

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0008

BETWEEN:

JOINT STOCK COMPANY “BTA BANK”

Appellant

and

- [1] **SADUAKAS MAMESH**
(formerly SADUAKAS MAMESHTEGI)
- [2] **ADM ASIA-PACIFIC TRADING PTE LTD.**
(formerly TOEPFER INTERNATIONAL ASIA PTE LTD.)
- [3] **ADM GERMANY GMBH**
(formerly ALFRED C. TOEPFER INTERNATIONAL
GMBH)
- [4] **GROVE SERVICES, INC.**
- [5] **BUNGE SA**
- [6] **BUNGE CIS LLC**
- [7] **DAUREN BEKBERGENOV**
- [8] **EKATERINA KUZMICHEVA**

Respondents

Before:

The Hon. Mr. Trevor M. Ward	Justice of Appeal
The Hon. Mr. Reginald T. A. Armour	Justice of Appeal [Ag.]
The Hon. Mde. P. Nicola Byer	Justice of Appeal [Ag.]

Appearances:

Mr. Roger Masfield KC with him, Mr. David Welford and Mr. Alexander Muksimov for the Appellant

Mr. Stephen Moverly KC with him, Mr. James Noble, Ms. Amelia Tan and Ms. Joni Khoo for the First Respondent

Mr. Thomas Grant KC with him, Mr. Matthew Freeman for the Second and Third Respondents

Mr. Richard Evans for the Fourth Respondent

Mr. Matthew Hardwick KC with him, Mr. Oliver Clifton, Mr. Daniel Hayward-Hughes, Mr. Andrew Chissick and Mr. Harry Oulton for the Fifth, Sixth, Seventh and Eighth Respondents

2025: November 25, 26;
2026: October 8.

Commercial appeal – rule 7.3(2) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (“2000 CPR”) – Service out order – Whether the judge erred in his analysis and application of the principles guiding the true construction and application of CPR 7.3(2) – Reasonable to try and proper party gateways - Whether the judge erred in finding that there was no real issue that was reasonable for the court to try as between the Bank and the BVI-SPVs with the result that the Bank had failed to satisfy the necessary and proper party gateway – Forum conveniens – Whether the judge erred in deciding that the BVI was clearly and distinctly not the most appropriate forum – Duty of full and frank disclosure – Whether the judge erred in concluding that the bank breached its duty of full and frank disclosure on the ex parte service out application

This interlocutory appeal concerns the learned judge’s order dated 7th December 2023 made following an *ex parte* application by the appellant (the “Bank”) to serve the respondents with the claim and statement of claim out of the jurisdiction. The Bank is a Kazakhstani financial institution while the respondents include the Bank’s former chairman, former employees, and offshore special purpose vehicles (“SPVs”) some of which were incorporated in the British Virgin Islands (the “BVI”).

On 24th September 2021 the Bank filed a claim against fifty-four (54) defendants including the respondents, alleging that it was the victim of a fraudulent scheme involving high-value letters of credit issued in a period likely spanning between 2005 and 2009 which resulted in an alleged loss of approximately USD230 million. The Bank alleged that the scheme, in which its employees unlawfully conspired to act against its interests, involved the issuance of approximately 100 letters of credit to a fund of purported commodity sales, with funds being diverted to offshore SPVs allegedly controlled by its former chairman. It was also alleged in the claim that these offshore SPVs, including those incorporated in the BVI (the “BVI-SPVs”), were used as vehicles to embezzle funds from the Bank with proceeds being siphoned/transferred to foreign entities, including the respondents.

Prior to filing the claim, the Bank applied, and on 21st September 2021, was granted an order to restore eight (8) of the BVI-SPVs to the Register of Companies which had been struck off and dissolved years earlier. These companies were restored to the Register on 22nd September 2021. However, three (3) of these BVI-SPVs were struck off the Register again on 21st March 2022 and the remaining five (5) struck off and dissolved on 12th May 2023.

The Bank filed an *ex parte* application seeking permission under CPR 7.3(2) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the “2000 CPR”) to serve the claim out of the jurisdiction on foreign defendants. That application was granted on 17th May

2022. The respondents thereafter filed applications to set aside (the “Set Aside Applications”) that order granting the Bank permission to serve them on the basis that the Bank failed to demonstrate a real issue that was reasonable for the court to try against them; that the BVI was not the appropriate forum for the trial; and that there was material non-disclosure by the bank in making the *ex parte* service out application.

Having heard the Set Aside Applications over a period of four (4) days in June 2023, the learned judge in a judgment dated 7th December 2023 granted the relief prayed for by the respondents. He determined that the Bank failed to demonstrate that the claim against the BVI-SPVs raised a real issue that was reasonable for the court to try on a proper application of CPR 7.3(2)(a); that the company gateway under CPR 7.3(7) was not engaged because there was no issue or challenge relating to the ownership or control of the BVI-SPVs; that the BVI was not clearly and distinctly the most appropriate forum for the trial of the claims raised, rather that the forum is Kazakhstan, Germany or Switzerland; and that the Bank failed its duty of full and frank disclosure and fair presentation at the *ex parte* hearing in significant and material respects, which failures were not innocent. Accordingly, the judge set aside and did not re-grant the service out order; set aside service of the claim form and statement of claim on the service out defendants; declared that the court has no jurisdiction to hear the claim against the service out defendants; and that BTA pays the costs of the Set Aside/Jurisdiction Applications to be assessed, if not agreed within 14 days.

Being aggrieved with the judge’s decision, this interlocutory appeal was filed on 21st March 2024 comprising of three grounds. Having perused the grounds of appeal and the submissions made by all parties, this Court determined that three issues arose for consideration, being: (i) whether in his analysis and application of the principles guiding the true construction and application of CPR 7.3(2)(a) to the application before him, the learned judge erred in his finding that there was no real issue that was reasonable for the court to try as between the Bank and the BVI-SPVs with the result that the Bank had failed to satisfy the necessary and proper party gateway; (ii) whether the learned judge erred in deciding that the BVI was clearly and distinctly not the most appropriate forum; and (iii) whether the learned judge erred in concluding that there was a breach of duty of full and frank disclosure by the Bank on the *ex parte* application for service out.

Held: Dismissing the appeal on all grounds and awarding costs to the respondents to be assessed by a master or judge of the Commercial Division of the High Court unless agreed within 21 days of the date of this judgment, that:

1. This Court, as an appellate court, ought to be slow to interfere with the learned judge’s decision where this appeal involves an evaluation of the facts and law and exercise of the learned judge’s discretion. This Court is not entitled to simply substitute its own view because it might have reached a different conclusion. It may only interfere with the learned judge’s evaluative decision if he can be shown to be wrong by reason of some identifiable flaw in his treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

Michael Dufour and others v Helenair Corporation Limited and others (1996) 52 WIR 188 applied; **Re Sprintroom** [2019] EWCA Civ 932 applied.

2. Having considered all of the arguments and evidence and applicable principles, the Court agrees that (i) the appeal is without merit and represents no more than an attempt by the Bank to re-argue matters of evaluative judgment in circumstances where the learned judge undertook a detailed and careful analysis of the evidence and applicable principles; (ii) the learned judge's decisions are grounded in principle and fact and disclose no error warranting appellate interference; (iii) the appellant has shown no flaw in the judge's evaluative reasoning; and the appellant failed to show that there was a real issue which it was reasonable for the court to try between it and the anchor defendants. The Court is satisfied that the learned judge's order that the Bank did not satisfy the Necessary and Proper Person ("NPP") Gateway Test was correctly made. Thus, ground 1 of the appeal should be dismissed and the service out order set aside.

Re Sprintroom [2019] EWCA Civ 932 applied; **Michael Dufour and others v Helenair Corporation Limited and others** (1996) 52 WIR 188.

3. The learned judge undertook a careful, detailed examination, analysis and evaluation of the pleadings, the evidence, the law and the submissions on the *forum conveniens* issue. In the exercise of his discretion, the learned judge accordingly took into consideration a number of factors, including the evidential inconsistency of the Bank's case with that pleaded (that the choice of offshore SPC was 'irrelevant'), in contrasting that to the evidence of the Bank's witness that 'the BVI-SPVs played a key role in the Scheme'. His was a careful evaluative consideration of all the circumstances in arriving at his conclusion that the BVI was not the appropriate forum and which he articulated more than once in his reasoned process at paragraphs [204], [214] and [215] of his judgment. In all the circumstances, the court endorses the decision of the learned judge on ground 2 and dismisses the appeal in that regard as well.

Nilon Ltd and another v Royal Westminster Investments SA and others [2015] 3 All ER 372 (PC) applied; **Altimo Holdings and Investment Ltd & others v Kyrgyz Mobil Tel. Limited** [2011] 4 All ER 1027 considered; **Vedanta Resources PLC and another v Lungowe and others** [2015] UKSC 20 considered; **Golden Ocean Assurance Ltd v Martin (The Golden Mariner)** [1990] 2 Lloyd's Rep 215 considered.

