Claim No: ARB 010/2024

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NEVEN

Applicant/Claimant

and

NOLE

Respondent/Defendant

REASONS FOR THE ORDER OF JUSTICE ANDREW MORAN DATED 7 JUNE 2024

Introduction and Background:

1. On the 7 June 2024, the Court made an order refusing the Claimant's claim and application for orders of injunction and disclosure (the refusal of the former was upon an undertaking being given by the Defendant, mirroring precisely the injunction sought) and stated in doing so that its reasons for doing so, would follow. The Court now delivers its reasons for its orders. References hereafter are to a hearing bundle by page number [HB/n].

2. A dispute has arisen between the parties hereto. The Part 8 Claimant and Applicant is a Swiss company, trading as Neven, (hereafter `Neven' or `the Applicant'). It is the trustee of two trusts, the `Nuan' and `Novak' (the `Trusts'), settled under Guernsey law by Mr Nishant (`Mr Nishant') and Ms Nina on 3 March 2021 (the trusts being established and endowed for the purposes described below). The Defendant is a DIFC company, until recently trading as Nole, (`Nole'); but now trading under the name `Nilly'. It is referred to by either abbreviated name interchangeably hereafter and in evidence and submissions before the court.

3. Nole is the holding company of an international group that provides engineering, architectural and planning consultancy services. It is registered and based in the DIFC. Its corporate holdings are numerous and extensive across the world, as the Claimant's counsel was at pains to demonstrate during the hearing before the court. He drew the Court's attention to a list of all of its subsidiaries; and to a list of its major subsidiaries seated in various jurisdictions across the world. Whilst the purpose of the submission was to demonstrate that its multi-billion-dollar assets are spread; and may not be as readily available for enforcement of an award as cash held in Dubai; the submission also clearly illustrated that the Defendant is and has been, an acquisitive conglomerate, in the ordinary course of its business and growth, with some of its major corporate assets located in jurisdictions where enforcement of an arbitration award, can be straightforward.

4. Mr Nishant worked for the Nole group from 1978 to 2020, serving ultimately on its Board and its Leadership Development Committee as its Director of Resources and Environment until retiring at the end of 2020. As a director, he received shares as part of his compensation and was party to various shareholder agreements of which the last was, The Amended and Restated Shareholders Agreement of 14 June 2014, hereafter `the 2014 SHA'. By that agreement, the parties made arrangements for Mr Nishant to realise his equity interest in Nole, so that in consideration for ceding his shares back to it, he was to receive their value in periodical payments bi-annually, in the four years following his retirement. This was his `Economic Interest' in the shares, the subject of the assignments described below. Mr Nishant has duly ceded his shares but has not received the payments due; as further detailed below.

5. The material provisions of the 2014 SHA giving rise to this arrangement (from which this dispute stems) are neatly summarised in the first witness statement of Nargis at paragraph 10 thus:

> *"The broad scheme of the relevant provisions in the 2014 SHA was that the shareholder should, by the year end following their retirement, have `ceded' all of their shares in the company in return for the contractual promise in that agreement that they would be paid their share of the Defendant's equity, their `Cumulative Net Interest' ("CNI"), as the value of their shares, to be paid in bi-annual instalments in the four years after their retirement. That cession was to be effected by transfer of the shares to the trustees of a `Treasury Trust' for onward transfer to new shareholders among others."*

The provisions of the 2014 SHA, providing for Mr Nishant's and by assignment the claimant's entitlement to his CNI, said to have been breached, are reproduced for ease of reference as follows:

> *"3.8 The Company shall, to the extent permitted by law and subject to the Company's working capital requirements and future liabilities for Retired Shareholders, distribute by way of Dividends in respect of each Financial Year a percentage of the audited after tax profits of the Company and its Subsidiaries for the Financial Year."*
>
> **Retired Shareholders**
>
> *"7.6 If a Treasury Trustee acquires (whether by purchase, gift, testamentary disposition or otherwise) any Shares to hold on the terms of the Treasury Trust from a Shareholder who by reason of such transfer becomes a Retired Shareholder, the Cumulative Net Interest of that Retired Shareholder shall be paid in accordance with the provisions of Clause 4."*
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> **4. CALCULATION OF RETIRED SHAREHOLDERS ENTITLEMENT**

"4.1 A Retired Shareholder shall be entitled to his Cumulative Net Interest as at 31 December immediately preceding the Transfer Date, subject to subsequent adjustment pursuant to Clause 4.2.

4.2 The amount to be paid to a Retired Shareholder, may be subject to adjustment by such amount as the Finance Department may after the Transfer Date, determine as a further Prior Year Adjustment relating to any period in the four Financial Years immediately preceding the Financial Year ending on the Transfer Year-End.

4.3 Each Shareholder undertakes to the other Shareholders and to the Company not to enforce or seek to enforce repayment or collection of his Cumulative Net Interest other than by the mechanism described in this Agreement.

4.4 A Retired Shareholder shall be paid the amount due to him pursuant to Clause 4.1 (as adjusted pursuant to Clauses 3.7 and 4.2) in eight semi-annual consecutive payments made on 1st of June and 1st of December in each year over a four year period commencing on or with effect from 1st of June.

4.5 A Shareholder can direct the Finance Department in writing prior to retirement that his Cumulative Net Interest shall on his becoming a Retired Shareholder be paid to one or more individuals or entities as he directs.

4.6 Priority shall be given to the payment of Retired Shareholders Equity Accounts prior to the payment of any Dividend to the Shareholders pursuant to this Agreement."

(Court's emphasis added).

6. At the end of each financial year Nole calculates each member's share of the total change in Nole's value (based on its audited financial statements) and adds that amount to the member's Equity Account. The member receives an `Annual Equity Report' after the signature of the audited financial statements, showing the breakdown of their total accrued CNI entitlement and any changes in it. That annual report that was provided by Nole to its Shareholders was included in a `Partner Compensation Statement' (`PCS'). By 2019, Mr Nishant had accumulated some 9,750 shares in Nole, being a 3.25% stake in its equity. His PCS of 11.7.21, recorded that his total accrued CNI as at 31 December 2020, the day he retired, was USD 164,716,827 [HB/170-178]. It was this amount, as might be varied by changes in Nole's value, which it is claimed he was entitled to receive in bi-annual instalments in the four years after his retirement.

7. On 3 March 2021, Mr Nishant and his wife settled the two Guernsey trusts mentioned, the `Nuan Trust' for the benefit of, among others, his son and his issue, and the `Novak Trust' for the benefit of, among others, his daughter and her issue [HB/43-66 and HB/67-87].

