OUTER HOUSE, COURT OF SESSION

[2019] CSOH 15

P525/18

NOTE BY LADY WOLFFE

In the cause

DAVID ARCHER

Petitioner

To recall an order made under section 1 of the Administration of Justice (Scotland) Act 1972 at the instance of PETROCELTIC RESOURCES LIMITED

Respondent

Petitioner: R Dunlop QC, R Anderson; Mackinnons
Respondent: Lord Davidson of Glen Clova of Glen Clova QC, Tyre; Gilson Gray LLP

15 February 2019

Introduction

Motion to recall section 1 order

[1] The Noter, Mr Archer, seeks recall of an order granted by interlocutor of this court on 30 August 2017 ("the order") on the *ex parte* application of Petroceltic Resources Limited ("the petitioner") in proceedings for that purpose ("the section 1 proceedings") under section 1 of the Administration of Justice (Scotland) Act 1972 ("the Act"). Mr Archer was the first respondent in the section 1 proceedings; the other three respondents were members of his immediate family.

[2] The basis for recall was said to be due to the lack of candour on the part of the petitioner, in the form of a failure to disclose certain information material to the court at the time of the grant of order. Mr Dunlop QC, who appeared on behalf of the Noter, confirmed that the impetus for this application for recall was the discharge by the English High Court of a previously granted worldwide freezing order ("WFO") in English proceedings ("the English proceedings") on grounds of a similar non-disclosure.

The respondents' position

[3] Lord Davidson of Glen Clova QC, who appeared on behalf of the respondents to the Note (being the petitioner in the section 1 proceedings), conceded that there had been a degree of non-disclosure. His position, in short, was that this did not vitiate the order; in any event it did not vitiate all of it (given that the non-disclosure related to only one of several parts of the petitioner's case) and, if the order were recalled, it should be granted of new.

Scope of issues argued at recall

[4] Parties' submissions comprised a day and entailed detailed reference to the pleadings, productions, the decision of the English High Court in the English proceedings already adverted to, and to some of the caselaw. An additional matter raised was the amendment by the petitioner of commercial proceedings they brought subsequent to the grant of the order, in effect, to substitute associated companies as new pursuers in those actions. Further, the Noter makes a separate complaint that the petitioner deployed the information recovered under the order in other proceedings (the English proceedings), in breach of the undertaking given to the Court upon the grant of the order. Reference was

also made to infringement of the article 8 rights of the Noter and his family. A number of additional orders are sought in the Note, including a declarator that the petitioner is liable to the Noter for losses incurred as a result of the order and a number of pecuniary claims. The issue argued before me was confined to the recall of the order.

[5] I begin by outlining the basis of the petitioner's section 1 proceedings and subsequent events, so far as it is necessary to do so, before setting out the matters not disclosed and parties' submissions.

The grounds and supporting information presented at the time the order was sought

The petitioner's application in the section 1 proceedings

[6] In the section 1 proceedings the petitioner explained that it is an oil and gas company trading in a number of companies. It was the parent company (directly or indirectly) of a number of wholly-owned subsidiaries, including Petrolceltic Bulgaria EOOD ("Bulgaria"), Petrolceltic Luxembourg Sarl ("Luxembourg"), and Petrolceltic Company of Egypt ("Egypt") (hereinafter referred to collectively as the "Petrolceltic Companies"). The first respondent, the Noter, was a director of the petitioner between about February 2006 and February 2016. In addition, he was the registered manager or director of Bulgaria (between 1999 and February 2016), of Luxembourg (up to early 2016) and Egypt (the date is not specified). The petitioner avers that the other respondents, respectively the daughter and two sons of the Noter, had significant connections with a number of other companies, either in the form of substantial shareholdings or holding positions of responsibility (eg as a "named representative" of Bon Marine International AD, a Bulgarian company).

