am not prepared to accept this evidence, of what Mr Nabil Chartouni said to Mr Vaghadia was the intention, purpose and belief of Mr Mansouri, as reliable evidence of what Mr Mansouri's intention, purpose and belief was. In addition to my assessment (above) of Mr Vaghadia as a witness, Mr Vaghadia's evidence tells me nothing of what Mr Mansouri in fact said on these aspects to Mr Nabil Chartouni. And Mr Nabil Chartouni is not at this trial to tell me himself."

6. Following the trial, Knowles J made an order which included an order requiring an officer of the Defendants to swear an affidavit providing information and documentation in respect of the three categories of “Relevant Assets” in relation to which the Defendants acted as Mr Mansouri’s agent during his lifetime. Under the Order, the Claimant had liberty to apply for (1) further information and documentation and (2) cross-examination of the deponent of the affidavit in relation to its contents and any other relevant matter.
7. In more detail, the order provided as follows:
  - 1) paragraphs 1(b), 2, 3 & 4: which obliged the Defendants as the agents/fiduciaries of Mr Mansouri to account to the Claimant in relation to “*transactions and other business*” conducted (1) on behalf of Mr Mansouri or (2) jointly with another in relation to the ASFL Shares;
  - 2) paragraph 6(2)(a) & (b): which required the affidavit provided by the Defendants (1) to address the basis on which the transfer of the ASFL Shares (a) was effected and (b) (if different) is said to have been legally effective and (2) to exhibit any documents recording the transfer of the ASFL Shares to Mrs Kurdi;
  - 3) paragraph 9 (i) & (ii): which entitled the Claimant to apply for an order for further information and documentation in relation to the transfer of the ASFL Shares and to seek an order for cross-examination in relation to “*any other relevant matter*”.
8. Following the trial before Knowles J, the Defendants sought permission to appeal, an application which was only finally disposed of by virtue of orders of Briggs LJ (as he then was) dated 1 February 2017 and Sharp LJ dated 3 November 2017. Prior to this date, Knowles J’s order was stayed. Immediately following the dismissal of the application for permission to appeal, however, the affidavit contemplated by the order of Knowles J was filed, on 8 November 2017. That affidavit was Mr Vaghadia’s first affidavit, and is referred to in this judgment as Vaghadia 1, and contained four paragraphs relating to the ASFL shares. There was in addition an exhibit served to that Affidavit, which contained 17 pages relating to the ASFL shares.
9. On 12 November 2017 TA Legal Consultancy (acting for the Claimant) required BNY Mellon to provide (1) copies of all documents held by BNY Mellon which evidenced “*any instructions received*” in relation to the registration of the ASFL Shares in Mrs Kurdi’s name in April 2011; and (2) “*any other document*” relied on by BNY Mellon to register Mrs Kurdi as the owner of the ASFL Shares (including any indemnity given by any party in BNY Mellon’s favour).
10. On 9 December 2019, HMA Law resumed correspondence on the information in Mr Vaghadia’s affidavit after resolving disputes relating to the Defendants’ costs liability. The letter to BNY Mellon appended a schedule of “requested information” in relation to the transfer of the ASFL Shares from Mr Mansouri to Mrs Kurdi, which was copied to Cooley and Dechert (the “**BNY Mellon Schedule**”). This included requests for the following information:

- 1) copies of all documents submitted to/received by BNY Mellon requesting the transfer of the ASFL Shares from Mr Mansouri to Mrs Kurdi;
  - 2) originals of the stock transfer forms;
  - 3) the reasons why the transfer of the ASFL Shares was not documented by BNY Mellon until 31 March 2011.
11. On 11 December 2019, Mr Vaghadia forwarded the letter from Cooley to Dechert with the message “*I will discuss this with Cooley over the next couple of days*”.
12. On 13 January 2020, BNY Mellon responded by email. It required the “*appropriate consent of the relevant Acropolis entities*” before any information could be provided.
13. On 17 February 2020, HMA Law sent a letter in which they asserted that there were substantial inadequacies in the information and documentation provided in Vaghadia 1. Specifically, in relation to the ASFL shares, HMA Law requested:
- 1) the Defendants’ understanding as to the “*reasons for the alleged delay*” in sending the transfer documentation to BNY Mellon; and
  - 2) confirmation that (1) all documentation (2) within the control of the Defendants (3) relating to the transfer of the ASFL Shares (including all written communications relating to this issue between 13 April 2010 and 30 April 2011) had been/would be provided.
14. On 27 February 2020, HMA Law sought the Defendants’ consent to authorise BNY Mellon to release to the Claimant the information set out in the BNY Mellon Schedule. However, no consent was given for some time (with a number of reasons being put forward for this), until, on 7 May 2020 HMA Law reserved the Claimant’s right to issue an application, if no substantive response was received by 14 May 2020. Cooley’s response, on the same day, was to say that “*it would be precipitous to commit to any date by which we will be able formally to respond to your letter. However, it is fair to say that it will not be in the short term*”.
15. On 25 June 2020 the Claimant issued this application notice seeking (1) authority in relation to the BNY Mellon Schedule (2) a further affidavit addressing the HMA Law 17 February letter and/or (3) an order for cross-examination of Mr Vaghadia in relation to the contents of Vaghadia 1 “*and any further affidavit and exhibit*”. The hearing was listed for 15 December 2020. By the time of the application before me, the authority referred to in (1) had been given, and three further affidavits had been served (on which more below).
16. On 12 October 2020 the Defendants served a further affidavit from Mr Vaghadia (“Vaghadia 2”). Paragraphs 41 to 46 addressed the transfer of the ASFL Shares. In particular, Mr Vaghadia gave evidence that:
- 1) he had “*no knowledge*” of the reason for the delay in Mrs Kurdi sending the documentation to BNY Mellon; and

