IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 227 OF 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN CHAMBERS

Appearances:

Mr Christopher Levers and Mr Adam Barrie, Mourant Ozannes, for the Plaintiff ("FDL")

Mr Jalil Asif QC, Kobre & Kim (Cayman), on behalf of the Defendant ("Canterbury")

Before:	The Hon. Justice Kawaley
Heard:	25th February 2020
Draft Judgment Circulated:	11 April 2020
Judgment Delivered:	15 April 2020

HEADNOTE

Defendant holding Plaintiff's shares and proceeds of sale pursuant to undertakings given pursuant to Court Order-change in Plaintiff's beneficial ownership- directions given by Court requiring Plaintiff to comply with Defendant's AML requests-whether Defendant entitled to release from undertakings by reason of Plaintiff's non-compliance with Court directions

RULING

Introductory

1. This litigation substantively concerns the status of a brokerage agreement between the Plaintiff (a British Virgin Islands company) ("FDL") and the Defendant ("Canterbury") dated May 9, 2018 (the "Account Agreement") and whether the Defendant is required to, *inter alia*, return to the Plaintiff certain shares in Yangtze River Development Corp ("YRIV") (the "Shares") and the proceeds of sale of some of the Shares. The Defendant also asserts a substantial Counterclaim.

2. On December 13, 2018, the following Order was made (the "December 13, 2018 Order') upon the return date of an *ex parte* injunction that FDL had obtained on December 7, 2018:

> "***UPON*** *the Defendant giving the following undertakings:*
>
> *i. that it will hold any of shares transferred out of the Plaintiff's account with the Defendant into the Defendant's account (the "**Transferred Shares**") that have not been sold pending further order of the Court or the Plaintiff's agreement;*
>
> *ii. that it will hold the proceeds of sale of those Transferred Shares which have been sold, insofar as those proceeds remain in the Defendant's control (the "**Proceeds**"), pending further order of the Court or the Plaintiff's agreement. For the avoidance of doubt, the Proceeds amount to US $14,959,352.20; and*
>
> *iii. that, save as otherwise allowed by any later order, or by agreement with the Plaintiff, the Defendant will not transfer or sell any further shares held by it*

*for the Plaintiff (the "**Shares**") in satisfaction of the Plaintiff's alleged obligations to the Defendant.*

***AND UPON** the Plaintiff giving the following undertakings:*

iv. *that, if the Court later finds that this order, or the Order dated 7 December 2018 in these proceedings (the "**Order**"), has caused loss to the Defendant or any third parties, and decides that the Defendant and/or such third parties should be compensated for that loss, the Plaintiff will comply with any order the Court may make;*

v. *that it will make no attempt to, withdraw or transfer from the Defendant any shares in Yangtze River Port and Logistics Ltd held for it by the Defendant pending further order of the Court or agreement by the Defendant; and*

vi. *that insofar as any third party is, or has been, provided with the Order or this order, by or on behalf of the Plaintiff, such third parties will be told expressly by or on behalf of the Plaintiff that the Order and/or this order do not freeze the assets of the Defendant or otherwise interfere with its business dealings, including its bank accounts, custody accounts or brokerage accounts. The Order relates only to the Transferred Shares, the Shares and the Proceeds as set out above.*

IT IS ORDERED THAT:

1. *Paragraph 1 of the Order is discharged;*

2. *Costs reserved; and*

3. *The parties shall have liberty to apply.*"

3. The present application relates to Canterbury's attempts to ensure that FDL as its past or present customer complies with its 'Know Your Customer' ("KYC") requests for so long as Canterbury is bound by and FDL benefits from the December 13, 2018 Order. Canterbury applied by Summons dated June 19, 2019 for an Order that:

> *"1. The Plaintiff do provide the documents and information set out in the Defendant's letter to the Plaintiff with enclosures dated 20 March 2019 and attached to this summons at Appendix 'A', to enable the Defendant to satisfy itself that it is compliant with the Anti-Money Laundering Regulations 2018 ("AML Regulations")…"*

4. That Summons was substantively heard on August 6, 2019. In a Ruling delivered on September 16, 2019, I concluded:

> *"66. The POCL and AML Regulations do not positively require Canterbury to continue to seek nor oblige FDL to produce KYC/CDD information. Compelling FDL to produce the information is not required to immunize Canterbury from potential criminal liability in circumstances where (a) the service provider/client relationship has broken down and is subject to litigation before this Court; (b) Canterbury's continuing custody of the assets is pursuant to a Court Order, and (c) Canterbury has sought directions from the Court.*
>
> *67. However, the December 13, 2018 Order which in substance grants discretionary injunctive relief cannot properly be continued until trial unless FDL additionally undertakes to comply with the valid information requests. Failure to do so would undermine the important public policy objects of the legislative scheme and would not be a course of conduct that should be rewarded by a Court of equity which is being invited to grant discretionary interim relief. It bears repeating, that FDL gave every indication in the course of argument that it would be willing to supply whatever information this Court determined it was or could be legally required to produce."*

5. What Order should be made to dispose of this seemingly unprecedented application was controversial. On October 25, 2019, I eventually granted an Order (the "AML Order") that, *inter alia*:

> *"1. The Plaintiff shall provide to the Defendant the documents and information requested by the Defendant at sub-paragraphs (a) (unsigned), (b), (e), (i), (k), (l) and (m) of its letter to the Plaintiff dated 20 March 2019 ('**the March Letter**') within 14 days; in default, the Defendant shall be at liberty to apply to the Court forthwith on paper to be released from the undertakings given by the Defendant.*

*to the court at paragraphs (i) to (iii) (inclusive) of the Order dated 13 December 2018 ('**the Undertakings**')…"*

6. By letter dated December 17, 2019, Kobre & Kim applied to the Court on behalf of Canterbury pursuant to paragraph 1 of the AML Order to be discharged from the Undertakings on the following grounds:

> "*Whilst the Plaintiff has provided documents which purport to comply with paragraph 1 of the AML Order, the documents do not constitute bona fide compliance for the reasons set out in the Affidavit of Eric L. Miller enclosed with this letter.*"

7. The AML Order contemplated dealing with a blanket refusal to comply with its terms on the papers. FDL's attorneys persuaded me that the application was sufficiently nuanced and significant to justify not depriving FDL of an oral hearing which might result in it being deprived of the benefit of important interim injunctive relief.