[7] The graveman of the petitioner's complaint is said to be the unlawful diversion and extraction of funds from the Petrolceltic Companies "via a range of third party companies in

which [the Noter] was either directly or indirectly interested". The dealings are set out in detail in the petition but for present purposes may be summarised as follows:

1. *The dealings with Dexia*: it is stated that the first respondent caused Bulgaria to enter into contracts between 2010 and 2013 with a third party, Dexia Bulgaria OOD, 50% of whose share capital is owned by Dexia International and said to be owned and controlled by the Noter. Reference is also made to a joint venture. In effect, the contracts entered into with third parties connected to the Noter were said to be the means by which profits were diverted from the petitioner to one or more of these third parties. The Noter did not disclose his interest in Dexia. Some of the aforementioned names were said to be used with "deceptive intent". The loss from this alleged wrongdoing is estimated at approximately US$2 million.
2. *The dealings with Optimus:* it is stated that the first respondent caused Bulgaria, Egypt and Luxembourg to enter into a number of contracts between 2007 and 2015 with a Bulgarian company, Optimus Engineering AD ("Optimus"). Reference is made to the companies said to be controlled by the Noter (and subsequently by persons said to be closely connected to him) and which held significant shareholdings in Optimus. In brief, it is stated that these Petroceltic Companies paid approximately £23 million to Optimus for "engineering services". The petitioner's position is that the Noter directed that these contracts were not subject to any tendering process and that the invoices related in part to work never undertaken and in part to work excessively priced. By these means profits were diverted from these Petroceltic Companies. The Noter did not disclose his interest in Optimus. The sums lost are estimated at US$1.2 million.

3. *Dealings with the Bon Marine group of companies:* the petitioner referred to two Bulgarian "Bon Marine" companies, namely Bon Marine International EOOD and Bon Marine International AD. The Noter is said to have caused Bulgaria to enter into a series of uncommercial and/ or unnecessary contracts with these companies. These included a charter party and contracts for the provision of dockside storage at excessive rates and for which Bulgaria had no need. The petitioner's estimate of loss from this alleged wrongdoing is said to be US$7.4 million.

4. *Dealings with Orbida:* the petitioner states that the Noter owns the entire shareholding of the ultimate parent company (Orbis Holdings Limited) of another Bulgarian company, namely, Orbida EOOD. The Noter is said to have caused Bulgaria to enter into a series of uncommercial agreements (including car hire agreements and a lease) at excessive rates with estimated loss of US$260,000.

In addition to very detailed statements in the petitioner's petition, the petitioner's application for the order was supported by an inventory of productions.

The order

[8] The petition contained an extensive specification of the documents in respect of which an order under the Act was sought. This included documentation evidencing dealings Bulgaria had with Dexia, Optimus, Bon Marine and Orbida, as well as the Noter's financial records showing *inter alia* shareholdings and dividends in or from these companies. Documentation evidencing the alleged hacking into Bulgaria's IT systems was also sought.

The material presented to the court at the time the order was sought

[9] The petitioner's first Inventory of Productions comprised seven items. Four of these items bore to be examples of the allegedly objectionable contracts entered into with third parties. There was an unsigned affidavit provided by the in-house solicitor to the petitioner as well as an undertaking granted by him on their behalf. For present purposes, it is necessary to note in more detail No 6/4 of Process, described as "Notice from Diligence Geneva" dated 19 May 2017 ("the Diligence report"). It is this document whose terms are said to be incomplete or failing to reflect the totality of information available to the petitioner, and which is at the heart of the Noter's motion for recall of the order.

The Diligence report

[10] The Diligence report bears to have been prepared by an entity known as Diligence Global Business Intelligence SA ("Diligence"), and it sets out their findings. The scope of its enquiries related to Bulgaria and the conduct of the Noter and a named individual, a Bulgarian citizen, with whom he is said to be associated. In the preliminary part of the Diligence report it is stated that the Noter took advantage for years of the lack of supervision of Bulgaria by, or lack of integration of it with, the petitioner. There is reference to the operation of "a parallel structure to conceal" fraudulent activities and, further, the removal of Bulgaria's server and erasure of its hard drive within a few days of notification of investigation by Diligence. It was also noted that the Noter had logged into Bulgaria's IT systems in order to delete files, notwithstanding that he was neither a consultant nor an employee at that time. This part of the Diligence report concluded that Diligence had uncovered fraudulent activity at the expense of the Petroceltic businesses.

[11] The body of the Diligence report sets out the conduct or actions said to have been taken by the Noter (or individuals or corporate entities associated with, or said to be controlled by, him) which corresponds broadly to the individual chapters of the petition's grounds, which I have set out above (at para [7]).

[12] The annexes to the Diligence report were not produced to the court at the time the order was sought. These were subsequently produced and comprised a full lever arch file of materials. No reference was made to any of the annexes in the hearing before me.