- 2) all documents (except those that are subject to privilege) relating to the transfer of the ASFL Shares between 13 April 2010 and 30 April 2011 had been provided.
17. On 16 October 2020 HMA Law made a request of ASFL’s new lawyers (Cooke, Young & Keidan) that ASFL authorise BNY Mellon to release the information in a schedule. After rounds of correspondence seeking time, ASFL did not provide its consent.
  18. On 16 November 2020 HMA Law responded to Vaghadia 2. They requested Mr Vaghadia “*to identify the categories of documentation relating to the alleged transfer of the ASFL Investment withheld by the Defendants on the grounds of privilege in respect of the period 13 April 2010 to 30 April 2011 stating the grounds of privilege relied on in respect of each category*”.
  19. On 4 December 2020 Cooley responded, stating that a small number of documents relating to the transfer of the ASFL Shares had not been provided. Cooley described this as a “*simple error*”. In brief:
    - 1) 44 non-privileged documents relating to the transfer of ASFL shares to Mrs Kurdi had been identified which had not previously been disclosed (the “**ASFL New Disclosure**”);
    - 2) Mr Vaghadia’s explanation for the error was that none of these documents appeared to be disclosable (1) against any of the issues in dispute in the main proceedings or (2) pursuant to paragraph 6(2)(b) of the Order;
    - 3) the ASFL New Disclosure was provided with Cooley’s letter; and
    - 4) “*fewer than 25*” allegedly privileged documents continued to be withheld as “*communications requesting and/or providing legal advice to ASFL and/or BNY (and/or form part of further communications regarding that advice)*”.
  20. On 10 December 2020 the Defendants served a further affidavit from Mr Vaghadia (“Vaghadia 3”). In this regard:
    - 1) paragraphs 8 to 19 sought to explain how Mr Vaghadia had come to make the statement in his previous affidavit that “*all documentation*” relating to the transfer of the ASFL Shares in the period 13 April 2010 to 30 April 2011 had been provided;
    - 2) in swearing this further affidavit, Mr Vaghadia gave what the Claimant alleges to be a different explanation for the failure to provide the ASFL New Disclosure than that provided through Cooley on 4 December 2020;
    - 3) Mr Vaghadia’s new explanation was that all documents “*relating to*” the transfer of the ASFL Shares would have been provided to the Claimant “*through what I understood to be a wide disclosure process undertaken by ACP and ACM’s then lawyers in these proceedings*”. In support, Mr Vaghadia relied on an affidavit sworn by the Defendants’ then lawyers, Memery Crystal, in which it was stated that an end date of 1 February 2011 for searches was selected because:

- a) it was “highly unlikely” that documents created 8 months after Mr Mansouri’s death “*would shed light on the issue of whether [the Defendants] were Mr Mansouri’s agents during his lifetime*”;
  - b) it was “disproportionate” to search for documents in the subsequent five years;
  - c) (overall) the process of identifying and reviewing electronic documents for disclosure was undertaken “*reasonably, proportionately and thoroughly*”.
21. On 14 December 2020 the parties agreed to adjourn the hearing on 15 December 2020. The Claimant alleges that the adjournment was necessitated by the Claimant’s need to consider (1) the recent and late ASFL New Disclosure and (2) the explanation for the same in Vaghadia 3.
  22. On 23 December 2020 HMA Law asked Cooley to clarify the claim to privilege asserted on 4 December 2020.
  23. On 6 January 2021 Cooley responded, stating that the 44 new documents were “*of little or no relevance*” to the issues in dispute and “*of only really marginal wider relevance to the transfer of the Relevant Assets*”. Cooley stated that the privilege claim related to legal advice sought between “*around 5 January 2011 and 11 May 2011*” in relation to the effective transfer of the ASFL Shares to Mrs Kurdi.
  24. On 8 January 2021 HMA Law sent a further letter in which they set out their understanding of the relevant narrative and asked for confirmation of that understanding. In the light of this incomplete picture, HMA Law asked the Defendants to provide a further affidavit from Mr Vaghadia setting out his knowledge of the process whereby the ASFL Shares were transferred to Mrs Kurdi by reference to the ASFL New Disclosure.
  25. On 14 January 2021 the parties agreed to adjourn the (adjourned) December hearing to the first available date after 5 March so that the Defendants could provide the requested affidavit.
  26. On 29 March the Defendants served a copy of a further affidavit from Mr Vaghadia (“Vaghadia 4”). Paragraph 23 provides the requested account of the transfer of the ASFL Shares, and it is in respect of this paragraph that the Claimant seeks to cross examine Mr Vaghadia.

### **The background to the current application.**

27. This Application arises out of what the Claimant alleges to be the inadequacy of the explanations and documentation provided by the Defendants in relation to the transfer of the ASFL Shares in the four affidavits sworn by Mr Vaghadia and in the correspondence. In brief, the Claimant alleges the facts to be as follows:
  - 1) Some three months after Mr Mansouri’s death and following a telephone call with Mr Vaghadia, Ms Lapwood, on 1 September, submitted a signed stock transfer form to BNY Mellon in support of the transfer which caused BNY

Mellon (on 10 September) to create a new account in the name of Mrs Kurdi. The Claimant alleges that this submission was deliberately false since Ms Lapwood, knowing that Mr Mansouri was dead, represented that she had just received instructions from him.

- 2) The Claimant alleges that, despite knowing from 10 September 2010 at the latest that BNY Mellon had been misled by Ms Lapwood into believing that Mr Mansouri was still alive, on his own untested evidence Mr Vaghadia said nothing to BNY Mellon about Mr Mansouri's death for 10 weeks. The Claimant asserts that he has made no attempt to explain why this was.
  - 3) On 29 November 2010, BNY Mellon reported its concerns to Mr Vaghadia about the validity of the alleged transfer of the ASFL Shares. Mr Vaghadia's evidence is that he does not recall anything about BNY Mellon's concerns or telephone conversations or voicemail messages he left at this time.
  - 4) However, Mr Vaghadia has positively asserted (in his fourth affidavit served on 5 March 2021) that he "*continued to follow-up with BNY Mellon*" on the status of the transfer during December 2010.
  - 5) After 5 January 2011, ASFL and BNY Mellon took legal advice in relation to the transfer of the ASFL Shares, over which they (through Mr Vaghadia) have also claimed privilege. The upshot of this advice appears to have been that ASFL agreed to provide an indemnity to BNY Mellon against "*any and all costs, losses, damages...whatsoever incurred*" by BNY Mellon in relation to the transfer. Mr Vaghadia's explanation for this requirement is that "*the circumstances of the transfer were non-standard*".
  - 6) On 10 May 2011, in an email to BNY Mellon's legal counsel (Hugh Sheridan), Mr Vaghadia referred to an unspecified "*transfer registration issue*" in relation to the ASFL Shares. Later the same day, Mr Sheridan informed Mr Vaghadia that the transfer of the ASFL Shares to Mrs Kurdi had been given an "as of processing date" of 31 March 2011 which required a "waiver form". In his evidence, Mr Vaghadia has stated that this form was required as it was a "non-standard transaction".
  - 7) On 11 May 2011, in an email copied to Mr Vaghadia, Mr Sheridan stated that the stock transfer form, which came from the Defendants, was "*not a standard document*".
  - 8) On 18 May 2011, the transfer of the ASFL Shares to Mrs Kurdi appears to have been finally completed, over 13 months after Mr Mansouri's alleged instructions.
28. In short, the Claimant says, the Defendants have failed to explain why it took over a year for the transfer of the ASFL Shares to be processed. That encompasses the following fundamental questions, which remain unanswered or unsatisfactorily answered by Mr Vaghadia:
- 1) why have the Defendants failed to provide any letter documenting Mr Mansouri's contemporaneous wishes to transfer the ASFL Shares to Mrs Kurdi?