8. At the beginning of the hearing and without making a formal application for leave to adduce further evidence in opposition to the application, which was not contemplated by the procedural directions, FDL sought to put into evidence the First Affidavit of Claire Murphy sworn on February 25, 2020, the date of the hearing. Canterbury understandably objected to the way this was initially introduced. In addition to reserving judgment on the substance of the application, I also indicated that I would consider whether or not this additional evidence should properly be taken into account.

9. In the event, I have decided to consider the application firstly on the basis of the evidence which was properly before the Court and thereafter to consider whether the further evidence should be admitted and also whether it in any way changes the appropriate result[1].

Canterbury's case on non-compliance

10. The most serious complaint advanced by Canterbury was summarised as follows in the First Affidavit of Eric Miller ("First Miller Affidavit"):

[1] This approach was fortuitously facilitated by the fact that the relevant additional evidence, not included in the hearing bundles, was misplaced. Counsel was only asked to provide a further electronic copy after I had fully considered the original material.

> "*10.2 The most important breaches are that some of the material provided appears to be untrue or inaccurate in a number of important respects, as explained below, or FDL has simply failed to provide proper answers to the requests it was ordered to respond to. I therefore believe that FDL's breaches of the AML Order cannot be cured.*"

11. The First Miller Affidavit, somewhat as an aside, points out that the majority of documents which FDL provided on November 11, 2019 were created before October 25, 2019 when FDL argued that it had not previously agreed to produce the requisite information. It was also noted that in paragraph 22 of the Sixth Affidavit of Holly Morrison, Ms Morrison had detailed seven concerns about the KYC information initially supplied by FDL. Mr Miller then deposed:

> "*13. FDL should therefore have been well aware of the context in which CS was pursuing the AML document and information requests, and the Court made the AML Order. FDL has not expressly answered the concerns expressed by Ms Morrison, whether in any affidavit or in correspondence. In addition, those concerns have still not been properly addressed or resolved due to the inadequate documentation provided by FDL in its purported compliance with paragraph 1 of the AML Order.*"

12. The foundation for the March Letter was said to be Canterbury's discovery of an apparent change in FDL's ultimate beneficial ownership. The relevant concerns may be summarised as follows:

(a) FDL opened its account with Canterbury on the basis that, as confirmed by a copy of its Register of Members provided in August 2018, a Mr Chen was the sole member. This was certified to be a true copy of the Register on August 21, 2018;

(b) in response to the March letter, FDL provided a copy of its Register of Members certified as being a true copy on October 15, 2018, which showed that the sole share in FDL had been transferred from Mr Chen to a Mr He on February 1, 2018, three months before the account with Canterbury had been opened;

(c) FDL pursuant to paragraph 1 of the AML Order (and in respect of requests (a) and (l)) provided documents which did not resolve the ambiguities in the beneficial owner position. This was because, *inter alia*:

(i) an agreement dated January 31, 2018 contemplating Mr Chen swapping his 100% ownership of FDL for an interest in a Chinese company owned by Mr He and a Ms Zhong (the "Swap") on its face amounted to an agreement to agree, not a completed transaction. Corporate searches subsequently carried out suggest that Messrs He and Chen have never been shareholders of the Chinese company in question;

(ii) the second version of the Register of Members suggested that Mr Chen transferred his sole share in FDL to Mr He on February 1, 2018;

(iii) the second version of the Register of Directors suggested that Mr Chen resigned as a Director on February 1, 2018 and that Mr He was appointed, followed by Mr Sin on February 10, 2018.

13. In response to this evidence FDL produced Written Resolutions dated October 10, 2018 purportedly formalising these early 2018 changes in ownership and directorship terms ("Written Resolutions"). In the Second Affidavit of Eric Miller, he deposes that these documents themselves raise serious concerns, including:

(a) the Written Resolutions purport to be signed by Mr Sin and Mr He on October 10, 2018 in their capacities as directors accepting Mr He's resignation on February 1, 2018 and appointing Mr He as a director with effect from the same date;

(b) it appears that Mr Sin was not validly appointed as a director by anybody. It was not resolved that Mr He should be appointed a director until October 2018, so he could not have validly appointed Mr Sin on February 10, 2018;

(c) the Written Resolutions do not purport to ratify the appointment of Mr Sin. Mr He could not have validly and retrospectively appointed himself as a director with effect from February 1, 2018;

(d) in proceedings against YRIV and FDL in the New York State Court commenced by Stenergy LLC (the "Stenergy Proceedings"), paragraph 5 of the Complaint alleged that FDL was incorporated in BVI, owned by Mr Chen and that Mr Sin was its US agent. The Answer dated December 4, 2018 stated:

> "*5. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 5 of the Plaintiff's Complaint and on that basis denies the same.*"

14. Other, to my mind more pernickety, "complete non-compliance" complaints were made by Canterbury in evidence and in the '*Defendant's Skeleton Argument in Support of Application to be Discharged from Undertakings pursuant to Order dated 25 October 2019*' (at paragraphs 8 to 11) which do not warrant detailed consideration in their own right. Canterbury primarily made these complaints, it seemed to me, with a view to persuading the Court to accept its submission that "*Mr Sin displays a nonchalant disregard for the need to comply with orders and, having breached the AML Order, to comply with the promise made on FDL's behalf on 11/11/19 to provide the documents 'as soon as possible'*" (paragraph 8).

15. Canterbury makes various "inadequate compliance" complaints, some of which appear insignificant in their own right (e.g. unclear addresses and the failure of Mr Sin or Mr He to sign the KYC forms). However it also contended more significantly that FDL's letter of November 11, 2019 sent by FDL in order to comply with the AML Order fails to adequately explain important matters, notably the ownership and directorship issues and the relationship between FDL and YRIV.

FDL's response

16. The Fourth Affidavit of Dominic Sin was sworn in support of FDL's opposition to the present application. In a nutshell, it was averred that FDL had clearly complied with the AML Order and that Canterbury's application was both misconceived and improperly motivated by a desire to gain a litigation advantage. These central points were skilfully elaborated upon by Mr Levers in oral argument.

17. Mr Sin firstly averred as follows:

> "*15. FDL provided the Core AML Documents on 11 November 2019, with the exception of three reference letters. The delay in providing this information was due to the political unrest in Hong Kong which caused difficulty in obtaining these documents on time. These were in any event provided to Canterbury on 2 December 2019....*"

18. He then proceeded to set out a table showing the information requests contained in the AML Order and the documents supplied, before asserting:

"19. Even from a cursory examination of the above and the documents themselves, there can be no doubt that FDL complied with paragraph one of the AML Order by providing the requested information. The only possible complaint is that FDL, due to reasons out of its control, was delayed in providing certain reference letters. However, those documents were in fact provided shortly thereafter...