The Noter's response to the petition proceedings

[13] The Noter did not lodge answers to, or otherwise oppose, the petitioner's petition. He did not seek recall of the order in the period following its grant.

The non-disclosure on the part of the petitioner

Documentation and outcome of investigations

[14] Cockerill J sets out in her careful and full judgment *Petroceltic Resources Ltd and others* v *David Archer* [2018] EWHC 671 (Comm), dated 2 March 2018 ("the WFO discharge judgment") the background facts concerning the petitioner, its associated companies, the Noter, the allegations and investigations of these carried out in Bulgaria: see paragraphs 4 to 16. I need not repeat this.

[15] In statement 6 of the Noter's Note he identified a number of documents or decisions omitted from the petitioner's petition and which he contended resulted in the petition being misleading by reason of being incomplete and failing to mention these.

[16] The substance of the nondisclosure was that a variety of investigations in Bulgaria were conducted; they found no evidence of the kind of misconduct being investigated and

this was not disclosed at the time the order or the WFO in the English proceedings were obtained. In particular, the Bulgarian prosecution service had investigated a complaint initiated by Diligence (in August and October 2015) and relating to Optimus and Orbida. Its original determination that there was no evidence of fictitious deals or extraction of funds (in March 2016) was upheld on appeal (in late March 2016). While that decision was revoked by the Supreme Prosecutor's Office of Cassation on 31 May 2016, the tax authorities release of information was said to have returned a zero result, with the consequence that the decision not to launch a prosecution was upheld. After a further appeal and investigation was ordered in August 2016, the authorities subsequently concluded that they found no evidence of a crime and refused to institute criminal proceedings. That decision, dated 16 January 2017, was notified to Diligence. Furthermore, an earlier internal investigation conducted by internal legal counsel and assisted by Herbert Smith Freehills, concluded that allegations of bribery and fraud were without foundation.

[17] To the extent there was any difference in the extent of non-disclosure in the section 1 proceedings and the English proceedings, it was that the existence of some of the Bulgarian investigations was disclosed in the English proceedings at the time the WFO was granted. However, the exculpating outcome was not disclosed. See the WFO discharge judgment paragraphs 71 to 72 and 103 to 106.

Submissions on behalf of the Noter

Procedural background

[18] Mr Dunlop QC set out the procedural background. On the same day that the petitioner obtained the order they also presented a summons against the Noter seeking US $11 million. The order was executed the next day, on 1 September 2017, at the Noter's

address and on subsequent dates and at addresses occupied by the Noter's children. The summons was not lodged for calling. This was protested and Lord Clark ordained that the summons be lodged. A number of additional actions against the Noter were raised by companies within the Petroceltic group. In one of these actions, a minute of amendment was lodged in late November 2017 to delete the name of the petitioner (who, of course, is the pursuer) and to substitute one of the other Petroceltic companies as the new pursuer. In early December 2017 an interim worldwide freezing order ("WFO") was sought from and granted by the English court against the Noter. This was discharged by Cockerill J on 2 March 2018.

Matters not disclosed

[19] Mr Dunlop QC referred to a number of the productions to demonstrate the content of what had not, but should have been, disclosed. I have summarised the substance of these matters (at para [16], above). To the extent there was a difference in what was disclosed in the section 1 proceedings and the English proceedings, Mr Dunlop QC observed that the English court had at least been told about the internal investigation and the activities of the Bulgarian prosecutors (albeit it was suggested that those had fizzled out). The non-disclosure in the section 1 proceedings was more egregious. Mr Dunlop QC stressed that the nondisclosure was not the responsibility of the petitioner's legal advisers but was a decision taken by the petitioner itself. He referred to Answer 7 to the Note.

Petitioner's acceptance of non-disclosure

[20] Lord Davidson of Glen Clova QC intervened to clarify that he accepted that these matters were not disclosed to the court in advance of the grant of the order, and that they

should have been. He maintained that it was not deliberate. (He expanded on these matters, but I record those below, under his submissions.)

The Noter's comment on the petitioner's admission

[21] Mr Dunlop QC resumed his submissions. He was sceptical of the explanation that the nondisclosure arose from a mistake. The petitioner had been asked and had chosen not to disclose information to their agents. He explained that the Noter had not been told the outcome of the internal report and that the report of the Bulgarian prosecutors had not been produced to him. Indeed, he was not aware of these until they were disclosed in the English proceedings.