- 2) why did the Defendants positively mislead BNY Mellon to believe that Mr Mansouri was still alive between September and November 2010?
  - 3) who disclosed Mr Mansouri's death to BNY Mellon in November 2010?
  - 4) what were the concerns raised by BNY Mellon in November 2010, which culminated in BNY Mellon and ASFL seeking legal advice in January 2011?
  - 5) what was so "non-standard" about (1) the circumstances of the transfer of the ASFL Shares or (2) the stock transfer forms as to require ASFL to provide (a) an indemnity and (b) a non-waiver form to BNY Mellon?
  - 6) why was the transfer of the ASFL Shares retrospectively processed on 31 March 2011?
29. The Claimant also asserts that it is particularly unsatisfactory that the nature of the (unanswered) questions in play now has only become apparent since 4 December 2020, when the Defendants disclosed the new documentation relating to the transfer of the ASFL Shares, set against a backdrop of (1) Mr Vaghadia's inconsistent explanations to date (2) Knowles J's finding (after observing Mr Vaghadia giving evidence for 1.5 days) that he was an unreliable witness and (3) the Defendants' historical lack of co-operation. It was only after the Claimant issued the Application in June 2020 that the Defendants started to engage with the Claimant's requests, it is alleged.

#### **Legal principles relating to the agent's duty to account.**

30. The Claimant asserted that the legal incidents arising out of an agent's "duty to account" to its principal are:
- 1) first (duty to account): an agent is under an obligation to keep an accurate account of all transactions entered into on the principal's behalf: *Bowstead & Reynolds on Agency* (22nd ed.) 6-092;
  - 2) second (duration): the actual authority of an agent (if given for a particular transaction) is terminated only by completion of that transaction (*Bowstead*, 10-002 to 10-003). Further, the agent's duty to provide to his principal the records of transactions effected pursuant to the agency must subsist notwithstanding termination of the agent's authority: *Yasuda Ltd v Orion Underwriting Ltd* [1995] QB 174 (Colman J 185H – 186A); and
  - 3) third (inspection of emails): the duty encompasses a principal's right to inspect and copy emails held on the agent's computer "*relating to its business affairs*": *Fairstar Heavy Transport NV v Adkins* [2013] 2 CLC 272 (Mummery LJ [46]).
31. I did not understand these principles to be in dispute. I would in any event accept this as an accurate account.

#### **Legal principles as to orders for cross-examination.**

#### ***Jurisdiction.***

32. The parties were agreed that I had jurisdiction to make an order for cross-examination, but they did not agree as to the source of that jurisdiction or as to the principles governing the exercise of the jurisdiction.
33. Four bases for the jurisdiction were put forward by the parties, namely:
- 1) CPR Part 32.7;
  - 2) CPR Part 71;
  - 3) The inherent jurisdiction of the Court;
  - 4) S.27(1) of the Senior Courts Act.
34. CPR Part 32.7 provides as follows:
- 1) Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence.
  - 2) If the court gives permission under paragraph (1) but the person in question does not attend as required by the order, his evidence may not be used unless the court gives permission.
35. CPR Part 71.2 provides, in material part, as follows:
- 1) A judgment creditor may apply for an order requiring –
    - a) a judgment debtor; or
    - b) if a judgment debtor is a company or other corporation, an officer of that body,to attend court to provide information about –
    - i) the judgment debtor's means; or
    - ii) any other matter about which information is needed to enforce a judgment or order.......
  - 6) A person served with an order issued under this rule must –
    - a) attend court at the time and place specified in the order;
    - b) when he does so, produce at court documents in his control which are described in the order; and
    - c) answer on oath such questions as the court may require.

36. It is also clear that the Court retains an inherent jurisdiction to make an order to ensure compliance with orders already made. This is apparent, by way of example, from the decision of Foxton J in the case of *Lakatamia Shipping v Su* [2020] 1 WLR 2852, where the judge said, at paragraph 17:
- “I am satisfied that I do have jurisdiction, certainly to the good arguable case thresholds appropriate for an interim application: (i) under section 37(1) of the Senior Courts Act 1981 , on the basis that such an order is just and convenient as a necessary adjunct to the injunctions and orders for the giving of information and production of documents already made against Mr Su; (ii) under the court's inherent jurisdiction to ensure compliance with the orders already made against Mr Su.”
37. Following the hearing in front of me, both parties submitted further written submissions addressing, inter alias, the question of jurisdiction.
- 1) The Claimant, for its part, submitted that the most appropriate of the above sources of jurisdiction was the inherent jurisdiction referred to above. It was said that neither of the CPR provisions was clearly apt to cover this situation.
  - 2) The Defendants position was that neither of the above cited provisions of the CPR applied, nor the inherent jurisdiction of the Court. However, the Defendants accepted that I had jurisdiction under s.37(1) of the Senior Courts Act 1981 to make the order sought.
38. In my judgment, it is not necessary for me to choose between these possibilities in relation to the issue of jurisdiction, since both parties accept that I have such jurisdiction. My own view is that any of the bases of jurisdiction would in fact be applicable. However, I accept the Defendants’ submission that the important question is as to the applicable principles.

### ***Principles.***

#### **The Defendants’ submissions.**

39. The Defendants, for their part, referred me to a number of authorities, which they relied on by way of analogy, namely *Jenington International Limited v Assaubayev* [2010] EWHC 2351 (Ch); *West London Pipeline and Storage Ltd v Total UK* [2008] EWHC 1729; and *JSC Commercial Bank Privatbank v Kolomoisky and others* [2021] EWHC 403 (Ch). Taking those cases chronologically:
- 1) The *West London* case concerned an application to cross examine a party on an affidavit claiming privilege. Beatson J, as he then was, refused that application. He went through a number of cases, before seeking to summarise the relevant principles in paragraph 86 of his judgment, as follows:

“86. It is possible to distil the following propositions from the authorities on challenges to claims to privilege:

(1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* (2007) 11-46, and paragraph [50] above. A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: *Bank Austria Akt v Price Waterhouse*; *Sumitomo Corp v Credit Lyonnais Rouse Ltd* (per Andrew Smith J).

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved: *Re Highgrade Traders Ltd*; *National Westminster Bank plc v Rabobank Nederland*.

(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority*.

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharne* (the Chief Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montevideo Gas Co*; *Birmingham and Midland Motor Omnibus Co v London and North Western Railway Co*; *National Westminster Bank plc v Rabobank Nederland*.

(4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it:

(a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection: *Neilson v Laugharne*; *Lask v Gloucester Health Authority*.

