



Neutral Citation Number: [2021] EWHC 1031 (QB)

Case No: QA-2020-000237/QA-2020-000235

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ON APPEAL FROM THE SENIOR MASTER**

**IN THE MATTER OF THE EVIDENCE**  
**(PROCEEDINGS IN OTHER JURISDICTIONS) ACT 1975**

**AND IN THE MATTER OF THE HAGUE CONVENTION**  
**OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE**  
**ABROAD IN CIVIL OR COMMERCIAL MATTERS**

**AND IN THE MATTER OF RULES 34.17 TO 34.21 OF**  
**THE CIVIL PROCEDURE RULES 1998**

**AND IN THE MATTER OF PROCEEDINGS NOW PENDING**  
**BEFORE THE UNITED STATES DISTRICT COURT FOR**  
**THE DISTRICT OF DELAWARE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/04/2021

Before :

**MR JUSTICE FREEDMAN**

Between :

**COMPAGNIE DES GRANDS HÔTELS D'AFRIQUE S.A.**

**Respondent /**  
**Appellant and Cross-Appellant /**  
**Applicant**

- and -

(1) SARAH PURDY

Appellant and Respondent to Cross-Appeal /  
Respondent

(2) MAQUAY INVESTMENTS LIMITED

Respondent / Respondent

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David Edwards QC and Julia Gibbon (instructed by **Humphries Kerstetter**) for the  
Respondent /  
Appellant and Cross-Appellant / Applicant

Michael Todd QC and Jack Rivett (instructed by **Michelmores LLP**) for the Appellant and  
Respondent to Cross Appeal / Respondent

Hearing date: 17 March 2021  
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**Approved Judgment**

**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 Friday 23 April 2021 at 10.15am.**

**MR JUSTICE FREEDMAN:**

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## **II Introduction**

1. This is an appeal against an order of Senior Master Fontaine in connection with an order made against the Appellant (“Ms Purdy”) under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the “1975 Act”) and CPR, rr. 34.17 to 34.21 (the “Deposition Order”). The Deposition Order was made by the Senior Master on 13 September 2019 on the without notice application of the Respondent (“CGHA”). It was made pursuant to a Letter of Request issued by the United States District Court for the District of Delaware in connection with proceedings currently pending before that court (the “Delaware Proceedings”) between CGHA and a U.S. corporation, Starman Hotel Holdings LLC (“Starman”), which were commenced by CGHA on 30 April 2018.
2. The Deposition Order requires Ms Purdy to attend an examination to give evidence on the topics set out in Attachment A to the letter of request for use in the Delaware Proceedings. The matters on which Ms Purdy is required to give evidence are also the subject of a criminal complaint which was filed by CGHA (through its Moroccan lawyers) with the Public Prosecutor of the Casablanca Criminal Court (the “Moroccan Criminal Complaint”) on 7 March 2018. There was also an order on 13 September 2019 for disclosure (the “Disclosure Order”) against a related entity, Maquay Investments Limited (“Maquay”), pursuant to a Letter of Request issued in connection with the Delaware proceedings.
3. By her application dated 10 January 2020, Ms Purdy applied to set aside the Deposition Order on two grounds, namely:
  - (1) Non-disclosure: on its without notice application for the Deposition Order, CGHA failed to disclose the existence of:
    - i. the Moroccan Criminal Complaint and the criminal investigation being carried out by the Moroccan authorities pursuant to that Complaint (“the Moroccan Criminal Investigation”); and

- ii. a protective order dated 23 April 2019 issued by the Delaware court concerning the use of information disclosed by parties and non-parties in the Delaware Proceedings (“the Protective Order”); and
  - (2) Oppression: by reason of the Moroccan Criminal Complaint and the Moroccan Criminal Investigation it would be oppressive for Ms Purdy to be examined and no sufficient protections removing or minimising such oppression had been offered and put in place.
4. Ms Purdy’s application was heard together with an application by Maquay to set aside the Disclosure Order on the same grounds. The Senior Master held in summary:
  - (1) The material non-disclosure by CGHA on its without notice applications for the orders under section 2 of the 1975 Act was serious (see J/[82]);
  - (2) The correct sanction for that non-disclosure would be an appropriate costs order (see J/[82]).
  - (3) The Deposition and Disclosure Orders should not be set aside, but should be varied to include the additional protections offered by CGHA set out in two draft orders sent by CGHA’s solicitors, Humphries Kerstetter, on 6<sup>th</sup> January 2020 (see J/[126] and J/[133]).
5. In arriving at that conclusion, the Senior Master held that not every risk of oppression had to be averted: it was sufficient on the facts of this case that the risk of oppression did not have to be avoided provided that it could be alleviated to a sensible and acceptable degree (see J/[132]). The judgment of the Senior Master has a neutral citation number [2020] EWHC 2785 (QB)
6. There is no appeal about the failure to set aside the order for non-disclosure, nor is there an appeal by Maquay who has given the disclosure ordered. However, the appeal is that the Senior Master erred in principle and/or gave insufficient weight to oppression caused by Ms Purdy being compelled to give evidence which might be used against her by the Moroccan prosecuting authorities for the purposes of their investigation and deployed in evidence against her at a criminal trial. It is therefore said that the Senior Master reached the wrong decision, and that the Deposition Order should be set aside.
7. There is a cross appeal about costs by CGHA. It is made against Ms Purdy and Maquay (collectively referred to as “the Purdy parties”). The overall costs order of the Senior Master in respect of the application to set aside the Deposition Order and the Disclosure Order was that CGHA pay 75% of the Purdy parties’ costs of the two issues on the standard basis. CGHA says that it ought not to have been held liable to pay any part of

the Purdy parties' costs, and further as the successful party, the order ought to have been that at least some part of their costs ought to have been ordered to be paid by the Purdy parties to CGHA.

8. The Senior Master granted permission to Ms Purdy to appeal against the Deposition Order. No order for permission has been made in respect of the costs appeal. The Court indicated that it would not treat the question of permission as a preliminary matter, but instead decided to deal with the questions of permission and, if granted, the appeal at once.

## **II Factual Background**

9. The following summary of the factual background is derived from the judgment of the Senior Master which in turn was derived from evidence before the court and the agreed chronology.
10. CGHA is a company incorporated in Morocco. It is the owner of a luxury hotel in Casablanca called the Royal Mansour Hotel ("the Hotel"): see J/[77-78].
11. On 23 November 1989 CGHA entered into a long-term Management Agreement ("the Management Agreement") in respect of the Hotel with Trust House Forte Morocco Sarl ("the Manager"), whose obligations were guaranteed by Trust House Forte (UK) Limited ("the Guarantor"). The Manager and Guarantor were both companies within the Trust House Forte hotel group: see J/[77-78].
12. The obligations of the Manager under the Management Agreement included, *inter alia*, obligations to:
  - (1) pay a minimum Annual Fee to CGHA in quarterly instalments; and
  - (2) maintain and operate the Hotel to the standard and stature of a five-star international hotel: see J/[77-78].
13. The Management Agreement was governed by Moroccan law. Disputes between the parties were required to be determined by International Chamber of Commerce ("ICC") arbitration in London.
14. As a result of a number of corporate acquisitions and restructurings, by 2006 the ownership of the Manager and the Guarantor had been transferred to two unrelated entities. The Manager was owned by Starman, a company formed as a joint venture entity by Starwood Capital Group Global LLC ("Starwood") and Lehman Brothers in 2006 to acquire certain assets. The Guarantor was owned by an entity unrelated to Starman or its joint venture owners.

15. The Manager was re-named Woodman Maroc Sarl (“Woodman”): see J/[77-8]. Starman owned Woodman indirectly through a Netherlands entity and a Luxembourg entity.
16. On 6 August 2013 CGHA commenced arbitration proceedings against Woodman and the Guarantor before the ICC in London (“the Arbitration”) seeking, *inter alia*, payment of outstanding instalments of the Annual Fee and damages for breach of the obligation to maintain and operate the Hotel to an international five-star standard: see J/[78]. On 16 July 2014 the Arbitral Tribunal issued procedural directions. The Guarantor was dismissed from the arbitration, leaving Woodman as the sole respondent.
17. On 7 May 2014 Maquay was incorporated in England. Ms Purdy is Maquay’s sole shareholder and director. On 19 June 2014, Starman transferred the entire share capital of Woodman’s parent entity to Maquay for €100. Starman’s parent was subsequently renamed Iona Maroc Sarl (“Iona”). On 15 July 2014 Iona was placed into voluntary liquidation.
18. CGHA learnt of these matters on 26 July 2014 when it received a letter from Ms Purdy dated 2 July 2014. On 11 August 2014, Woodman’s lawyers informed the Arbitral Tribunal that, with immediate effect, they were no longer instructed, and that all future correspondence should be directed to Iona’s liquidators. The arbitration nonetheless continued.
19. The Arbitral Tribunal issued its Final Award on 6 May 2015, which declared that Woodman had breached the Management Agreement and ordered Woodman to pay damages in the sum of MAD (Moroccan Dirhams) 549,612,765 (approximately \$57.1 million at the then prevailing exchange rate) plus interest and costs.
20. In its Final Award, in relation to the events between May and July 2014, the Tribunal said this at paragraph 192:

*“The restructuring of the Manager’s sole shareholder after the Management Agreement had been terminated and this Arbitration started by the Owner suggests that Maquay Investments, which does not appear in any way related to the international five-star hospitality industry or involved in the operation of hotels of such category, was created for the sole purpose of receiving the shares of the Manager’s sole shareholder before being renamed and placed in voluntary liquidation and, as a result, avoid any possible liabilities under the Management Agreement.”*
21. On 14 December 2016 CGHA obtained an order from the Moroccan court recognising and enforcing the Arbitral Tribunal’s Final Award against Woodman. The sums ordered to be paid have never been paid.

22. On 7 March 2018 CGHA, through its Moroccan lawyers, filed a complaint about the matters addressed and/or revealed in the Arbitration with the Public Prosecutor of the Casablanca Criminal Court (“the Moroccan Criminal Complaint”). The Moroccan Criminal Complaint alleges that specific individuals and entities involved in and with Woodman had violated various Moroccan criminal laws. Included in that Complaint are the following allegations against Ms Purdy and/or Maquay:
- (1) Sub-section 1.1: Crime of swindling under Article 540 of the Criminal Code against Ms Purdy and Maquay;
  - (2) Sub-section 1.3: Crime of disposing of company’s funds in mala fide (Article 107 of Act No. 5-96 on limited liability companies) against Ms Purdy;
  - (3) Sub-section 1.6: Crime of fraudulent bankruptcy (Articles 557, 558 and 559 of the Criminal Code) against Ms Purdy;
  - (4) Sub-section 1.8: Crime of money-laundering (Articles 574-1 and 574-2 of the Criminal Code) against Ms Purdy and Maquay.
23. Various other parties are named as putative guilty parties, including Starwood and Starman, the defendants in the Delaware Proceedings, and certain Starman officers and/or employees.