8. By two Deeds of Assignment dated 23 April 2021 [HB/115-124 and HB/125-134], to which Nole was party, Mr Nishant assigned to Neven, as trustee of those family trusts, with immediate effect, the Economic Interest in relation to the Shares. His right to make that assignment was provided for in the 2014 SHA, and a further shareholders agreement made in 2021 (the `2021 SHA'). The Recitals to the Deeds explained that as Assignor, Mr Nishant wished to assign to Neven as trustee, the Economic Interest in accordance with the relevant provisions of the 2021 SHA, and that the Parties to the Deeds *`.have agreed to the assignment on the terms and conditions below'.* Those terms included in each case, an irrevocable direction by Mr Nishant to Nole, to pay all of his relevant entitlement to such bank account as may be designated by Neven.

9. The Applicant alleges that Nole has persistently, deliberately, indefensibly and now *"swaggering[ly]",* breached its obligation to pay Neven Mr Nishant's assigned entitlements for his ceded equity - the last of those descriptions being an oft-repeated characterisation of its ongoing breaches and responses to complaints about them, by the Applicant's counsel at the hearing. Nole has paid comparatively small amounts from time to time, so that (as illustrated in the table prepared by Ms Nargis at paragraph 36 of her first statement) at the time of that statement, it was allegedly in arrears to the tune of USD 96.6m with another USD 20.4m which has become payable since, on 1 June 2024, which is also unpaid. At the present time, it is thus allegedly in default of making payments due to Neven pursuant to these arrangements, amounting to more than USD 117m, with another USD 20.4m falling due in December this year.

10. In response to pursuit of the largely unpaid instalments of CNI, by both Mr Nishant and Neven over a long period of time, Nole has not challenged either its contractual obligation to pay the CNI or the amount of its debt. It has instead, in correspondence, sought to suggest that its obligation to pay CNI may be subject to *`cash resource availability'* and/or `protecting working capital'. Its position, without yet articulating any recognisable legal basis of a defence for it under DIFC Law, which governs the 2014 SHA (including by its counsel, when asked by me directly at the hearing if he could, in a sentence or two outline its defence), has been that it is a matter of timing for the Board of Nole to decide when CNI instalments will be paid, having regard to a list of priorities, in which it appears to place entitlements of retired shareholders, at the bottom. Nole's position in evidence is an even more oft-repeated mantra that the Claimant and Mr Nishant were accepting of its position in the words, `fine with that'. "The Applicant relies heavily on the most recent `swaggering' - per its counsel - articulation of Nole's position and priorities, in its letter to the Applicant (Ms Nargis) dated 7 May 2024, [HB/489] in which in response to her demand for payment of the outstanding CNI, it asserted, the following:

"The primary concern of the Board is to ensure the Company's going concern and operational integrity, which includes but is not limited to meeting all financial obligations such as loan repayments, shareholder disbursements, salaries for our employees, and the entitlements of retired shareholders."

11. In addition, it is part of the relevant background to record that during the time when the CNI payments to the Claimant have been outstanding, the Defendant has paid nearly USD 25m in dividends to shareholders in 2021 and 2022, allegedly in breach of Clause 4.6 of the 2014 SHA, as set out above. It is not only suggested that these dividend payments were made in breach of contract, they are also alleged to be evidence of the Defendant having a propensity or "having form" for dissipating assets instead of paying CNI due to the Claimant.

12. The Applicant's delay in bringing any form of proceedings in response to these alleged breaches of contract by the Defendant, is a striking and important feature of the relevant background, having regard to the claimed urgency, which must be established, to justify bringing this application before the court, rather than in an arbitration under the Rules of the Dubai International Arbitration Centre (`DIAC'). In passing, it may be

recorded that the parties were ad idem before me (though there was a suggestion by the Applicant that it believed for some reason that the Defendant might be amenable to an agreement for arbitration under the LCIA Rules) that DIAC arbitration is now, by Decree 34 of 2021 the agreed dispute resolution process, under the 2014 SHA (absent any agreement for a different arbitral forum and rules). This very substantial delay by the Applicant in bringing any arbitral proceedings (which have still not been brought though a draft request for arbitration has now been produced), in response to Nole's claimed breaches of contract, began in the financial year 2021 (after Mr Nishant's retirement on 30 December 2020). The breaches allegedly arise from defaults or shortfalls in payment of CNI of over USD 30m, year on year from 2021 to 2023, and now into this year 2024, with a failure to pay the USD 20.4m due on 1 June, as explained above.

13. This extraordinary delay in bringing a claim to recover these large sums unpaid, and the communications passing between Mr Nishant and the parties, is helpfully tabulated in a chronology appended as Schedule 2 to the Respondent's skeleton argument. I find that chronology to be a reasonably fair and accurate summary and extraction of the contents of the referenced exchanges. It demonstrates (here avoiding the use of legal terminology - as the court is initially concerned to determine whether the requirement of there being such urgency as would justify recourse to it, instead of to an arbitral tribunal) very long standing tolerance by Mr Nishant and the Claimant of what are claimed to be serious and deliberate breaches of contract, resulting in enormous losses, without even recourse to raising a Disputes Notice under Clause 13 of the 2014 SHA, until now.

14. It is correct that there are several reservations by the Claimant of its rights, but these are in the presence of repeated instances and the whole lengthy period of tolerance (without action to end it) of the position taken by the Defendant, most recently and strongly epitomised, in its letter of 7 May 2024, referred to in paragraph 10 above. The only inference the court can draw from this chronology and the exchanges it tabulates, is that Mr Nishant and more importantly the Claimant, must have been content to stay its hand, in the belief that the Defendant would pay what was due in its own time and that it was good for the money. The Court must also observe, that without a substantially compelling change of circumstances and/or some new and substantial ground or reason emerging, that provided credible grounds to show that assets of the Defendant may be the subject of an application for a freezing injunction, the Claimant would not have had the slightest chance of persuading a court to exercise its jurisdiction to grant the orders now sought, and to trespass thereby, on the province of an arbitral tribunal. These are important findings which do not vanish or cease to be relevant. They must be weighed carefully in the court's decision as to whether any change in circumstances has given rise to the requisite degree of urgency for it to intervene and exercise its powers to order disclosure as a precursor to a possible application for a freezing order, in support of the arbitral process. The question for the court, is thus whether the corporate transactions done and in prospect, that the Claimant now relies on (as to which vide infra), provide those credible grounds and evidence that there may be assets of the Defendant, which will be the subject of an application for a freezing injunction?