(b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory: *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*; *National Westminster Bank plc v Rabobank Nederland*.

(c) It may inspect the documents: see CPR 31.19(6) and the discussion in *National Westminster Bank plc v Rabobank Nederland* and *Atos Consulting Ltd v Avis plc* C (No. 2). Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

(d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets: *House of Spring Gardens Ltd v Waite*; *Yukong Lines v Rensburg*; *Motorola Credit Corp v Uzan*. However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents: *Frankenstein's case*; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* and *Fayed v Lonrho*. In cases where the issue is whether the documents exist (as it was in *Frankenstein's case* and *Fayed v Lonrho*) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue.”

- 2) In *Jenington*, which was a case involving cross examination of a Defendant in relation to an asset disclosure affidavit, Vos J (as he then was) said this, at paragraph 22 of his judgment:

“Against the background of those authorities and the submissions of the parties which were not much at odds as to the principles to be applied, it seems to me that the requirements for ordering cross-examination in circumstances such as these may be summarised as follows:

(1) the statutory discretion to order cross-examination is broad and unfettered. It may be ordered whenever the court considers it just and convenient to do so.

(2) generally cross-examination in aid of an asset disclosure order will be very much the exception rather than the rule.

(3) it will normally only be ordered where it is likely to further the proper purpose of the order by, for example, revealing further

assets that might otherwise be dissipated so as to prevent an eventual judgment against the defendants going unsatisfied.

(4) it must be proportionate and just in the sense that it must not be undertaken oppressively or for an ulterior purpose. Thus it will not normally be ordered unless there are significant or serious deficiencies in the existing disclosure.

(5) cross-examination can in an appropriate case be ordered when assets have already been disclosed in excess of the value of the claim against the defendants.”

- 3) Finally, in the *Privatbank* case, Trower J, having referred to the statement of Vos J cited above, went on to say, at paragraphs 40-44:

“40. The proper purpose of the order is (as Neuberger J said in *Great Future International Ltd v Sealand Housing Corporation* (22/3/2001) Unreported at p.2 of the Transcript): “solely to discover what assets the defendant has with a view, if the court thinks it appropriate, to making freezing orders or similar orders in respect of some or all of those assets”. As Potter LJ said in *Motorola Credit Corporation v Uzan & Ors* (No 2) [2004] 1 WLR 113 at paragraph 142: “The purpose for which disclosure of assets is required and where disclosure is inadequate cross-examination is ordered is to enable the claimant to make the freezing order effective”. The purpose is therefore to police the freezing order so that it has effect for the purposes for which it was originally granted.

41. It is possible to add to these principles by reference to a number of further authorities from which the following additional points can be derived:

(1) Significant or serious deficiency in the existing disclosure has been characterised as a necessary, but not sufficient, condition for ordering cross- examination: *Kazakhstan Kagazy v Zhunus* [2019] EWHC 1693 (Comm) at [39] (per Jacobs J).

(2) Defects in asset disclosure should be identified with as much precision as possible - a general suspicion that disclosure is inadequate is unlikely to be sufficient: *CBS United Kingdom v Perry* (1985) FSR 421 at 429.

(3) A change in the respondent’s story may be a good reason to order cross- examination: *Shalson v Russo* (Neuberger J, Unreported 23 March 2001) (at p.5).

(4) The court will have regard to whether there is a less intrusive means to obtain the information required (and in that context will take account of earlier efforts to do so by means of solicitors’

correspondence and the like): *Otkritie v International Urumov* [2012] EWHC 3106 (Comm) at [33].

(5) It would be wrong to make an order for cross-examination for a wider purpose, such as the investigation of issues in the substantive claim or to obtain ammunition for an application for contempt (*JSC Mezhdunarodniy Bank v Pugachev (No 2)* [2016] 1 WLR 781 at [39]).

42. Mr Tom Adam QC for Mr Kolomoisky relied on the decision of HHJ Pelling QC in *Bank of Scotland Plc v Greville Development Company* [2013] EWHC 983 (Ch) at para [34] in support of a submission that an order for cross-examination is an order of last resort, which Mr Hunter construed as a submission that the Bank needs to show that cross-examination is the only possible way forward. Whether or not Judge Pelling QC intended to go quite that far, I think it is clear that, given the intrusive and burdensome nature of the process, the court will always give very careful consideration to “whether there are not alternative means of achieving the same end that are less burdensome” (per Phillips LJ in *Yukong Line Limited of Korea v Rendsburg Investments (Court of Appeal Unreported 17 October 1996)*).

43. The way that Mr Adam put this point in the course of his submissions was that “last resort” is a fair description because it is only when the court decides that other forms of enquiry have run into the sand, and there is no point in going on with them, that the stage is reached at which a cross-examination is appropriate. In large part I agree, although, at the end of the day the reason for that is that it is only then that in the normal case this is the just and convenient order to make.

44. Mr Adam also drew my attention to some further passages from the judgment of Vos J in *Jenington* (at paras [58]-[61]), which are of assistance in illuminating the correct approach to an application for cross-examination as to assets in litigation of this sort. It is, however, important to recognise that the statutory discretion is broad and unfettered, and what ultimately is just and convenient will depend on all the circumstances of the particular case:

...

58. There is a fine line between a genuine scepticism about the veracity of asset disclosure and a refusal to accept the truth of any statements made by a mistrusted defendant. This case has epitomised that line. The claimants in this case have seemingly refused to accept the truth of anything the defendants have said, querying everything and demanding documents to support every point.

59. The defendants say that this is simply not what asset disclosure is about. It is not intended to allow the claimant to investigate every aspect of every transaction undertaken by a defendant in the run-up to litigation.

60. It seems to me that the balance between these two positions must be carefully held. Asset disclosure is intended to ensure that the worldwide freezing order is effective, and that the claimants are aware of assets owned or allegedly owned by the defendants so as to prevent their being dissipated so as to frustrate an eventual judgment obtained.

61. But the asset disclosure process cannot resolve disputed questions as to the ownership of assets. Nor is it appropriate to allow any kind of mini-trial, by endless rounds of evidence and counter-evidence. A stage is eventually reached at which the claimants can contend that an asset is owned by the defendants and the defendants can contend that it is not. It [is] then up to the claimants to take such steps as they legitimately can to persuade this court -- or in some cases a foreign court -- that that asset should be preserved, pending the conclusion of the contested substantive litigation. Only at that stage, during a final enforcement process, will the court determine whether a disputed asset actually belongs to a defendant, so that it can be enforced against.”