#### **IV The Delaware Proceedings**

24. On 30 April 2018, CGHA commenced proceedings in the Delaware Court against Starman and Starwood seeking to enforce the Final Award obtained against Woodman against them. An agency basis of claim against Starman and Starwood was dismissed, but the *alter ego* liability was not dismissed. This was on the basis that Starman controlled and dominated the affairs of Woodman such that Woodman was merely the *alter ego* of Starman, that the two functioned as a single economic entity, and that the structure adopted worked a fraud and injustice on CGHA.
25. In his ruling on the *alter ego* claim, Judge Andrews explained the legal ingredients of such a claim under Delaware law, namely, that a plaintiff had to show: (i) that the corporation and its shareholders operated as a single economic entity; and (ii) that an overall element of injustice or unfairness was present.
26. Judge Andrews has found that both ingredients of alter ego liability were adequately pled. As for the second ingredient (the requirement for an overall element of injustice or unfairness) he explained in his ruling dated 9 January 2019 (at internal page 9) [367]:



*“As to the second element of alter ego liability, Plaintiff asserts that Starman strategically sold Woodman’s parent entity in order to prevent Plaintiff from recovering any award issued by the arbitrators (D.I 1 ¶ 117). Plaintiff supports this argument with allegations that Maquay was only incorporated six weeks before the sale took place, there were shared connections between Maquay and Starman, and the sale occurred shortly after the arbitration was initiated. (Id. ¶¶ 59, 63-65). While Defendant attempts to argue that this theory cannot be used to pierce the corporate veil (D.I. 16 at 17-18), I disagree. These facts, accepted as true, support Plaintiff’s claim that Starman’s acts were strategic and intended to leave Woodman unable to pay any award. [citation omitted] Acts intended to leave a debtor judgment proof are sufficient to show fraud and injustice. Thus, I find fraud and injustice adequately pled.”*

27. On 6 February 2019, Starman filed its Answer and Affirmative Defences in the Delaware Action on 6 February 2019.
28. On 23 April 2019, Judge Andrews made a Protective Order limiting disclosure of information produced in the proceedings that was designated as confidential.
29. CGHA has notified this court that the issues in the Delaware Proceedings include the following:
  - (1) the circumstances in which Starman sold Woodman’s parent to Maquay;
  - (2) whether Maquay was unrelated to Starman;
  - (3) whether the sale of Woodman’s parent to Maquay was negotiated (a) for a commercially reasonable consideration and (b) on an arm’s length basis;
  - (4) whether Starman acted in good faith with respect to the sale of Woodman’s parent to Maquay; and
  - (5) whether Starman’s sale of Woodman’s parent to Maquay was intended to leave Woodman unable to pay an award.
30. Both parties to the Delaware Proceedings, namely CGHA and Starman, asked the Delaware Court to issue letters of request to obtain oral and documentary evidence from various overseas parties. On 5 August 2019, at the request of CGHA, Judge Andrews issued two letters of request addressed to the English court, one seeking documents from Maquay and the other seeking the oral examination of Ms Purdy.

31. On 13 September 2019, the Senior Master without notice to the Purdy parties made orders against them to give effect to both Letters of Request. On 10 January 2020, the Purdy parties issued applications seeking to set the orders aside. Both applications were dismissed. There is no appeal against the Senior Master’s decision in relation to Maquay, and the documents required have now been disclosed.
32. CGHA filed an amended complaint on 9 March 2020 (“the Amended Complaint”) with a motion for leave to amend; the Amended Complaint includes serious allegations against Maquay, although neither Maquay nor Ms Purdy are parties to the proceedings. At J/[24], it was stated that it was not known whether leave to amend has been granted.

#### **IV The applications to the Senior Master**

33. The Deposition Order and the Disclosure Order (dated 13 September 2019) (hereafter “the Orders”) were deemed served on 19 September 2019.
34. On 17 October 2019 solicitors for the Purdy parties, Michelmores LLP (“Michelmores”), wrote to Humphries Kerstetter LLP (“HK”), solicitors for CGHA, referring to the Moroccan Criminal Investigation and raising the concern that it had not been referred to in the without notice application.
35. HK responded the following day, on 18 October 2019, enclosing a copy of the Protective Order and stated: “We understand your clients’ concerns ... If you have proposals for protections beyond those ordered by the Delaware court, our client will consider them ... If you do have any such proposals, please provide them to us by 22 October 2019 in the form of a draft amended order”.
36. On 25 October 2019, Michelmores wrote to HK complaining that the Protective Order had similarly not been disclosed to the court in the without notice application.
37. On 4 November 2019, the Purdy parties asserted that there had been material non-disclosures and also that the Orders were oppressive. They demanded various undertakings and confirmations which came to be known as the “three core requirements” (set out in the Judgment, at para 95) which – it was said – would sufficiently mitigate the alleged oppression. This comprised (1) the withdrawal of the Moroccan Complaint, (2) an undertaking not to pursue any action against the Purdy parties arising out of the subject matter of the Moroccan Complaint or the Delaware proceedings and (3) an undertaking not to use the evidence provided by the Purdy parties other than for the purpose of the Delaware proceedings.
38. CGHA did not agree the three core requirements. Instead, between 14 November 2019 and 3 January 2020 CGHA proposed various undertakings to the Purdy parties, culminating in the offer on 3 January 2020. This was to undertake (1) not to seek to obtain or procure a physical copy of Ms Purdy’s testimony, and (2) not to give instructions for, or otherwise authorise, the transmission of the same outside the US or the UK, except to countries other than Morocco for the purpose of obtaining discovery

for use in the Delaware Proceedings and subject to and in accordance with the terms of the Protective Order.

39. CGHA also offered to compensate the Purdy parties for their reasonable costs, contingent on the issue being resolved by agreement, from the date of service of the Letters of Request to 14 November 2019, i.e. the date on which CHGA offered its first undertakings.
40. On 6 January 2020, these proffered undertakings and confirmations were set out in proposed draft orders sent to Michelmores (“the 6 January 2020 draft Orders”). Those draft orders also provided that CGHA would pay the Purdy parties’ costs of responding to the Orders from 17 September 2019 to 14 November 2019.
41. The applications to set aside the Orders were filed at Court on 10 January 2020. The Purdy parties sought that the Orders be set aside. The Purdy parties continued to insist on the three core requirements, and thereby rejected as inadequate the terms of the undertakings set out in the 6 January 2020 draft Orders. CGHA apologised for the non-disclosures, but submitted that the Orders should not be set aside and were not oppressive.
42. By its judgment, the Court dismissed the applications of the Purdy parties to set aside the Orders and varied them to include the additional protections offered by CGHA (J/[132-133]). The Court considered that the Purdy parties’ three core requirements were either not realistic or not possible (J/[128-131]).
43. In addition to the protections in place in the Protective Order, there were the protections summarised in (J/106-107), the effect of which was that:
  - (1) CGHA itself would never come into possession of either a physical or an electronic copy of the transcript of Ms Purdy’s evidence that it might then be compelled to disclose;
  - (2) CGHA would not instruct or authorise a copy of the transcript of Ms Purdy’s evidence to be transmitted to Morocco, and thus into the territory in which the Moroccan prosecuting authorities have jurisdiction.

Neither CGHA, nor anyone in Morocco, would thus have an electronic or hard copy of Ms Purdy’s evidence which they could be compelled by the Moroccan prosecuting authorities to produce.

## **VI The appeal of Ms Purdy: Grounds of Appeal**

44. At J/[122], the Senior Master explained the approach which she was taking on Ms Purdy’s application as follows:

“The approach that the court is directed to take by the authorities, as in *Akciné*, is to consider whether any protections can be put in place so that the requesting court can receive the witnesses’ evidence, and the witnesses can be sufficiently protected against the oppression, namely the risk of evidence which might incriminate them being made available to the Moroccan Criminal Investigation.”

45. The Senior Master applied that approach at J/[132]:

“I consider that the approach of Gloster J., in *Akciné*, is an equally appropriate approach in this case. The court is not obliged to refuse orders unless every conceivable risk of oppression is eliminated. The court’s duty is to balance the interests of the requesting court and those of the witness: *The State of Minnesota* at 176 per Lord Woolf MR and *First American* at 1165-6 per Sir Richard Scott VC. In my view, the risk of oppression, which cannot be averted in this case by the reliance on privileges that would be recognised in the Delaware court (unlike the position in *MicroTechnologies*), can be alleviated to a sensible and acceptable degree by the combination of the Protective Order and the protections offered by CGHA. Further CGHA have agreed to give an undertaking to this court to comply with the Protective Order, which can be included in the order.”

46. The grounds of appeal were that:

- (1) the Senior Master erred in principle in refusing to set aside the Deposition Order, notwithstanding that the risk of oppression to the Appellant in giving that evidence could not be eliminated but could only be alleviated. In particular, the Senior Master was wrong to apply the approach adopted by Gloster J. in *Akciné Bendrové Bankas Snoras (in bankruptcy v. Antonov and another* [2013] EWHC 131 (Comm.) (“*Akciné*”). The decision in *Akciné* was (and is) distinguishable from the facts of this case and the approach adopted in that case was accordingly not appropriate to an application under section 2 of the 1975 Act.
- (2) In this connection, the oppression to the Appellant arises out of the fact that: (i) the Appellant is the subject of a criminal investigation in Morocco initiated by CGHA, (ii) even with additional protections in place, there is a risk that the evidence given by Ms Purdy pursuant to the Deposition Order will come to the attention of the Moroccan prosecuting authorities and (iii) unlike in *Akciné*, the fact that such evidence was

obtained from Ms Purdy by compulsion would not prevent the Moroccan criminal court from admitting that evidence in breach of Ms Purdy's right to a fair trial under Article 6(1) of the European Convention on Human Rights. Having regard to the nature of the oppression faced by the Appellant, and having concluded that the risk of oppression could not be averted, the Senior Master ought to have set aside the Deposition Order.

## **VII The appeal of Ms Purdy: the legislative background and the relevant legal principles**

47. Section 1 of the 1975 Act provides as follows:

“Where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied-

(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the High Court, Court of Session or High Court of Justice in Northern Ireland, as the case may be, shall have the powers conferred on it by the following provisions of this Act.”

48. Section 2 of the 1975 Act then provides (so far as material) as follows:

“(1) Subject to the provisions of this section, the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision-

(a) for the examination of witnesses, either orally or in writing;

[...]