The orders sought:

15. The relevant orders sought were framed as follows:

> *"2. The Defendant shall not [until further Order of the Court], declare, pay or distribute any dividends to its shareholders, or otherwise enter or give effect to any binding or non- binding commitment to do the same, shall not make any payment to them, whether by return of capital or otherwise, to like effect, and shall not cause any of its subsidiaries or any branch in any jurisdiction to do the same.*
>
> *3. Upon service of this Order upon the Defendant, the Defendant must, by no later than 4pm on [the date that falls 7 days from the date of this Order [XX] June 2024], produce the documents and/or classes of documents responsive to the requests, and provide the relevant information, set out in Schedule 2 to this Order to the members of the Confidentiality Club set out at Schedule 3 to this Order."*

16. These orders were respectively and aptly dubbed at the hearing, "the dividends injunction" and "the disclosure order". The Court can deal with the application for the dividends injunction very shortly. Whilst the alleged dissipation of assets by payment of dividends in breach of contract, remains a consideration in the court's decision on the disclosure order sought, on the basis that the Claimant alleges it shows the Defendant has form for disregarding ordinary standards of commercial conduct, and would stop at nothing to evade its obligation to pay the Claimant Mr Nishant's arrears of CNI, there is no longer any need or urgency for the order sought.

17. That is because during the hearing, the Defendant's counsel was instructed to give and gave an undertaking to the court that it would not pay dividends, in precisely the same terms as the order of injunction sought, until 31 December 2024. Whilst the Claimant did not withdraw its application for the dividends injunction, its counsel immediately, properly and fairly conceded, that the undertaking offered and given, would provide the Claimant with substantial protection it says it needs, from illicit (on its case) payment of dividends, until the end of the year. The Court is satisfied that if, contrary to its view (infra) that the payment of dividends should be viewed as dissipation of assets, the undertaking given has arrested and will prevent dissipation of assets by that means and any further breach of Clause 4.6 of the 2014 SHA, if such it is found to be, by an arbitral tribunal.

18. Further, the Court was satisfied that there was ample time and opportunity for the Claimant to commence an arbitration and bring this claim for relief beyond the end of the year, before an arbitral tribunal (if it wishes to pursue it). This would be to do as it was bound to do, absent urgent need and inability of a tribunal to act in time. In all of those circumstances, and for those reasons, the Tribunal refused to make the dividends injunction.

The corporate transactions:

19. The Claimant puts its case that these transactions give rise to credible grounds for the court to hold that certain assets of the Defendant may be the subject of an application for a freezing injunction, based on the following characterisation of them. This is a summary and extraction of the key points from the skeleton argument and its elaboration by counsel at the hearing. Not every point made in writing or orally is included in the summary, but every point advanced was carefully considered by the court in reaching its decision:

20. As at 31 December 2022, Nole held a significant shareholding in Worley, an Australian engineering professional services company valued at c.

USD 1.25 billion, which has been acquired over the years since an initial acquisition of shares in 2017, which it has disposed of.

21. Nikolai itself confirmed in a market announcement of 30 April 2024 on the Australian Securities Exchange (`ASE') its understanding that Nole had that morning, sold 19% of Nikolai by way of an underwritten block trade [HB/439]. This was confirmed by Nole in a `Notice of Ceasing to be a Substantial Shareholder' filed on 2 May 2024. Nole declared that it had disposed of 100m shares in Nikolai pursuant to a block trade agreement with two banks dated 29 April 2024 [HB/440-463]; A sale agreement accompanying that Notice recorded that the shares were to be sold at a minimum share price of AUD 14.25 per share, which would give a total sale price of c. AUD 1.4b (c. USD 925m) [HB/451].

22. The Claimant submits that a `block trade' is a privately negotiated offering and sale of a significant holding of shares without prior substantial marketing efforts and usually away from public markets by private purchase agreement, in an effort to lessen the depressive effect of the sale on the security's price. Block trades ordinarily proceed on the basis of a significant price discount, with the trade often underwritten by an investment bank to mitigate risk. It calculates the discount given to achieve a quick trade based on a sale price per share of AUD 2.06 less than the market price at closing on 29 April 2024, at USD 1.36m.

23. It complains it has no information by which to assess the dissipation of value it presumes (but does not know) occurred by this block trade, because it has no information as to the pricing methodology, th price at which the shares were in fact sold, and/or any consideration paid to the banks involved for their underwriting of the minimum price.

24. On 8 May 2024, a Scottish engineering and consulting company listed on the London Stock Exchange (the `LSE'), Nash, confirmed in a `Response to Speculation' on the Regulatory News Service (`RNS') feed of the LSE that it had received from Nole an unsolicited proposal regarding a cash offer for the entire share capital of Nash, which had been rejected by the Board of Nash as undervaluing the company [HB/471]. Insofar as Nash has some 691,839,369 issued shares, Nole's offer price of 206 pence per share (the Response quotes an offer price of 205p per Nash share but it matters not for the purposes of the submission) required a total offer of GBP 1.4 billion (USD 1.77 billion). Even if Nole retained all of the USD 925m of proceeds of the sale of Worley, it would require significant further funding to buy Nash at an offer price worth USD 1.77 billion.

25. Nole made three further increasing offers upon rejection of earlier offers ending with its latest offer on 29 May 2024, Nole confirmed in a `Statement re Final Possible Offer for Nash Group' on the RNS feed of the LSA that it has made yet a further cash offer of 230 pence per share, said to be Nole's final offer. That offer valued Nash at GBP 1.59 billion (USD 2.02 billion) and was said to be at a significant premium to Nash's share price before the first offer [HB/539-541]. Under Rule 2.6(a) of the Takeover Code, Nole had to announce its firm intention (if any) to make an offer for Nash by 5 pm on 5 June 2024.

26. The Claimant submitted that in circumstances where Nole has already paid dividends, as it alleges in dissipation of its assets and in deliberate breach of the 2014 SHA, there is real cause for concern that the Corporate Transactions may have a similar effect. It contends that the Retired Shareholders need both reassurance that the Corporate Transactions are not dissipating value and information in respect of the assets against which they may need to enforce the awards they will likely obtain, about borrowing to acquire them and whether the shares in Nash may be assets against which they could satisfy their awards.

27. The Claimant advances its concern that, in spite of repeated requests to Nole for a timetable for payment and Nole's repeated attempts to excuse or justify its failures to pay by reference to constrictions on its cash reserves and working capital, Nole appears to be proceeding with the Corporate Transactions in total secrecy, without sharing any relevant information with its Retired Shareholders.

28. On 2 May 2024, the Claimant wrote to Nole to seek clarity as to Nole's intentions as to the Shortfall in the light of its reported sale of its shares in Nikolai [HB/485] and

i. reserved the right to seek interim relief pending the commencement of Court or arbitral proceedings;

ii. requested an undertaking from Nole that it would pay no further Dividends until Nishant's CNI entitlement had been paid to Neven in full;

iii. sought information regarding the sale of the Nikolai shares and any transactions related to that sale (while offering any confidentiality that Nole may require);

iv. requested Nole's confirmation that, among other things, no part of the proceeds of sale of the Nikolai shares would be returned to the existing Shareholders; and

v. requested Nole's acknowledgment of the non-exclusive jurisdiction of the DIFC Courts and the application to the Claimant's claims of DIFC law.