21. The fact that Canterbury purports to have questions arising from the disclosure is not surprising, not least due to the vague nature of some of the categories of documents ordered to be provided...Accordingly, even if Canterbury may have further legitimate queries arising from the documents and information it has received, this does not constitute a breach of the AML Order. FDL therefore considers that this application is misconceived and seeking the discharge of its undertakings is an improper course of action.

22. FDL is of the view that Canterbury has contrived this AML Issue so that it can be released from its undertakings and, in turn, dispose [of] *or otherwise deal with FDL's assets and cash. As the Court has already determined, there is no risk of Canterbury being in breach of its regulatory obligations as it has both requested the documentation and issue*[d] *a court order to obtain the same."*

19. There are two implicit assumptions subtly interwoven into these averments. Firstly it is implied that one can look solely at the character of the documents supplied without regard to their content for the purposes of determining the question of compliance. Secondly, echoing a theme which was advanced and rejected in the Ruling which resulted in the AML Order, it is implied that the Court should view the issue of compliance through the lens of whether Canterbury (as opposed to the Court) has any legitimate grounds for enforcing any non-compliance which may have occurred. This point was made almost explicit in the paragraphs which follow (paragraphs 22-24).

20. Mr Sin most convincingly demonstrates that there is little substance to Canterbury's minor complaints, in particular those about delay and outdated documents. He also confirms on oath the accuracy of the KYC forms submitted without signatures, effectively dealing with that point (to some extent at least). As regards the critical question of beneficial ownership and the appointment of directors, Mr Sin crucially deposes as follows:

"*35. This difference* [between the two versions of the Register of Members] *is due to the delay in registration of the transfer of shares from Mr Chen to Mr He. In support of this I exhibit a written resolution dated 10 October 2018.*

36. In any event, it is confirmed that the UBO of FDL is Mr He, who has been FDL's UBO since 1 February 2018, as per the last two ROMs provided to Canterbury (which ROMs are correct). This is supported by other documentation provided, such as the share transfer agreement, and Canterbury has no positive evidence to the contrary...

38. Similar to the ROMs, the reason for the inconsistency between the RODs is because of a delay in registering the changes....

39. In any event it is confirmed that the directors of FDL are Mr He and myself, who have been FDL's directors since 1 February 2018 and 10 February 2018 respectively..."

21. As regards the share transfer agreement and inconsistent corporate search results obtained by Canterbury about the Chinese company referred to in the Swap, Mr Sin deposes:

"42. With respect to Mr Miller, if the Transfer Agreement along with FDL's ROMs (as clarified above) are not sufficient to illustrate the transfer of shares, it is difficult to see what information, within reason, would satisfy Canterbury...

44. The maintenance of Hualin's corporate affairs is not a matter for FDL and I do not consider it appropriate for FDL to be required to give evidence in relation to the same."

Findings: governing legal principles

22. Mr Levers referred the Court to one authority to substantiate what he contended were the governing principles applicable to determining whether Canterbury should be released from its undertakings: the decision of Smellie CJ in *Braga-v-Equity Trust Company (Cayman) Limited* [2011 (1) CILR 402]. Dr Braga applied *ex parte* for disclosure orders in aid of Brazilian proceedings in connection with an alleged fraud. An application was made to discharge the *ex parte* orders on the grounds that Dr Braga breached both express and implied undertakings to the Court by failing to ensure that documents he filed in Brazil were sealed. FDL's counsel rightly submitted that this decision demonstrated that a breach of undertakings can only be made out where (a) the

undertakings are sufficiently precise, and (b) proof to the criminal standard was required of the breach of a clear and unambiguous order. Reliance was placed on the following portions of Smellie CJ's judgment:

> "*123 It must of course be accepted that the purpose behind the undertakings was to ensure that the confidential information would only be utilized in a limited manner for the purposes that had been explained to the court and in accordance with the public policy of maintaining the confidentiality of business information subject to the Confidential Relationships (Protection) Law. Indeed, for those reasons, the express undertakings were drafted with a degree of precision intended to ensure that Dr. Braga understood what his restrictions were in the context of his application in circumstances where the applicants were not present to see to their own interests. But that was not the only reason for the attempt at precision: of importance also was the need to ensure that the specificity required for the enforcement of the undertakings in the event of breach, by way of sanction for contempt, was met.*
>
> *124 In failing to impose a positive duty upon Dr. Braga to take all reasonable steps to ensure, in keeping with Brazilian law, that once filed in court the confidential information remained sealed except only for the purposes of court proceedings absent further leave of this court. The undertakings are now shown to have lacked a necessary degree of specificity for which I may not now make amends simply "by taking into account the subject-matter of the proceedings when reaching a conclusion on the clarity" of the undertakings' provisions.*
>
> *125 Proof is required to the criminal standard that an alleged contemnor breached a clear and unambiguous court order (here, undertaking to the court) with actual knowledge of the precise terms breached. Thus, the undertakings must contain full details of the acts mandated or prohibited without the need to refer to other documents or circumstances and so without the need to imply terms not expressed in the undertakings: Telesystem Intl. Wireless Inc. v. CVC/Opportunity Equity Partners L.P. applying Seaward v. Paterson and R. v. City of London Magistrate's Ct., ex p. Green*, and indeed as shown in *Spectravest Inc.* v. *Aperknit Ltd*....
>
> *132. I am compelled to accept the correctness of that argument in response to allegations of a breach of undertakings which would invite the imposition of severe, even criminal, sanctions. While the court must express its disappointment at Dr. Braga's failure to honour the fair spirit of his undertakings by taking all reasonable measures available to him to protect the confidential information, I am obliged to conclude that he is not shown to have breached the terms—express or implied—of the undertakings.*"

23. Mr Asif QC in reply submitted that FDL's reliance on *Braga* was misconceived. *Braga* dealt with an entirely different situation. The present application was concerned with whether or not the Plaintiff's entitlement to equitable relief had been so eroded that the

December 13, 2018 Order should be discharged through releasing Canterbury from its undertakings.