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

[...].”

49. There is no dispute that the court has jurisdiction under section 1 of the 1975 Act to make the Deposition Order. As to the principles on which the court will exercise its discretion to make an order under section 2 giving effect to a letter of request, the starting point is the dictum of Lord Denning M.R. in *Rio Tinto Zinc Corporation Inc. v. Westinghouse Electric Corp.* [1978] A.C. 547, C.A., at p. 560G-H: “It is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States to help us in like circumstances. ‘Do unto others as you would be done by’” (quoted in the judgment at J/[113]).

50. At J/[114], the Senior Master referred to the balance to be struck between the requesting court and the witnesses to be examined in the following terms:

“In *The State of Minnesota v Philip Morris* [1997] ILP 170 at 176, Lord Woolf MR stated that when considering whether, and if so on what terms, to give effect to a letter of request, there is a balance to be struck between the interests of the requesting court and witnesses to be examined. This was confirmed in *First American Corp v Zayed* [1999] 1 WLR 1154 at 1165-6 where Sir Richard Scott VC. said:

“...in deciding what response to make to a letter of request, the court should bear in mind the need to protect intended witnesses from an oppressive request. There is a balance to be struck in

each case between the legitimate requirements of the foreign court and the burden those requirements may place on the intended witness. I agree with Ralph Gibson LJ in *In Re State of Norway's Application* [1987] 1 QB 433 433, 490 6F – G, that the balance is much the same as that which has to be struck if an application is made to set aside a subpoena....”

51. As noted by the Senior Master at J/[115], it is also well established that the court should not order an examination where it would be oppressive to the proposed witness (*per* Morris J. in *MicroTechnologies, LLC v. Autonomy, Inc. and others* [2016] EWHC 3268 (QB.) (“*MicroTechnologies*”), at [51]). In that case, Morris J. said that the court “*must also hold a fair balance between the interest of the requesting court and the interests of the witness*” (citing Brooke L.J. in *United States of America v. Philip Morris Inc.* [2004] 1 C.L.C. 811, C.A. at [17]).
52. The Senior Master referred at J/[118] to the significance of related proceedings, which was considered in *MicroTechnologies* by Morris J at [55] as follows:

“Secondly, in a case where fraud is alleged, a letter of request is oppressive where allegations of fraud are made against the witnesses sought to be examined but where those witnesses have not been sued as defendants in respect of those allegations, and where those allegations are being held over the heads of the witness with the possibility of being made a party to a claim, whilst at the same time seeking a wide examination of the witness on the very topics that will be relevant in such an action, if brought. This was the situation in the *First American* case.”

53. Any oppression is neutralised where the witness is entitled to rely on the privilege against self-incrimination. This is because, where the witness chooses to invoke the privilege in respect of any question, that will result in there being no answer at all in response to that question, and therefore no evidence which could potentially be used, whether in criminal or civil proceedings (*per* Morris J. in *MicroTechnologies*, at [81]): see J/[86].
54. However, as a matter of English law, the privilege against self-incrimination attaches only where there is a danger in relation to proceedings in part of the United Kingdom (*per* Popplewell J. in *JSC BTA Bank v. Ablyazov and others* [2014] EWHC 2788 (Comm.) (“*Ablyazov*”), at [113]). The position is the same in the U.S.A. under the Fifth Amendment to the U.S. Constitution (as recorded by the Senior Master at J/[120]). The rationale for this approach under English law was explained by Lord Nicholls in *Brannigan and others v. Davison* [1997] A.C. 238, P.C. (“*Brannigan*”) (at p. 249D-H):

“Seen from the point of view of the witness, the right may be as much needed where foreign law is involved as where it is not. The

difficulty confronting the individual may be just as acute when the feared prosecution is under the law of another country. There is, however, a real problem in letting this lead to the conclusion that the privilege should apply in such a case. The privilege is rigid and absolute. The witness has an unqualified right. Where the privilege applies the witness need not answer. Unless the case falls within a statutory exception, that is the end of the matter. There is no scope for the court to exercise any discretion.

It is the unqualified nature of the right, so valuable as a protection for the witness, which gives rise to the problem when a foreign law element is present. If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings."

55. Notwithstanding these limitations on the privilege against self-incrimination, the Court can nevertheless intervene to excuse a witness from giving self-incriminating evidence where the feared prosecution is under foreign law (see *Ablyazov*, at [113] *per* Popplewell J.). This discretion arises out of the Court's inherent power to conduct its process in a fair and reasonable manner (see *Brannigan*, at p. 251D *per* Lord Nicholls) and/or (in the context of an application under the 1975 Act) its power to refuse an examination on the grounds that it would be oppressive to the proposed witness.<sup>1</sup>
56. Further, the Court is bound, as a public authority, to respect a witness's rights under Article 6(1) of the European Convention on Human Rights ("ECHR") when exercising any discretionary power, such as that which it is granted under the 1975 Act (*MicroTechnologies*, at [66] *per* Morris J.; see also section 6 of the Human Rights Act

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<sup>1</sup> See *Arab Monetary Fund v. Hashim and others* [1989] 1 W.L.R. 565, which concerned an application to set aside a worldwide freezing order and ancillary disclosure order. At p. 574C-D, Morritt J. said: "[...] the source of the jurisdiction to grant interlocutory injunctions is section 37 of the Supreme Court Act 1981. The jurisdiction is discretionary within the principles laid down in the decided cases. [...] In the case of offences under the criminal law of a foreign state, there is no privilege, but I see no reason why the possibility of self-incrimination or the incrimination of others should not be a factor to be taken into account in deciding whether and, if so, in what terms a disclosure order should be made."



1998). The right not to incriminate oneself is at the heart of the notion of a fair procedure, as noted by the European Court of Human Rights in *Saunders v. United Kingdom* [1998] 1 B.C.L.C. 362 (at [68]), to which the Senior Master referred at J/[87]:

“[...] the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under art 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art. 6 (see *Murray v UK* 22 EHRR 29 and *Funke v France* 16 EHRR 297). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in art 6(2) of the convention.”

57. Article 6 ECHR prevents both the use by prosecuting authorities of statements compulsorily obtained in civil or regulatory proceedings (for example to inform the criminal investigation or the decision to prosecute) as well as the deployment in evidence of such statements at a criminal trial (*per* Gloster J. in *Akciné Bendrové Bankas Snoras (in bankruptcy v. Antonov and another* [2013] EWHC 131 (Comm.) (“*Akciné*”), at [76(v)-(vii)]).
58. The question of whether an order for examination would infringe a witness’s rights under Article 6 ECHR is a question of law and not one for the discretion of the Court as to whether to give effect to a letter of request under the 1975 Act (*MicroTechnologies*, at [120] *per* Morris J.).

### **VIII The appeal of the Ms Purdy: the approach to discretion**

59. In *MicroTechnologies*, Morris J. explained the approach of the Court on an appeal against the exercise of a discretion under section 2 of the 1975 Act, as follows:

“63. This is an appeal against the exercise of a discretion by the Senior Master. It is not a *de novo* rehearing of the matters placed before her. In this regard, before interfering with the Senior Master’s decision, it must be shown that she has either erred in principle in her approach or has left out of account or has taken into account some feature that she should, or should not, have

considered or that her decision was wholly wrong because the court is forced to the conclusion that she had not balanced the various factors fairly in the scale: see Lord Woolf MR in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 1 WLR 1507 at 1523.

64. Whilst it is the case that the Senior Master has particular jurisdiction in relation to letters of request proceedings and is highly experienced in these matters, it was common ground that this is not one of those cases where the appeal court is required to show particular deference to the decision below by reason of the lower court's specialist expertise.

65. I approach this appeal on the basis that, first, the Senior Master's decision was clearly one of the exercise of discretion; secondly that that discretion is to be exercised in line with certain established principles, applicable to the approach of the English courts to letters of request (including those principles which I have discussed in the previous paragraphs), and thirdly that, if it can be seen that those principles have been erroneously identified or applied, this court might interfere and exercise the discretion afresh."

60. The above paragraph 63 of the judgment of Morris J was quoted in *Buzzfeed Inc v Alexei Gubarev* [2018] EWHC 1201 (QB), whereupon the judge, Mr Justice Jay, said:

"These considerations carry much greater weight in relation to Mr Bailin's submissions grouped under the rubric of oppression than to his submissions under the banner of relevance. The former raise discretionary considerations; as for the latter, points of principle may well arise, although the Senior Master in my view should be accorded an appropriate margin of appreciation as regards matters of evaluative judgment."

## **IX The appeal of Ms Purdy: Ms Purdy's submissions**

61. Ms Purdy submits that the approach of the Senior Master was wrong in principle and/or gave insufficient weight to the oppression faced by Ms Purdy, for the reasons given below.
62. Even with the combination of the Protective Order and the additional protections offered by CGHA, there is a risk that the evidence which Ms Purdy is asked to give under the

Deposition Order will come to the attention of the Moroccan prosecuting authorities. CGHA accepts that the prospect of Ms Purdy's evidence being referred to in a written judgment in the Delaware Proceedings "*cannot be ruled out*": see the second witness statement of Mr Braithwaite at para. 96(iii). The Moroccan investigative authorities have extensive powers of disclosure: see the first witness statement of Mr Sigler para. 63. In particular:

- (1) the Moroccan investigative authorities have power to compel witness evidence and production of documents;
- (2) similarly, the Moroccan criminal court has power to compel witnesses to give evidence at trial;
- (3) if evidence was provided to the Moroccan authorities in breach of the Protective Order, this would not prevent the Moroccan criminal court from admitting that evidence; and
- (4) the fact that evidence was obtained from Ms Purdy by compulsion (that is, following an order of the English court) would not prevent the Moroccan criminal court from admitting that evidence.

63. Further, by way of a statutory instrument made on 17 March 2020 (The Extradition Act 2003 (Amendments to Designations) Order 2020), Morocco was designated a 'Part 2 Territory' for the purposes of the Extradition Act 2003. This means that Morocco, on the basis of the bilateral Convention on extradition between it and the U.K., can now submit extradition requests to the U.K. Ms Purdy could be the subject of such a request, so as to enable her to be prosecuted in person in Morocco. This point was left open by the Court of Appeal *R. v. Khan* [2007] EWCA Crim. 2331, referred to by Popplewell J. in *Ablyazov* at [113]. Moses L.J. said (at [26]) that the question as to whether the principle that the privilege against self-incrimination is not available in respect of foreign criminal proceedings may need to be revisited in the light of Article 6 of the European Convention on Human Rights and in the context of extradition proceedings.