#### **The Claimant’s submissions.**

40. The Claimant, for its part, argued that the Court had jurisdiction to take any step to enforce existing orders or judgments, whenever the circumstances made it just and equitable to do so. The Claimant relied on a number of passages in the *Lakatamia* case, to which I have already made reference above, in which Foxton J observed (at paragraph 25) that the orders were “*consistent, in a post-judgment context, with the strong policy which favours facilitating the satisfaction of court judgments by those able to do so (as emphasised by the Court of Appeal in Emmott v Michael Wilson & Partners Ltd [2010] 4 WLR 53, para 44<sup>1</sup> )*”; and (at paragraph 27) that “*there is a strong judicial policy of seeking to ensure that court orders are effective and that judgments of the court are complied with*”. The Claimant pointed out also that Foxton J also relied on dicta of Teare J in *Nolan Family Partnership v Walsh* [2011] EWHC 55 (Comm), in which the learned judge granted the Claimant’s application for an order that an independent solicitor be appointed to carry out disclosure on the First Defendant’s behalf, so that the Claimant could find out where the proceeds of a fraud had gone. While accepting the novelty of the order, Teare J held that the court had inherent

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<sup>1</sup> Where the Court of Appeal (in considering the scope of the Mareva jurisdiction) stated: “...*the mere fact that a Mareva is sought post-judgment does not mean that the court is relieved from considering whether the application accords with the purpose underlying the grant of such relief. That said, there can be no doubt that the fact of an unsatisfied judgment debt – as contrasted with a pre-judgment claim for unliquidated damages – does make a difference. Given the policy of the law weighing heavily in favour of the enforcement of judgments, it would be surprising if it did not*”.



jurisdiction to make it because “*in the unusual circumstances of this case, it seems to me an appropriate way of ensuring that the disclosure obligation is complied with*”.

41. The Claimant also relied on *Halsbury’s Laws of England*, Volume 11, 2020, at paragraph 23, which states that:

“In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

42. Finally, the Claimant suggested that the test in this regard should be no higher than the low bar set in relation to Part 71 applications.

43. In its reply to these points, made in the Claimant’s post hearing submissions, the Defendants submitted as follows:

- 1) The need for caution in granting an order for cross-examination has been underlined by the fact that the Claimant’s Counsel indicated at the hearing that the purpose of the cross-examination was to inform the decision as to what if any further steps are taken to attempt to recover assets (i.e. what proceedings then to bring), and in particular the ASFL shares. It is notable that the Claimant has not even ruled out proceeding against the Defendants or Mr Vaghadia personally. This therefore squarely engages the principle that it is a misuse of cross-examination on an assets affidavit to investigate issues for a substantive claim: see e.g. *JSC Commercial Bank v Kolomoisky* at paragraph 41(5).
- 2) The fact that the approach under CPR Part 71 is inapt is graphically illustrated by the case of *Vale SA v BSG Resources Ltd* [2020] EWHC 2021 (Comm) at paragraph 36, where Master Davison points out that hundreds of applications are made under CPR Part 71 every week, usually being dealt with by court officers. An administrative process is envisaged. It cannot conceivably have been contemplated that the application for which liberty was granted under Para.9 of the August 2016 Order was intended to be administrative in nature.
- 3) An application under CPR Part 71 is founded upon an already precisely known and identified topic i.e. the terms of the Judgment which it is sought to enforce. Judgments are advisedly drawn in precise terms so as to ensure that liabilities and obligations are known with precision. CPR Part 71 can then be readily employed to assist in enforcement. That is very much not the circumstance obtaining here; the Claimant complains about lack of precision in existing disclosure (by witness statement/ affidavit/ documents) and has only provided a general description of inquiries it wishes to make in cross examination.
- 4) As already noted, the Claimant accepts that he is not seeking information needed for the purposes of enabling enforcement (which is why he accepts that CPR Part 71 does not apply). The Claimant does allege, however, that the order for cross-examination would itself amount to enforcement. This requires scrutiny.

Thus, if the Claimant is in substance seeking an Order to assist in probing whether the Defendants have complied with the obligations that they have as fiduciaries (and which they cannot deny they have as fiduciaries pursuant to the declaratory relief in the August 2016 Order) in the light of requests for information that have been made of them, then that is not seeking enforcement. It is not even seeking to require someone to do something that it follows from declaratory relief that they are obliged to do. It is rather a “policing” function: it is seeking to check that that person has in fact done that which they are required to do in accordance with declaratory relief that has been granted. If on the other hand the Claimant accepts that the Claimant must persuade the Court in advance of obtaining an Order for cross-examination that Para. 23 of the 4th Affidavit does not comply with the duties on the Defendants that follow from the declaratory relief in the August 2016 Order, then it is respectfully submitted that the Claimant plainly has not discharged that burden.

44. Finally, by way of comment on the authorities on which the Claimant places reliance in this connection:
- 1) *Lakatamia Shipping* does not assist the Claimant. All that the Judge in that case concluded was that “*the court has jurisdiction to make an order to procure compliance by a defendant with an obligation the defendant is under but refuses to perform itself*”. That is of no relevance to this case because the Defendants do not dispute that the Court has jurisdiction. So far as the principles to be applied go, it is noteworthy that in *Lakatamia* the Court in fact applied a “stringent test” applicable to a “pre-judgment context” even though the application for relief was made in the post-judgment context. The case is therefore no authority for the lax test for which the Claimant contends.
  - 2) *Emmott* does not assist the Claimant either. The case concerned the “ordinary course of business exception” in the context of freezing injunctions post-judgment. Although the Claimant relies on one paragraph, what that paragraph in fact serves to do is emphasise the importance of giving substantive consideration to whether the order sought promotes a relevant legitimate purpose. Here there is no such legitimate purpose.
  - 3) *Nolan* simply provides an example of a power the Court has pursuant to a non-statutory inherent jurisdiction to make disclosure related orders against non-parties. It does not assist in identifying the test to be applied to decide whether an order for cross-examination should be made.

Discussion and conclusions on the authorities.

45. In my judgment, these various authorities, dealing as they do with a variety of different situations, establish the following general propositions:
- 1) The discretion to order cross-examination is broad and unfettered and may be ordered whenever the court considers it just and convenient.
  - 2) The purpose of such an order (in any context) is to render the Court process effective.