24. In my judgment Mr Levers was right to contend that there is an analogy between:

(1) a defendant seeking to discharge an injunction on the grounds of an alleged breach of an undertaking given by the plaintiff as a condition for obtaining injunctive relief; and

(2) a defendant seeking to obtain a release from undertakings given in lieu of an injunction on the grounds that the plaintiff has breached an undertaking given as a condition for being permitted to continue to benefit from the "injunction".

25. *Braga* was also analogous in that the undertakings said to have been breached had a statutory public policy dimension to them, as is the case with the AML Order here. As regards undertakings and the need for them to be drafted with precision Smellie CJ stated:

> "*123 It must of course be accepted that the purpose behind the undertakings was to ensure that the confidential information would only be utilized in a limited manner for the purposes that had been explained to the court and in accordance with the public policy of maintaining the confidentiality of business information subject to the Confidential Relationships (Protection) Law. Indeed, for those reasons, the express undertakings were drafted with a degree of precision intended to ensure that Dr. Braga understood what his restrictions were in the context of his application in circumstances where the applicants were not present to see to their own interests. But that was not the only reason for the attempt at precision: of importance also was the need to ensure that the specificity required for the enforcement of the undertakings in the event of breach, by way of sanction for contempt, was met.*"

26. However, I reject the submission that *Braga* establishes the general proposition that all forms of non-compliance with Court orders must be established to the criminal standard of proof. That standard of proof clearly applies to contempt proceedings, as the authorities cited by Smellie CJ at paragraph 125 (e.g. *Seaward-v-Paterson* [1897] 1 Ch. 545) establish. The pivotal argument advanced by Dr Braga was that "*no express or implied restriction was placed on upon him requiring him to deploy documents only in a sealed proceeding*" (paragraph 131). Smellie CJ held:

> "*132. I am compelled to accept the correctness of that argument in response to allegations of breach of undertakings which would invite the imposition of severe, even criminal sanctions…*"

27. The reason why the issue of contempt was alluded to by Smellie CJ in *Braga* was that the applicants were positively seeking to commit Dr Braga for contempt. This is clear from paragraph (9) of the headnote to the report, and the following substantive paragraph in the Judgment:

> "*121 These being allegations of contempt inviting criminal sanctions, any such obligation can only now be imposed if it had been clearly a part of the implied or express undertakings. No such obligation can be deemed to have arisen as a matter of implication by the law of contempt.*"

28. In this important respect, the legal context in *Braga* was quite different to the present case as Mr Asif QC contended. I find that the civil standard of proof applies to the question of whether or not FDL (a corporate defendant) has failed to comply with the AML Order and that the degree of specificity which is required to establish liability for civil consequences of non-compliance is not as high as would be required to establish a criminal breach with penalties as severe as committal against a party who is a natural person.

Findings: has FDL breached the AML Order?

The dominant purpose of the Order

29. The starting point for analysing whether the AML Order has been breached is to identify the function it was intended to serve. That is a necessary prelude to considering how the terms of the Order should be construed and how the question of compliance should ultimately be determined. Its function was to impose an additional condition subject to which the December 13, 2018 Order would be continued in FDL's favour. This condition was not imposed to enable Canterbury to comply with its own statutory AML duties but rather to support the public policy objectives of the legislative scheme in circumstances where it appeared that FDL was seeking to avoid complying with the spirit of that scheme because the circumstances of the present litigation had taken the parties into a regulatory 'No Man's Land'. Paragraphs 66 and 67 of the Ruling which summarised the main conclusions have already been set out in paragraph 4 of the

present Ruling above and made it clear that the undertakings FDL was being asked to offer were not designed (primarily at least) to benefit or protect Canterbury.

30. Earlier in the Ruling (at paragraph 63), I listed six factors which mitigated in favour of requiring FDL to undertake to comply with outstanding KYC/CDD requests. The most pertinent one (in light of the summary of findings set out above) was the following:

> "*(c) if the Court grants discretionary interim injunctive relief to a non-compliant client or former client of an FSP which results in the FSP retaining custody of assets while bona fide KYC/CDD requests made to the applicant remain outstanding, the Court is tacitly signifying that the relevant non-compliance is not inappropriate conduct...*"

31. I then explained why some form of undertaking (the precise terms of which would be determined at a subsequent hearing) would be imposed as a condition of the December 13, 2018 Order being continued:

> "*64. In my judgment it is ultimately clear that were FDL to refuse to supply the KYC/CDD information that Canterbury seeks, without prejudice to its right to argue that certain information is not reasonably required, such refusal would constitute sufficient grounds for refusing interim injunctive relief. In the circumstances of the present case, it is in my judgment appropriate to require FDL as a condition for continuing the December 13, 2018 Order to supply the information sought.*"

32. In summary, the AML Order was made to protect the integrity of the Court's own processes by avoiding a situation in which a Court Order was being used by FDL as a shield to escape complying with the KYC/CDD obligations it became subject to when it entered into a contractual relationship with Canterbury.

33. The entire tenor of the Ruling made it clear that the Court considered that the relevant obligations were important in public policy terms and should be substantively complied with as a fundamental condition of the December 13, 2018 Order being continued.

The requirements of the Order and specificity

34. The AML Order provided as follows:

> *"1. The Plaintiff shall provide to the Defendant the documents and information requested by the Defendant at sub-paragraphs (a) (unsigned), (b), (e), (i), (k), (l) and (m) of its letter to the Plaintiff dated 20 March 2019 ('**the March Letter**') within 14 days; in default, the Defendant shall be at liberty to apply to the Court forthwith on paper to be released from the undertakings given by the Defendant to the court at paragraphs (i) to (iii) (inclusive of the Order dated 13 December 2018 ('**the Undertakings**')…"*

35. The most important request which I found had not been complied with before making the AML Order was the following sub-paragraph in Canterbury's March Letter to FDL:

> *"(a) New account application…along with updated corporate documentation showing Jielin He as the beneficial owner.*
>
> *(b) KYC questionnaire …and accompanying supporting documents to be completed by all directors, officers and shareholders…"*

36. The letter was prompted by Canterbury's discovery of an "*undisclosed material change in the ownership structure of Fortunate Drift Ltd. In January 2019, the beneficial owner of Fortunate Drift was changed to Jielin He.*" Canterbury understandably believed that the change had occurred after the initial forms had been completed, assuming them to have been accurate. The "*serious concerns*" Canterbury had about FDL's ownership based on the initial response to the March Letter were particularised in paragraph 22 of the Sixth Morrison Affidavit, which supported the application for the AML Order. These concerns were based, principally, on the inconsistencies between the First and Second Registers of Directors and Members.