64. If CGHA's criminal complaint had been lodged in the U.S.A., Ms Purdy would have been entitled to keep silent pursuant to the Fifth Amendment. Alternatively, if it had been lodged in the U.K., Ms Purdy would have been entitled to rely upon the privilege against self-incrimination, save to the extent that section 13(1) of the Fraud Act 2006 applied. However, even in that latter scenario, Ms Purdy's evidence would not be admissible against her in proceedings for an offence under the Fraud Act 2006, pursuant to section 13(2) of that Act. However, because CGHA filed its criminal complaint in Morocco, Ms Purdy is not able to rely on these protections. She ought to have been in exactly the same position as she would have been in had she been able to assert an English law privilege against self-incrimination (or a US law privilege given effect under section 3(1)(b) of the 1975 Act).

65. So it is said in paragraphs 28 and 29 of the skeleton argument on behalf of Ms Purdy:

“28. If CGHA’s criminal complaint had been lodged in the U.S.A., Ms Purdy would have been entitled to keep silent pursuant to the Fifth Amendment. Alternatively, if it had been lodged in the UK, Ms Purdy would have been entitled to rely upon the privilege against self-incrimination ... However, because CGHA filed its criminal complaint in Morocco, Ms Purdy is not able to rely on these protections.

29. “There is therefore a risk of oppression to Ms Purdy which cannot be averted” (emphasis added).

66. There is therefore a risk of oppression to Ms Purdy which cannot be averted, as the Senior Master accepted (at J/[132]). Furthermore, that risk includes a breach of Ms Purdy’s rights under Article 6 ECHR, because it involves the use by the Moroccan prosecuting authorities and the Moroccan court of statements by Ms Purdy which would have been obtained under compulsion.
67. The Senior Master concluded that it was sufficient that the risk of oppression had been alleviated. In support of that conclusion, she relied upon the decision of Gloster J. in *Akciné*. In that case, the claimant had obtained a worldwide freezing order against the defendant, Mr Antonov, in support of underlying claims which it had brought against him in England for misappropriation of assets and breach of duties owed to the claimant bank under Lithuanian law for a total of approximately €500 million. As is common in freezing orders, that order also directed Mr Antonov to give disclosure of his assets. By his application before Gloster J., Mr Antonov sought an order relieving him of the obligation to give disclosure of his assets. That application was based principally on his asserted fear that information provided by him would, in breach of his rights under ECHR, be passed to the Lithuanian prosecutor to assist him in a criminal investigation which had been commenced against Mr Antonov in that jurisdiction (see J/[73]).
68. Gloster J. rejected Mr Antonov’s application and declined to vary the disclosure order other than to impose limitations on the dissemination of the information provided. Her reasons for doing so were as follows ([77]):
  - “i) Given the nature and amount of the Bank’s claim, and the evidence relating to the manner of the alleged misappropriations by Mr Antonov, I take the view that this is quintessentially a case where a disclosure order is clearly necessary to make the freezing order effective. The reality is that, in the absence of disclosure of current assets, it will be almost impossible for the Bank to take steps to ensure that any judgment it may obtain will be enforceable....

ii) In the absence of cogent evidence to the contrary, I am entitled to assume that Lithuania, as well as Latvia and Switzerland, will honour their obligations under the Convention.

iii) Notwithstanding the evidence adduced by Mr Antonov, which I have carefully considered, there is no sufficiently cogent evidence before me to suggest that, in relation to this aspect of the matter, the Lithuanian state will not honour its obligations under the Convention to ensure that Mr Antonov has a fair trial. Thus I am not prepared to assume that, in breach of his rights under Article 6 of the Convention, a Lithuanian court would allow his answers to the disclosure order to be used in evidence against him at any criminal trial in Lithuania. Like the Court of Appeal in *Rottmann v Brittain*, I consider that, even if the Lithuanian Prosecutor were to obtain any of the information disclosed by Mr Antonov under the compulsory provisions of the WWFO, it is for the Lithuanian court to control such use as may be made by the Lithuanian Prosecutor in the context of the criminal proceedings, so as to ensure that Mr Antonov's Article 6 rights are preserved. Similar conclusions apply in relation to Switzerland and Latvia because they are both Convention compliant countries. Moreover, as at present there is no evidence that there is any credible risk of Mr Antonov's extradition to those countries.

iv) Mr Antonov has not established on the evidence that the Bank should effectively be treated as equivalent to the Lithuanian Prosecutor and that the former can effectively be regarded as a conduit for passing information on to the latter. In this respect I refer to the evidence which I have summarised at paragraphs 82 – 84 below to demonstrate that the Bankruptcy Administrator acts independently of the Lithuanian government and the Lithuanian Prosecutor.

v) The Bank, its employees, agents and legal advisers, which necessarily includes the Bankruptcy administrator, his staff and agents, are necessarily subject to the standard undertaking that they will not, without the permission of the court, use any of the information disclosed under compulsion by Mr Antonov pursuant to the terms of the WWFO, other than for the purposes of the current civil proceedings in England, and in particular that they will not use such information “for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction”. This undertaking of itself should prevent any disclosure by any of the foregoing of the information disclosed by Mr Antonov about his assets to the Lithuanian Prosecutor, the Lithuanian state, or indeed the prosecuting authorities in Latvia or Switzerland or indeed any other country.

vi) However, nonetheless, there is in my view, and despite such undertaking, a risk that information obtained from Mr Antonov under compulsion as to his current assets, could, whether inadvertently or otherwise, be communicated to the Lithuanian prosecuting authorities and thus used by the latter for the purposes of the criminal investigation and, in particular, collating the necessary evidence to be used against him in the criminal trial to demonstrate misappropriation or informing their decision as to prosecution. That is so despite the fact that, under Article 6 of the Convention, Mr Antonov's actual answers could not be relied upon as evidence at any criminal trial in Lithuania. Such a consequence might adversely prejudice Mr Antonov in the criminal investigation, although I do not make any finding as to whether such prejudice will in fact occur, or whether it would be unfair.

vii) I mention, simply by way of illustration, four examples of how information might become available to be [sic] Lithuanian Prosecutor, notwithstanding the undertaking: [...]

viii) However, in my judgment, the risk that such information may come into the hands of the Lithuanian Prosecutor, and that secondary use may be made of information to assist in the criminal investigation is not a factor, which balancing the competing interests of the Bank and Mr Antonov, in the exercise of my discretion outweighs the need and obligation for him to provide disclosure under the terms of the WWFO. Such risks can in my judgment be adequately addressed by imposing further safeguards, in addition to those which I have referred to above as the proposed safeguards. [...]"

69. In the submission on behalf of Ms Purdy, in following, adopting and applying the approach of Gloster J in *Akciné*, the Senior Master erred in principle and/or failed to give sufficient weight to the oppression faced by Ms Purdy (and to the potential breach of her rights under Article 6 ECHR which that involved). The features of that case are, it is submitted on behalf of Ms Purdy, distinguishable in important respects from the instant case:

(1) A safeguard relied upon by Gloster J. in *Akciné* was the fact that Lithuania is an EU member state and signatory to the ECHR so that it could be assumed that Lithuania would honour their obligations under the ECHR and (in particular) would not allow his answers to the disclosure order to be used in evidence against him at any criminal trial in Lithuania in breach of Article 6 ECHR. Ms Purdy is not the beneficiary of an equivalent safeguard in Morocco which is not a signatory state to the

ECHR. Evidence obtained from Ms Purdy under compulsion would not prevent the Moroccan criminal court from admitting that evidence. The last protection for Ms Purdy of her rights under Article 6 ECHR would be from the court in England and Wales, being a “*public authority*” within the meaning of section 6 of the Human Rights Act 1998 with a duty to act consistently with the ECHR.<sup>2</sup>

- (2) The disclosure order in *Akciné* was necessary to make the freezing order effective. That order had itself been issued by the Court in support of proceedings before the English court. If Mr Antonov had been allowed to remain silent based on a fear of prosecution under the law of another country, the effect would have been to allow the law of Lithuania to override the English court’s ability to conduct its own procedures and law, and in particular its ability to ensure the effectiveness of its own freezing order. By contrast, the Deposition Order is not required for the purposes of any proceedings before the English court or any proceedings against Ms Purdy. Rather, it is sought by CGHA for the purposes of proceedings before a foreign court, to which Ms Purdy is not a party.
- (3) There was a distinction between the claimant bank and the Lithuanian prosecutor in *Akciné*. By contrast, in the present case, CGHA itself filed the Moroccan Criminal Complaint (and did so approximately six weeks before it commenced the Delaware Proceedings).

70. The approach adopted by Gloster J. in *Akciné* was therefore not appropriate to the issue of whether Ms Purdy should be required to give evidence for the purposes of the Delaware Proceedings. Had the Senior Master adopted the correct approach, she would have set aside the Deposition Order unless the risk of oppression to Ms Purdy could be eliminated. This is because, as noted above, the Court as a public authority is bound to respect Ms Purdy’s right not to incriminate herself under Article 6 ECHR. The interests of the requesting court ought not to be allowed to trump that right.
71. On the facts of this case, there was a real risk that Ms Purdy’s compelled testimony could be used against her for the purposes of the Moroccan criminal investigation and any subsequent prosecution in breach of Article 6 ECHR. Having concluded that that risk could not be eliminated, the Senior Master should have proceeded to set aside the Deposition Order.

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<sup>2</sup> Compare the position in *National Crime Agency v. Hajiyeva* [2020] 1 W.L.R. 3209, in which the Court of Appeal noted (at [52]) that, in rejecting the appellant’s concerns about the risk of prosecution abroad, the judge at first instance “*bore in mind that any information which was provided by the appellant would be provided to the NCA which, as a public body, had a duty to act consistently with the European Convention on Human Rights, and was bound to comply with the Overseas Security and Justice Assistance guidance which included specific processes for deciding whether disclosure to a third party would give rise to an impermissible risk.*”

## X The appeal of Ms Purdy: Submissions on behalf of CGHA

72. CGHA characterises and criticises the submission of Ms Purdy as being a claim to an unqualified right to a privilege against self-incrimination that she would have had if the risk of prosecution had arisen under English law. The response of CGHA is that this proposition is contrary to case law including decisions post-dating the Human Rights Act 1998, that have accepted that a party in English proceedings has no *entitlement* to assert a privilege against self-incrimination under a foreign law, but that the court has a *discretion* to afford protection.
73. Where the risk of self-incrimination arises under foreign law, it has been recognised that measures can be put in place, such as a restricted information regime or “confidentiality club”, such that there is no significant risk that evidence given will be used against the witness abroad: see:
- (1) In *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) at 830E and 833D, where Millett LJ and Lord Bingham CJ both spoke of measures that would ensure that there was no “significant” risk that incriminating information would come into the hands of the Swiss prosecuting authorities;
  - (2) *JSC BTA Bank v Ablyazov* [2016] EWHC 289 (Comm) where Phillips J said at [40]:

“In my judgment, and as an exercise of my discretion, I will only recognise any such privilege to the extent that the documents should only be disclosed to the confidentiality club. Provided they are disclosed subject to that restriction, I do not consider that any further protection is necessary, proper or proportionate as a matter of discretion. I will therefore order disclosure subject to the existing confidentiality regime”.
  - (3) In *Akciné* Gloster J said, citing *Cuoghi*:

“Even if the court concludes that there is a real risk of prejudice, that fact in itself should not necessarily excuse the defendant from providing disclosure of his assets. The Court is entitled to take into account whether measures can be put in place which will sufficiently reduce the risk of self-incrimination in practice”.