4. On an *ex parte* application the duty of full and frank disclosure requires an applicant not only to advance its own case but also to identify and fairly present matters adverse to it, including legal authorities and factual considerations which may weigh against the grant of relief. That includes (i) the duty is to make full and fair disclosure of all the material facts; (ii) the material facts are those which it is material for the

judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisors; (iii) the applicant must make proper inquiries before making the application; the duty therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries; (iv) the extent of the inquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case; (v) if material non-disclosure is established the court will be astute to ensure that an applicant who obtains an *ex parte* order without full disclosure is deprived of any advantage he may have derived by that breach of duty; (vi) whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application; and (vii) it is not for every omission that the injunction will be automatically discharged; the court has a discretion.

The Caribbean Civil Court Practice, 3rd edn., LexisNexis Buetterworths 2024 considered; **Brink's Mat Limited v Elcombe** [1988] 1 WLR 1350 applied.

5. The learned judge found that on the *ex parte* application the Bank was guilty of material non-disclosure in several respects as to evidence and case law. He described the Bank's non-disclosure of the authorities as 'inexcusable'. He also found that the Bank had misrepresented its case to the court in certain respects, including the status of the BVI-SPVs; the discharging receivership orders; and the lack of evidence supporting the utility of trying the claims against the BVI-SPVs. The learned judge deemed these omissions as deliberate and material and concluded that they undermined the integrity of the service out application. On the evidence before him the learned judge concluded that the misrepresentations and omissions were not innocent but rather were deliberate.
6. It is beyond debate that the duty of full and frank disclosure to a court on an *ex parte* application is a strict duty, rooted in fairness and the integrity of the judicial system, to ensure that, in exercising its extraordinary power of hearing an application and making a decision in the absence of the party against whom it has been asked to make orders; justice is served fairly. On ground 3 as well, I am satisfied from the judgment of the learned judge and his very careful treatment of all the facts, the evidence, and the arguments on these Set Aside Applications that he was correct to find as he did. The court, therefore, for that reason, also dismiss this ground of appeal.

JUDGMENT

[1] **ARMOUR JA [AG.]:** This is an interlocutory appeal against certain orders made in paragraphs 1, 2, 3 and 6 of the order of the learned judge dated 7th December 2023, Mr. Justice Wallbank, giving effect to the judgment of that date.¹ Paragraphs 1, 2, 3 and 6 of the order provide that:

- “(1) The Service Out Order is set aside and not re-granted.
- (2) Service of the Claim Form and Statement of Claim on the Service Out Defendants is set aside.
- (3) The Court has no jurisdiction to hear the Claim against the Service Out Defendants.
- (6) BTA do pay the costs of the Set-Aside/Jurisdiction Applications, to be assessed if not agreed within 14 days.”

Background

[2] The appellant, Joint Stock “BTA Bank” (“BTA”/the “Bank”), a Kazakhstani financial institution, filed proceedings in the court below on 24th September 2021 (the “Claim”) against fifty four (54) defendants, of which the respondents to this appeal are respondent No. 1/defendant No. [9]; respondent No. 2/defendant No. [44]; respondent No. 3/defendant No. [45]; respondent No. 4/defendant No. [47]; respondent No. 5/defendant No. [48]; respondent No. 6/defendant No. [49]; respondent No. 7/defendant No. [50]; and respondent No. 8/defendant no. [51].

[3] In the Claim, the Bank alleges that it was the victim of a fraudulent scheme involving high-value letters of credit issued in a period likely spanning between 2005 and 2009, resulting in an alleged loss of approximately USD230 million.² The Bank claims that the fraudulent scheme was orchestrated by its former chairman, Mukhtar Ablyazov (the 52nd defendant in the court below) and, involved the use of offshore entities to embezzle funds from the Bank. The Bank pleaded that as part of the scheme its employees unlawfully conspired to act against its interests, benefitting Mukhtar Ablyazov and his associates. The scheme involved the issuance of

¹ At pages 351-355, Core Bundle Vol.1.

² At pages 1237-1327, Core Bundle, Vol. 5. See also the Amended Statement of Claim, pages 7681-7698, Core Bundle, Vol. 5.

approximately 100 letters of credit to a fund of purported commodity sales, with funds being diverted to offshore Special Purpose Vehicles (SPVs) allegedly controlled by Mr. Ablyazov. It is alleged that these offshore SPVs (including ones incorporated in the BVI) were allegedly used as vehicles to embezzle funds from the Bank, with proceeds being siphoned/transferred to foreign entities, including the respondents (“the Scheme”).

- [4] The first respondent, Saduakas Mamesh (the 9th defendant in the court below) was and is a former employee of the Bank and is alleged to have been involved in the scheme.
- [5] The second and third named respondents, ADM Asia-Pacific Trading PTE Ltd. and ADM Germany GMBH (the 44th and 45th defendants in the court below) were also alleged to have been involved in the scheme by receiving funds from the discounted letters of credit.
- [6] The other respondents, namely respondent No. 4 (defendant [47] in the court below); respondent No. 5 (defendant [48] in the court below); respondent No. 6 (defendant [49] in the court below); respondent No. 7 (defendant [50] in the court below); and respondent No. 8 (defendant [51] in the court below) are foreign commodity companies or traders or their current or former employees and, are also alleged to have been involved in the scheme.
- [7] Among the fifty-four defendants, the BVI incorporated companies, defendants Nos. [15] – [18]; [20]-[23]; and [27] in the court below (hereinafter the “BVI-SPVs”) are the locally incorporated BVI companies within a larger group of offshore incorporated SPV defendant companies.
- [8] Prior to the Claim being filed on 24th September 2021, the Bank successfully applied in the very month of September 2021 to restore eight BVI-SPVs to the Register of Companies which had been struck off and dissolved years earlier. This restoration

was granted on 21st September 2021, and those BVI-SPVs were restored to the Register on 22nd September 2021. However, three of these BVI-SPVs (D[15], D[18], and D[23]) were struck off the Register again on 21st March 2022 and, the remaining five BVI-SPVs (D[16], D[17], D[20], D[21], and D[27]) were struck off and dissolved on 12th May 2023.

- [9] On 17th May 2022 on an *ex parte* application by the Bank, the court below granted the Bank permission under CPR 7.3(2) of **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the “2000 CPR”) to serve the Claim out of the jurisdiction on the foreign defendants (“the Service Out Order”). CPR 7.3(2) provides as follows:

“7.3 ...
(2) A claim form may be served out of the jurisdiction if a claim is made -
(a) Against someone on whom the claim form has been or will be served, and
(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is necessary or proper party to claim
(b) ...
(c) ...”

- [10] The respondents to this appeal, all foreign incorporated defendant companies, made applications (the “Set Aside Applications”)³ challenging the Service Out Order, arguing that the Bank failed to demonstrate a real issue that was reasonable for the court below to try against the BVI-SPVs and, that the BVI was not the appropriate forum for the trial. They also complained of material non-disclosure by the Bank on the *ex parte* service out application.

³ Set Aside Application of the second and third respondent [D44 & D45] dated 22nd November 2022, pages 215-222, Appeal Bundle Part 1; Set Aside Application of the fourth respondent [D47] dated 13th December 2022, pages 223-230, Appeal Bundle Part 1; Set Aside Application of the fifth, sixth, seventh and eighth respondents [D48, D49, D50 & D51] dated 15th December 2022, pages 231-240, Appeal Bundle Part 1; and Set Aside Application of the first respondent [D9] dated 30th December 2022, pages 241-248, Appeal Bundle Part 1.

- [11] After hearing the Set Aside Applications over the period 5th, 6th, 7th and 8th June 2023, in his written judgment dated 7th December 2023, the learned judge was persuaded that the respondent/applicants were entitled to succeed for four main reasons.⁴
- [12] Firstly, that the Bank failed to demonstrate that the claim against the BVI-SPVs raised a real issue that was reasonable for the court to try, on a proper application of CPR 7.3(2)(a).
- [13] Secondly, that the company gateway under CPR 7.3(7) was not engaged because there was no issue or challenge relating to the ownership or control of the BVI-SPVs.⁵
- [14] Thirdly, with respect to *forum conveniens*, the learned judge determined that the BVI was not clearly and distinctly the most appropriate forum for the trial of the claims raised; rather, he found that the forum is Kazakhstan, or Germany or Switzerland.
- [15] Fourthly, the learned judge also found that the Bank failed in its duty of full and frank disclosure and fair presentation at the *ex parte* hearing in significant and material respects, which failures were not innocent and warranted the Service Out Order being set aside and not re-granted.
- [16] The Bank was granted leave to appeal by the learned judge on 29th February 2024.⁶ Thereafter, the Bank filed its notice of appeal on 21st March 2024⁷ and advanced three grounds of appeal which are as follows:

⁴ At paragraph [158] of the judgment.

⁵ CPR 7.3(7) provides as follows:

“A claim form may be served out of the jurisdiction if the subject matter of the claim relates to-

(a) the constitution, administration, management or conduct of the affairs; or

(b) the ownership or control of a company incorporated within the jurisdiction.”

⁶ At page 429, Core Bundle Vol. 1.

⁷ *Ibid* at page 5.