[22] In his submission, the nondisclosure was egregious in the extreme and it was of no avail to look separately at the allegations concerning Dexia or Bon Marine. The petitioner had relied entirely on the Diligence report in obtaining the order. He was also critical of Diligence's stature as neither experts were independent. At the same time, the petitioner should have disclosed the outcome of the internal investigation and the decision of the Bulgarian prosecutor not to initiate proceedings. In support of the submissions Mr Dunlop QC referred to paragraph 36, 59 and 69 to 76 of the WFO discharge judgement.

The Authorities

[23] Mr Dunlop QC turned to the authorities. He referred to the two questions posed by the Inner House in *The British Photographic Industry Ltd* v *Cohen, Cohen, Kelly, Cohen & Cohen Limited* 1983 SLT 137 at page 138 to be answered before any order under section 1 of the Act could be granted. He likened this to a Anton Piller order in England. He next referred to *Bell* v *Inkersall Investments Ltd* 2006 SC 507 and the observations of the court at paragraph 19,

to the effect that recall of interim interdict was justified in that case because it had been obtained on an uncandid basis. Under reference to observations in the case of *Brink's Mat Ltd* v *Elcombe* [1988] 1 WLR 1350 at 1357, he accepted that the court retained a discretion, notwithstanding proof of material non-disclosure which justified immediate discharge of the original order, nonetheless to continue or make a new order on similar terms. This passage of the opinion of Ralph Gibson LJ is based on the earlier case of *Bank Mellat* v *Nikpour* [1985] FSR 87 at 91. From these authorities I understood Mr Dunlop QC to eschew an absolutist position (ie that nondisclosure necessarily and inevitably meant recall of the original order) but he nonetheless maintained that the nondisclosure here was so egregious that it should be recalled. The petitioner should not be able to derive an advantage from its own nondisclosure. He accepted the court retained a discretion.

[24] Mr Dunlop QC also submitted that the documentation obtained by virtue of the order had been used in the English proceedings and this constituted a breach of the standard undertaking given to the court on behalf of a party obtaining an order under section 1 of the Act. Furthermore, as I understood him, he argued that the petitioner was seeking to maintain the benefit of the order even though it was no longer the pursuers in the related actions in the commercial court. He submitted that the order did not enure to the benefit of the petitioner; it was no longer pursuing a case against the Noter but it nonetheless wanted to maintain the benefit of the orders.

[25] Returning to the discharge of the WFO in the English proceedings, Mr Dunlop QC submitted that there was no real difference between this case and what was before her. He referred to her analysis at paragraph 108 to 111. The same result should follow here. In relation to the petitioner's submission about the renewed or the ongoing investigations, he was not in a position to respond to that for the purposes of his motion. Taking a somewhat

different tack, Mr Dunlop QC pointed out that the petitioner was seeking to retain all of the material. What had been recovered included a full imaging of the Noter's records. The only production lodged from that, however, was a loan document. The order should be recalled and the parties to the ongoing commercial proceedings should pursue recovery of a more limited scope within those proceedings. The court should be astute to prevent the petitioner taking unfair advantage. While Mr Dunlop QC referred to the Noter being deprived of access to this documentation, I did not understand the state of affairs to subsist and that the Noter has had access since the Note procedure had been initiated.

[26] Mr Dunlop QC's motion was for recall of the order and otherwise to continue other aspects of the order.

Submissions in reply on behalf of of the petitioner

[27] Lord Davidson of Glen Clova QC began by disputing Mr Dunlop QC's assertion that only one document had been utilised amongst all of those recovered as a consequence of the order. He referred to the unexplained transfer of US$1.1 million to the Malta account, the recovery of shredded materials and the non-recourse loan agreement. In passing, he observed that the Noter had not requested these materials of the petitioner's agents. He maintained that there were real issues being ventilated in the commercial court and which included the issue of the shredded documentation.

[28] In his submission, the English proceedings had a different focus and matters had moved on in Scotland. He stressed that the nondisclosure was not deliberate but, in his submission, caused by miscommunication. Even accepting that there had been nondisclosure, which Lord Davidson of Glen Clova QC emphasised was not deliberate, the consequence was not to render the order nugatory. The court retained a discretion and,

further, he submitted that Cockerill J went "too far and too fast" in discharging the WFO. The court should not simply follow her approach.