At [47] and at [77(viii)] Gloster J acknowledged that the safeguards were not perfect or exhaustive and that there remained a risk that information might still be misused, but she said that the risks could be adequately addressed by means of the safeguards proposed.



74. It therefore follows that the court is not obliged to remove all risk altogether by simply relieving the witness from answering the question or providing the relevant disclosure; it is enough if the risk can be removed or sufficiently reduced or that measures can be put in place such that there is no longer a significant risk. Even in relation to the English law privilege, where a party has an absolute right not to answer questions if the privilege can properly be claimed, the law requires that the risk of self-incrimination is “real and appreciable”: see *Rio Tinto Zinc. Corp. v Westinghouse Electric Corp.* [1978] AC 547 *per* Lord Denning MR at 565H.
75. The case of Ms Purdy assumes that since Morocco is not a signatory to the ECHR, that justice will not be done in Morocco. However, cogent evidence is required before the English court will decide that justice will not be done in a foreign court: see *Akciné* at [76(ix)], citing *Altimo Holdings v Kyrgyz Mobil Tel. Ltd* [2012] 1 WLR 1804 at [89]-[102] (a case concerning Kyrgyzstan). In the present case the court has no such cogent evidence. The powers of disclosure referred to above from paragraph 63 of Mr Sigler’s first witness statement are based on inquiries not by Mr Sigler, but another law firm with unidentified Moroccan lawyers about powers of disclosure. In any event, they are in general terms, and do not amount to evidence of anything very different from powers of disclosure in other legal systems, nor do they evidence that justice would not be done.
76. As regards Ms Purdy’s concern about the extradition treaty, this is alleviated by the following, namely:
- (1) The existence of the treaty is an indication of some recognition that the Moroccan legal system is one that provides accused persons with a right to a fair trial: see the fourth preamble to the extradition treaty.
  - (2) If there was a concern about a fair trial in Morocco, Ms Purdy would be able to contend the same in opposition to an extradition order in the UK on the basis that her Article 6 rights would not be respected in Morocco.
77. It was also submitted by the Purdy parties (in paragraph 4 of the Grounds of Appeal and in paragraph 33 of Ms Purdy’s skeleton argument) that the Senior Master failed to give those matters “sufficient weight”. This is not an error of principle nor is it a submission that the Senior Master failed to take into account a relevant matter. In order for such a factor to be wrong, the decision has to be outside the ambit of reasonable decisions. This is based on the suggestion that:

*“... on the facts of this case, there was a real risk that Ms Purdy’s compelled testimony could be used against her for the purposes of the Moroccan criminal investigation and any subsequent prosecution”.*

Whether there is a real risk involves an evaluation of primary evidence and is ultimately a

matter of fact. The Senior Master concluded, on the basis of the protections put in place, that there was not such a real risk; the protections, she held, provided sufficient protection.

## **XI The appeal of Ms Purdy: Discussion and disposal**

78. In my judgment, the submissions for Ms Purdy seek to identify an error of law or principle, but they fail in this fundamental regard. The Senior Master did not make any error of law or principle. She set out the law fully and fairly. She recognised the starting point about comity in acceding to a request of a Delaware Court for disclosure and information. She rightly quoted from the judgment of Lord Denning MR in *Rio Tinto Zinc Corporation* above: see [J/113]. However, she also took into account the need to balance that consideration against the interests of the witnesses, and she engaged in the balancing exercise. She was alert to the danger of oppression. She was concerned about the risk of oppression to the extent that there was no privilege against self-incrimination, which there is not as a matter of right, in respect of the risk of the use of material in the court of a foreign country.
79. She evaluated appropriately the protections offered to Ms Purdy in deciding whether the risk was such that it would be oppressive to accede to the foreign request. She appraised the protections in the Protective Order and the additional protections offered as summarised in [J/106-107].
80. There is an attempt to suggest that unless the protections were absolute to put Ms Purdy in the same position as she would be in under the privilege against self-incrimination in the UK or under the Fifth Amendment in the U.S.A., this Court ought to have refused the application for the Orders as of right. There is no support for this in the authorities referred to above, some of which post-date the coming into force of the Human Rights Act 1998. It is established law that the absolute privilege does not exist in respect of foreign proceedings, albeit that in the balancing act in which the Court is engaged, the risk of self-incrimination must be taken into account. There is nothing in the jurisprudence post the coming into force in domestic law of the ECHR which requires the privilege against self-incrimination as regards foreign law proceedings to be absolute in order to comply with Article 6. The case law cited by CGHA above demonstrates that this submission of the Purdy parties is not made out. The Senior Master was right to conclude that that submission went beyond the law. She identified the law, and she applied it correctly.
81. In relation to the overall question of whether, in the exercise of her discretion, she should make an order giving effect to the letter of request, the Senior Master approached matters properly in that she:
  - (1) started from the accepted proposition (see paragraph 13 of Ms Purdy's skeleton argument, citing *Rio Tinto per* Lord Denning MR at 560G-H)

that the English court should do all that it could to assist the foreign requesting court (J/[113]);

- (2) balanced the interests of the foreign court and the witness (see *The State of Minnesota v Philip Morris* [1998] ILPr 170 *per* Lord Woolf MR at 176, quoted at J/[114]) and to consider whether, as Ms Purdy alleged, to make an order giving effect to the Letter of Request would be oppressive.
- (3) concluded at (see J/[132]) that the court was not obliged to refuse orders unless every conceivable risk of oppression is eliminated, so long as it could be alleviated to a sensible and acceptable degree which was provided by the combination of the Protective Order and the protections offered by CGHA.

82. Far from there being an error of principle, the Senior Master:

- (1) recognised (as was accepted by Ms Purdy below) that, although Ms Purdy had no right to rely upon a privilege against self-incrimination under Moroccan law, the court had a discretion (see J/[86]);
- (2) acknowledged article 6 of the ECHR and the decision of the European Court of Human Rights in *Saunders v United Kingdom* [1997] ECC 872, referred to both by Ms Purdy’s counsel (see J/[86]) and also by Gloster J in *Akciné*;
- (3) assessed the protections already in place in the Protective Order and the additional protections offered by CGHA, and concluded that they “sufficiently protected” Ms Purdy in respect of the Moroccan Criminal Complaint and Investigation (see J/[122] and [128]).

83. The Senior Master was right to apply the case of *Akciné* in the way in which she did. She was mindful of the factual differences between that case and the instant case, but there were still features which could be applied. In particular, it was not the case that in order to avoid oppression, there had to be an absolute right to the privilege against self-incrimination or no risk of material obtained under compulsion being used in foreign proceedings. It sufficed if there were adequate protections in the circumstances of the case.

84. The suggestion that the Senior Master should not have followed *Akciné* because it had different characteristics from the instant case is answered in that each case is distinct on its own facts. *Akciné* was relied upon for some common features, not because all of its features were common ones. In answer to specific points, which appear in italics, CGHA drew attention to the following:

- (1) *Akciné concerned a Convention country (Lithuania) unlike Morocco which was not such a country. Akciné was simply relied upon as an example of how the English court addresses an asserted risk of self-incrimination under foreign law. Akciné was an example of a case where the judge (Gloster J) decided whether protections could be put in place that sufficiently reduced any risk of self-incrimination under the foreign law. This has been adopted in other cases, e.g., Ablyazov, where the risk was of criminal proceedings in a non-EU, non-ECHR signatory state, in that case a risk of proceedings in Kazakhstan.*
- (2) *Akciné concerned proceedings in this jurisdiction, and not proceedings in a foreign state (in this case, in Delaware). This distinction does not mean that there is a privilege engaged in a case where the risk of proceedings is outside the jurisdiction. There is no such privilege and the authorities do not recognise the same. Nor does section 3 of the 1975 Act which expressly addresses privilege and provides that a witness is entitled to rely upon any privilege he or she might have under English law and also (subject to certain procedural requirements) under the law of the requesting court.*
- (3) *While Akciné concerned the Lithuanian prosecutor, the prosecution in the instant Moroccan Criminal Complaint was lodged by CGHA. The answer here is that the prosecution was still the Morocco prosecuting authorities, and CGHA was simply the complainant. This was recognised by the Senior Master who referred to the fact that a condition of discontinuance against CGHA was unrealistic because the prosecutor might still wish to go on with the prosecution: see J/[128].*

85. When taking into account the protections offered, the submission is that even though no employee of CGHA would have a copy of the transcript of Ms Purdy's testimony, an employee might volunteer (even though it would put his employer in breach of orders made by the English and Delaware courts) or the Moroccan prosecuting authorities might seek to compel an employee to disclose third-hand information as to what he or she had been told about Ms Purdy's testimony. The possibility was addressed that the Delaware Court might refer to Ms Purdy's evidence in any public judgment, but that itself depends upon a number of assumptions. Even if there is full bench trial with a judgment, the judgment would have to include findings of fact about Ms Purdy's evidence despite the protections put in place in the Protective Order to protect Starman and its own employees who are also named in the Moroccan Criminal Complaint. This seems unlikely. Even if this were to happen, the position would remain: the Moroccan authorities will not have Ms Purdy's evidence: they will simply have a US judgment that may refer to it in the context of deciding a dispute between different parties.

86. The Senior Master considered all of these matters very carefully. She considered the additional protections sought by Ms Purdy, and rejected them at J/[127-130]. In

particular, it was not realistic to expect CGHA to withdraw the Moroccan Criminal Complaint in the factual circumstances outlined in the evidence nor to expect that the Moroccan prosecuting authorities would necessarily agree to close their investigation. She considered that the combination of the Protective Order and the protections offered by CGHA alleviated risks to a sensible and acceptable degree.