- (1) The Court erred in law in holding that the Bank failed to satisfy the necessary and proper party gateway test [BVI CPR 7.3(2)] (the “NPP Gateway test”).
- (2) The court was wrong to conclude that the BVI is not the proper place to hear the claim, but that the proper place was “*Kazakhstan, or Germany or Switzerland*” (Judgment, para [158(3)])⁸.
- (3) The learned judge was wrong to find that there was a breach of the duty of full and frank disclosure (there being no such breach).

The Appellant's Submissions

- [17] At the core of the Bank’s appeal is the proper construction and application of rule 7.3(2)(a) of the 2000 CPR. In particular, the question of what a claimant must establish in order to satisfy the court that there is a real issue between itself and the respondents which is reasonable for the court to try within the meaning of CPR 7.3(2)(a), thereby justifying a service out of the jurisdiction order.
- [18] The Bank submits that the learned judge erred in law in accepting the respondents’ position when applying the NPP Gateway test. That error also materially affected his conclusions on the related issues of *forum conveniens* and the alleged failure by the Bank to provide full and frank disclosure.
- [19] With respect to **Ground of Appeal 1** and the NPP Gateway test, the Bank submits that the BVI CPR provision is materially identical to the equivalent provision in the English CPR, which only requires that there be a real issue between a claimant and an anchor defendant which it is reasonable for the court to try, and that the foreign defendant be a necessary or proper party. The reformulation of the rule did not affect

⁸ See also judgment, paragraph [215].

any substantive change to the law, which continues to reflect the ‘properly brought’ test.

- [20] The learned judge’s error lay in the misapplication of that test. In particular, he failed to apply binding authority, including **Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd**⁹ and **Altimo Holdings and others v Krygyz Mobil Tel Ltd and others**¹⁰ which, the Bank submits, establish that (i) the impecuniosity or insolvency of an anchor defendant, and (ii) a claimant’s motive in suing that defendant in order to bring foreign defendants within the jurisdiction, are irrelevant to the question whether the claim is properly brought, although they may be relevant to *forum conveniens*. The learned judge nevertheless treated both factors as determinative against the Bank.
- [21] Further, the learned judge relied on dicta in the cases of **Erste Group Bank AG v JSC ‘VMZ Red October’ and others**¹¹ and **Gunn (a protected party, by her litigation friend Gunn) v Diaz**¹² to the effect that where an anchor defendant is not defending the claim, such that a default judgment may be obtained, it is unlikely that there is a real issue which it is reasonable to try. The Bank submits that those dicta must be read in their particular factual context, both cases involving extreme circumstances in which no real issue remained to be tried.
- [22] By contrast, submitted the Bank, subsequent authorities including **HC Trading Malta Ltd v KI (International) Ltd and others**¹³ and **Lakatamia Shipping Company Ltd v Su and others**,¹⁴ emphasize that the NPP Gateway is not exacting, and that the claimant need only to demonstrate ‘practical utility’ in pursuing the claim against the anchor defendant. Those cases confirm that the fact that an anchor

⁹ [1983] Ch 258.

¹⁰ [2012] 1 WLR 1804.

¹¹ [2015] EWCA Civ 379.

¹² [2017] EWHC 157 (QB).

¹³ [2022] EWHC 1387 (Comm).

¹⁴ [2023] EWHC 1874 (Comm).

defendant has not acknowledged service or may not defend the claim is not determinative and, that there may be utility in obtaining a reasoned or even uncontested judgment for purposes of enforcement abroad or in insolvency.

[23] On the proper application of those principles, the Bank submits that the 'reasonableness' requirement was satisfied. This was a claim in which it was legitimate and proper to proceed against the BVI anchor defendants together with the foreign conspirators in a single set of proceedings, so that the allegations could be determined globally and in the round, as recognised in **Lakatamia Shipping**. Further, there was practical utility in pursuing the claims against the BVI companies to a reasoned judgment, including for the purposes of enforcement in other jurisdictions and the potential appointment of liquidators to investigate and recover assets, including claims for fraudulent trading.

[24] The Bank submits that the learned judge instead took into account a number of irrelevant considerations, including: (a) the failure of the BVI companies to acknowledge service or indicate an intention to defend; (b) the existence of unpursued contractual claims; (c) the absence of any application for default judgment; (d) the recent restoration and status of the BVI companies; and (e) the fact that receiverships had previously been discharged without recovery. None of these matters were determinative in light of the authorities, and several were irrelevant to the NPP Gateway inquiry.

[25] In those circumstances, the Bank submits that the learned judge misdirected himself in law and wrongly concluded that the NPP Gateway was not satisfied. Properly applying **Multinational Gas** and **Altimo Holdings**, the Bank's intention in suing the anchor defendants, and their apparent impecuniosity, were irrelevant considerations at the jurisdictional stage. The learned judge also ought not to have treated the absence of a defence as determinative and should instead have followed **HC**

Trading and Lakatamia Shipping in recognizing the practical utility of pursuing the claim to a reasoned judgment.

- [26] With respect to **Ground of Appeal 2**, the Bank submits that the learned judge erred in law and on the evidence in concluding that the BVI was not clearly and distinctly the most appropriate forum, and in identifying Kazakhstan, Germany or Switzerland as appropriate alternatives.
- [27] As to Kazakhstan, the Bank submits that it is well established, including in **Altimo Holdings and Vedanta Resources PLC and another v Lungowe and others**,¹⁵ that the court may refuse a foreign forum where there is a real risk that substantial justice will not be obtained, including by reason of corruption or lack of independence. Although Kazakhstan may have had connections to the dispute, the unchallenged evidence demonstrated a real risk of injustice, including judicial corruption and political sensitivity. No respondent contended that Kazakhstan was an appropriate forum. The learned judge should therefore have discounted it, and this contrary conclusion was not open to him on the evidence.
- [28] As to Switzerland and Germany, the appellant relies on **Vedanta**, submitting that the same emphasizes the importance of identifying a single forum in which all claims against all defendants can be tried, so as to avoid fragmentation and inconsistent judgments. The BVI was the only jurisdiction in which the entire conspiracy claim against all defendants could be pursued. By contrast, the Swiss and German courts would not accept jurisdiction over the majority of defendants unless they submitted, and even then, jurisdiction was uncertain. Proceedings in those jurisdictions would therefore be fragmented.
- [29] Further, submitted the Bank, considerations of practical convenience pointed strongly to the BVI. A significant number of defendants were BVI companies or their

¹⁵ [2019] UKSC 20.

directors, the documentary evidence was largely in English and Russian, and the majority of witnesses were English-speaking. These factors made the BVI clearly more appropriate than Switzerland or Germany.

[30] Finally, the unchallenged evidence was that the claims would be time-barred in Switzerland and Germany, and no undertakings were offered not to rely on limitation defences. This provided an additional reason why those jurisdictions were not appropriate fora.

[31] In those circumstances, the learned judge erred in concluding that there were more appropriate alternative fora. Properly applying **Altimo Holdings** and **Vedanta**, the BVI was clearly and distinctly the most appropriate forum for the trial of the claims.

[32] With respect to **Ground of Appeal 3**, the appellant Bank submits that the learned judge erred in finding material non-disclosure at the *ex parte* stage. The first five findings made by the judge all concerned matters going to the NPP Gateway and arose from a misapprehension of the legal test. Properly understood, there was a fair presentation of both the law and the material facts.

[33] In particular, consistent with **Multinational Gas** and **Altimo Holdings**, the Bank correctly proceeded on the basis that the impecuniosity of the anchor defendants and the Bank's purpose in suing them were irrelevant to the NPP Gateway test. Nevertheless, the Bank drew to the court's attention the key underlying facts, including that the BVI companies had been struck off the register and restored; had previously been subject to discharged receiverships; were unlikely to have assets; and had not engaged with the proceedings. The Bank also anticipated the argument that the anchor defendants were 'dummy' defendants but correctly explained why that contention was legally irrelevant at the jurisdictional stage.

- [34] Against that background, the Bank submits that there was no failure to make full and frank disclosure. The omission of references to **Erste** and **Gunn** was not material. Nor was there any misrepresentation as to the role of the BVI anchor defendants which, submitted the Bank, the evidence showed were central to the alleged fraud and the recipients of a substantial proportion of the misappropriated funds. Likewise, the Bank did not mislead the court as to its intention to pursue claims against the BVI defendants to judgment, including for enforcement and insolvency purposes.
- [35] Further, the matters said to have been not disclosed, such as the corporate status of the BVI companies and the discharged receiverships, were either in fact disclosed or immaterial. In any event, the impecuniosity or status of the anchor defendants was irrelevant to the NPP Gateway analysis.
- [36] As to the Company Gateway, the Bank accepts that it failed to draw the court's attention to **Amerinvest International Forestry Group Company Ltd v Kwok Ka Yik**.¹⁶ However, that failure was inadvertent and immaterial in circumstances where permission to serve out was also granted under the NPP Gateway, which was properly satisfied. It would therefore be disproportionate to set aside the order on that basis alone; any appropriate sanction would lie in costs.
- [37] In those circumstances, the Bank submits that the learned judge erred in finding material non-disclosure. Alternatively, any omissions were innocent and not material to the outcome and would not have justified setting aside the Service Out Order.