[29] He argued there was no concerted plan to conceal anything. In any event, the Noter was himself aware of the internal investigations and, indeed, had been questioned in the course of them. He was therefore aware of this. That made it highly improbable that any nondisclosure was deliberate. In relation to the other investigations, these all related to Optimus Engineering; they did not relate to Dexia or Bon Marine. If there were a failure, even if inadvertent, of full and frank disclosure this was confined to the allegations concerning Optimus. The court could look at the other allegations as concerning discrete matters. To illustrate this point Lord Davidson of Glen Clova QC refers to certain passages in the petition concerning these other companies.

Updated information about ongoing investigations in Bulgaria

[30] In relation to events in Bulgaria, on the information available to him, the central ministry had now sent a notice back to the local prosecutor and investigations were continuing. These investigations had been expanded into a full complaint against Dexia and Bon Marine. This was confirmed to the petitioner's agents the day before the hearing. The petitioner and the Bulgarian solicitors have also confirmed that these investigations were ongoing and there were now four areas of concern. In relation to the earlier internal investigation, the petitioner had not accepted this. It did not regard the Noter or his named associate as blameless. It was for these reasons that Lord Davidson of Glen Clova QC invited the court to re-impose the order of new, if it were compelled to recall that by reason of the non-disclosure.

[31] In relation to Mr Dunlop QC's comparison of these proceedings with the English ones, the risk of dissipation under consideration in the English proceedings was not the same test to be applied in these proceedings. He submitted that the court should approach the matter afresh by asking itself what it would have done if it had been told. It was not correct to suggest that the Noter was being harassed by execution of the order without foundation. The was intelligence and facts, not just supposition. There was a large amount of organised crime in Bulgaria. Diligence have continued their investigations and put these to the Ministry in Bulgaria. The investigations have been widened to include the other companies referred to in the petition. There was a distinction between the prosecutors at the local level and the central authority. The latter had intervened and remitted matters back to the local level where the investigations have restarted. These are ongoing.

[32] In summary his position was that he accepted there was a failure of the duty of full and frank disclosure. However, this was not deliberate. It remained the case that there was surreptitious conduct by the Noter and concealed activity on his part, for example the interests he had not disclosed. Lord Davidson of Glen Clova QC made brief reference to a loan document which stipulated it was not be repaid, and which he indicated was in substance a bribe. He also referred to a transfer of US$1.1 million to the Noter's HSBC account in Malta and, on present information, this was an unexplained payment and likely to be a bribe.

[33] Lord Davidson of Glen Clova QC also queried what was to be done following return of the documents, as the Noter sought? Were the averments concerning this to be deleted? This was unrealistic and did not serve the interests of justice. If it were open to the petitioner to continue to use the documentation recovered and the knowledge gained, there

was no practical purpose to the Noter's motion to recall or the ancillary pecuniary orders claimed.

[34] In relation to the use of the materials by a subsidiary of the petitioner, in his submission this was no more than a technical breach. The documentation had flowed from the petitioner as the parent company to its wholly-owned subsidiaries. The same solicitors were involved and it was highly artificial to suggest that this was analogous to the kind of breach disclosed in *Harman* v *Secretary of State for the Home Department* [1983] 1AC 280. In the instant case, the material had been recovered for litigation and had been used in the litigation for which purpose it had been sought. In relation to the alleged use of these materials in the English proceedings, Lord Davidson of Glen Clova QC disputed this. He submitted, under reference to paragraph 49 of the affidavit of Paul Tracey (lodged in the English proceedings), that all that had been produced for the purpose of the English proceedings had been the summons in the Scottish action and the report of the Commissioners. The deponent, who is a partner of the firm of Grosvenor Law, agents for the applicants for the interim WFO from the English court (and which included *inter alia* the petitioner), explained that Scottish agents, Levy & McRae, had advised that permission of the Court of Session would be required before information obtained as a result of the order could be used in the English proceedings. That passage of the affidavit also records Levy & McRae's advice that it would not be a breach of the undertaking given to the Scottish court for the summons and the commissioners' reports to be produced to the English court for the purposes of the English proceedings. Lord Davidson of Glen Clova QC stressed that no documents recovered under the order had been used directly for the English proceedings. In any event, the English proceedings were no longer insisted in.