37. Accordingly, although paragraph 1 of the AML Order merely repeated the language of the March Letter, the intent was clearly not that FDL supply again what it had already supplied but that it should fill the gaps in that initial material. As the Ruling observed:

> *"12. I had no hesitation in accepting that Canterbury was not merely genuinely but justifiably concerned about the adequacy of KYC information FDL had provided in relation to the January 2019 change in its beneficial ownership…"*

38. In correspondence before that hearing, Mourant requested further particulars of their obligations and Kobre & Kim on October 21, 2019 clarified that "*corporate documentation*" in request (a) included "*shareholder and director registers...and documents concerning transfers of ownership, including resolutions and share purchase agreements*". At the hearing to settle the terms of the AML Order on October 25, 2019, what needed to be produced was largely agreed and FDL could and should have raised any concerns about a lack of particularity at that stage.

39. Having regard to this background, paragraph 1 of the AML Order clearly, by necessary implication, required FDL to produce documentation that explained the change of beneficial ownership in a way which was intelligible. This requirement lay at the heart of the reason why the AML Order was made. Since there is no question of the imposition of criminal sanctions for contempt, such as committal as in the case of *Braga*, I find that paragraph 1 of the AML Order as regards request (a) in particular was sufficiently clearly drafted to support a civil finding of non-compliance, taking into account the wider context in which the Order was made.

Did FDL substantially comply with the AML Order?

40. The core obligation of FDL under paragraph 1 of the AML Order as regards request (a) was to produce corporate documentation which clarified and confirmed who the beneficial owner of the company was in circumstances where FDL admitted there had been a change formally recorded after FDL initially provided KYC/CDD information to Canterbury in the summer of 2018. However, bizarrely, FDL contended through its evidence that these changes became operative before the summer of 2018. This occurred against the following background:

(a) in proceedings in the New York State Court brought by FDL against America 2030 Capital LLC (the "America 2030 Proceedings"), Mr Sin swore an Affidavit on May 2, 2018 stating that Mr Chen was at that time "*the owner of FDL*";

(b) on December 4, 2018 in the Stenergy Proceedings, FDL averred that it had insufficient information to plead a positive case as to who its owner was;

(c) in response to the March Letter sent some three months after this pleading was filed in the Stenergy Proceedings, FDL produced copies of revised Registers of Directors and Members suggesting that its beneficial ownership had been registered as changing on or about October 10, 2018 but with effect from February 1, 2018. It objected in principle to having to explain the inconsistencies;

(d) when Canterbury sought assistance from the Court, FDL indicated that it had no objections to providing any information that the Court considered it was required to produce;

(e) at the hearing of the application which resulted in the AML Order, the central complaint relied upon by Canterbury as regards request (a) was unexplained inconsistencies arising from the documentation supplied to that point.

41. The AML Order afforded FDL an opportunity to demonstrate that Canterbury's professed concerns were (as it contended) wholly misconceived and tactically motivated by producing a straightforward explanation of the beneficial ownership position, like a magician producing a rabbit from a hat. FDL did produce a rabbit, but like the White Rabbit in '*Alice in Wonderland*', it only leads one down a legal rabbit hole into an unreal world. The principal features of the world portrayed by FDL's evidence are as follows:

(a) Dominic Sin and Jielin He as directors of FDL on October 10, 2018 approved the appointment of Mr He as a director with effect from February 1, 2018 and the resignation of Mr Chen on the same date;

(b) the same directors on the same date approved the transfer of the company's sole share from Mr Chen to Mr He, "*subject to the proper execution of the relevant Instrument(s) of Transfer*";

(c) FDL produced neither a share purchase agreement nor copies of the instruments of transfer;

(d) the (second) Register of Members records the share transfer from Mr Chen to Mr He as having taken place on February 1, 2018, before FDL represented to Canterbury on or about May 9, 2018 (the date of the Account Application form) that Mr Chen was the beneficial owner of the share;

(e) the (second) Register of Directors records that Mr Chen ceased to be a director on February 1, 2018 and that Mr He became a director on February 1, 2018 and Mr Sin became a director on February 10, 2018, before (1) Mr Sin on May 2, 2018 swore in the America 2030 Proceedings that Mr Chen was "*the owner of FDL*" and (2) FDL represented to Canterbury on or about May 9, 2018 that Mr Chen was still a director;

(f) by the Written Resolution dated October 10, 2018, Mr Sin purported to approve the appointment of Mr He as a director with effect from a date when Mr Sin had himself not become a director being the same date on which the Register of Directors records Mr Chen as having resigned;

(g) on December 4, 2018, less than two months after the Written Resolution was purportedly signed formalising a change of ownership with retrospective effect, FDL pleaded in the Stenergy Proceedings that it did not know whether or not Mr Chen was its owner as the New York plaintiff alleged.

42. Mr Sin in his Fourth Affidavit herein states: "*Similar to the ROMs, the reason for the inconsistency between the RODs is because of a delay in registering the changes*" (paragraph 38). He confirms that Mr He is now the owner of FDL, but sees no need to explain why, if the changes actually occurred in February 2018 and were only formally recorded in October 2018 and purportedly given retrospective effect, the true position was not disclosed before the substantive changes were formally recorded. It is a common occurrence that corporate transactions are decided upon and acted upon before formal minutes are drawn up and registers are changed. When this occurs the relevant actors usually conduct themselves in a manner which is consistent with the transactions which have taken place and only formalise the position later. A director who has ceased to be a director does not ordinarily continue to hold himself out to be a director merely because his resignation has not been formally recorded in the company's minute book.

43. Despite the legal significance of being a registered shareholder in terms of relations between the company and its shareholders, in the KYC context a company does not ordinarily represent that a shareholder who has sold his shares is still the beneficial owner: what the share register says is wholly immaterial to the beneficial ownership position. In such a situation the registered shareholder who has sold his shares is just that; a registered shareholder. The purchaser is the beneficial owner. In any event here (before the further evidence added a fresh dollop of confusion to the soup), the second Register of Members purports to record the change in registered shareholder status as having occurred on February 1, 2018.