29. Nole responded by its letter of 7 May 2024 [HB/489] to which the Court has already referred, in which, inter alia, it offered no assurance or undertaking it would pay no further dividends until the shortfall of CNI had been paid. It failed to provide any information requested about the Nikolai shares. It advanced no defence to the claims, and it made the statement of its position and intentions for dealing with its funds, already quoted in paragraph 10 above. In consequence of its stance, the Claimant has brought its claims and applications before this Court

The parties' submissions for and against the grant of the disclosure order:

Matters agreed or not in dispute:

30. The Court begins with clarification of what is agreed or not in dispute for the purposes of this claim and application, which is now effective only in respect of the seeking of an order for disclosure in advance of a freezing order application, that may be made.

31. First, it is agreed that this Court has jurisdiction and power to grant the relief sought under the Rules of the Dubai International Financial Centre Courts of 2014 (`RDC') In particular, RDC 25.1 (7) and (9).

32. Secondly, it is agreed that absent any agreement to a different arbitral forum and rules, then by the terms of their agreement and the effect of Decree 34 of 2021, the parties have (and by the decree), agreed to refer their disputes to arbitration under the Rules of the Dubai International Arbitration Centre - or `DIAC' as it is known. Further that the seat of any arbitration will be the DIFC, unless a different seat is agreed.

33. Thirdly, it is agreed that the juridical seat or legal place of any arbitration commenced will be the DIFC. It is not disputed that the DIFC Arbitration Law applies and that as noted in the first matter of agreement, Articles 15 and 24 of that Law endow the Court with the power it is being asked to exercise in this case. The Court notes in passing here, that as the relief sought is a pre-cursor to a possible application for a freezing order, it is of the view that it should approach the application on the basis that the primary objective in its making, is for the Court to exercise its power under RDC 25.1 (7) and RDC 28.48 urgently in support of an intended arbitration. As it is directed to do by Article 24 (3) of the Arbitration Law, it will exercise its power in accordance with its own procedures, which include that it will only act in place of an arbitral tribunal, in cases where it is satisfied that there is an urgent need to act because an imminent risk of dissipation of assets, that would frustrate the arbitral process, exists; and that a tribunal could not be constituted to deal with it in time.

34. Fourthly, that in granting or refusing interim injunctions, this Court should apply the long-established American Cyanamid test as reflected in judgments of this Court including, recently, that of Justice Robert French in LXT *Real Estate Broker LLC v SIR Real Estate LLC* [2023] DIFC CFI 050. The Court will adopt and apply the Claimant's exposition of that test put by its counsel in paragraph 8.4 of his skeleton in these terms, which does not materially differ from the Defendant's exposition of the test at paragraphs 34 and 35 of its counsel's skeleton argument:

> i. The Court must be satisfied that the claim is `not frivolous or vexations; in other words, that there is a serious issue to be tried' and that, on the material available, the Applicant has a `real prospect of succeeding in [its] claim for a permanent injunction at trial';
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> ii. If so, the Court must go on to consider whether damages would be an adequate remedy for a party injured by the Court's grant or refusal of an injunction, which will ordinarily require consideration as to whether the relevant party would be able to satisfy any award of damages; and
>
> iii. If not, the Court must determine where the `balance of convenience' will lie.

35. Fifthly it is not in dispute that there is a serious issue to be tried on the Claimant's claims.

36. Sixthly as the proposition is put by the Claimant at paragraph 8.5 of its skeleton, and not contested by the Defendant:

> *"In considering an application for disclosure in respect of assets which may be the subject of a freezing order under RDC 25.1(7), the starting point for the Court is to consider the likely or potential entitlement of the Applicant to the grant of a freezing order."*

37. Seventhly, it is submitted by the Claimant and has not been disputed by the Defendant, that in *Ithmar Capital Ltd v. 8 Investment FZE* [2008] DIFC CA 001 (17 March 2008) CJ Evans identified the four main requirements for a freezing order, as being that:

> i. the Claimant has a `good arguable case';
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> ii. the Defendant has or may have assets which will be available to satisfy a judgment against him if given in the Claimant's favour;
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> iii. there is a real risk that a judgment will not be satisfied by reason of an `unjustified' disposal of those assets; and
>
> iv. in all the circumstances, it is `just and convenient' to make the Order sought.

38. Eighthly, and likewise, it is submitted by the Claimant and has not been disputed by the Defendant, that as to the `risk of dissipation', the Court may have regard to whether the Respondent has been guilty of discreditable conduct, or are *`the sort of people who would stop at nothing to frustrate the Claimant from making a substantial recovery': Bocimar v. ETA* [2015] DIFC CFI 008 (31 January 2016). The issue is whether the Defendant's alleged breaches of contract and their manner of committing them, could justify such findings about its propensity and inclination on the facts of this case.

39. Ninthly, it is not disputed that there is no requirement for the applicant for an order under RDC 25.1(7) to show that an application for a freezing order in respect of such property would succeed and that the test for the court to apply in deciding whether to make the order for disclosure now sought, is that derived from *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2015] EWCA Civ 139; [2016] 1 WLR 160. In that case, the English Court found, with regard to the analogous provision in CPR r.25.1(1)(g), that the applicant need only show that there is *"`some credible material' or a reasonable possibility based on credible evidence that a freezing order may be sought in respect of those assets'.* This decision has been followed in the DIFC, where the Court accepted in *Pearl Petroleum Co Ltd v. KRG* [2017] DIFC ARB 003 (20 August 2017) that there is a lower threshold for an application for asset disclosure in advance of a freezing order than for the eventual application for a freezing order. It likewise held that the applicant must show that there are credible grounds for making an application for a freezing order. It is also not disputed that Note 25 January 2026, in the 2024 English White Book (Vol 1, pp. 710-712) concerning the identically worded Rule 25.1 (1) (g) in that jurisdiction, correctly summarises the test and approach that this Court should apply and follow, when an application is made to it under RDC 25.1 (7).

The Claimant's submissions:

40. At paragraph 10 of its skeleton argument, advancing its case for the grant of the disclosure order, the Claimant relies on those features of the Corporate Transactions adumbrated above in its characterisation of them. It contends there may have been significant dissipation of Nole by its assets in the sale of the Nikolai shares at an undervalue. It complains it is not aware of the extent of Nole's equity in the shares it held, and that if there are cash proceeds, it is hard to see why the cash is not being used to discharge its CNI liabilities which (on its case) have accrued due to a lack of sufficient cash reserves.

41. It further complains there is no basis on which it can assess the merits of the proposed acquisition of Nash. It relies on its purchase of the Nash

shares at a significant premium and speculates on its borrowing being such as would give rise to a risk of negative equity if the share price falls. Otherwise, it concedes that there is no basis on which it can assess whether the acquisition would cause a dissipation of value.