The First Respondent's Submissions

- [38] The first respondent to the appeal was the ninth defendant in the court below [D9], Saduakas Mamesh. It is his submission that the appeal is without merit and represents no more than an attempt by the Bank to re-argue matters of evaluative

¹⁶ BVIHCMAP 2014/0033 (delivered 4th March 2015, unreported).

judgment, in circumstances where the learned judge undertook a detailed and careful analysis of the evidence and applicable principles. Further, the learned judge correctly concluded that the requirements for service out were not satisfied, that the BVI was not the appropriate forum, and that there had been serious and non-innocent breaches of the duty of full and frank disclosure.¹⁷

[39] At the outset, the first respondent emphasizes the nature of appellate restraint in the circumstances of this case. The decision below involved the exercise of discretion and evaluative judgment particularly in relation to the application of the NPP Gateway, *forum conveniens*, and the consequences of non-disclosure. In such circumstances, the court of appeal should not interfere unless there is a clear error of principle or a conclusion that was plainly wrong.

[40] With respect to **Ground of Appeal 1**, the first respondent submits that the learned judge correctly identified and applied the governing principles, including the requirement that there be a 'real issue which it is reasonable for the court to try' between the claimant and the anchor defendants. The learned judge's conclusion that this requirement was not satisfied was based on a detailed assessment of the pleaded case, the evidence, and the surrounding circumstances, including the absence of any genuine intention to pursue relief against the BVI-SPVs.

[41] The first respondent cites the authorities of **Erste** and **Gunn** which establish that where an anchor defendant is not participating in the proceedings, and there is no realistic prospect of obtaining substantive relief, it will ordinarily not be 'reasonable for the court to try' the claim against the defendant. These authorities also support the proposition that the court is entitled to consider questions of utility and the practical purpose of the proceedings in determining whether the NPP Gateway test is satisfied. Furthermore, the judge's analysis of 'utility' was both correct and firmly

¹⁷ See paragraphs 1-6 of the first respondent's skeleton in opposition to the appeal filed on 6th November 2024, pages 121-123, Core Bundle, (Vol. 2).

grounded in the evidence.¹⁸ The BVI-SPVs were long-defunct, assetless, and had no real prospect of participating in the proceedings. In those circumstances, there was no meaningful utility in pursuing claims against them, and their invocation served only as a device to found jurisdiction over foreign defendants. Therefore, this case falls squarely within the principles articulated in the cases of **Erste** and **Gunn** and indeed, presents an even clearer case for their application, given the factual findings made by the learned judge as to the status and role of the SPVs.

[42] Furthermore, the first respondent submits that the learned judge correctly concluded that the BVI was not clearly or distinctly the appropriate forum. The only connection to the jurisdiction was the incorporation of the SPVs, which was of minimal weight given their lack of assets, operations, or participation. The underlying transactions, witnesses, and documentary evidence were located in other jurisdictions.

[43] In relation to **Ground of Appeal 3**, the first respondent submits that the learned judge correctly identified multiple serious breaches of the duty of disclosure in an *ex parte* application, which were material and non-innocent. These included failure to draw the court's attention to relevant authorities concerning the proper approach to the first stage of the NPP Gateway test, that is, it must be shown that there is between the claimant and the anchor defendant a real issue which is reasonable for the court to try, failures to address the 'reasonable for the court to try' requirement, and failures to present the factual position regarding the SPVs accurately and fairly. The duty of full and frank disclosure requires an applicant not only to advance its own case but also to identify and fairly present matters adverse to it, including legal authorities and factual consideration which may weigh against the grant of relief. The learned judge's findings that these obligations were breached, and that the breaches were serious, are findings of fact and evaluation which are not open to

¹⁸ See paragraphs 21-25 of the first respondent's skeleton filed on 6th November 2024, pages 128-129, Core Bundle, (Vol.2).

challenge on the present appeal. In those circumstances, the first respondent submits that the learned judge was fully entitled to set aside the service out order.

The Second and Third Respondents' Submissions

- [44] The second and third respondents to the appeal were the 44th and 45th defendants in the court below. For clarity and brevity, they will be referred to as the “ADM respondents”.
- [45] The ADM respondents submit that the learned judge’s conclusions were firmly grounded in principle and fact and disclose no error warranting appellate interference. In addition, they set out the correct approach to appeals against evaluative decisions, as summarized by the English Court of Appeal in **Re Sprintroom Ltd**.¹⁹ They contend that, unless the Bank can identify a specific flaw in the judge’s evaluative reasoning, this Court ought to uphold the decision.
- [46] They submit that as explained in **Nilon Ltd v Royal Westminster Investments S.A.**,²⁰ three requirements must be satisfied: (i) a serious issue to be tried on the merits, (ii) a good arguable case that the claim falls within a jurisdictional gateway; and (iii) that the forum is clearly or distinctly appropriate and the court should exercise its discretion to permit service out. The burden lies on the claimant throughout, and the assessment is made by reference to the position at the time of the application, albeit subsequent events may be relevant.²¹ The ADM respondents submit that the learned judge correctly applied these principles and was entitled to conclude that the Bank failed to satisfy the NPP Gateway test. In particular, the learned judge found that the Bank had failed to establish that it was ‘reasonable for the court to try’ the claims against the BVI-SPVs, a conclusion which the Bank challenges but which is unassailable on the evidence. The judge’s analysis properly

¹⁹ [2019] BCC 1031.

²⁰ [2015] 3 All ER 327 (PC).

²¹ See *Soriano v Forensic News LLC and others* [2022] QB 533 at para 12 and *WWRT Ltd v Carosan Trading Ltd et al* BVIHCP2022/0002 (delivered 11th May 2023, unreported).

focused on the requirement of utility, considering all the circumstances ‘in the round’ and assessing whether any practical benefit could be derived from pursuing the claims against the anchor defendants.

- [47] It is also the ADM respondents’ submission that the learned judge did not treat any single factor as determinative when considering the application. In particular, the learned judge did not treat the impecuniosity of the BVI-SPVs as ‘fatal’ to the application of the gateway. Rather, he correctly treated it as one relevant consideration with broader utility analysis. It would be illogical to exclude the financial position of an anchor defendant from the utility assessment, since such matters directly bear on whether any judgment could be enforced.
- [48] Furthermore, the learned judge’s consideration of the failure of the BVI-SPVs to defend the claim was entirely orthodox. The learned judge’s reference to and reliance on the decisions in **Erste** and **Gunn** was correct. Those authorities establish that where an anchor defendant is not defending and a default judgment may be obtained, it is ‘highly unlikely’ that there is a reasonable issue for the court to try. In **Erste**, the England and Wales Court of Appeal’s analysis of whether there was ‘a real issue which it is reasonable for the court to try’ formed a central part of its reasoning, culminating in the conclusion that the gateway was not satisfied.²² Therefore, the learned judge was fully entitled to rely on these principles.
- [49] With respect to *forum conveniens*, the ADM respondents submit that the learned judge correctly concluded that the BVI was not clearly or distinctly the appropriate forum. The claims were overwhelmingly foreign in nature, and any connection to the BVI was artificial, arising solely from the incorporation of the SPVs. The applicable law issues further reinforced this conclusion, including that claims in unjust enrichment would be governed by the law of the place of enrichment, which was not the BVI.

²² *Erste*, supra per Gloster L.J. at paras 77-78.

- [50] The ADM respondents emphasize that even if the gateway and forum requirements had been satisfied, the learned judge's exercise of discretion to set aside the Service Out Order was independently justified. The third limb of the **Nilon** test requires the court to consider whether, 'in all the circumstances', it ought to permit service out. The judge held that he had 'no hesitation' in setting aside the order, considering the Bank's conduct and approach to the application.²³
- [51] As to **Ground of Appeal 3**, the ADM respondents submit that the learned judge properly identified serious breaches of the duty of full and frank disclosure, including (i) the failure to address the 'reasonable for the court to try' requirement and to draw the court's attention to the cases of **Erste** and **Gunn**; (ii) the misleading representation that the BVI-SPVs were 'key to the present claim' without sufficient evidence; and (iii) broader failures in the presentation of the case. These breaches were properly characterised as 'not innocent' and indeed 'deliberate', particularly given the absence of any explanation for the failure to raise highly material points. The judge was entitled to regard these breaches as sufficiently serious, of themselves, to justify setting aside the service out order.
- [52] Additionally, the ADM respondents submit that the Bank failed to establish that there was any serious issue to be tried against them. The burden lies on the claimant to demonstrate a real (as opposed to a fanciful) prospect of success, applying the same test as for summary judgment.²⁴ On the facts, there is no such serious issue that arises. With respect to the claim against the 3rd respondent, the claims are unsustainable given that the alleged losses largely arise from transactions in which they had not been involved. In relation to the 2nd respondent, the pleaded case is described as 'bizarre' and unsupported by evidence, relying on speculative

²³ Paragraph [229] of the Judgment in the court below.

²⁴ See *VTB Capital plc v Nutritek International Corp* [2013] AC 337 at [90]; *Altimo* at [71], [82]; and *Donna Union Foundation v Koshigi Ltd BVIHC(Com)* 231 of 2018 (delivered 14th May 2019, unreported) at [35].

inferences as to the involvement of Mr. Richardson without any proper evidential foundation.