[35] In relation to Mr Dunlop QC's characterisation of the petitioner's conduct, Lord Davidson of Glen Clova QC replied that the nondisclosure was not deliberate. In other words, it was not a considered decision not to disclose. The situation arose from a miscommunication between the Bulgarians and the Scottish agents. Lord Davidson of Glen Clova QC explained that the executive within the petitioner instructing these matters was Bulgarian and he did not understand that disclosure in Scotland required disclosure of the investigations by the Bulgarian prosecutors, which were by that stage final, or their decisions. As a Bulgarian national he was not well-versed in the obligations for full and frank disclosure which were features of the UK jurisdictions. It was, at bottom, a question of miscommunication. The petitioner's English and Scottish agents were well aware of this obligation. They thought it had been complied with and as soon as they became aware that it had not been, they disclosed this factor. Grosvenor Law had made enquiries of the petitioner before the order was sought. Neither they nor Levy & McRae knew of the existence of the non-disclose materials at the time the order was sought. This was not deliberate conduct on the part of the petitioner.

[36] None of this was deliberate in the sense of being culpable. Furthermore, if it were the case that the Noter was ignorant of the involvement of the Bulgarian prosecution service, this was curious. At that time, the Noter was a director and if he had not been questioned by the Bulgarian prosecution or tax authorities, this was indicative that the investigations were not full investigations. Notwithstanding any observation to the contrary in the judgement of Cockerill J, the Noter was undoubtedly aware of the petitioner's internal investigation.

[37] Turning to the status of Diligence, of which Mr Dunlop QC was critical, they were not tendered as "experts" in the sense of being independent or neutral. They were not presented in this way. They were, however, skilled investigators.

[38] As far the cases cited by Mr Dunlop QC, Lord Davidson of Glen Clova QC stressed that any breach on the part of the petitioner was not deliberate; there was a fluidity in language which contributed to the misunderstanding. One had to look at this as one factor among many, which was consistent with the discussion in some of the cases cited, for example *Brink's Mat* at page 1357. What those cases disclosed was that there was no hard rule that a non-disclosure necessarily resulted in discharge of the order. He noted the passages in *Bank Mellat* to the contrary and the observations, for example, of Slade LJ (at 1358D-E and 1359B-D), about the court retaining a discretion. He noted that while there were passages in the case law about self-incrimination this was not relevant in the instant case. This was not relied on and the Noter was not asked to incriminate himself. The case of *Bell* was unusual and, in any event, the obligation is on the lawyers. The instant case is quite different and distinguishable from *Bell*, as there is a basis for apprehension here. Further, some of the features recorded by the court in *Bank Mellat* (at the end of page 92) were not present in this case. In the instant case, one was in very different territory, and it remained a question of the particular facts and circumstances. In respect of the Article 8 implications, he accepted that an order such as that granted under section 1 of the Act was invasive but it was permitted under the ECHR. It was proportionate and it remained so for the order to continue. No further interventions or recoveries will take place. The *Harman* case is an artificial argument. It is also distinguishable on its facts.

[39] In relation to the WFO discharge judgment, Cockerill J had stated at paragraph 113 that she would have been minded to re-grant the interim WFO as proportionate, even if it had been deliberate, but she did not further explain her reasoning. In terms of the reference to the Scottish summons and the commissioners' reports, this was not something that was done lightly. Advice had been taken from English and Scottish agents.

[40] Recall should be refused on the order granted of new.

Discussion

Motion to recall on the basis of non-disclosure

[41] The basis for the Noter's motion is the non-disclosure of certain material information known to the petitioner (but not its agents or counsel) at the time of the order, and which is now admitted should have been disclosed. While Mr Dunlop QC referred to the test to be satisfied for the grant of orders under section 1 of the Act, *per* Lord President Emslie in *The British Phonographic Industry Limited* at 138, he relied principally on the now admitted non-disclosure of the outcome of the Bulgarian and internal investigations.

The duty of full and frank disclosure

[42] It is undoubtedly the case that there is a stringent professional obligation on those acting for parties seeking *ex parte* orders from the court (whether interim interdicts, as in *Bell* or an order under section 1 of the Act) to disclose all relevant factors, whether those are favourable or unfavourable to the party seeking the order. The duty to make a full, fair and accurate disclosure of material information to the court, and to draw the court's attention to significant factors (whether legal, factual or procedural), is essential to the proper and fair functioning of the exercise of the court's power to grant *ex parte* applications. The court has a continuing interest to ensure the integrity of the orders it pronounces and in that context it should be astute to ensure that a party does not benefit from its breach of this duty or otherwise secure an unfair advantage.