42. On the basis of its characterisation and speculation about the transactions, it submits, that as to the proceeds of sale of the Nikolai shares, the acquisition of shares in Nash and (then importing into its target for disclosure), any other business acquired with those proceeds, there is clearly `some credible material' or a reasonable prospect based on credible evidence, that a freezing order could be sought in respect of those assets, for the purposes of the *Pugachev* analysis.

43. It then addresses (at skeleton paragraph 10.2) the American Cyanamid tests, first asserting it has a good arguable case, which is not in dispute. Next it asserts and admits (tellingly in this Court's view) that Nole has assets available to satisfy an award in the DIFC and in any event worldwide. It then founds it case and application squarely on the risk of dissipation, on the basis that, *"Nole has already `shown form' in its discreditable conduct in dissipating assets that would have been available for the payment as a matter of contractual priority of its CNI liability by paying significant Dividends. If and insofar as either of the Corporate Transactions may further have dissipated value or net assets of Nole, that would provide further compelling evidence of the risk of dissipation and the need to freeze whatever remains of the proceeds of sale or any shares or assets obtained with them in order to preserve assets against which Neven could enforce an award which is likely to be in a significant sum."*

44. On those bases it submits that it would clearly be appropriate or just and convenient, to freeze the proceeds and any assets acquired with them, until a Tribunal decides on the claims, and can grant its own interim measure to freeze assets.

45. On the requirement of urgency in relation to the disclosure order, it submits that it needs the requested information or documents urgently to assess its position and decide whether it should be seeking a freezing order.

46. The Claimant makes submissions in response to the Respondent's confidentiality concerns in the making of a disclosure order but for reasons which will become apparent, it is not necessary for the Court to summarise them here.

47. The Claimant has not adequately explained or justified, in its skeleton or in its oral submissions, its recourse to the court instead of to an arbitral tribunal that could have been put in place by DIAC, including in the person of an emergency arbitrator. The Court interposes here for convenient reference, the arbitration agreement which the Claimant is bound by:

> *"13. DISPUTES*
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> *13.1 In the event of any dispute between the parties arising out of or relating to this Agreement, the parties shall within 10 business days of service of a notice from either party to the other party (a Disputes Notice) hold a meeting (a Dispute Meeting) in an effort to resolve the dispute. In the absence of agreement to the contrary, the Dispute Meeting shall be held at the registered office for the time being of the Company.*
>
> *13.2 Any dispute which is not resolved within 20 business days of the service of a Disputes Notice whether or not a Dispute Meeting has been held, shall, at the request of either party made within 20 business days of the Disputes Notice being served, be referred to arbitration under the rules of the DIFC LCIA (the Rules) before a panel of three arbitrators who shall be appointed in accordance with the Rules. The place of arbitration shall be Dubai, United Arab Emirates although hearings may be held elsewhere and the language of the arbitration shall be English."*

48. In its skeleton argument, the failure to seek appointment of an Emergency Arbitrator (`EA') under the DIAC Rules is dealt with in this manner at paragraph 11.3 thus:

> *"Nole contends that the urgency of Neven's application could have been mitigated by the appointment of an emergency arbitrator under the DIAC Rules. However, Neven's understanding is that it was Nole's and its Shareholders' preference that the arbitration of a dispute under the 2014 SHA should be administered under LCIA-style rules, and it has proceeded on the basis that they will agree to arbitration under the LCIA Rules, which more closely follow the now extinct DIFC-LCIA Rules than the DIAC Rules."*

The Defendant's submissions:

49. The submission referred to immediately above, leads conveniently to a summary and consideration of the Defendant's first submission opposing the court acting to grant the order sought on the ground of a lack of urgency and opportunity to seek its remedy in arbitration, at paragraphs 8-10 (there based on its entitlement to the confidentiality of an arbitration) and 18-21 of its skeleton argument.

50. The Defendant points to historic and continuing delay in the commencement of an arbitration. Accepting the effect of Article 15 of the Arbitration Law that *"It is not incompatible with an Arbitration Agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure",* it submits this a deliberate decision and that there is no good reason (as the court accepts there must be) for why the Claimant has sought urgent assistance from the Court, rather than proceeding in the agreed forum for dispute resolution. It refutes the excuse that an EA is likely to be slower than a judge of the DIFC in making the orders sought, relying on the provisions of Article 2 of the Rules including that an EA will be appointed within one day and that he/she has full powers to grant the relief sought.

51. The Respondent submits that the required degree of urgency is lacking in the Claimant's pursuit of the disclosure order. It refers to RDC 25.7(2) and submits the DIFC Court should only consider granting an interim remedy if it is persuaded that the matter is urgent or that it is otherwise desirable to do so in the interests of justice:

> *"the Court may grant an interim remedy before a claim has been made <u>only if:</u>*
>
> *(a) the matter is urgent; or*

(b) it is otherwise desirable to do so in the interests of justice;"

(emphasis added).

52. It submits that the explanation of urgency in the claim form does not make sense, because it does not seek relief that would remove the Claimant's professed concerns, so as to:

"(i) prevent the Respondent from using "the proceeds of sale to enter into a corporate transaction"; nor

(ii) require the Respondent "to pay the Claimant's outstanding CNI"; nor

(iii) freeze any cash or assets so that they will be available to "be enforced against following an arbitral award being made".

It further submits that it is no surprise that the Applicant has not applied for any interim relief that would address the above, since any such application would be hopeless and bound to fail.

53. The Tribunal observes in passing, that in light of the undertaking now given by the Defendant, the urgency and need for the relief sought, stemming from the possibility that the Defendant might use the proceeds of sale of the Nikolai shares to pay dividends, has now fallen away.

54. As for reliance on the fact that the Defendant has recently come into possession of, and is holding a large cash sum (from the sale of the Nikolai shares), the Defendant submits this does not give rise to an urgent need for action, for as the Claimant has admitted, it is the fact and the Claimant has been aware of it all along, that the Defendant had substantial cash assets at its disposal to pay CNI due, but had simply chosen not to do so.

55. The Defendant also relied on historic and continuing delays in the commencement of arbitration. The Defendant's position in not paying the full amounts allegedly due, has been clear since the first time the alleged payment timetable was not followed in June 2021. It submits that there is no good reason now for making this application to the Court, and not having recourse to arbitration, as the Court has already mentioned above.