87. Given the absence of an error of law or principle, the appeal amounts to an attempt to interfere with an exercise of discretion. Reading and re-reading the careful and comprehensive judgment of the Senior Master, it is apparent that she has identified the various factors and has balanced them fairly and reached a conclusion readily available to her. She has exercised her discretion applying the correct legal principles, and there are no circumstances in which this appellate court is able to interfere with and exercise the discretion afresh.
88. It follows that the appeal of Ms Purdy is dismissed.

## **XII The cross appeal of CGHA: Introduction**

89. The Court will consider the matter as follows, namely by summarising:

- (1) the decision and reasoning of the Senior Master;
- (2) the correct principles;
- (3) the submissions of CGHA; and
- (4) the submissions of Ms Purdy.

90. In the light of the foregoing, the Court will then set out its discussion and decision.

## **XIII The cross appeal of CGHA: the Senior Master's decision**

91. The Senior Master found that the two issues before her, namely non-disclosure and oppression, each took up roughly half of the time. In respect of the non-disclosure issue, she decided that CGHA should pay Ms Purdy's costs on the standard basis. In respect of the oppression issue, she decided that CGHA should pay half of the costs of the Purdy parties, also on the standard basis. Putting together these two decisions, the Senior Master therefore ordered CGHA to pay 75% of the Ms Purdy's costs of the two issues on the standard basis.
92. As noted above, the subject matter of the Deposition and Disclosure Orders are also the subject of the Moroccan Criminal Complaint, filed on 7<sup>th</sup> March 2018, *i.e.* approximately 7 weeks before it commenced the Delaware Proceedings. By contrast with the Delaware Proceedings, Ms Purdy and Maquay are putative defendants to that complaint. Notwithstanding this, CGHA did not disclose the existence of the Moroccan Criminal Complaint.

93. In her judgment on those applications, the Senior Master concluded that the failure by CGHA to disclose the existence of the Moroccan Criminal Complaint was serious (see J/[78] and [82]), and she was critical of CGHA's conduct:
- (1) The Senior Master said that if the Court had been alerted to the fact of the criminal investigation against Ms Purdy and Maquay, it would have directed that CGHA's applications for the Deposition and Disclosure Orders be on notice (see J/[66]). Indeed, if CGHA's English solicitors, Humphries Kerstetter, had known of the Moroccan criminal investigation, the Senior Master would have expected the application to have been on notice ( J [66]).
  - (2) Whilst she accepted the evidence of CGHA's US lawyers that the non-disclosure of the Moroccan Criminal Complaint was not deliberate, she noted that it was information known to CGHA and its US lawyers and, from the perspective of a UK lawyer, its relevance ought to have been perceived (see J/[68]).
  - (3) The evidence of CGHA's US lawyer, Mr Spears, did not deal expressly with why he did not inform HK of the existence of the Moroccan criminal investigation (see J/[68]). Instead, it was left to the Senior Master to infer that he simply did not consider it relevant because it was not a "*related proceeding*".
  - (4) As the Senior Master observed, that explanation was "*somewhat surprising, given that he was in court when Judge Fallon made clear her concerns about the risk of information from the Delaware proceedings being disclosed to the Moroccan prosecutors*" (see J/[68]). This was a reference to a hearing before Magistrate Judge Sherry J. Fallon in the Delaware court, who had heard a dispute between CGHA and Starman (the defendant to the Delaware Proceedings) as to the terms of the Protective Order on 15<sup>th</sup> April 2019 (see J/[36]).
  - (5) The Senior Master further observed that it was the duty of CGHA's English solicitors, HK, to have informed its US lawyers of the duty of full and frank disclosure on a without notice application, and there was no evidence as to whether that was conveyed (see J/[69]). In particular, Kristopher Kerstetter, who was the partner of Humphries Kerstetter who gave evidence on behalf of CGHA in support of its without notice applications and therefore the person best placed to explain (and apologise to the Court for) the non-disclosure did not give evidence.
  - (6) Whilst the failure to disclose the existence of the Protective Order was not in the same category of seriousness as the Moroccan Criminal Complaint (see J/[70]), the evidence of CGHA was that Ms Purdy would only have been shown the terms of the Protective Order on the date of her examination.

- (7) The Senior Master also held that it would have been “*extremely unsatisfactory*” for Maquay to have been shown the terms of the Protective Order only on the date on which it was originally due to give disclosure under the Disclosure Order (see J/[45] and [71]). That would not have enabled Ms Purdy to take any advice before the examination as to whether the Protective Order gave her sufficient protection
- (8) The Senior Master held that, whilst the non-disclosure of the Protective Order (on its own) would not be a reason for the Court to set aside the Deposition and Disclosure Orders, it was to be taken into account in considering the appropriate sanction for the entirety of the non-disclosure (see J/[72]).

94. In respect of the non-disclosure issue, the Senior Master recognised that CGHA had succeeded in that the without notice order had not been set aside for non-disclosure. She took the following into account in disapplying the general rule under CPR 44.2(2)(a) that the successful party should receive its costs:

- (1) The non-disclosure issue only arose because of the failure of CGHA to provide full and frank disclosure when it applied (without notice) to the Senior Master for the Deposition and Disclosure Orders in respect of a central and important issue (the Moroccan Criminal Investigation) and in respect of a significant issue (the Protective Order). In no sense had the Purdy parties contributed to the non-disclosure.
- (2) The matter required the court’s consideration in any event. This must have been by reference to the matters set out in the preceding paragraph and the seriousness of the non-disclosure. This was a good reason to disapply at least the rule that the successful party ought to have its costs, and it comprised 50% of the overall costs.

95. In respect of the oppression issue, the Senior Master recognised that CGHA had succeeded in that the without notice order had not been set aside for oppression. She held that the risk of oppression could be alleviated to a sensible and acceptable degree by the combination of the Protective Order and the additional protections offered by CGHA set out in two draft orders sent by CGHA’s solicitors, HK, on 6 January 2020 (see J/[126] and [132]). She accordingly declined to set aside the Orders, but varied them to incorporate the additional protections (see J/[126] and [132]). However, she took the view that the general rule under CPR 44.2(2)(a) should be disappplied to the extent that she was ordering that in effect 50% of the costs of the oppression issue should be paid by the Defendant for the following reasons:

- (1) It was a further sanction and deterrent arising out of the material non-disclosure.
- (2) The fact that the grounds for oppression relied upon by the Purdy parties, namely the Moroccan Criminal Investigation, was the same matter of which there was non-disclosure. It was reasonable for Ms Purdy to bring this issue before the Court for the Court to consider whether the protections offered were appropriate, in the unusual circumstances where the usual privilege against self-incrimination would not apply (the position of Maquay, which was only ordered to produce documents, was less disadvantageous, but this took up much less time.)
- (3) This was not party and party litigation in that Ms Purdy was not a party to the underlying proceedings in Delaware and would derive no benefit from those proceedings. The Court had a discretion as regards a witness as to whether to allow its costs even of an unsuccessful challenge, provided that the witness had not behaved unreasonably. There was something of an analogy of a shareholder's application in schemes of arrangement which come before the Chancery Division where non-party witnesses are being brought into litigation unwillingly and receive their costs.

96. The Senior Master also took into account the following points which were in favour of CGHA or at least mitigated what had been done wrongly:

- (1) The non-disclosure was not deliberate.
- (2) CGHA admitted the existence of non-disclosures in the applications by the Purdy parties and apologised to the Court.
- (3) As soon as CGHA's solicitors discovered the non-disclosure they disclosed the relevant information and agreed to extensions of time.
- (4) CGHA offered protections that the court ultimately found were sufficient to protect the Purdy parties.
- (5) CGHA offered to pay the Purdy parties' costs to mid-November 2019 if they were to comply with the Orders.
- (6) Ms Purdy was aware of the Moroccan Criminal Investigation and, while she was a lay person, she was appropriately advised once the non-disclosure had been rectified.
- (7) Unlike in the case of freezing orders, there had been no obligation on the Purdy parties to comply with the Orders before the non-disclosure was discovered and the Purdy parties had therefore not suffered any prejudice.



97. Taking all matters into account, the Senior Master decided that the CGHA should pay 75% of the overall costs of the Purdy parties on the two issues.

#### **XIV The cross appeal of CGHA: approach to costs appeals**

98. The law reports contain many reminders about the reluctance of appeal courts to interfere with decisions on costs. The starting point is often the judgment of the Court of Appeal in *Tanfern v Cameron-Macdonald* [2000] EWCA Civ 3023; [2000] 1 WLR 1311:

“30. As a general rule, every appeal will be limited to a review of the decision of the lower court. This general rule will be applied unless a practice direction makes different provision for a particular category of appeal, or the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing (CPR 52.11(1)). The appeal court will only allow an appeal where the decision of the lower court was wrong, or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court (CPR 52.11(3)).

31....The appeal court's duty is now limited to a review of that decision, and it may only interfere in the quite limited circumstances set out in CPR 52.11(3).

32. The first ground for interference speaks for itself. The epithet "wrong" is to be applied to the substance of the decision made by the lower court. If the appeal is against the exercise of a discretion by the lower court, the decision of the House of Lords in *G v G* [1985] 1 WLR 647 warrants attention. In that case Lord Fraser of Tullybelton said at p 652C:

"... the appellate court should only interfere when they consider that the judge of the first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

33. So far as the second ground for interference is concerned, it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the proceedings in the lower court was a serious one, and that this irregularity caused the decision of the lower court to be an unjust decision.”

99. In *Blindley Heath Investments Ltd and another v Bass and others* [2015] EWCA Civ 1023; [2017] Ch 389, Hildyard J observed as follows at [127] to [128]:

“127. Appeals in relation to costs are discouraged. An appeal court will be particularly loath to interfere with a decision on costs. As Wilson J said (sitting in the Court of Appeal) in *SCT Finance Ltd v Bolton* [2003] 3 All ER 434, para 2:

‘This is an appeal . . . in relation to costs. As such, it is overcast, from start to finish by the heavy burden faced by any appellant in establishing that the judge’s decision falls outside the discretion in relation to costs . . . For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion widely.’

128. In other words, the generous ambit within which a reasonable disagreement is possible is at its most generous in such a context.”

100. Mummery LJ observed to similar effect in *R (on the application of Evers) v Uttlesford District Council* [2010] EWCA Civ 48 at [15]:

“15. I can tell Mr and Mrs Evers from many years’ experience, not just in this court but in other courts, that appeals against costs hardly ever succeed, for the reason that it is the judge who is dealing with the case to decide what is fair about costs. This court would only interfere with the appeal court if there has been an error of law, and there has been no error of law in this case.”

101. An appeal court will set aside a decision on costs where it is appropriate to do so. However, the court has to be convinced that there was an error of principle or that the decision went beyond the “*generous ambit [...] at its most generous*”.