44. In FDL's world, therefore it was seemingly entirely unremarkable that despite knowing that Mr Chen was in substance no longer FDL's owner in May 2018, but only the shareholder of record, Mr Sin should swear to the New York State Court that he was still the "owner". It called for no explanation that a few days later he should (as director and secretary) sign a "*Corporate Trading Resolution*" when opening an account with Canterbury representing that Mr Chen was still a director when he knew that, formalities apart, he was not. Why Mr Sin and Mr Chen should on the same date sign a "*Certificate of Incumbency*" certifying that they were both FDL's "*officers and directors, and as such are authorized signatories of the company*" called for no explanation, FDL implicitly argued. Nor did it, most astonishingly of all, call for any

explanation that Mr Chen on May 9, 2018 signed the Account Application Form on behalf of FDL certifying that he was the "*BENEFICIAL OWNER*" (page 3), the only "*ultimate beneficiar*[y]" of the assets in the account and expressly agreeing, *inter alia*, to the following terms and conditions:

> "*1...The Client confirms that they are the ultimate beneficial owner(s) of the assets and that they are not representing any undisclosed principal or other person.*" [Emphasis added]

45. Mr Sin did not, it must be acknowledged, have an opportunity to respond to both the points raised in relation to the inconsistent positions adopted by himself and FDL in the Stenergy Proceedings. The apparently inconsistent position adopted by Mr Sin in his Affidavit sworn on May 2, 2018 in the America 2030 Proceedings was dealt with in the First Miller Affidavit and not answered. The second point was only raised in Canterbury's evidence in reply. But the second point is of peripheral relevance although it is a good 'jury point'. Having regard to the character of the application before the Court, the most important matter to be explained was why the Account Application failed to state what FDL in February 2020 claimed to have been the true beneficial ownership at the time that that document was signed. Mr Sin also did not have an opportunity to respond (within the prescribed filing timetable) to another document set out at Exhibit "ELM5" to the Second Miller Affidavit at page 26, which I do not believe was referred to in the course of oral argument. This was the Verified Petition filed by FDL and YRIV against America 2030 Capital LLC and VStock Transfer, LLC in the New York State Supreme Court on May 2, 2018 referred to above. Paragraph 11 of the Verified Complaint described Mr Chen as the "*owner of FDL*". Mr Chen verified the Complaint through Mr Sin acting as his (or FDL's) "*US Authorized Agent*". The Verification sworn before a New York Notary on May 2, 2018 and signed by Mr Sin opens with the following pertinent words:

> "*I am the Chairman and Chief Executive Officer of Petitioner Fortunate Drift Limited…*"

46. The question of whether the directors had been validly appointed appeared to be a 'Rubik's Cube' type puzzle which fortunately did not have to be solved in the context of the present application. Mr Asif QC did enough to demonstrate that, assuming BVI corporate law to be the same as Cayman Islands corporate law, it is impossible to identify any straightforward understanding of how the October 10, 2018 Written Resolution achieved the legal objects it was apparently designed to implement. Mr Levers responded that all that these legal points demonstrated was that FDL was poor

at corporate administration and nothing worse than that. (The further documentation filed on the date of the hearing lent some credence to this argument but it was far from a complete answer to Canterbury's complaints). Such technical irregularities, and in particular, the need for a valid resolution approving a corporate decision, could always be waived by a sole shareholder under the *Duomatic* principle. He referred the Court to *EIC Services Limited and another –v-Stephen Lawry Phipps and others* [2003] EWHC 1507 (Ch) where Neuberger J (as he then was) observed:

> "*122. Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.*"

47. No basis was advanced for holding that this principle applies not just to shareholders meetings but to directors meetings as well; the question here is whether the directors have made a valid decision. But it may well be right that all of the shareholders (or a sole shareholder) can validate many decisions made by the directors in breach of the articles. However, the point advanced by FDL does not completely solve the puzzle posed by Canterbury's counsel. If it is unclear whether any legally effective share transfer occurred, it must equally be unclear whether the newly registered shareholder can ratify an arguably defective appointment of directors and an arguably defective approval of the registration of the shares in the new shareholder's name. However, as will be seen, the further documents produced on the day of the hearing did shed fresh light on this issue, without (ultimately) helping to unravel the legal knot.

48. So FDL has failed to explain why, if the change of beneficial ownership and directors did in real world terms take place in February 2018 and there was an administrative delay in formally registering the changes in FDL's corporate records with retrospective effect, the key human actors involved in this change expressly represented to the NYSC in two different proceedings, and to Canterbury in May 2018, a state of affairs that did not reflect substantive commercial reality but merely reflected technical and transitory corporate formality. If the relevant human actors gave so much deference to corporate

formalities, one would have expected the October 10, 2018 Written Resolution to be expressed in terms which did not purport to have retrospective effect. There is nothing unusual about retrospectively approving through corporate instruments acts and transactions which a company has represented to the world have validly occurred. It is highly unusual, and ought to be legally impossible, retrospectively to 'approve' transactions which did not in fact previously take place or to confer the status of beneficial owner on a person who at the material time did not assert the rights of beneficial owner. As Mr Levers would accept when deploying the Articles and the further documents to demonstrate how the directors could indeed have been validly appointed by reference to instruments executed in February 2018, FDL's Articles provided that a share transfer did not take effect until it was entered in the register.

49. I am bound to find, based on the material properly before the Court pursuant to the directions given for the hearing that FDL has failed to substantively comply with paragraph 1 of the AML Order as regards the most important request about beneficial ownership. Its fundamental obligation was to clarify the position. Its response added more confusion. The most powerful illustration of how confused FDL itself seemingly is about its beneficial ownership is its remarkable Answer filed on December 4, 2018 in the Stenergy Proceedings to a plea that Mr Chen was the beneficial owner in which this fact was denied on the grounds that it lacked "*knowledge or information sufficient to form a belief as to the truth or falsity of*" the allegation that, *inter alia*, "*Fortunate Drift is...owned by Linyu Chen*".