- [53] With respect to further breaches of the duty of full and frank disclosure, including the failure to identify adverse authorities such as **Amerinvest International** and the failure to present any contrary arguments on the applicability of the company gateway, the ADM respondents submit that these failures go beyond mere omission of authority and reflect a broader failure to comply with the duty of fair presentation at the *ex parte* stage. Therefore, the learned judge correctly identified and applied the governing legal principles, conducted a careful and detailed evaluative analysis, and reached conclusions that were plainly open to him on the evidence.

The Fourth Respondent's Submissions

- [54] The fourth respondent, Grove Services Inc., was the 47th defendant in the proceedings below (hereinafter "Grove Services").
- [55] With respect to **Ground of Appeal 1**, Grove Services adopts the other respondents' submissions and contends that the learned judge did not err in his application of CPR 7.3(2) or the NPP Gateway test. In particular, they submit, **Multinational Gas** does not establish that the financial position of the anchor defendant or the claimant's purpose in suing it are irrelevant in all circumstances. On the contrary, the authority underscores the requirement of good faith when seeking permission to serve out. The learned judge made clear and unchallenged findings that the Bank had not acted in good faith, both in bringing the claim and in the *ex parte* application. The learned judge identified significant deficiencies, including the absence of pleaded contractual claims against the SPVs, and the Bank's failure to properly address whether the claims were suitable to be tried or to engage with relevant authorities and adverse arguments. Therefore, **Ground 1** discloses no error of law or principle.

[56] As to **Ground of Appeal 2**, concerning *forum non conveniens*, Grove Services submits that the learned judge conducted a careful and detailed evaluative analysis. The Bank's concession that factors such as the impecuniosity of the anchor defendant and the purpose of invoking it are relevant.

[57] In relation to **Ground of Appeal 3**, Grove Services submits that the learned judge's analysis demonstrated the Bank's serious and deliberate failures to comply with the duty of full and frank disclosure. In particular, it is incumbent on an *ex parte* applicant not only to advance its preferred position but also to identify potential adverse arguments, especially where the point is at least arguable. Accordingly, Grove Services adopts the other respondents' submissions that the breaches of non-disclosure identified by the learned judge were material, non-innocent, and went to the heart of the jurisdiction application.

The Fifth – Eighth Respondents' Submissions

[58] The fifth to eighth respondents were the 48th-51st defendants in the court below (hereinafter the "Bunge respondents").

[59] In relation to **Ground of Appeal 1**, the Bunge respondents submit that the learned judge correctly applied the principles governing the NPP Gateway, in particular the requirement that there be 'a real issue which it is reasonable for the court to try' between the claimant and the anchor defendants. The authorities establish that this is an objective and evaluative inquiry in which the court must consider whether there is any utility in pursuing the claim against the anchor defendant. The Bunge respondents submitted that the principles in the cases of **Erste** and **Gunn** are binding and central. In particular, the so-called 'No Defence Principle', that where the anchor defendant has failed to acknowledge service or is not defending the claim 'there is unlikely to be a real issue...which is reasonable for the court to try', is not obiter but an essential part of the reasoning in both cases. This is demonstrated by the analysis in **Erste**, where the court of appeal held that the absence of any

intention by the anchor defendants to defend, coupled with the absence of any substantive dispute, meant that there was no real issue which it was reasonable for the court to try. Similarly, in **Gunn**, Andrews J identified this principle as one of the core propositions governing the gateway.

[60] The Bunge respondents submit that the facts of the present case, namely the restoration of defunct entities, a history of non-participation, and the use of those entities as a jurisdictional device to bring in numerous foreign defendants are significant. Further, the requirement of 'utility' is central to the analysis. As explained in **Erste**, and reflected in **Gunn**, the gateway cannot be satisfied. The Bunge respondents submit that, on the facts, the BVI-SPVs were defunct, assetless, and not participating in the proceedings, such that there was no realistic prospect of any relief or utility.

[61] As to **Ground of Appeal 2**, the Bunge respondents submit that the judge correctly concluded that the BVI was not clearly or distinctly the appropriate forum since the only connecting factor relied upon by BTA was the incorporation of the SPVs, which is of minimal weight, particularly where those entities had no business, assets, or operations in the jurisdiction. They noted the case of **Golden Ocean Assurance Ltd v Martin, (The Goldean Mariner)**,²⁵ wherein it was held that the court should not permit foreign defendants to be brought within the jurisdiction merely because doing so avoids multiple proceedings. The multiplicity of proceedings is not a sufficient basis to displace the service out test. Therefore, the learned judge's conclusion that the invocation of the BVI-SPVs was 'no more than an artifice' to found jurisdiction over foreign defendants with 'deep pocket' was fully justified on the evidence. Accordingly, the finding that the BVI was not the appropriate forum was plainly open to the learned judge and cannot be impugned.

²⁵ [1990] 2 Lloyd's Rep 215 at 222.

[62] In relation to **Ground of Appeal 3**, the Bunge respondents submit that the learned judge correctly found serious and multiple breaches of the duty of full and frank disclosure. The most fundamental failure was BTA's omission even to acknowledge the 'reasonable for the court to try' component of the NPP Gateway in its *ex parte* submissions. Further breaches included the failure to mention the leading authorities of **Erste** and **Gunn**, the true status of the BVI-SPVs, the failure to disclose their lack of participation in the proceedings, the misleading assertions that the SPVs were 'key' to the claim, and that the 'full gamut' of claims would be pursued against them. Therefore, the Bunge respondents submit that these omissions were plainly material, going directly to jurisdiction and the exercise of the court's discretion. Thus, the learned judge was entitled to set aside the service out order.

Issues

[63] On the grounds of appeal filed and the submissions made by all parties' three issues arise for consideration by this Court, which may be stated succinctly as follows:

- (1) Firstly, whether in his analysis and application of the principles guiding the true construction and application of CPR 7.3(2)(a) to the application before him, the learned judge erred in his finding that there was no real issue that was reasonable for the court to try as between the Bank and the BVI-SPVs with the result that the Bank had failed to satisfy the necessary and proper party gateway;
- (2) Secondly, whether the learned judge erred in deciding that the BVI was clearly and distinctly not the most appropriate forum; and
- (3) Thirdly, whether the learned judge erred in concluding that there was a breach of the duty of full and frank disclosure by the Bank on the *ex parte* application for service out.

Discussion and Analysis

[64] I am of the view that an appeal such as this ought properly to be approached through the well-established lens of appellate restraint applicable to evaluative and discretionary decisions of a lower court. The issues arising, as stated, on the true construction of CPR 7.3(2) namely, the application of the NPP Gateway test, the assessment of *forum conveniens* and the evaluation of the fact and consequence of material non-disclosure are quintessentially matters involving a multi-factorial evaluation of fact and law.

[65] In this jurisdiction, our courts are guided by the locus classicus decision of **Michael Dufour and others v Helenair Corporation Limited and others**²⁶ that an appeal against a judgment given by a court below, in the exercise of a judicial discretion, will not be allowed unless:

“the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong,” per Sir Vincent Floissac, CJ.²⁷

[66] Further and more recently, the unanimous decision of a strong UK Court of Appeal in **Re Sprintroom**,²⁸ drawing on the pedigree of a wealth of House of Lords and Supreme Court authorities, has authoritatively stated the proper approach to appeals against evaluative decisions in the United Kingdom, in terms which are consistent with the approach in this jurisdiction and which I adopt, as follows:

“76. ..., on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge’s treatment of the question to be decided, “such as a gap in logic, a lack of

²⁶ (1996) 52 WIR 188.

²⁷ Supra, at page 191.

²⁸ [2019] EWCA Civ. 932.

consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion”.

77. All this said, when assessing an evaluative decision of the facts found by a trial judge, there can be no doubt that one must also bear in mind the well-known passage in the speech of Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] R.P.C. 1 [at] 45 where he said:

“...The need for appellate caution in reversing the judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation. It would in my view be wrong to treat Benmax as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge’s evaluation.”²⁹ (All emphasis supplied)

- [67] I therefore propose to consider this appeal in line with the principles set out in **Michael Dufour and others v Helenair** and in **Re Sprintroom**. This Court, as an appellate court, ought to be slow to interfere with the learned judge’s decision where this appeal involves an evaluation of the facts and law and the exercise of discretion by the learned judge. This Court is not entitled to simply substitute its own view because it might have reached a different conclusion. It may only interfere with the learned judge’s evaluative decision if he can be shown to be wrong by reason of some identifiable flaw in his treatment of the question to be decided, such as a gap

²⁹ Per Mc Combe LJ, Leggatt LJ and Rose LJ.

in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

- [68] It is noteworthy that for this jurisdiction, on the proper construction and application of CPR 7.3(2), this Court in **WWRT Ltd v Casoran Trading Ltd** expressly adopted³⁰ the guidance of Sir Vincent Floissac CJ in **Dufour**:

“As a starting point we wish to reiterate the role of the appellate court when it has been invited to review the exercise of a trial judge's discretion. Guidance on the role of the appellate court in this regard has been set out in the leading case of **Dufour and Others v. Helenair Corporation Ltd and Others**”.