56. The Defendant submits that there is no urgency in respect of the disclosure order since the Applicant's witness statements do not contain any credible material on which an application for a freezing order might be based. It relies on passages from Gee on Commercial Injunctions 7th Ed., where at 23-007, Gee provides a summary of the judgment of the English Court in *Parker v CS Structured Credit Fund Ltd* [2003] 1W.L.R. 1680, which considered the provision in the English Civil Procedure Rules which is equivalent to RDC 25.1(7), in the context of a claimant who sought disclosure in relation to an actual or potential transaction for the sale or exchange of certain hotels. The application in that case was made in the context of a complaint that the claimant had a contractual right to receive a substantial payment which had not been paid and the author commented (in a passage worthy of citation), as follows:

"In Parker v CS Structured Credit Fund Ltd the claimant sought an order for disclosure in relation to a transaction or proposed transaction which he asserted in evidence, which did not detail its sources, was to be carried out at an undervalue. The application was made under CPR r.25.1(g), which applies to assets which are or may become the subject of a freezing injunction. It was argued that under the rule an order could be made otherwise than as part of an application for a freezing injunction or in order to make the injunction effective or assist in the formulation of its terms or a decision about them. Reliance was placed on the words in that rule "relevant property or assets which .may be the subject of an application for a freezing injunction" and it was suggested that the order could be granted with a view to providing the applicant with information which might lead to an application being made for a freezing injunction. This proposition was rejected because the intended use was too remote; it involved "fishing" for material which might justify an application for freezing relief."

The Court notes in passing, that it considers that the circumstances of this case are more similar to the facts of the Parker case, than to the circumstances in the decisions in Bocimar and Pearl Petroleum, on which the Claimant has relied.

57. The Defendant further relied on a passage from the judgment in the case itself to demonstrate that the terms of the rule, identical to RDC 25.1.7, "assumes that there is some credible material on which a freezing order application might be based". Again part of the passage relied on from the Judgment, at paragraph 23, merits citation. The judge interpreted the rule and its purpose and limitations thus:

"Looking first of all, as a matter of construction, at the language used, it seems to me that it is dealing with a situation where there is either an application for a freezing injunction on foot or one where it is at least likely that there will be such an application. In other words, the provision assumes that there is some credible material on which such an application might be based. ***In the present case, Mr Brodie candidly admits that he does not have the material with which to apply for a freezing injunction. He would like to have the information that he seeks and then consider the position. In my judgment, that is not the type of situation with which this provision is dealing.*** *Otherwise anyone who is a claimant could come along and say they cannot be completely sure that they do not need a freezing injunction and would like to have every piece of information at the earliest possible stage which might be relevant to that question.*

Mr Mervis justifiably described this approach as seeking to have a fishing expedition."

(court's emphasis added)

58. Founding on that dictum, the Defendant submits that the Claimant's reasons for the disclosure order, do not identify any credible material on which an application for a freezing order might be based (paragraph 29 (c) of its skeleton). It then extracts and recites them to justify its submission that as in Parker, where it was held the applicant was on a "fishing expedition", that is the case here.

59. This submission is based on the admissions in the reasons advanced for the disclosure order, that (in summary): the Claimant does not have the material with which to apply for a freezing injunction; that it has insufficient information to suggest a significant erosion of net assets, cash reserves,

or working capital; that it needs to understand (implicitly - does not understand) the Defendants current financial position; and has a desire to have "information regarding the offer made to Nash to determine whether that asset/assets/those shares would be suitable to satisfy any award of damages in the proposed arbitral proceedings". The Defendant submits this is not relevant to the question of whether there is credible material on which an application for a freezing order might be based. In addition, as noted (in paragraph 25 of its skeleton), by reference to Gee: it reminds the court that:

> *"The underlying purpose of the jurisdiction [to grant interim freezing orders] is not to provide a claimant with security for its claim, [.] or to preserve a fund from which an eventual judgment could be paid".*

60. For those reasons, the Court should dismiss the application for disclosure orders.

61. If the Court is not with it in holding that the Claimant has failed to cross the threshold requirement of urgency in making this application, the Defendant submits that upon consideration of the criteria for the grant of an interim injunction, it is also demonstrated that there is/are no credible evidence/grounds on which an application for a freezing order may be brought.

62. In view of the Court's determination of the application for a disclosure order, it is only necessary to refer to the Defendant's submissions on the question of whether damages would be an adequate remedy for the Claimant. The Court has already referred to the Claimant's admission (obviously made subject to its case on needing to know if the corporate transactions have dissipated or will dissipate them) that the Defendant has assets in Dubai and worldwide, against which enforcement could be levied, if the Defendant did not pay the amount of any award. The Defendant confirms the position in its easy calculation (skeleton paragraph 37 (a)) of the value of the Claimant's claim, including if did not pay any more CNI before December this year, as being nearly USD 141m. It then submits:

> *"There is no reason to doubt that the Respondent would be in a financial position to pay the amount awarded to the Applicant if the Applicant commenced "the intended arbitration" and succeeded in its claims. The Respondent has a very substantial global business, and it holds extensive assets which are located in a variety of jurisdictions, including real property in the United Kingdom. In financial year 2022, the value of the Respondent's total assets was set out in its audited consolidated financial statements as: USD 4,767,866,000."*

The Court notes in addition, the Claimant's reference (skeleton 2.18) to the Defendant's holding of net assets of USD 2.204 billion, including of cash and short-term deposits of USD 550 million, `being [as it submits] at all times significantly more than the shortfall', in the same financial statements for the year 2022.

63. For reasons that will become apparent, it is not necessary for the Court to summarise the various submissions of the parties on the balance of convenience, as it is not satisfied that there are credible grounds on which an application for a freezing order may be made, including because an award of damages for the Claimant would, in the Courts view, be an adequate remedy. Conversely put, it is not shown to the Court that there are credible grounds for believing an award of damages would not be paid or not be capable of enforcement against such a surplus of net assets, above the size of the claim in prospect.

Determination and discussion:

64. Having considered all of the evidence and submissions before me, particularly concerning the Corporate Transactions, I am not satisfied that there is the required degree of urgency to justify the court acting to issue relief in the form of the disclosure order sought. That is to say, before a tribunal may be constituted in accordance with the parties' agreement to arbitrate their disputes, including to provide as it sees fit, such interim relief it considers to be necessary, to prevent frustration of the arbitral process, by any dissipation of assets it might see in prospect.

65. Further, I am not persuaded or satisfied that there is credible material or a reasonable possibility, based on credible evidence, that a freezing order may be sought in respect of certain assets of the Defendant. Yet further, I am not persuaded on the evidence before me that there are credible grounds to believe that the Corporate Transactions may involve dissipation of the Defendant's assets - still less are there credible grounds to believe that they may involve dissipation to the extent that they might effect such a significant erosion of the net assets, cash reserves or working capital of the Defendant, that the Claimant would be unable to enforce any award it might secure, for unpaid CNI due to it. Put another way, I am not satisfied that there is credible material or a reasonable possibility based on credible evidence, that an application for a freezing order may be brought by reason of the fact that there is a real risk that a judgment will not be satisfied by reason of an `unjustified' disposal of those assets. What is speculated about by the Claimant in its characterisation of the Corporate Transactions, does not, in my judgment, provide credible grounds for believing that an application for a freezing order may be made on the basis of an "unjustified" disposal of those assets (in the sense intended by Chief Justice Evans in Ithamar, supra at para 37). The fact that money is being invested or dividends are being paid at the same time as a breach of contract is being perpetrated, does not, ipso facto, amount to an unjustified disposal of assets, especially if the party in breach otherwise has the means to rectify its breach of contract, and is simply choosing not to do so.