- 3) The cross-examination must be proportionate and must not be for an ulterior purpose.
- 4) Significant or serious deficiencies in existing disclosure, or in responses to earlier orders, may justify cross-examination.
- 5) If alternative ways of achieving the same end can be used, these should be used in preference to cross-examination.
- 6) A change in the Defendant's story may be a good reason to order cross-examination.
- 7) There may be specific considerations applicable to particular situations in which an order for cross examination is sought.
  - a) Cross-examination in relation to an affidavit on disclosure should not be allowed.
  - b) Cross examination in relation to asset disclosure should be the exception rather than the rule.
- 8) There is an important distinction to be drawn between cases relating to the situation before judgment and cases which relate to the situation after judgment. In my judgment, the position is different after judgment has been given, for a number of reasons:
  - a) There is no question of the trial process being prejudiced by virtue of a cross-examination procedure having taken place before trial. This possibility clearly troubled Beatson J in the *West London Pipeline* case: see paragraph 84 of that case in particular.
  - b) There is a valid analogy between the provisions of CPR Part 71 (relating to attendance of witnesses to give oral evidence in aid of execution) and the current case, even if, as the parties suggest, Part 71 is not itself applicable in terms (a proposition which I would wish to leave open). However, I do not propose in this case to apply a "very low bar".
  - c) It is important to bear in mind that this is a case where the very duty sought to be enforced is a duty to give information. This, in my judgment, tends to support the suggestion that the agent or fiduciary should be required to give explanations, and to attend to answer questions in this regard.
  - d) It is also important to bear in mind that the order of Knowles J specifically contemplated that there might indeed be a need for cross-examination, following the production of the documents required by virtue of his holdings.

**Is an order for cross-examination required in this case?**

**The Claimant's submissions.**

46. The Claimant relies on the following matters in support of an order for cross-examination.

- 1) Incomplete and misleading evidence to date.
- 2) New and late disclosure.
- 3) Improper or unexplained grounds for withholding information and documentation.
- 4) Bad character.
- 5) A lack of cooperation in relation to the transfer of the ASFL Shares.

47. I deal with each in turn, before turning to the Defendants' response.

*Mr Vaghadia's evidence to date.*

48. I can start therefore with the Claimant's submissions in relation to Mr Vaghadia's evidence to date. In essence, the Claimant contends that the affidavit and other evidence to date from Mr Vaghadia in relation to the transfer of the ASFL Shares raises serious issues which remain unexplained in a number of respects.

- 1) The letter from Mr Mansouri: Mr Vaghadia has not explained why the Defendants have not provided a copy of the letter from Mr Mansouri to Mr Chartouni allegedly evidencing his wish to gift the ASFL Shares to Mrs Kurdi at or before the meeting of 13 April 2010. This is so notwithstanding that:
  - a) in his evidence at trial, Mr Vaghadia stated that at the meeting of 13 April 2010 he was shown three signed letters from Mr Mansouri to Nabil Chartouni which included "*a letter transferring the shares of the fund to Mrs Kurdi*";
  - b) the Defendants have (1) access to documentation held by/addressed to Mr Chartouni and (2) exhibited to Vaghadia 1 a letter from Mr Chartouni to Mrs Kurdi dated two weeks after the meeting which purported to confirm Mr Mansouri's wish to gift the ASFL Shares to Mrs Kurdi; and
  - c) the New ASFL Disclosure reveals that BNY Mellon raised its concern on 29 November 2010 that there was no evidence in the instructions that Mr Mansouri actually agreed to the transfer;
- 2) The reasons for Mrs Kurdi's delay. Mr Vaghadia has given various, shifting explanations about the extent of his knowledge of the reasons for Mrs Kurdi delaying until the end of August 2010 to submit the stock transfer form to BNY Mellon, which are nonsensical. That evidence is important against the following background:
  - a) the Defendants allege that Mrs Kurdi counter-signed the stock transfer form on 1 June 2010;

- b) the date of Mrs Kurdi's signature, the Claimant says, has been obviously altered; and
  - c) Mrs Kurdi herself does not deal with the date of her signature of the stock transfer form in her evidence;
- 3) misleading of BNY Mellon: Mr Vaghadia has made no attempt to explain the documents which appear to show that he and Ms Lapwood and/or Mr Chartouni deliberately withheld from BNY Mellon the fact of Mr Mansouri's death until at least 3 November 2010. It now appears from the New ASFL Disclosure (not available at trial) that Mr Vaghadia lied under oath at trial that he was not aware at the time of Ms Lapwood's email to Mr Atkinson of 1 September 2010 in which she made the deliberately false statement to BNY Mellon that Mr Mansouri was still alive and had given her instructions that morning;
- 4) disclosure of Mr Mansouri's death: Mr Vaghadia's evidence that he voluntarily disclosed the fact of Mr Mansouri's death to BNY Mellon on 3 or 4 November 2010 is nonsensical. The more likely explanation is that BNY Mellon raised this issue with the Defendants following receipt of the Claimant's letter on 3 November 2010;
- 5) BNY Mellon's concerns: Mr Vaghadia claims not to recall any of his conversations with BNY Mellon in late November 2010 arising out of their "concerns" surrounding the completion of the transfer. Given the obvious importance and urgency of these concerns, Mr Vaghadia's alleged total lack of recollection is not credible. In any event, his failure to comment on the nature of BNY Mellon's concerns is contrived: because the Defendants have reviewed the contents of Mr Vaghadia's "follow-up" communications with BNY Mellon in December 2010 in order to advance an incoherent privilege claim to avoid disclosing evidence of those communications.
- 6) non-standard transaction: Mr Vaghadia describes the (1) circumstances of and (2) documentation relating to the transfer of the ASFL Shares as "non-standard" having regard to one or more of the following:
- a) BNY Mellon's requirement for a letter of indemnity;
  - b) BNY Mellon's requirement for a "waiver form" to support the "as of processing date";
  - c) BNY Mellon's description of the stock transfer form as "not a standard document".

Yet Mr Vaghadia has not explained what made the transfer of the ASFL Shares "non-standard". This is so notwithstanding his evidence that (1) he prepared the stock transfer form at the meeting on 13 April 2010 using documentation held at the offices of the Defendants and (2) he was privy to the communications in relation to (a) the letter of indemnity and (b) the waiver form.

- 7) retrospective processing date: Mr Vaghadia claims not to recall (1) the "registration" issue or (2) why the transfer was process with a dealing date of

31 March 2011. The Defendants have agreed to carry out further searches to identify potentially relevant documents to elucidate these issues.

49. The gaps in Mr Vaghadia's account of the transfer of the ASFL Shares in paragraph 23 of Vaghadia 4 are therefore extensive and call for explanation.