- [69] In respect of the well-settled emphasis on the deference which an appellate court affords to the ‘evaluative’ assessment undertaken in the court below, Pereira CJ, as she then was, accurately stated the court of appeal’s application of the principle in that regard thus:

“In determining whether there is a serious issue to be tried for the purposes of a service-out order, a judge is not required to conduct a mini-trial. Rather, the judge must assess the claim and the evidence before him and determine whether it met the threshold of a serious issue. The trial judge in determining whether the case at bar met this threshold was cognisant of the relevant case law and engaged in a sound evaluative process, assessing the claim and the evidence before him...”³¹

- [70] This approach is especially important in cases such as the present, where the learned judge undertook a careful and detailed analysis and evaluation of the law, the evidence and arguments presented by all parties in his assessment of a number of factors, including the nature of the claim, the role of the anchor defendants, the usefulness or utility of the proceedings, and the *forum conveniens* issue.

Issue 1 - The Proper Application of CPR 7.3(2)(a)

³⁰ At paragraphs [13]-[14], [17] and [62] through [68] of the judgment.

³¹ *WWRT Ltd v Casoran Trading Ltd* infra, Held point no. 3.

[71] We are fortunate to have the authoritative guidance of the Board of the Judicial Committee of the Privy Council relating to service out of this jurisdiction under CPR 7.3(2)(a) in **Nilon Limited v Royal Westminster Investments SA and Others**.

[72] In **Nilon Limited** Lord Collins refers to³² and adopts the Board's earlier guidance in **Altimo Holdings**³³ that, on an application for service out of the jurisdiction three requirements have to be satisfied: Firstly, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, that is to say, a substantial question of fact or law or both. Secondly, the claimant must satisfy the court that there is a good arguable case, in that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other. Thirdly, the claimant must satisfy the court that in all of the circumstances, the forum which is being invoked (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute and that in all of the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.

[73] Lord Collins also adopts and sets out eight points of principle from **Altimo Holdings** which are applicable to the 'necessary or proper party' head of jurisdiction, as follows:

"(1) The necessary or proper party head of jurisdiction was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts.

(2) Caution must always be exercised in bringing foreign defendants within the jurisdiction under that head, and in particular it should never become the practice to bring in foreign defendants as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.

³² At paragraph 13 of Lord Collins' judgment.

³³ *Altimo Holdings and Investment Ltd & others v Kyrgyz Mobil Tel. Limited* [2011] 4 All ER 1027.

- (3) The fact that the defendant within the jurisdiction (D1 or the anchor defendant) is sued only for the purpose of bringing in the party outside the jurisdiction (D2) is not fatal to the application for permission to serve D2 out of the jurisdiction, but it is a factor in the exercise of the discretion.
- (4) The action is not properly brought against D1 if it is bound to fail.
- (5) If a question of law arises on the application which goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case.
- (6) The question of the merits of the claim is relevant to the question of whether the claim against D1 is 'bound to fail' and to the question whether there is 'a serious issue to be tried' in relation to the claim against D2; and there is no practical difference between the two tests, and they in turn are the same as the test for summary judgement.
- (7) In considering the merits of the claim, whether the claim against D1 is bound to fail on a question of law should be decided on the application for permission to serve D2 (or to discharge the order), but it would not normally be appropriate to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts.
- (8) The question whether D2 is a proper party is answered by asking: 'Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?'³⁴ (All emphasis supplied)

[74] Further points of note in the true construction and application of CPR 7.3(2)(a) are settled in the authorities of **Gunn**, and **Erste**. These may be stated as follows: a) the court must first ask itself, viewed in isolation from the other defendants outside of the jurisdiction, whether there is a real issue to be tried between the claimant and the anchor defendant on the merits. The court must proceed on the assumption that there will be no additional joinder of the foreign defendants, the point being that it is

³⁴ Nilon Limited v Royal Westminster Investments SA and Others [2015] 3 All ER 372 (PC), at [15].

the BVI claim against the anchor defendant which is to be assisted by the addition of foreign defendants;³⁵ b) if such a real issue exists, whether it is reasonable for the court to try that claim as between the claimant and the anchor defendant, with that question being an objective one;³⁶ and c) if the anchor defendant has failed to acknowledge service or is not defending the claim there is unlikely to be a real issue to be tried which it is reasonable for the court to try.

[75] In applying the **Nilon** and **Altimo Holdings** principles it is useful to examine the care which the learned judge took in his judgment and which he articulated in his evaluation of the arguments for and against setting aside the Service Out Order. Equally, it is useful to remind ourselves that the learned judge who made the decision to set aside the Service Out Order, and from which decision this appeal comes, is the very judge before whom the *ex parte* application for the Service Out Order was made in the first instance. In my respectful view that is a relevant consideration for the proper evaluative approach which this Court, as an appellate court, must necessarily take and the appropriate deference which this Appellate Court ought to accord in that regard.

[76] The learned judge begins his discussion³⁷ and analysis of the case by recounting that the arguments which he had summarized in his judgment are by no means the totality of the points contended by the parties and that he had rather confined himself to what he considers to be essential.

[77] When he turned to consider CPR 7.3(2), he stated further:

“For present purposes I am prepared to proceed on the basis that there is a real issue between BTA [the Bank] and the BVI SPVs and that BTA [the Bank] now wishes to serve the claim form on the Defendants who are outside the jurisdiction and who are necessary or proper parties to the claim. I am also prepared to proceed on the basis that in relation to the

³⁵ Gunn (a protected party, by her litigation friend Gunn) v Diaz [2017] EWHC 157 (QB).

³⁶ Erste Group Bank AG v JSC ‘VMZ Red October’ and others [2015] EWCA Civ 379.

³⁷ At paragraph [148] of the judgment.

foreign Defendants, there is a serious issue to be tried on the merits. That said, I stop short of making a specific, formal finding that BTA [the Bank] has established the existence of such a serious issue in respect of all the present applicants. ...the real point of contention in respect of this gateway is whether the issue between BTA [the Bank] and the BVI SPVS is reasonable for the court to try."³⁸ (All emphasis supplied).

[78] The learned judge examined in detail the comparable CPR 7.3(2) English provisions and the authorities of **Gunn** and **Erste**. He emphasized to himself that whether there is a real issue which it is reasonable for the court to try must be taken in isolation from claims intended to be brought against the foreign target defendants, with the court proceeding on the assumption that there will be no additional joinder of those foreign defendants. He stated thus:

"[169] ... The circumstance we are concerned with here is when it can be said that a foreign defendant is a 'necessary or proper party' to a claim pursued here in the BVI, against (usually but not always) a BVI defendant. That defendant would be the defendant that anchors the proceedings in this jurisdiction ... the 'anchor defendant' ...The point is that it is the BVI claim against the anchor defendant which would be assisted by the addition of the foreign defendant. ...In other words, utility in suing foreign defendants cannot be used to overcome lack of utility in trying the claim against the BVI defendant...."

[79] Guided by **Gunn**, the learned judge stressed to himself that the assessment of reasonableness to try an issue was to be done objectively. He stated:

"[170] ...The Court has to consider whether, on all of the facts evidenced before it, there would, viewed objectively, be any utility in trying the purported claim brought against the anchor defendant, stripped of the proposed claims against the foreign defendants."

[80] In **HC Trading Malta**³⁹ the English Commercial Court considered that the formulation 'reasonable for the court to try' raised a 'finely nuanced soft-edged question' and in essence what would satisfy this limb of the gateway test is if some

³⁸ At paragraphs [161] and [162] of the judgment.

³⁹ See footnote reference no.13, *infra*.

useful purpose or legitimate interest might be served by the prospective grant of summary or final judgment on an uncontested basis against the anchor defendant.

[81] The learned judge further considered the applicability of **HC Trading Malta** to the Set Aside Applications before him. He acknowledged that the fact that a defendant has not acknowledged service, nor filed a defence, nor otherwise engaged with the claim brought against him served as a strong pointer that it is not reasonable for the court to try the claim, and that practical reality as to inform what constitutes utility depends upon the circumstances of the particular case. In his evaluation he stated ‘complete certainty may not always be possible.’⁴⁰ He concluded on the utility point by noting that what constituted utility sufficient to render it reasonable to try an issue can also vary, depending upon the circumstances of a particular case: ‘...the Court has to look at the practical reality, including extent or degree of a professed ‘utility.’⁴¹ In language which practically articulates the essence of the evaluative approach described in **Re Sprintroom**, the learned judge pointed out that the third point⁴² to be derived from the passages to which he referred in the quoted authorities is that ‘...the Court is concerned with ‘likelihoods’. The Court can only perceive matters the best it can, on the material before it, using its knowledge and experience, including of human nature, and common sense. Complete certainty may not always be possible.’

[82] He was not persuaded that a claim for declaratory relief was viable in this case. He examined and distinguished the decision of **Satfinance Investment Ltd v Athena Art Finance Corp**⁴³ cited by the Bank on the facts of that case with those before him at bar. He concluded that the Bank’s counsel had not persuaded him why the Bank needed the declaration sought:

“Why [the Bank] would need a declaration to that effect is unclear and that was not explained by [the Bank’s] Counsel. Leaving out the foreign

⁴⁰ At paragraph [172] of the judgment.

⁴¹ At paragraph [173] of the judgment.