50. FDL's Answer reflects the position that Canterbury and the Court are left in today as regards the averment in the Fourth Sin Affidavit that Mr He is and has been the beneficial owner of FDL since February 1, 2018. At the heart of FDL's non-compliance is an apparent and possibly genuine (but clearly misguided) belief that neither Canterbury nor the Court has the right to inquire into this matter. The AML Order was not appealed. There is an apparent assumption that whatever FDL chooses to say from time to time on the beneficial ownership question should be uncritically accepted even if it is inherently incredible on its face (at worst) or unintelligible (at best). This is best illustrated by the following extract from the Fourth Affidavit of Dominic Sin:

> "*25. FDL therefore considers that the Court should reject Canterbury's application on the basis that FDL has complied with paragraph one of the AML Order as it has provided the requested documents and it was not part of the AML order that the documents provided had to address settle any and all concerns Canterbury had.*"

51. In my judgment it was or ought to have been obvious to FDL that the central purpose of the AML Order as regards request (a) was to clarify and explain the beneficial

ownership position against a background of inconsistent copies of registers having been supplied before the Order was made. It also was and ought to have been obvious that the AML Order was made not to satisfy Canterbury's regulatory compliance concerns, but because the Court was not willing to confer the continued benefit of injunctive relief on FDL in circumstances where it was in breach of KYC/CDD requirements which would have applied in an ordinary commercial relationship. Rather than engaging with the objective merits of the beneficial ownership position with a view to addressing the concerns of the Court, the general tenor of FDL's response was to attack the merits and motives of Canterbury's renewed information requests. This 'red herring" tactical approach cannot be attributed to a naïve misunderstanding of the AML Order and the Court's reasons for making it in the present circumstances. It is ultimately obvious that FDL is unable (or unwilling) to provide a straightforward and credible explanation as to how and when the registered change of beneficial ownership occurred, if any change did in fact occur at all.

52. Canterbury has satisfied me that FDL's non-compliance with the AML Order engages the Court's discretion to discharge the December 13, 2018 Order and provides sufficient *prima facie* grounds for granting such relief.

Findings: the impact of the First Affidavit of Claire Murphy

53. Although Mr Asif QC initially objected vigorously to the Court giving leave for FDL to rely on the First Affidavit of Claire Murphy (a Mourant paralegal), he ultimately sagely conceded that it did not seriously prejudice Canterbury's position. I accordingly grant leave to FDL to rely on this evidence, which was sworn on the date of the hearing.

54. The First Murphy Affidavit exhibits three "*further relevant documents*" not previously placed in evidence:

(a) "*Resignation letter from Chen Linyu to the Plaintiff dated 1 February 2018*";

(b) "*Written Resolutions of the directors of the Plaintiff appointing Dominic Sin as a director dated 10 February 2018*";

(c) "*Letter from Dominic Sin consenting to act as a director of the Plaintiff dated 10 February 2018*".

55. Understandably the deponent was in no position to explain the provenance of these documents. Their late production appears to be designed to meet the significant questions raised about whether Mr Sin was validly appointed as a director. But they do not directly address the beneficial ownership issue. Unsurprisingly, they raise more

questions than they provide answers, not least when were the documents executed? On their effective date or on the eve of the February 25, 2020 hearing? If they were executed in February 2018, why did Mr Sin and Mr He sign a Written Resolution dealing with the same director appointment issues in October 2018? Dealing with each document in turn:

(a) the Swap is dated January 31, 2018. If it did take effect as a share purchase or transfer agreement as FDL contends (which on the face of the English translation of the Chinese original it does not), this leaves unexplained why Mr Chen described himself to Canterbury as the beneficial owner of the company in May 2018, more than three months later;

(b) the resignation letter from Mr Chen suggests that he actually tendered his resignation on February 1, 2018. It sheds no light on when the resignation was accepted, a matter which is seemingly governed by the October 10, 2018 Written Resolution, which purportedly accepted it with effect from February 1, 2018. It leaves unexplained why he still held himself out as the Chairman and Chief Executive Officer, a director and beneficial owner in May 2018;

(c) the February 10, 2018 Written Resolution of the Directors purportedly appointing Dominic Sin as a director presents another brain-numbing legal puzzle. It is signed by Mr Chen as "Resigning Director" (10 days after his resignation took effect according to the terms of the October 10, 2018 Written Resolution), by Mr He as "Proposed Director" (10 days after he was effectively appointed, according to the terms of the October 10, 2018 Written Resolution) and by Mr Sin as "Proposed Director". This suggests that, contrary to the later Written Resolution signed by Mr He and Mr Sin:

    (1) Mr Chen did not at the time consider that his resignation had taken effect on February 10, 2018;

    (2) Mr He did not consider at the time that his appointment as a director took effect on February 1, 2018; and

    (3) Mr Sin did not consider at the time that Mr Chen had resigned effective February 1, 2018 and that Mr He had become a director on that same date;

(d) the February 10, 2018 Consent to Act letter is entirely straightforward in that Mr Sin accepts his appointment "*with immediate effect*".

56. Despite the various questions raised by these documents, and their seemingly irreconcilable inconsistencies with other FDL documentation, they do potentially locate one piece of the puzzle referred to above as to how Mr Sin could have been validly appointed as a director. Mr Levers made the interesting submission that Mr Chen was still on February 10, 2018 the sole registered member of FDL; he was therefore competent under the Articles, qua member, to appoint Mr Sin as a director, irrespective of his status as a director. It followed that, the quorum for the Board of Directors being only one, Mr Sin alone was competent on October 10, 2018 to approve the share transfer from Mr Chen to Mr He, without regard to the validity of Mr He's appointment as a director. I accept it could be argued that Mr Chen as the sole shareholder of record could also have in that capacity appointed Mr He as a director at any material time before the date when the share transfer was registered. In the context, and in light of this additional corporate documentation, the *Duomatic* principle would seem to potentially apply to this issue and Mr Levers' reliance upon *IC Services Limited and another –v-Stephen Lawry Phipps and others* [2003] EWHC 1507 (Ch) (at paragraph 122) seems justified.

57. However if this line of analysis is correct, it must follow that the October 10, 2018 Written Resolution and the latest version of the Register of Members are both ineffective in law to the extent that they purport to record the transfer of legal title to the sole share in FDL as occurring on February 1, 2018. This position is plausible. It also must follow, though, that the Written Resolution and the Register of Directors were also wrong to confirm that Mr Chen ceased to be a director on February 1, 2018. This position is also not wholly implausible but it leaves unanswered the question, admittedly not important for present purposes, of precisely when did Mr Chen's resignation take effect. It also follows that Mr Sin must have been wrong to confidently depose in his Fourth Affidavit that the second Registers of Directors and Members reflected the true current position. Of course, I am not required to reach a concluded view on any of these underlying issues and do not do so. The purpose of these observations is to explain why I have found that FDL has not complied with the AML Order by failing to explain in any way which comes close to being comprehensible who the beneficial owner of FDL is.