66. My reasons for these conclusions follow.

67. It is necessary to examine first, the nature of the Defendant and its business, as far as can be ascertained from the evidence before me, and to view the transactions done and in prospect, calmly and carefully, putting aside any mis-characterisation of them, born of admitted ignorance and speculation on the Claimant's part, when spurred into fearful action of two big deals, after years of tolerating alleged breaches of contract, with nothing more than reservation of rights, in the face of allegedly ever increasing default. The description of the Defendant (together with its undisputed multi-billion dollar total and net asset value detailed above), given in unchallenged evidence by Nida is a highly relevant feature to be weighed, when considering whether the necessary "credible grounds" for the application and relief sought, are present in this case. Whilst the Corporate Transactions have undoubtedly spurred the Claimant into action, they have to be seen and assessed in the whole background context of the Defendant's business, its modus operandi, its high net worth and whether in the breach it has allegedly committed indefensibly and `swaggeringly' (per counsel for the Claimant), it can be found to have such `form' for discreditable commercial conduct, that the necessary credible grounds for the relief sought exist.

68. Ms Nida's unchallenged description of the business, merits recital thus:

> *"Nilly (formerly the Nole Group) is a global design, engineering and consulting group supporting some of the world's biggest and most complex design and engineering projects Nilly was established in 1956 by four engineering professors. Today, it is one of the world's leading consultancies, providing design, engineering, and consulting services with award- winning impact and global reach. It specializes in major building, planning, and infrastructure projects.*
>
> *Nilly is a privately held partnership that is proud of its growth and success. It has 20,500 employees in 21 companies located in 60 countries. Nilly has been a trusted partner to government clients worldwide to provide innovative, long-term solutions for challenging, complex and sensitive project assignments, and it has delivered over 4,500 projects worldwide worth more than USD 540 billion. Nilly has extensive assets in a variety of jurisdictions, including real property in the United Kingdom.*
>
> *Originally founded with four shareholders, Nilly's ownership has expanded to 44 active shareholders, with 52 shareholders who have retired. Nilly generates revenues of over USD 2.4 billion. A contributing factor to Nilly's success has been the investment by its shareholders in the continuing expansion of the business. Although it has now become a large international business with a significant number of projects, clients and employees across the globe, Nilly has maintained the closeknit environment of a family-run business where shareholders are considered family."*

69. In my judgment, the Claimant in its submissions summarised at 40-43 supra, has speculated in admitted ignorance to arrive at, and present to the court, the most dreadful complexion of the Corporate Transactions that it could paint, based on the two features of a sale of shares at an undervalue and purchase of other shares (presumably with all or part of the proceeds), at a premium. This it has done with a raft of significant adverse features grafted into its portrayal of the deals, based on its speculation, including, dissipation of assets, negative equity, share price falls and excessive leverage or borrowing, but without any regard for the entrepreneurial considerations and objectives that are likely to be driving the transactions.

70. It serves to illustrate the unreliability of this contrived vista of possible dissipation and corporate waste, to contemplate an alternative view, based on the undisputed business model, growth and achievements of the Defendant, by successful use of its working capital for targeted acquisitions, which must in part have been attributable to Mr Nishant's stewardship of the business before his retirement. The transactions called into question may well be commercially explicable on the basis of a need for immediate liquidity, by surrender of a measure of value of the Nikolai shares, when calculated by reference to the market price of a share, or a small number of shares in ordinary share sale transactions. That measure of value is unrepresentative of the value or price of the shares, when a sale of a block of them is required to fund an acquisition. This form of disposal could properly be done in order to take advantage of a desirable corporate opportunity.

71. It is also reasonable to infer from the evidence before the Court, that the acquisition and incorporation of Nash into its holdings, is seen by the current management of the Defendant as a good fit, by entrepreneurs seeking to grow the business and taking legitimate commercial risks to do so. From its structure, organisation and numerous worldwide subsidiaries, which the Claimant's counsel drew to the Court's attention, for another purpose, this transaction, though very substantial, may be seen as being done by the Defendant for major growth, in the ordinary course of its acquisitive business activities. I stress that I am not making any findings that this alternative view of the transactions is correct and accurate; but the credibility of that alternative view, based on the evidence of its assets and performance, demonstrates that it is unsafe and unfair to rely on the Claimant's contrary speculative adverse portrayal of the transactions, as amounting to credible grounds for believing they represent an unjustifiable dissipation of assets, that might be the subject of an application for a freezing order. The Claimant's characterisation of the transactions and its submissions to that effect are accordingly rejected as unreliable.

72. The Claimant seeks to bolster its case of credible grounds, by reference to what it claims to be the Defendant's *"form"* for engaging in discreditable commercial conduct. This is by reference to its alleged (and presently undefended beyond the *"fine with that"* assertions) breaches of its contractual promise to pay the CNI due to the Claimant in the instalments provided for, its breach of contract in paying dividends in priority to payment of CNI and its unwarranted subjugation of its obligations to pay CNI to its list of other priorities, most recently articulated in its letter of 7 May 2024, which is quoted in its material part in paragraph 10 above.

73. In my judgment, it is not justifiable for the Court to equate the alleged breaches of contract in this case (assuming for present purposes they are proved) and the position taken by the Defendant with regard to its obligations to pay CNI, and disordered priorities, with the sort of conduct that has led courts to find that there is a risk of dissipation of assets, by those persons who were shown to have engaged in discreditable commercial conduct, such as found in the cases the Claimant has relied on.

74. A breach of contract by a person or company, even a flagrant and seemingly indefensible one, does not without more, justify a finding that such person or company in breach, has a discreditable commercial morality; or *"form"* for acting with a disregard for commercial morality. Still less does it demonstrate, that he/she/it would stop at nothing to dispose of, conceal or dissipate assets to frustrate the arbitral process. If the position were otherwise, freezing injunctions would be issued like confetti, in response to any breach of contract.