⁴² At paragraph [172] of the judgment.

⁴³ (2020) EWHC 3527 (Ch).

defendants, I have serious difficulty discerning any utility in trying a claim for a declaration against the BVI Defendants alone..."⁴⁴.

In any event, and notwithstanding that the learned judge did not expressly refer to this in his reasons for refusing the claim for declaratory relief, he had in fact previously taken note of the fact that the claim for this declaration was introduced only by way of amendment after the *ex parte* hearing. 'I should approach the question whether the permission to serve the claim out of the jurisdiction was rightly given as at 17th May 2022, and not as at the subsequent hearing in June 2023' (citing **WWRT Ltd v Carosan Trading Ltd**).⁴⁵

[83] On the significance of the date, the learned judge reasoned thus:

"[153] The reason why the date matters is because BTA amended its claim shortly after the hearing on 17th May 2022 ...It was thus after the hearing on 17th May 2022 that BTA introduced its claim for a declaration. As at 17th May 2022, it was not open to BTA to argue that **Satfinance** offered it a way of satisfying the requirement to show that its claim raised an issue as between it and the BVI SPVs that was reasonable for the Court to try."⁴⁶ (Emphasis by the learned judge).

On the authority of **WWRT Ltd** therefore, the question of the declaration (sought by amendment after the *ex parte* grant of the Service Out Order on 17th May 2022) representing an issue for trial on the Set Aside Application was moot.

[84] A fourth point which the learned judge introduced is derived from **Gunn** and the very wording of CPR 7.3(2)(a), that is, whether the issue must be reasonable for the court, in its BVI jurisdiction, to try. The question he examined was whether the BVI court should try the issue between the claimant Bank and the anchor defendant, not whether it would be reasonable to try that issue somewhere else in abstract. He

⁴⁴ At paragraphs [174] & [175] of the judgment.

⁴⁵ At paragraph [152] of the judgment.

⁴⁶ At paragraph [153] of the judgment.

acknowledged that the lack of acknowledgement of service and/or defence are indicators (albeit powerful ones) and, that the court should have regard to other indicators as well, citing **Gunn**.⁴⁷ Contrary to the Bank's pleading found in **Ground of Appeal 1[c]**, that the "learned Judge was persuaded (wrongly) to rely on obiter dicta in **Erste** and **Gunn v Diaz** ... to the effect that where the anchor defendant is not defending the claim and a default judgment could be obtained against that anchor defendant, it is highly unlikely that there is a reasonable issue for the BVI Court to try", the learned judge instead explicitly found that "What **Gunn v Diaz** is not a proposition for is that a failure to acknowledge service or to serve a defence can be branded as a talisman and taken as conclusive that this means it is not reasonable for the court to try the case. If utility, viewed in the round, is the main touchstone of the test in respect of this limb to the gateway, another is realism." ⁴⁸

[85] The learned judge next looked at the **Erste** and **Satfinance** lines of authority. He referenced the fact that in **Erste** the court of appeal stated that the limb of the gateway raised a much more 'finely nuanced soft-edged question'.⁴⁹ In examining **Satfinance**,⁵⁰ the learned judge stated that the guidance which he took therefrom was that it is for the claimant to provide a plausible evidential basis for the application of a relevant jurisdictional gateway. It merits remarking that the learned judge stressed that the evidence was '**plausible**'. He made the point that the entire rationale for the restrictive manner in which the gateways are to be utilized, is in fact to limit the use of the court's extra territorial jurisdiction to genuine cases where foreign defendants are necessary or proper parties to support proceedings in this jurisdiction.

[86] At paragraph [190] of his judgment the learned judge remarked on the difficulty which counsel for the Bank had in articulating what the utility of trying the claim

⁴⁷ At paragraph [178] of the judgment.

⁴⁸ At paragraph [179] of the judgment.

⁴⁹ At paragraphs [180] - [182] of the judgment.

⁵⁰ At paragraphs [186] - [189] of the judgment.

brought against the BVI-SPVs would be. At paragraph [192] he listed six considerations which informed his decision that there was no utility for a trial of the claims against the BVI-SPVs. His evaluation is significant in this respect, derived in part from the totality of the evidence including the Bank's own pleading. He remarked on the Bank's reliance on the BVI's connection to the claim being limited to the incorporation of the BVI-SPVs; he found on 'the [Bank's] own case that the offshore SPV were used as 'siphons' or vehicles for funnelling money from [the Bank] to Mr. Ablyzov and his close associates.'⁵¹ In his consideration, all the factors evinced a lack of utility, which would be impractical to ignore including other relevant factual observations made by the learned judge in his addressing the *forum conveniens* issue arising under CPR 7.3(2)(a)(ii) which 'in the round' are all relevant considerations which must necessarily have informed the totality of his decision. Indeed, at paragraph [214] of his judgment under the *forum* issue he stated as follows:

"[214] I am satisfied that the connection with the BVI was merely tangential, or peripheral. BTA described the BVI SPVs as 'based in' the BVI, but it is clear to me that was unduly loaded language. These companies were merely incorporated here. There is no evidence that they had any operational offices, or operational or executive staff, or documents located in the BVI...."

[87] He concluded his treatment of the proper gateway by remarking⁵² that the Bank could have obtained judgment in default of acknowledgement of service or of defence against the BVI-SPVs but it had not; that it could also have obtained the appointment of an office holder such as a receiver by way of equitable execution, or indeed a liquidator over the BVI-SPVs which would enable them to participate actively in the claim but the Bank had not.

[88] Throughout his judgment the learned judge undertook a careful treatment of the facts and arguments and the law placed before him, taking all the circumstances

⁵¹ At paragraph [193] of the judgment.

⁵² At paragraph [195] of the judgment.

into consideration from the perspective of an experienced judge, and who had heard and considered both the *ex parte* Service Out and Set Aside Applications. In my respectful view, the judgment was a careful evaluation by an experienced judge, in the exercise of his discretion, based on the material which was before him, and which persuaded him that the Bank had not made out a proper case to satisfy the CPR 7.3(2) gateway test.

[89] This was quintessentially an evaluative analysis of the Set Aside Applications and the evidence and arguments of parties on both sides by the learned judge. Applying the **Re Sprintroom** guidelines and the authoritative mandate of **Dufour v Helenair**, and, having considered all of the arguments and evidence and the applicable principles, I accept the submissions of the respondents/applicants which, in summary, are (1) that the appeal is without merit and represents no more than an attempt by the Bank to re-argue matters of evaluative judgment, in circumstances where the learned judge undertook a detailed and careful analysis of the evidence and applicable principles; (2) the learned judge's decisions are grounded in principle and fact and disclose no error warranting appellate interference; and (3) the appellant has shown no flaw in the learned judge's evaluative reasoning. In particular the appellant has failed to show that there was a real issue which it was reasonable for the court to try between it, as claimant and the anchor defendants.

[90] On Issue 1, I am therefore of the view that the order made by the learned judge at paragraph [228] of his judgment, that the Bank did not satisfy the NPP Gateway Test was correctly made and accordingly, Ground of Appeal No. 1 should be dismissed. The Service Out Order is accordingly set aside.

Issue 2 - Forum Conveniens

[91] On this issue, I have considered carefully the arguments of the Bank that the learned judge erred in law and on the evidence in concluding that the BVI was not clearly and distinctly the most appropriate forum and that, he erred in identifying

Kazakhstan, Germany or Switzerland as appropriate alternatives. I have also considered carefully the arguments of the respondents, supporting the decision of the learned judge that ‘the BVI is certainly not clearly or distinctly the appropriate forum for the trial of the dispute.’⁵³

- [92] I have already reviewed and applied the guiding principles endorsed by and emerging from the Board in **Nilon Limited**.⁵⁴ On the issue of appropriate forum in that case, the Board’s decision is pellucid with reference to the third requirement to be satisfied, that where a claimant applies for permission to serve the claim documents outside of the jurisdiction, the applicant (in this case, the Bank) must satisfy the court that:

“in all of the circumstances the forum which is being seized (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.” (Emphasis supplied).

The Board went on to make clear that ‘in the search for the appropriate forum the question of the location of witnesses will be an important factor and has been described as a core factor.’⁵⁵

- [93] The 43rd through to the 51st defendants in the court below are pleaded by the Bank as being the ‘Commodity Sellers’.⁵⁶ The Bank’s amended statement of claim at Section E⁵⁷ names and identifies three individuals referred to as the ‘engineers involved in a financial engineering scheme’⁵⁸ as the Commodity Sellers with whom employees of the Bank worked closely, to include Mr. Richardson (the 45th

⁵³ At paragraph [204] of the judgment.

⁵⁴ *Nilon Limited v Royal Westminster Investments SA and others* [2015] 3 All ER 372, at [71], among others.

⁵⁵ At paragraphs 13 to 14 and 54 through 68 per Lord Collins.

⁵⁶ At paragraph 33 of the Amended Statement of Claim, page 7707, Appeal Bundle, Vol. 5.

⁵⁷ Commencing at paragraph 65 of the Amended Statement of Claim, page 7718, Appeal Bundle, Vol. 5.

