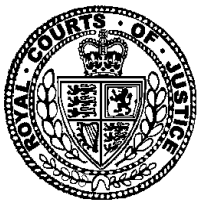

Neutral Citation Number: [2021] EWHC 1089 (Comm)

Case No: CL-2019-000412
Case No: CL-2020-000432

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION (QBD)
COMMERCIAL COURT

Royal Courts of Justice
Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 30 April 2021

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between:

(1) PJSC NATIONAL BANK TRUST
(2) PJSC BANK OTKRITIE FINANCIAL CORPORATION

Claimants/Respondents

-and-

(1) BORIS MINTS
(2) DMITRY MINTS
(3) ALEXANDER MINTS

Defendants

(4) IGOR MINTS

Defendant/Applicant

(5) VADIM BELYAEV
(6) EVGENY DANKEVICH
(7) MIHAIL SHISHKHANOV

Defendants

- -
- -

David Davies QC and Bibek Mukherjee (instructed by **Steptoe & Johnson UK LLP**) for the **Claimants**

Duncan Matthews QC and Richard Greenberg (instructed by **Stephenson Harwood LLP**) for the **Fourth Defendant**

Hearing date: 14 April 2021

- -

Approved Judgment

……...

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 April 2021 at 10:15am.

Mr Justice Calver :

Introduction

1. This is an application made by the Fourth Defendant, Igor Mints ("IM"), for an order that the Claimants be required to provide a further US$20,000,000 by way of additional fortification of their cross-undertakings, as contained in the worldwide freezing order of Moulder J dated 28 June 2019 (as subsequently varied) (the "WFO") and the return date order of Jacobs J dated 11 July 2019 (as subsequently varied) (the "Return Date Order"). This additional fortification would supplement the existing fortification of US$2,000,000 provided by the Claimants pursuant to the Return Date Order. IM contends that the additional fortification is required in respect of losses allegedly suffered by third-party entities in which he has an interest and which need to be secured, as follows:

   i. IM's investment management business ("EGCA Group"), which includes EG Capital Advisors Cayman Islands ("EGCA"), EG Capital Advisors UK Ltd ("EGCA UK") and EG Capital Advisors LLC ("EG LLC") (the latter being a subsidiary of EGCA UK), in which IM and his brother, Alexander Mints ("AM") (the Third Defendant in these proceedings), have a combined majority shareholding of 85%[1]; and

   ii. Tylsoca Limited ("Tylsoca"), EG Fixed Income Fund I Limited ("EG I") and EG Fixed Income Fund IV Limited ("EG IV").[2] EG I and EG IV are companies wholly owned by Tylsoca, a company within the MF Trust, a Cayman Islands Trust in respect of which IM is within a class of discretionary beneficiaries (the "MF Trust"). EG I and EG IV are both funds managed by the EGCA Group.

   (For convenience the EGCA Group, Tylsoca, EG I and EG IV, are referred to below as the "IM Companies".)

2. The application, which is brought by IM alone, turns on whether or not IM has shown a good arguable case that:

   i. there is a sufficient level of risk of loss (or indeed actual loss) to require additional fortification beyond that provided by the Claimants pursuant to the Return Date Order;

   ii. the making of the WFO / Return Date Order is or was a cause without which the relevant loss would not be or would not have been suffered; and

   iii. the Court can make an intelligent estimate of the likely amount of loss which might result or which has resulted by reason of the WFO / Return Date Order[3].

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[1] See the EGCA Group structure chart at Appendix 1 to this Judgment.
[2] See the Tylsoca, EG I and EG IV structure chart at Appendix 2 to this Judgment.
[3] Applying *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2015] 1 WLR 2309.

Background

3. The Claimants are Russian banks. They, or their predecessors in title, lent substantial sums of money to companies in or connected to a group of companies known as the O1 Group, secured by pledges of shares. The Claimants' case is that the O1 Group, including the entities that borrowed from the Claimants, was ultimately owned by the First Defendant, Boris Mints ("BM"). He is the father of the Second to Fourth Defendants. The Claimants believe that most of the First to Fourth Defendants' assets, to the tune of US$300-400m are held in the MF Trust, which was established in late 2017, a few months after the replacement transactions referred to in paragraph 4 below. BM is the settlor of the MF Trust and the Second to Fourth Defendants are among its discretionary beneficiaries. The Claimants believe that the assets held within the trust are in reality the beneficial property of BM.