*New and late disclosure.*

50. I turn to the next matter relied on by the Claimant, namely the new and late disclosure. The Claimant submits that it is relevant that the subject matter of Mr Vaghadia's cross-examination arises out of documentation only disclosed on 4 December 2020. The Claimant relies on the following features:

- 1) First (prejudice): the Defendants' late disclosure was not produced until (1) 4.5 years after the trial and (2) over 9 months after HMA Law's letter of 17 February 2020 seeking all documentation within their control relating to the transfer of the ASFL Shares. As a consequence, the Claimant has been prejudiced in seeking to ascertain promptly what happened in relation to the transfer. That prejudice is serious and real because the delay (a) affects the beneficiaries of Mr Mansouri's estate (in terms of increased cost and delay) whose interests he is seeking to protect and (b) deprived the Claimant of cross-examining Mr Vaghadia at trial in relation to the new documentation. An order for cross-examination (rather than further rounds of affidavit evidence) is the most effective means of minimising this prejudice.
- 2) Second (lack of convincing explanation) the explanation provided for the late disclosure is totally unconvincing:
  - a) 14 of the 44 new documents fell within the 1 February 2011 end date for disclosure in the underlying proceedings: no explanation has been provided to justify the failure to disclose these documents;
  - b) the selection date of 1 February 2011 which apparently caused the remaining 30 documents not to be disclosed was nonsensical;
  - c) the post-February 2011 documents arise out of the Defendants' attempted implementation of instructions allegedly emanating from the individual who was said to be their principal (the issue to be tried);
  - d) Mr Vaghadia well knew that those instructions had not been implemented by 1 February 2011.
  - e) Mr Vaghadia's own evidence in his trial witness statement was that BNY Mellon "formally recorded" the transfer of Mr Mansouri's shares in around March 2011: that was untrue, because the transfer was not recorded until late May 2011;
  - f) notwithstanding the Claimant's specific request for the documentation, Mr Vaghadia positively asserted on oath in unequivocal terms that "all written communications" relating to the transfer had been disclosed;

- g) Mr Vaghadia's subsequent explanation for that error is (1) inconsistent and (2) fails to explain how the documentation was not captured by a disclosure exercise which purported to be comprehensive.

51. Having regard to the gaps in Mr Vaghadia's evidence, prejudice and lack of explanation there is a strong inference that the Defendants deliberately withheld the New ASFL Documentation from the Claimant before the trial and subsequently in order to avoid answering difficult questions about it.

*Continued reliance on insufficiently explained or improper grounds.*

52. Next, the Claimant relies on the suggestion that Mr Vaghadia continues to advance insufficiently explained or improper grounds for failing to cover obviously relevant matters in his affidavit evidence in two respects, namely privilege and confidentiality.

1) The privilege claimed in respect of Mr Vaghadia's "follow-up" communications with BNY Mellon in December 2020 was incomprehensible as formulated:

a) the claim to privilege (as first formulated) was said to arise in respect of "*communications requesting and/or providing legal advice to ASFL and/or BNY (and/or form part of further communications regarding that advice)*";

b) the legal advice was first sought around 5 January 2011;

2) However, those communications pre-date by a month the date on which legal advice was sought: they cannot therefore "*form part of further communications regarding that advice*". What is now said is that the "follow-up" "*was in the context of privileged communications and the related documentation is being withheld on grounds of legal privilege*"; but (again) communications pre-dating the date on which advice was first sought cannot be "in the context of privileged communications".

53. The consequence, so the Claimant says, of this lack of precision is that the Defendants need properly to articulate this new claim to privilege. They have asked for an affidavit from Cooley in this regard. I deal with this below.

54. The other ground on which the Defendants seek to withhold inspection is alleged third party confidentiality. Specifically, it is said that "confidentiality restrictions" apply to Mr Vaghadia's role as an ASFL "representative"; that ASFL or BNY Mellon are "*respectively subject to respective duties of confidentiality arising out of their roles in respect of the Fund*" and/or that Mr Vaghadia has said that what he can say is limited "*having regard to...concerns as to confidentiality obligations owed to others (in relation to matters which on no view involved communications or steps on behalf of Mr Mansouri*".

55. On 13 April 2021 Cooley provided the following response to HMA Law's request to specify the nature and extent of the information/documents allegedly covered by the unspecified "confidentiality obligations" identified by Mr Vaghadia:

“Our clients’ confidentiality concerns in relation to the information in question arise having regard to the role of ACM and ACP in providing services to the Fund and expectations of confidentiality on the part of ASFL, its directors, as well as Mrs Kurdi...we can confirm that the extent of the documentation in question is very limited.”

56. The Claimant argues that this explanation is so vague as to be useless.

*Bad character.*

57. I turn next to the question of bad character. The Claimant relies on the following matters relating to Mr Vaghadia’s character as relevant:

- 1) Knowles J’s assessment of Mr Vaghadia as an unreliable witness; and
- 2) previously inaccurate evidence given by Mr Vaghadia on oath.

58. The Claimant contends that Mr Vaghadia’s known propensity to mislead strengthens the case for cross-examining him. He has had the benefit of the assistance of lawyers in presenting four rounds of affidavit evidence. Cross-examination by reference to contemporaneous documents is likely to be the most effective means of getting close to the truth of what happened.

*Past lack of cooperation.*

59. Finally, while the Claimant acknowledges that since October 2020 the Defendants (through Cooley) have made some efforts to answer the Claimant’s questions in relation to Mr Mansouri’s other assets, it is argued that the position in relation to the ASFL Shares is distinct. Thus, the Claimant argues:

- 1) the information provided in Vaghadia 1 was scant;
- 2) BNY Mellon never answered TA Legal Consultancy’s letter of November 2017 (presumably on the instructions of ASFL’s directors, Mr Chartouni and Mr Evett);
- 3) the Defendants and ASFL chose to ignore the letters of 9 December 2019;
- 4) since October 2020, ASFL (again presumably on the instructions of their directors, Mr Chartouni and Mr Evett) have refused to allow the release of the BNY Mellon Information;
- 5) when first providing the ASFL Documentation (1) on 4 December 2021 or (2) his third affidavit on 10 December 2021, Mr Vaghadia made no attempt to explain the contents of it; he only did so when that was requested on 8 January 2021;
- 6) Mr Vaghadia has discussed material parts of Vaghadia 4 with Mr Chartouni.



60. These matters, so it is said, create the strong impression that the Defendants have continued wilfully to obstruct the Claimant's attempts to understand the basis on which the ASFL Shares were transferred to Mrs Kurdi.