⁵⁸ At paragraph 69.3 of the Amended Statement of Claim, Appeal Bundle, page 7723, Vol. 5.

defendant in the court below), Mr. Bekbergenov (the 49th defendant in the court below) and/or Ms. Kuzmicheva (the 50th defendant in the court below).

[94] The learned judge undertook a careful, detailed examination, analysis and evaluation of the pleadings, the evidence, the law and the submissions on this issue, in the exercise of his discretion, employing the **Nilon** lens of 'in all of the circumstances.' In my view, it is noteworthy that, whilst the Bank relies on the earlier paragraph [158](3) of the judgment in its notice of appeal for this ground of appeal, in which paragraph the locations of 'Kazakhstan, or Germany or Switzerland' are referred to by the learned judge at the very start of his discussion, as he continues in his reasoning process and engages this ground from paragraph [202] of his judgment, in taking all of the circumstances into consideration (**Nilon**), his articulation of his decision at paragraphs [204] and [215] in particular make clear that he is '...thus entirely satisfied that the BVI is not an appropriate forum for the trial of this claim and it is certainly not clearly or distinctly the most appropriate forum.'⁵⁹ (Emphasis supplied)

[95] In particular, at paragraph [205] of the judgment he recorded his evaluation of the case placed before him by the Bank. He found that:

"The alleged scheme which is the subject of the claim was perpetrated mainly in Kazakhstan, by officers and employees, located in Kazakhstan, of a Kazakhstani bank, dealing with commodity traders operating out of various jurisdictions, such as Germany and Switzerland, but not from the BVI, with funds being channeled to a bank in Latvia. None of the witnesses are in the BVI."

I remind myself that in **Nilon**, Lord Collins emphasized the importance of the question of the location of witnesses which he described as 'a core factor'.⁶⁰

⁵⁹ At paragraph [215] of the Judgment.

⁶⁰ At paragraph 90.

[96] In this regard the learned judge references the Bank's own pleaded case, that the choice of offshore SPV was 'irrelevant',⁶¹ referring to among others, paragraphs 192.1, 192.2 and 192.3 of the appellant Bank's amended statement of claim. It is worth recalling also the Bank's pleading in its amended statement of claim that Mr. Richardson, Mr. Bekbergenov and/or Ms. Kuzmicheva were the 'engineers' involved in the financial engineering scheme.⁶²

[97] In the exercise of his discretion, the learned judge accordingly took into consideration a number of factors, including the evidential inconsistency of the Bank's case with that pleaded (that is that the choice of offshore SPV was 'irrelevant'), in contrasting that to the evidence of the Bank's witness Ms. Nartay's second affidavit that '...the BVI SPVs played the key role in the Scheme.'⁶³ He also took into consideration that it was not only BVI-SPVs that were chosen – that Seychelles and Cypriot companies were used too and, that the single largest indebted SPV (of approximately USD\$48 million) was a Cypriot company; he was critical of the fact that these details were not brought to the court's attention at the Ex Parte Hearing.⁶⁴ He commented with reference to Ms. Nartay's evidence that the Bank's case on appropriate forum included a 'blatant and telling ... misrepresentation...[and that] ...BTA... are quite prepared to proffer self-serving, exaggerated half-truth to serve their ends.'⁶⁵ He found further:

"I am satisfied that the connection with the BVI was merely tangential or peripheral. BTA described the BVI SPVs as 'based' in the BVI, but it is clear to me that that was unduly loaded language. These companies were merely incorporated here. There is no evidence that they had any operational offices or operational or executive staff or documents located in the BVI..."⁶⁶

⁶¹ At paragraph [206] of the judgment.

⁶² At paragraph 91 of the Amended Statement of Claim, page 7730, Core Bundle vol. 5.

⁶³ At paragraph [207] of the judgment.

⁶⁴ At paragraph [208] of the judgment.

⁶⁵ At paragraph [211] of the judgment.

⁶⁶ At paragraph [214] of the judgment.

He referenced Adderley J's observation, 'mere incorporation in the BVI is not sufficient to found the BVI as the most appropriate forum' and 'although it is a connecting factor very little weight should be given to it': **Best Grain et al v Emerwood Ventures Ltd et al**.⁶⁷

[98] With reference to the learned judge's treatment of the evidence referred to above, in the exercise of his discretion, I remind myself that in his judgment he has guided himself with **Nilon**, in which the Board emphasized that an applicant must satisfy the court that in all of the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute.⁶⁸ He concluded that:

"...the BVI was not a strong thread running through the Scheme; it was as incidental and irrelevant as the identity of the offshore SPVs themselves... I am thus entirely satisfied that the BVI is not an appropriate forum for the trial of this claim and it is certainly not clearly or distinctly the most appropriate forum."⁶⁹

[99] In addition to **Nilon**, I have also considered the authorities of **Altimo**, **Vedanta** and, **Golden Ocean Assurance Ltd** among others, which were referred to by the parties in their submissions with reference to forum, access to justice and not allowing foreign defendants to be brought within the jurisdiction merely because doing so avoids multiple proceedings.

[100] In the exercise of his discretion in the case at bar, the learned judge also noted that the Bank had previously obtained judgments against Mr. Ablyazov and other defendants in Kazakhstan and England, further supporting the conclusion that the BVI was not the appropriate forum.

[101] His was a careful evaluative consideration of all the circumstances in arriving at his conclusion that the BVI was not the appropriate forum and which he articulated more

⁶⁷ BVIHC (COM) 153 of 2018 (delivered 28th February 2019, unreported).

⁶⁸ At paragraph [203] of the judgment.

⁶⁹ At paragraphs [214] and [215] of the judgment.

than once in his reasoned process at paragraphs [204], [214] and [215] of his judgment, following and applying the **Nilon** guideline interpretation for service out of the jurisdiction.

- [102] In all of the circumstances I endorse the decision of the learned judge on Issue 2 and dismiss the appeal in that regard as well.

Issue 3 - Material Non-Disclosure

- [103] This is not a difficult issue to determine. The law is clear on the duty owed to a court of law and the authorities all speak with one voice, which authorities were cited to the learned judge and which I have considered. I have reviewed the principles applicable to the duty of full and frank disclosure on an *ex parte* application and the arguments presented by the Bank and the respondents.

- [104] On an *ex parte* application the duty of full and frank disclosure requires an applicant not only to advance its own case but also to identify and fairly present matters adverse to it, including legal authorities and factual considerations which may weigh against the grant of relief. The appellant and the respondents have all cited authorities on this point. In my view it is sufficient to refer to the most recent edition of **The Caribbean Civil Court Practice**⁷⁰ which encapsulates an applicant's duty of disclosure, the extent of the duty and the consequences of omission. The learned authors rely⁷¹ on what might be called the *locus classicus* decision on an applicant's duty and the oversight of the court in respect of the same **Brink's Mat Limited v Elcombe**⁷²: [1] The duty is to make full and fair disclosure of all the material facts; [2] the material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisors; [3] the applicant must make proper

⁷⁰ The Rt. Hon. Mr. Justice Adrian Saunders and Louise di Mambro et al, 3rd Edn., LexisNexis Butterworths 2024.

⁷¹ Note 14.34, pages 226-227.

⁷² [1988] 1 WLR 1350.

inquiries before making the application; the duty therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries; [4] the extent of the inquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case; [5] if material non-disclosure is established the court will be astute to ensure that an applicant who obtains an ex parte order without full disclosure is deprived of any advantage he may have derived by that breach of duty; [6] whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application; [7] it is not for every omission that the injunction will be automatically discharged; the court has a discretion.

[105] The learned judge found that on the *ex parte* application the Bank was guilty of material non-disclosure in several respects as to evidence and case law. Among the more egregious of the breaches of that duty was the Bank's non-disclosure of the authorities of **Erste** and **Gunn**, which was described by the learned judge as 'inexcusable'.⁷³

[106] He also found that the Bank had misrepresented its case to the court on the *ex parte* application in certain respects, including the status of the BVI-SPVs, the discharged receivership orders, and the lack of evidence supporting the utility of trying the claims against the BVI-SPVs. These omissions were deemed deliberate and material and, the learned judge concluded that they undermined the integrity of the Service Out Application.

[107] On the evidence before him the learned judge concluded that the misrepresentations and omissions were not innocent but rather were deliberate.⁷⁴

⁷³ At paragraph [216] of the judgment.

⁷⁴ At paragraphs [221] - [226] of the judgment.

[108] It is beyond debate that the duty of full and frank disclosure to a court on an *ex parte* application is a strict duty, rooted in fairness and the integrity of the judicial system, to ensure that, in exercising its extraordinary power of hearing an application and making a decision in the absence of the party against whom it has been asked to make orders, justice is served fairly.

[109] On Issue 3 as well, I am satisfied from the judgment of the learned judge and his very careful treatment of all of the facts, the evidence and the arguments on these Set Aside Applications that he was correct to find as he did. I, therefore, for that reason, also dismiss this ground of appeal.

Disposition

[110] The Appeal is accordingly dismissed on all grounds. The appellant shall bear the respondents' costs to be assessed by a master or judge of the Commercial Division of the High Court unless agreed within 21 days of the date of this Judgment.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
P. Nicola Byer
Justice of Appeal [Ag.]



By The Court

Chief Registrar