## **XV The cross appeal of CGHA: the submissions of CGHA**

102. At paragraph 6 of its skeleton argument in support of an application for permission to appeal, CGHA put its case as follows:

“The hearing of matters consequential on the main judgment was held on 23 November 2020. The Senior Master ruled that,

notwithstanding the fact that it succeeded in resisting both applications to set aside the Orders on both grounds advanced, and CGHA was, therefore, wholly successful, CGHA should nonetheless pay 75% of Ms Purdy's and 75% of Maquay's costs, to be assessed on the standard basis, and that CGHA should make payments on accounts of those costs in the aggregate amount of £150,000 within 28 days of the judgment ("the costs order"). That is an extraordinary result, which CGHA submits cannot be justified by reference to the principles and/or to any proper approach to the exercise of the court's discretion."

103. More specifically, CGHA put its case in a variety of ways. I shall summarise the case without reciting each and every aspect of the same, but I have taken into account every aspect of the case even where it is not specifically mentioned. CGHA submits that

- (1) The order failed to reflect the normal rule under CPR 44.2(2).
- (2) While CGHA accepts that a discount is appropriate to take into account the non-disclosure, it submits that the starting point should nevertheless be that it was the successful party and should therefore be awarded its costs, rather than the other way around.
- (3) In any event, it was wrong to order that any part of the costs of the non-disclosure issue should be ordered to be paid by CGHA to the Purdy parties.
- (4) As regards non-disclosure the Senior Master's order wrongly gave the Purdy parties a 'free shot' at setting aside the Orders. CGHA relied on the following observation by Males J (as he then was) at [13] in *National Bank Trust v Yurov* [2016] EWHC 1991 (Comm):

"13. In general, however, I consider that the starting point must be that the claimant is the successful party. If the starting point were that costs, particularly on the indemnity basis, were awarded in favour of a defendant which has after all failed to obtain the discharge of the order, that could encourage disputes about failures to disclose to be litigated rather than promoting a realistic attitude on the part of defendants as to whether, despite a failure to disclose, a freezing order is nevertheless appropriate. An approach which, as it were, gives the defendant a free shot at discharging a freezing order so far as costs are concerned would not be helpful."

The Respondents should have accepted the apologies about the non-disclosure and consented to the continuation of the without notice order.

- (5) As regards the oppression issue, there was double counting to have regard for a second time to the non-disclosure issue. That was (more than) taken into account in connection with the non-disclosure issue and should not have been revisited in connection with the oppression issue.
- (6) By the time that the oppression issue was raised, the offers had been made about the non-disclosures, and therefore it was wrong to reflect the non-disclosure issue into the issue of oppression.
- (7) CGHA offered suitable undertakings. The Purdy parties contended that they were not sufficient, and they failed in that the Court held that the undertakings sufficed. Because they failed: they ought to have been ordered to pay the costs of the oppression issue to CGHA.
- (8) A substantial portion of the costs was incurred in brief fees and other preparation for the hearing, i.e. well after 10 January 2020, by which time the non-disclosures had been admitted and the relevant protections offered.
- (9) Although Ms Purdy was strictly a non-party, she was so closely connected with the parties to the Delaware proceedings that the Court should not have treated her as a non-party witness or ought to have held that in the circumstances, this was a point on which Ms Purdy could place no or no substantial reliance. This is bearing in mind that (i) the ICC Arbitration Tribunal stated that events suggested that Maquay had been created for the sole purpose of receiving shares and avoiding any possible liabilities under the Management Agreement, and (ii) the Purdy parties were alleged by CGHA to be centrally involved in the underlying dispute.
- (10) There was relatively little to be said about oppression in respect of the order to produce documents against Maquay (as the Senior Master found), but there was no distinction between the CGHA/Ms Purdy Orders and the CGHA/Maquay Orders.
- (11) Something had gone very wrong when the costs were ordered to be paid by CGHA in respect of the oppression issue. Alternatively, the order was so far removed from the kind of orders made that the order fell well outside the generous ambit of the Court's discretion.

104. CGHA further relies on costs orders made in other non-disclosure cases, and contrasts the result in the instant case in order to submit that the Senior Master has exceeded her discretion.
105. In *U&M Mining Zambia Ltd. v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm) the defendant resisted the continuation of a worldwide freezing order on, *inter alia*, the ground that the claimant had failed to comply with its duty of full and frank disclosure when making the *ex parte* application. Teare J found that the claimant had breached its

duty in a number of ways but that the failure related primarily to the financial circumstances of the defendant rather than its conduct. The failure therefore did not concern information that was relevant to assessing the risk of dissipation. Teare J also found that the failure was “*innocent in the sense that it was not deliberate*” (at [95]). Teare J further said as follows at [95]:

“The court’s order must mark the importance of complying with the duty of full and frank disclosure and serve as a deterrent to ensure that persons who make *ex parte* applications realise that they must discharge that duty. That purpose can be satisfactorily achieved, in an appropriate case, by an appropriate order as to costs.”

On this basis, Teare J decided to continue the freezing order but ordered the claimant to bear its own costs and to pay one third of the defendant’s costs of resisting the continuance on the indemnity basis.

106. In *National Bank Trust v Yurov* referred to above, an application was made by Mr and Mrs Yurov to set aside a freezing order made against them. One of the grounds of the application was that the claimant had failed to comply with its duty of full and frank disclosure. Males J found that there were three failures of disclosure, which were of “*varying significance*” ([81] of the main judgment: [2016] EWHC 1913 (Comm)). The first failure was “*very close to [...] the uncertain borderline between material facts and non-material facts – albeit that, as the bank accepts, it fell on the wrong side of that border.*” Of the other two failures, Males J said that they “*were more substantial failures, but I have no doubt that, even if they had been disclosed, the freezing order would and should still have been granted.*” In the circumstances of the case, Males J dismissed the application. In a further judgment ([2016] EWHC 1991 (Comm)), he held that the claimant should be sanctioned for the non-disclosure by a costs order. At [12] he noted the judgment of Teare J in *U&M Mining*:

“I acknowledge that there may be cases where, rather than making a deduction, even a very substantial deduction, from the costs to be awarded to the successful claimant which has succeeded in maintaining its injunction, it may be appropriate to make an award of costs in favour of the defendant, sometimes even an award for assessment on the indemnity basis. That was Teare J’s approach in the *Konkola Copper Mines* case and nothing I say should be understood as casting doubt on his order. Every exercise of discretion depends on its own circumstances.”

107. Males J said, at [14], that “*starting from the position that the claimant bank has been successful, I propose to make a deduction from the costs which would otherwise have been awarded in its favour. That deduction needs to be sufficient to represent a real*

*sanction and to be an effective deterrent in other cases.*” Males J took into account the following factors in making his decision ([15] to [20]):

- (1) The claimant had a strong case for a freezing order.
- (2) The claimant succeeded on an independent point, namely risk of dissipation.
- (3) The defendants failed to establish a failure of disclosure on three of six points on which they relied.
- (4) The approach of the defendants made identification of their complaints difficult.
- (5) The disclosure failures were admitted either at a late stage or not at all.

108. On this basis, Males J, who said that “*every exercise of discretion depends on its own circumstances*” ordered that the claimant should be awarded 40% of its costs in relation to the application to discharge the freezing order, to be assessed on the standard basis.
109. In the submission of Mr Edwards QC for CGHA, the costs order in the instant case was out of all proportion to the other cases. Whatever might be said in general terms about the difficulties of appeals against costs orders, the order in the instant case went very far outside the generous ambit of discretion in these cases.

## **XVI The cross appeal of CGHA: the submission of Ms Purdy**

110. Whilst presented (at least in part) as errors of principle and an allegation that the Senior Master took into account irrelevant matters or left out of account relevant matters, properly scrutinised CGHA’s complaints all go to the manner in which the Senior Master balanced the various relevant factors in exercising her discretion on costs. It is clear from the approved note of the Senior Master’s oral judgment on costs that she took into account all of the matters identified in CGHA’s Grounds of Appeal.
111. In reality, it follows that the appeal is about a decision being outside the generous ambit of the Senior Master’s discretion. It is a high hurdle to demonstrate that the Senior Master’s decision was wrong.
112. As a preliminary point, CGHA’s grounds of appeal proceed on false factual premises which include the following:
- (1) CGHA alleges that it was wholly successful and Ms Purdy and Maquay were entirely unsuccessful. That is not correct. CGHA’s case before the Senior Master was that its non-disclosure was not serious and had been

remedied (see J/[54] and [59]). The Senior Master rejected that case, and instead agreed with Ms Purdy and Maquay as to the seriousness of the non-disclosure of the Moroccan Criminal Complaint and investigation (see J/[78]).

- (2) CGHA alleges that the Purdy parties had all necessary protections by (at the latest) 6 January 2020 (a fact which the Senior Master took into account in her decision on costs). However, Ms Purdy says that it is not the case that they “*ended up with precisely the outcome that had been offered to them by no later than 6 January 2020.*” This is because CGHA offered to pay costs from 17 September to 14 November 2019, but not until 6 January 2020.

## **XVII The cross appeal of CGHA: discussion and disposal**

113. In my judgment, this is a case where CGHA has not identified any error in principle on the part of the Senior Master. None of the matters referred to in the submissions of CGHA was overlooked by the Senior Master. The note of the judgment of the Senior Master about costs shows that she took into account carefully all the relevant factors and arrived at a calibrated response within the generous ambit of her discretion.
114. The suggestion that the Defendants ought to have accepted the offers was rightly rejected by the Senior Master. For the reasons which she identified, the non-disclosure was serious. It was not on the margins: it was central to the application. It was so important that if alerted to the criminal investigation against the Defendants, the Court would not have allowed the applications to be made without notice (J/[66]). The non-disclosure was not deliberate, but nor was it innocent in the sense that its relevance ought to have been perceived (J/[68]). There was not adequate evidence put before the Court to explain the full circumstances in which the non-disclosure had arisen (J[68-69]).
115. Such was the seriousness of CGHA’s material non-disclosure that it was appropriate for the Court to consider and decide on the appropriate sanction. There are cases where for a respondent to a without notice order not to accept an offer, but to insist on going to court will amount to wanting to have a “free shot”. So broad is the notion of a material non-disclosure that it still applies even where had the disclosure been made, it would have made no difference to the result of the without notice application. It suffices if the matter not disclosed is relevant to the exercise of the discretion even if it would not have been decisive. Especially in such a case, to go on in the face of an offer may be regarded as having a “free shot”. However, the Senior Master was entitled in the particular circumstances to regard this as not such a case because of the gravity and centrality of the non-disclosure. This gave rise to the Court accepting that it was entirely appropriate for the Purdy parties to draw to the attention of the Court what had occurred so that the Court could consider the appropriate sanction and deterrent.
116. Were it the case that a respondent had to concede the point subject to some compensation of limited costs, then the Court would not have the opportunity in a serious case like the

instant one to consider the matter for itself and give a public judgment disapproving the conduct of CGHA and to decide for itself on appropriate sanctions and deterrents. Further, in the instant case, the Purdy parties would not have had the opportunity to have the Court consider the full extent of the culpability of CGHA and the appropriate response. There was a real reason to consider that an order other than an order for costs was appropriate, even though in the end, the ultimate sanction was in costs.