75. The breach of contract alleged, and position taken by the Defendant regarding its priorities in this case, also must be viewed in the context of the whole factual background of the case. The Defendant has acted and taken a position, which a tribunal may or may not find to be unlawful, with its former director - a member of the corporate `family' - and the assignee and trustee of his Economic Interest in his CNI. It's taking of that position, has for long been tolerated by the Claimant and Mr Nishant and not even formally made the subject of their agreed dispute resolution procedure until now. There was complaint and reservation of rights by the Claimant in response, but no outraged protestations that the Defendant was exhibiting a lack of commercial morality or engaging in discreditable commercial conduct. In addition, there is a complete lack of any other evidence of any conduct demonstrating a discreditable commercial morality on the Defendant's part. In those circumstances, I reject the Claimant's suggestion, that I should mark out the Defendant as an entity lacking commercial morality, which would take action to dissipate assets or stop at nothing to frustrate the arbitral process. The basis for the suggestion of a lack of commercial morality, - in short it being in breach of contract and taking a position that it will pay down the CNI but when it decides to pay - is seriously lacking; and I certainly see no justification for the characterisation of the Defendant's behaviour as *"swagger"*. In the circumstances of those findings, this allegation of having form for discreditable commercial conduct, or a lack of commercial morality is rejected. There is therefore no credible material stemming from this suggestion, on which a

freezing order may be sought, either standing alone or taken together with alleged risks from the Corporate Transactions called into question.

76. I have considered the Defendant's submissions founded on the case of Parker summarised at 56-60 above and find them persuasive and compelling against the grant of a disclosure order in this case. In my judgment, and as already noted in 56 supra, this case has greater similarity on its facts to the Parker case, than to the two cases relied on by the Claimant. Considering the dictum quoted at 57 supra, I am not satisfied for the reasons explained above, that there is credible material on which an application for a freezing order might be based. Counsel's position (Mr Brodie QC in that case) was very similar to the position of counsel for the Claimant in this case. Here counsel is forced to admit, like Mr Brodie, that he does not have the material with which to apply for a freezing injunction. In this case like Mr Brodie QC in Parker's case, he would like to have the information that he seeks, and then consider his position. As the judge found in that case, and in the circumstances of this case, where I have found there is no credible material for believing an application for a freezing order may be made, this is not the type of situation the rule is dealing with. I find that what is going on in this case, is the same sort of fishing expedition that was found to be underway in Parker.

77. There are therefore no credible grounds, in my judgment, for believing that a freezing order may be sought in respect of the Defendant's assets, in particular the proceeds of sale of the Nikolai shares. There is therefore no urgency for the Court to act to make a disclosure order in place of an arbitral tribunal that could be constituted and act in time; and for that reason alone, the Court is entitled to decide that the order sought should be refused and it has been so refused.

78. There is a further reason why there are no credible grounds for believing an application may be made for a freezing order, and that is my conclusion that the putative or notional reasonable applicant for a freezing order in this case, would be satisfied and conclude, that damages would be an adequate remedy for the breach in respect of which the claims are being brought and would.

79. Whilst there is much speculation by the Claimant about how the Corporate Transactions might have resulted in a diminishing of the Defendant's net assets, it is not demonstrated to my satisfaction, that the amount of undervalue received for the Nikolai shares and overvalue price paid for the Nash shares, would so reduce the Defendant's net assets, that it could not meet the full liability amount of an award of the maximum calculated amount the Claimant is seeking. Still less is it shown, that there may be insufficient assets against which execution could be levied, if the Defendant failed to pay, to satisfy an award. I accept the submissions advanced in the alternative by the Defendant, summarised at 62 supra.

80. In case my conclusion that there is a lack of credible material or evidence to suggest an application for a freezing order may be made, for the reasons thus far given, is considered to be wrong in another place; and it was decided contrary to my view, that there are credible grounds for believing an application for a freezing order may be made to neutralise a risk of dissipation of assets, I move now to consider the separate and distinct requirement of satisfying the court, of the need for it to act urgently to grant the relief sought, because an arbitral tribunal could not be constituted in time to deal with the application, to prevent any risk of dissipation of assets from materialising.

81. With regard to this issue, I find that what has been placed before the Court by the Applicant, is wholly insufficient to counter the Defendant's submissions that a DIAC arbitral tribunal in the person of an EA, could have been constituted and the applications brought before him/her as quickly, and perhaps more quickly, than they have been brought before the Court.

82. The sum of what has been advanced by the Applicant is set out in 48 above. The *"understanding"* contended for by it, is not explained or evidenced, and the rest of the submission is not a sufficient explanation or justification for failing to investigate with DIAC, how quickly an EA might be appointed to deal with these applications on notice.

83. In her first witness statement, Ms Nargis at paragraph 18, explains the failure to commence an arbitration thus:

> *"The Arbitration has yet to be commenced because the Claimant awaits the decision of various third-party funders and/or insurers that have expressed an interest in funding and/or underwriting the claims. In view of the lack of any defence on liability and the significant quantum of the claims, it is anticipated that a positive decision on funding will be made shortly. However, if no funder wishes to finance his claims, Mr Nishant would then fund them himself."*

84. The Claimant's wish for funding from a third party and delay in putting it in place, is not a good reason for not seeking its remedy in arbitration and, in any event, it is admitted that Mr Nishant is willing and able to fund the (claimant's) claims himself. Abiding decisions on funding, is certainly no excuse for not investigating a referral to DIAC and the availability of an EA to deal with these applications. The law, the arbitration agreement and Decree 34 of 2021 are clear in their effect (as Ms Nargis concedes at paragraph 87 of her first statement) and the rest of her vague and dubious evidence about the parties having to vary the arbitration agreement and waiting for funding, does not explain or justify the failure to explore or seek the assistance of an EA under DIAC Rules.

85. In Dubai, where the Defendant is seated, and where its assets sufficient to meet an award (as the Claimant admits) are located, there would be none of the difficulties of the continuing validity of the arbitration agreement or of enforcement of an award, stemming from the dissolution of the originally agreed arbitral forum, that have been encountered in some other seats and jurisdictions.

86. The Court notes that the Defendant's submission summarised at 50 above, has not been refuted by the Applicant with any evidence or submissions of inability at the DIAC to comply with its rules in appointing an EA. It has not provided any evidence of adverse experience in seeking urgent relief from an EA at the DIAC or elsewhere, nor has it advanced any adequate submissions explaining why recourse was not made to the contractual forum for dispute resolution. The practice of this Court is to uphold and support parties' arbitration agreements, and no good reason of such a degree of urgency has been advanced before the Court by the Claimant, to justify why it did not have recourse to, and did not even explore the possibility of recourse to a DIAC EA.

87. The Court was separately justified, and for this reason alone, was entitled to refuse, the disclosure order sought in these proceedings. It may be useful for this Court to indicate, that when parties bound by an arbitration agreement choose to come before the Court seeking urgent interim relief in support of arbitration proceedings, as they are entitled to do in cases where an urgent remedy or relief is needed, they should be prepared to justify their choice of venue; and demonstrate, that for whatever reason, the arbitral process could not be engaged quickly enough, to meet the urgency of the application.

88. Although other persuasive reasons were advanced by the Defendant for why relief in the form of a disclosure order should not be granted, it is not necessary for the Court to deal with them, in circumstances where the reasons it has given above, amply justify refusal of the order sought.

Issued by:
Hayly Norton
Assistant Registrar
Date of issue: 25 June 2024 At: 10am