**The Defendants' submissions.**

61. The Defendants' first point, which was by way of a preliminary point, was that the application for cross-examination was not properly "live", because it was made in case the deficiencies identified in the letter of 17 February 2020 were not rectified, which they had been. The attempt to convert the application into an application to cross examine on deficiencies referable to the later letters of 8 January and Vaghadia 4, they argued, should be rejected.
62. The Defendants went on to make further points, which respond to the arguments I have outlined above which are made by the Claimant. They contended, in summary, as follows:
- 1) The test is whether it would be just and convenient to make the order.
  - 2) Here, it would not be just or convenient, for the following reasons:
    - a) The Claimant has delayed too much in seeking the order.
    - b) No legitimate or useful purpose would be served by making the order.
    - c) The Claimant had already had the opportunity to cross-examine Mr Vaghadia at the original trial and had done so at length.
    - d) In relation to a number of the specific points made by the Claimant, as summarised above, the Defendants contended that these arguments took matters no further.
63. In relation to the first of these points, the Defendants submitted that any application should have been made by late 2017 or early 2018 at the latest, to avoid oppression. The intention behind the order was that matters should be dealt with speedily, and Mr Vaghadia is prejudiced by the delay.
64. In relation to the second of the points, the Defendants argued as follows:
- 1) The purpose of the action should be to bring in assets, since that was the duty of the Claimant.
  - 2) Here, however, cross-examination of Mr Vaghadia would not assist in relation to this. The Claimant knows perfectly well where the assets are – i.e. with Mrs Kurdi – and how they got there – i.e. via BNY Mellon - and further cross-examination would not assist in recapturing those assets:
    - a) The Claimant asserts that Mr Vaghadia is not a truthful witness – but showing that this is true will not assist in restoring assets.
    - b) It is highly unlikely that Mr Vaghadia has relevant evidence. The criticisms that the Claimant makes of him are minor and pedantic.

- c) It is very unlikely that Mr Vaghadia will even have any recollection of the events, which took place a decade ago. In this regard, I was reminded of the well known comments of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd and anor* [2013] EWHC 3560 (Comm) at paragraphs 15-22 as to the unreliability of evidence based on recollection.
  - d) Even if Mr Vaghadia did say something which was of relevance, this could not be relied on as an admission against either Mrs Kurdi or BNY Mellon, since he was not an employee of either of these parties.
  - e) It was critical that the evidence should be useful in taking action against one of the parties against whom steps should be taken, here Mrs Kurdi or BNY Mellon. Here, no sufficient explanation had been given of how Mr Vaghadia's evidence might be so helpful.
- 3) In relation to the third of the points set out above, the Defendants argued that further cross-examination would achieve nothing, since there had already been extensive and detailed cross-examination.
  - 4) Lastly, the Defendants sought to put forward detailed responses to the detailed criticism set out by the Claimant, which in most, if not all, cases, amounted to saying that the criticisms simply did not take the Claimant anywhere.

#### **Discussion and conclusions.**

65. As to the Defendants' preliminary, procedural, point, I do not accept this argument, for the following reasons:
  - 1) The application in terms was for an order for the cross-examination of Mr Vaghadia on Vaghadia 1 or any later affidavit. It contemplated, as might be expected, the possibility that the explanations in later affidavits might not be adequate, and made allowance for this possibility.
  - 2) The application has "morphed", as the Defendants' put it, because of changes in the Defendants case over time, and because of the production of further documentation during the relevant period.
  - 3) I consider that it would clearly not be in accordance with the overriding objective to defer consideration of this matter in order to enable a further application to be issued, in circumstances in which both parties came prepared to deal with the merits of the matter before me.
66. I turn therefore to the more substantive issues between the parties. As I have already indicated, the question in my view is whether it would be just and convenient to order the cross-examination of Mr Vaghadia on the limited matters set out in the skeleton argument of the Claimant (ie paragraph 23 of Mr Vaghadia's fourth affidavit). Despite the attractive arguments of Mr Croxford QC, I have concluded that it would clearly be just and convenient to make the order sought. I reach this conclusion for the following reasons:

- 1) I accept that the purpose of this action must be, in the final analysis, to enable the Claimant to collect in the assets of Mr Mansouri. However, the purpose of the proceedings before Knowles J was, in my judgment, to take the first steps in this regard, by establishing that the Defendants were obliged to provide information to the Claimant to assist him in achieving this end. The question must therefore be whether the further cross-examination of Mr Vaghadia may provide further useful information, of the type which Mr Vaghadia should have provided in compliance with his duties as a fiduciary, to enable assets to be collected in.
  - 2) In this regard, I do not think that it is relevant that Mr Vaghadia's evidence will not bind either Mrs Kurdi or BNY Mellon. The question is whether it might advance the Claimant's ability to recover assets from Mrs Kurdi if, in fact, she is not entitled to them.
  - 3) Clearly, the fact that Mr Vaghadia may not remember the relevant matters, or may not be prepared to tell the truth about them, is something that is relevant to the exercise of my discretion in this regard. However, in my judgment, Mr Vaghadia cannot rely on his own lack of probity (if such there be, and I make no comment in this regard) to resist cross-examination; and the best way of testing recollection is via cross-examination.
  - 4) It is of course quite true that there has been extensive cross-examination of Mr Vaghadia already. However, I accept the submission that the most relevant consideration in this regard is that further documents have been disclosed since then which would be likely to have a bearing on the course of cross-examination, and I do not accept that the documents which have been disclosed are irrelevant. It is important that the story of the transfer of the shares from Mr Mansouri to Mrs Kurdi be told clearly, by reference to such contemporaneous documents as are available.
  - 5) I do not accept that the criticisms of Mr Vaghadia's evidence are in all respects minor and pedantic. Some may well be easily explicable; and if this is correct, no doubt Mr Vaghadia will do this. Others, on their face, seem far less easily explicable. By way of example, I accept that it is difficult to square Mr Vaghadia's evidence at trial that he did not know that Ms Lapwood had indicated to BNY Mellon that Mr Mansouri was still alive some months after he died with the fact that he was copied into the email from Ms Lapwood in which Mr Mansouri's instruction was passed on to BNY Mellon some time after he had in fact died. This requires to be explained. Further, the description of the transaction as non-standard is one which requires, or at least deserves, further investigation.
67. Accordingly, in the exercise of my discretion, I make the order for cross-examination sought, in relation to the limited matters dealt with in paragraph 23 of Mr Vaghadia's fourth affidavit.

**Privilege and confidentiality.**

68. I can deal more briefly with the two remaining matters which were the subject of argument and submissions before me and following the hearing, namely privilege and confidentiality.
- 1) Dealing first with privilege, there was no formal application before me in this regard, and no application notice. The application was made in the skeleton argument filed by the Claimant. Whilst, as will have been clear to the parties from my response during the hearing, I had and have some sympathy with the position of the Claimant, on reflection, and in the absence of any formal application, in the light of the submissions put in after the hearing I have concluded that I should not make any order at this stage. I should however make clear that I am not ruling out the possibility of such an order if the parties cannot reach agreement on the appropriate way forward. In this connection, any such application should be made by the Claimant in the relatively near future.
  - 2) Similar observations apply to issues of confidentiality. It may well be that, if the Defendants explain the position more fully to the Claimant, this issue will fall away. If, however, the matter cannot be dealt with by agreement between the parties (as I would hope that it can) then an appropriate application can be formulated and put forward with proper notice.
69. I close by recording my thanks to both Counsel and their teams, and would ask for an appropriate order reflecting this decision to be drawn up.