58. I have already found based on the evidence properly filed before the hearing that FDL failed to substantially comply with paragraph 1 of the AML Order as regards request (a) and beneficial ownership, without considering other lesser complaints. How then does this late evidence, which I rule may be admitted, undermine that conclusion? The following general factors arising from the further documents potentially operate in FDL's favour:

(a) according to the Articles (6.2) Mr Chen was the sole legal shareholder of FDL until the share transfer was actually registered on or about October 10, 2018

pursuant to the Written Resolution, and the purported registration with effect from February 1, 2018 is of no legal effect;

(b) Mr Sin was accordingly entitled to describe Mr Chen as FDL's "owner" in his Affidavit dated May 2, 2018 in the America 2030 Proceedings, because he was the registered member until the October 10, 2018 Written Resolution was implemented, even if he was not the beneficial owner;

(c) Mr Levers was right to admit that FDL has poor corporate administration practices. The backdating of the registration of the share transfer was simply an administrative error. It is therefore important to distinguish between substantive and purely technical concerns.

59. However, the following important aspects of the case for non-compliance with the AML Order by failing to credibly explain the beneficial ownership position are not diminished by the further documents:

(a) the lack of evidence of an actual share purchase agreement pursuant to the Swap which merely contemplated such a transaction and did not on its face purport to effect sale of the sole share in FDL;

(b) the lack of evidence of an executed share transfer instrument (standing by itself perhaps merely an administrative matter);

(c) the fact that Mr Chen signed documents in May 2018 representing to Canterbury that he was the beneficial owner of FDL and a director at a time when Mr Sin in these proceedings now swears that he was not;

(d) the fact that Mr Sin on behalf of Mr Chen swore on May 2, 2018 when verifying the America 2030 Complaint that Mr Chen was then the Chairman and Chief Executive Officer of FDL when he now swears in these proceedings that Mr Chen was not at that time still a director or a beneficial owner;

(e) the fact that FDL equivocated about its ownership in the Stenergy Proceedings on December 4, 2018 only weeks after the ownership position was supposedly clarified in mid-October 2018 by the Written Resolutions;

(f) the strong overall impression that identifying who the beneficial owner is ought ordinarily to be a simple and straightforward proposition and that FDL has overall dealt with explaining the position in a wholly unconvincing and generally evasive manner.

60. I find that even taking the further documents into account, Canterbury has made out a *prima facie* case for being released from its undertakings based on FDL's substantial non-compliance with paragraph 1 of the AML Order in relation to request (a).

Findings: appropriate relief for FDL's non-compliance with the AML Order

61. Paragraph 1 of the AML Order contemplated that Canterbury would be able to apply for a summary determination on the papers of its right to be discharged from its undertakings embodied in the December 13, 2018 Order in the event of breach. I have already decided, by acceding to FDL's request for an oral hearing, that the non-compliance alleged was not so flagrant that the issue of non-compliance was suitable for summary determination. The AML Order is a very unusual 'beast' and that part of the case on non-compliance which I have accepted required somewhat nuanced analysis.

62. Mr Levers' fall-back submission was that if a breach had occurred, it would be disproportionate to discharge the December 13, 2018 Order altogether. If further information was required, it could be supplied. The most important missing documents which were clearly required to be produced but which have not been produced are a share purchase agreement and a share transfer instrument. Alternatively, FDL should confirm that no such documents exist. I find that FDL should be ordered to produce such documents (if they exist) within 14 days of the date of delivery of the present Ruling or confirm that no such documents exist.

63. I do not accept that releasing Canterbury from their undertakings would be a disproportionate penalty for FDL's breach. Canterbury was in my judgment fully justified in making the present application and has clearly demonstrated its *prima facie* entitlement to be released from its undertakings on the basis that they were originally proffered to the Court. That was as an alternative to the terms of the interim injunction initially granted to FDL, together with additional cross-undertakings being required of FDL. However, it does not follow that Canterbury should be left free to deal with the disputed assets as it sees fit. This conclusion largely flows from the logic underpinning the present application.

64. The position may be summarised as follows:

(a) Canterbury contends that it should not be required to hold assets received from a client which has failed to confirm who the true beneficial owner of the assets is as required by the AML scheme;

(b) I have found that FDL has failed to provide the requisite information about its beneficial owner and that the most important outstanding documents relating to request (a) not yet supplied should be supplied or confirmation given that the documents do not exist and accordingly cannot be produced;

(c) Canterbury should logically prefer to hold the assets under Court Order until the conclusion of the present litigation and/or until the beneficial ownership issue can be resolved. It is inconsistent with the nature of Canterbury's concerns for Canterbury to wish to be able to deal with the assets as its own while their provenance is still in doubt, regardless of its position in the present litigation;

(d) FDL is keen to agree to transfer the assets to a third party and Canterbury has, perhaps in part for tactical reasons, declined to pursue such negotiations. Mr Asif QC rightly submitted that the Court has no power to direct such a transfer. Even if I had the power to do so, I would not exercise it at this stage of the litigation based on the presently available facts;

(e) having found on Canterbury's application that its concerns about the beneficial ownership of FDL and/or the assets it received from FDL are justified, it would be contrary to the public policy considerations which prompted the making of the AML Order for Canterbury to be left free to deal with 'suspect' assets which FDL claims are its assets as Canterbury sees fit. The fact that FDL could enforce any judgment it obtains against Canterbury is beside the point.

65. I do nonetheless find that FDL's failure to comply with paragraph 1(a) of the AML Order justifies discharging Canterbury from its undertakings contained in the December 13, 2018 Order altogether in the exercise of this Court's discretion. Before the Order is drawn up, however, I would invite Canterbury to consider the above provisional findings about the public policy consequences of such relief being granted. These issues were understandably not canvassed at the hearing of the present application.

Conclusion

66. Subject to hearing counsel, if required, on the terms of the final Order and as to how Canterbury proposes to deal with the assets presently preserved by the December 13, 2018 Order, Canterbury is entitled to be released from its undertakings.

67. As regards the AML Order, FDL shall provide to Canterbury within 14 days of the date of delivery of the present Ruling copies any share purchase agreement and/or share transfer agreement relating to the disputed 2018 share transfer transaction or confirm that no such documents exist. I would otherwise stay the AML Order until further Order to avoid a disproportionate amount of costs be expended on this issue which is collateral to the main issues in controversy in the present action.

68. Unless either party applies within 21 days to be heard as to costs, Canterbury's costs of the present application shall be paid by FDL to be taxed if not agreed on the indemnity basis and payable forthwith.

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