117. In this regard, the cases referred to by CGHA do not provide much guidance. Every case is decided on its own facts and are of limited assistance. The facts of *U & M Mining* and *Yurov* were very different in that there the non-disclosure did not make a difference to the outcome: this was stated expressly in *Yurov* and can be inferred in *U & M Mining*. By contrast, the non-disclosure in the present case went to the heart of the application. The Senior Master would not have been willing to hear the application on an *ex parte* basis at all (see (J/[66])) and would, as she did once she was aware of the relevant facts, have provided for significant protections for the Purdy parties. Moreover, both *U & M Mining* and *Yurov* concerned freezing orders, which, as already pointed out, are made against parties to the underlying proceedings. These cases underline the importance of the specific facts of each case and do not show that the Senior Master exceeded her discretion.
118. As regards non-disclosure, this was a case where the Senior Master was entitled to take the view that the non-disclosure was serious, and that no order would have been made at the without notice stage if there had been proper disclosure. The Senior Master was therefore entirely right to say that the Purdy parties behaved reasonably in seeking to bring the matter to the attention of the Court.
119. Furthermore, the existence of the Moroccan Criminal Complaint was an important issue for the Court's consideration on whether it was appropriate to compel a witness to give evidence under section 2 of the 1975 Act, on which there was no previous judicial authority. Whilst the Senior Master considered that Maquay's case on oppression was less strong than Ms Purdy's, she noted that it had occupied much less time. The non-disclosure therefore straddled and potentially informed the grounds based on oppression. This itself was a significant factor as to why it was reasonable for Ms Purdy to challenge the Orders and specifically to rely on oppression in addition to non-disclosure.
120. CGHA concedes that a discount for some part of the non-disclosure costs was appropriate. In my judgment, once it is accepted that it was reasonable for the Purdy parties to have contested the non-disclosure issue, in my judgment, it was appropriate, and well within the ambit of the discretion of the Senior Master, for all of the costs of the non-disclosure issue to be awarded to the Purdy parties. Given the seriousness of the non-disclosure and/or the fact that there was no offer of costs up to 6 January 2020 (but only until an earlier stage) and/or the need to provide a deterrent, such an order was entirely conventional. Despite the general rule that costs should follow the event, in circumstances where the Court finds that the non-disclosure was central to the application and serious, even where the Court refuses to discharge the Order, it is not uncommon for



the applicant/claimant to be ordered to pay all or some of the defendant's costs. That is usually because the costs order is said to be a proportionate response to the conduct of the claimant/applicant or a deterrent to other parties making without notice applications.

121. The real battleground in the appeal about costs is about the costs attributable to the oppression element. As identified above, the Senior Master has given three reasons for costs not following the event, namely (a) a further sanction and deterrent arising out of the material non-disclosure, (b) the fact that the grounds for oppression relied upon by the Purdy parties was the same matter of which there was non-disclosure, and (c) Ms Purdy was a non-party to the proceedings in Delaware. In my judgment, the Senior Master did not err in principle or in law in taking each of these three matters into consideration in deciding to make an award against CGHA and in favour of the Purdy parties as to costs in respect of the oppression element.
  
122. As regards the sanction and deterrent, it was not double counting to reflect the seriousness and centrality of the non-disclosure by adding to the scope of the penalty by costs attributable to some part of the oppression element. The Senior Master took into account the fact that the Court was already going to mark the non-disclosure by an award of that part of the costs against CGHA. She was entitled to add to that sanction and deterrent by reference to a part of the costs of the oppression element. That was especially justified for these reasons, namely
  - (1) the Senior Master was entitled to decide within reason the scope of the sanction and deterrent and to extend it beyond the non-disclosure element;
  - (2) the non-disclosure was about the very matter which founded the grounds for oppression, so the two elements were closely linked;
  - (3) the non-disclosure was so serious and central to all aspects of the application.
  
123. The Senior Master was entitled to reflect the fact that the Purdy parties were non-parties in the Delaware proceedings. There was a motion to dismiss an *alter ego* claim against Starman for the liability of Woodman which was denied by a Memorandum Order on 9 January 2019 by District Judge Richard G. Andrews, although a motion to dismiss agency liability against Starman and Starwood Capital Group was granted. It is important to note in the Delaware Proceedings that there was no allegation of agency or alter ego liability against Ms Purdy or Maquay. On 5 August 2019, Judge Andrews issued a Hague Evidence Convention letter of request in respect of Ms Purdy. The letter is not couched in terms that Ms Purdy was the *alter ego* of Woodman or Starman, but at para. 12 "*to obtain testimonial evidence by way of examination under oath from Sarah Purdy for use as evidence at trial. Ms Purdy is believed to be located in the United Kingdom. CGHA has alleged in this action that Starman strategically sold Woodman's*

*parent entity to Maquay in order to prevent CGHA from recovering on an award issued in the Arbitration. Starman has denied these allegations. Ms Purdy is and was at all material times the founder, sole owner and director of Maquay. She can be expected to have knowledge as to the circumstances of the transfer of Woodman's parent company to Maquay and subsequent voluntary liquidation."*

124. In para. 14 of the skeleton argument of the Purdy parties in connection with consequential orders before the Senior Master, the matter was expressed as follows:

"...it is important to note the particular nature of an application under section 2 of the 1975 Act. In particular, such an application does not constitute ordinary contested litigation, in which a claimant seeks a remedy against a defendant in respect of a past or threatened act, alleged to be in breach of the claimant's enforceable rights. In the case of an application under section 2 of the 1975, far from seeking to protect and/or vindicate its rights against the respondent, the applicant is seeking to persuade the Court to invoke a statutory provision compelling the respondent (who is not a party to the underlying litigation) to give evidence against its will and in circumstances where the risk of oppression to the respondent cannot be completely eliminated. In those circumstances, provided that its concerns are not frivolous, the respondent should be entitled to ventilate its concerns about the letter of request before the Court and ensure that the letter is properly scrutinised by the Court without fear of being rendered liable for the applicant's costs, but in the expectation that (ordinarily) the applicant will bear the respondent's costs."

125. The fact that Ms Purdy was said to be the founder, sole owner and controller of Maquay is a relevant consideration potentially distinguishing it from a professional third party such as a banker or an accountant, but nevertheless the fact is that she was not a party to the underlying litigation in Delaware. In these circumstances, the Court was entitled to take into account as a factor the fact that the Purdy parties were not parties and the fact that it is very common in such litigation for costs of the non-party to be provided for even where the non-party's concerns are overridden by an order against them, provided that such concerns were not unreasonable or frivolous. That is what the Senior Master found in the instant case. It is not an answer to say that the transaction of the sale of the shares to Maquay and the control of Maquay by Ms Purdy, make the Purdy parties totally identified with Woodman and Starman. That might be how it appears at some later stage, but the Court need not evaluate that at this stage. The Court did not err at this stage by treating the Purdy parties stand as witnesses and the assistance sought by the Delaware court being in their capacity as witnesses. The Senior Master was entitled to treat them as such.

126. Even if there was no error in principle, it is said that something has gone very wrong where 50% of the costs of the oppression issue were ordered to be paid by CGHA to the Purdy parties even after ordering them to pay all the costs of the non-disclosure issue. As noted above, this is said on behalf of CGHA to be an “extraordinary” result not justified by reference to a proper exercise of the court’s discretion. In my judgment, this is exactly the kind of argument on costs where in the oft cited words of Wilson J (as he then was) referred to above, it is “*overcast, from start to finish...*”. Given the generous ambit of discretion, the notion that the factors should have been calibrated differently with a different order as to costs is one which rarely succeeds. The more usual response of the appellate court is that other judges might have made an order more in favour of the appellant, but that it has not been shown that the order lay outside the exercise of the court’s discretion.
127. In the instant case, bearing in mind the factors which the Senior Master took into account and in the exercise of discretion, it was justified that there should be no order as to costs in respect of the oppression issue. The more nuanced approach, where other judges may not have gone this far, is to have awarded 50% of the costs of the oppression element in favour of the Purdy parties. However, the Court was entitled to take into account the following matters, namely
- (1) once proper and admissible factors are taken into account, they do not admit to precise calibration such as to put the order made outside the exercise of the court’s discretion;
  - (2) the judgment was nonetheless careful to admit a substantial number of factors in favour of CGHA including but not limited to the admission of the non-disclosure, the apology to the Court, the cooperation as regards disclosure, the undertakings offered, such offer as was made as to costs and the fact that the Orders were not discharged;
  - (3) the order did not ignore these factors because a substantial part of the costs of the Purdy parties was reduced so that overall there was a reduction of 50% to their costs referable to the oppression element, and 25% of their costs overall;
  - (4) an examination of the Judgment on the substantive matters and on the consequential shows a very detailed and careful appreciation of all the relevant matters, and an appellate court ought to take that into account, bearing in mind the review nature of an appeal;
  - (5) in all the circumstances, there is nothing to show that the Senior Master had erred in the exercise of her discretion as to costs or that she has gone outside the generous ambit of her discretion.
128. In these circumstances, should the Court dismiss the application for permission to appeal? There is sometimes an artificiality in how to approach the question of permission in a rolled-up hearing. In this case, the artificiality is particularly acute. This is because

the Court is already dealing with an appeal in respect of the oppression element where permission has been granted. In those circumstances, it would be odd to give detailed consideration to the oppression element, but a broader overview in respect of the costs element of the appeal. This is particularly so where the Senior Master has found that there is an overlap between the oppression element and the non-disclosure element. There is in fact an overlap between all the issues which have been considered. In my judgment, that provides at this stage some other reason for the matter of costs to be considered fully in the appeal. I therefore give permission to appeal on costs. However, for all the reasons set out above, the appeal against costs is dismissed.

## **XVIII Conclusion**

129. It follows that both the appeal of the Purdy parties and the cross-appeal of CGHA are dismissed. It remains for the Court to thank all Counsel for their assistance, and to ask them to seek to agree a draft order, failing which I shall rule upon any consequentials which are outstanding.