[43] Mr Dunlop QC accepted, in my view correctly, that non-disclosure did not *per se* inevitably require recall of the order and that in such circumstances the court retained a

discretion in the matter. This appears also to be the position in England: *Bank Mellat* at p 90, *per* Lord Denning MR; and applied *Brink's Mat Ltd, per* Ralph Gibson LJ at 1357D to F. (The extent of the court's discretion might be different in cases of illegality or a want of *vires* in how a court's order has been carried out (eg see *Dominion Technology Ltd* v *Gardner Cyrogenics Ltd (no 2)* 1993 SLT 832.))

Should the same result as in the English proceedings follow?

[44] I do not accept Mr Dunlop QC's submission that the subject matter of this recall and the discharge of the WFO before the English court are the same and that I should simply follow that decision. In my view, the two cases are not similar. The character of a WFO is materially different from the application under section 1 of the Act. Cockerill J was considering an order designed to address the risk of the dissipation of assets and which involved consideration of, among other things, whether there was a real risk supported by solid evidence that the future judgement would not be met because of unjustifiable dissipation by a defendant: see paragraph 21 (4) of the WFO discharge judgement. (The purpose of a WFO appears to be comparable to an application for caution in the Scottish courts, albeit the WFO is far wider in reach and effect.) However, the impact of such an order as described by Cockerill J is different and materially more draconian than the effect of the order, not least, because of the effect of a WFO in prohibiting a party from dealing with its own assets. That is not the effect of the order under section 1 of the Act, which is essentially to preserve documentation for the purposes of litigation. In the normal case, the documents recovered come under the control of the court and the opposing party may obtain access to these materials following the appropriate procedure (subject to confidentiality, legal privilege or similar issues).

[45] In relation to the discussion in the English cases of the consequence of breach of the duty of full and frank disclosure, from the two cases cited to me it is clear that English law has a well-developed case law on the consequences of nondisclosure. There appears to be a rule in English law that an *ex parte* order will be discharged if obtained without full disclosure. That, at least, is the import of the discussions in cases concerning *ex parte* injunctions: see *Brink's Mat Ltd* at p 1358C to D and the discussion, more generally, at pp 1356F to 1357. Indeed, in that case it is referred to as a "judge-made rule" (*ibid* at p 1358D to E, *per* Balcombe LJ). I am not persuaded that there is such a rule in Scots law or that that is the necessary starting point. Helpful though the discussion is in these English cases, particularly as regard the duty of full and frank disclosure, and which Scots law also has, the outcome in the WFO discharge judgment flowed from the application of a distinctive approach.

Characterisation of the culpability of the non-disclosure

[46] I turn to Mr Dunlop QC's next submission, that the nondisclosure was so egregious that it should justify recall of the order in its entirety, notwithstanding that the nondisclosure affected only one of several grounds on which the order was sought. On the material available to me, and accepting the explanation provided to me by senior counsel for the petitioner on his responsibility, I am not persuaded that the non-disclosure was deliberate in the sense contended by Mr Dunlop QC. (While this was how Cockerill J characterised it, it may be that the explanation tendered to me was not presented to her (certainly, this was not suggested and the court was not taken to any passage in the WFO judgment about this.)) Accordingly, in this case I am concerned with a non-deliberate

nondisclosure. I accept that the legal advisers and counsel acted responsibly and brought this to the attention of the court upon realising the breach of duty.

The parties' presentation of the issue

[47] Having accepted that the court retained a discretion, even in cases of non-disclosure, parties invited the court to consider what its decision would have been on the footing that the undisclosed matters had been disclosed at the time the order was sought. In my view, that may be too narrow a focus. It may be relevant also to consider the circumstances that resulted in the non-disclosure (and the degree of culpability), the subsequent use that has been made of the documentation recovered, the passage of time, the subsequent conduct of the parties and the progress of any related litigation. Before turning to consider the proper approach, I should address the suggestion that there has been a breach of undertaking in the form of inappropriate use or disclosure of the documentation recovered under the order.

Allegation of breach of the usual undertaking regarding use of documentation recovered

[48] I should comment on the suggestion that there has been a breach or breaches of the undertaking. I do so at this stage, as breach of the undertaking would be relevant to the kind of motion I am considering. The alleged misuse of the recoveries following execution of the order appeared to take two forms:

1) alleged improper use in the English proceedings of the information recovered, and
2) use of the information by a subsidiary of the petitioner.

In relation to the first ground, on the limited information presented, I am not able to conclude that there has been a breach of the undertaking. If the only matters produced were

the Summons and the commissioners' reports, as Lord Davidson of Glen Clova QC explained (and Mr Dunlop QC did not challenge that as inaccurate), there is nothing objectionable in referring to the Summons. A commissioner's report would typically focus on the procedure followed and the itemisation of what was recovered (rather than its content). None of these reports was produced to this court (which, of course, are lodged in process in different proceedings) to support the contention that there had been a breach of the undertaking. In relation to the second breach, which Lord Davidson of Glen Clova QC implicitly admits in his characterisation of it as "technical", this does cause some disquiet. However, on the information presented to me, which was relatively limited in scope, there appears to be force in Lord Davidson of Glen Clova's submission that the order was sought to enable litigation to ensue in relation to the subject matter of the petition and litigation has in fact followed in the form of the several sets of proceedings by way of Commercial Actions. Mr Dunlop QC did not gainsay this. Further, Lord Davidson of Glen Clova QC described the new pursuers as wholly-owned subsidiaries of the petitioner and employing at all times the same legal representatives and counsel as the petitioner. On the information presented, this would appear to be no more than a technical breach. In these circumstances, and in the absence of any further information, I do not place much weight on this as a factor I take into account as part of the circumstances informing whether or not recall should be granted.

Should the order be recalled, in whole or in part?

[49] The relevant question, in my view, is whether, in the exercise of its discretion and having regard to all of the relevant circumstances, the court should recall the order. The fact of non-disclosure is certainly a significant factor, but it is not determinative. A subsidiary

question that arises, if the court is minded to consider recalling the order on the basis of non-disclosure, is whether it should it recall the whole order (for which Mr Dunlop QC contends) or only in part (Lord Davidson of Glen Clova QC's fall-back position)?

[50] I note that Mr Dunlop QC did not demur from the distinction Lord Davidson of Glen Clova QC drew between the grounds which were unaffected by the nondisclosure and the ground (concerning Optimus) which was. While I do not preclude the possibility, in a suitable case, of the court recalling an order in its entirety as a form of censure for a party's deliberate nondisclosure, this in not such a case. Furthermore, looked at critically, the non-disclosure did not affect all of the grounds identified in the petition. Mr Dunlop QC's approach invites the court to take an essentially penal approach to the nondisclosure. Given that I am not persuaded that the nondisclosure was deliberate or attracted the degree of censure that Mr Dunlop QC invites, to recall the order in total would not be in the interests of justice. The non-disclosure did not affect the non-Optimus grounds. Accordingly, I refuse the Noter's motion *quoad* the non-Optimus grounds.

Consideration of the new material

[51] As noted above (at para [49]), parties proceeded on the basis that I should determine the motion for recall by confining myself to matters as they stood as at the time I granted the order but having regard to the now-disclosed matters. Mr Dunlop QC periled his motion essentially on the basis that the same result as in the WFO discharge judgment should follow here. As I have him noted, he was not in a position to address the new material referred to by Lord Davidson of Glen Clova QC (summarised at para [30], above). However, on the approach I have adopted this material is relevant to consideration of the remainder of the Noter's motion. (Even if the parties' positions are divided more formally into two steps:

should the court recall the motion and, if so, should it nonetheless grant the order of new?; for the purpose of that second step I would require to take into account the new material.) In those circumstances, it is appropriate that I continue that part of the Noter's motion to afford the Noter an opportunity to respond to this new material. Accordingly, I shall put the matter out for a further hearing confined to consideration of that part of the motion that remains (ie that part of the petitioner's case to which the nondisclosure related).

Final comments

[52] While parties referred *en passant* to Article 8 considerations, this matter was not canvassed before me. It did not form part of the motion for recall and it is appropriate that I make no observations on that matter, given that it may form part of a substantive claim or separate remedy sought by the Noter.