4. The claims arise from an alleged fraud (the "Alleged Fraud") which the Claimants contend was perpetrated by all of the Defendants. This occurred in mid-2017, when the Second Claimant ("Bank Otkritie") was on the brink of being taken over by the Russian Central Bank because of its serious financial problems. The essence of the Alleged Fraud was that short-term, largely secured, interest-bearing and performing loans and repos issued by Bank Otkritie with a value of close to US$600m were "repaid" using the proceeds of uncommercial and off-market bonds issued by a Mints family company, worth at best a fraction of the value of the loans they replaced. Those off-market bonds were long-term, unsecured and with all of the interest deferred until maturity (i.e. they yielded no income to Bank Otkritie for at least 10 years). The Claimants' case is that, knowing Bank Otkritie was about to collapse, and the inevitable problems that this would cause to the Mints family, Bank Otkritie's senior management agreed this replacement transaction to help their friends, being the Mints family and their O1 Group. Bank Otkritie then duly collapsed on 29 August 2017.

5. On 27 June 2019, the Claimants successfully applied without notice for the WFO against the First to Fourth Defendants. By the WFO Moulder J ordered that, until after the return date hearing on 11 July 2019 (the "Return Date Hearing") or further order of the Court, each of the First to Fourth Defendants shall not:

   i. remove from England and Wales any of his or her assets which are in England and Wales up to the value of US$572,000,000; or

   ii. in any way dispose of, deal with or diminish the value of any of his or her assets whether they are in or outside England and Wales up to the same value.

6. By paragraphs 1 and 6 of Schedule B to the WFO, the Claimants gave cross-undertakings, which included undertakings in respect of loss caused to the First to Fourth Defendants and third parties, as well as (in paragraph 2) an undertaking to fortify such cross-undertakings by a payment of US$250,000 into the client account of their solicitors, Steptoe & Johnson UK LLP ("Steptoe & Johnson"). Paragraphs 1 and 6 were worded as follows:

   "*1. If the Court later finds that this order has caused loss to any Respondent, and decides that that respondent should be compensated for that loss, the Applicant will comply with any order the Court may make.*

…

6. The Applicants will pay the reasonable costs of anyone other than the Respondents which have been incurred as a result of this order including the costs of finding out whether that person holds any of a respondent's assets and if the Court later finds that this order has caused such person loss and decides that such person should be compensated for that loss, the Applicants will comply with any order the Court may make."

7. The following day, on 28 June 2019, the Claimants issued their Claim Form, which attached their Particulars of Claim dated 24 June 2019. The Claim Form, Particulars of Claim and the WFO were served on the First to Fourth Defendants on 29 June 2019.

8. Shortly thereafter on 2 July 2019, AM notified J.P. Morgan Bank Luxembourg S.A ("JPM") of the WFO. JPM had provided loans (the "JPM Loans") to companies that fell within the MF Trust. Specifically, the JPM Loans consisted of loans to Tylsoca, EG I and EG IV. JPM's representatives immediately asked for a copy of the WFO and said that they would require input from JPM's legal and compliance officer.

9. The following day, 3 July 2019, JPM blocked all of the MF Trust's company bank accounts. On 4 July 2019, JPM demanded early and immediate repayment of the JPM Loans, totalling approximately US$112,000,000. However, following discussions with AM and the Second Defendant, Dmitry Mints ("DM"), JPM agreed to postpone its demand for repayment of the JPM Loans until after the Return Date Hearing.

10. On 11 July 2019, the Return Date Hearing took place before Jacobs J, who considered that there was sufficient material from which to infer that a real risk of dissipation of the First to Fourth Defendants' assets existed and so he decided to maintain the WFO until the sealing of the Return Date Order, whereupon the WFO would cease to have effect and would be replaced by undertakings made pursuant to the Return Date Order (the "Return Date Undertakings"). The Return Date Undertakings were in substantially similar terms to the WFO.[4]

11. Pursuant to paragraphs 1 and 2 of Schedule 2 to the Return Date Order, the Claimants maintained their cross-undertakings. At paragraph 2 of the Return Date Order, the Claimants were ordered to provide additional fortification of US$1,750,000 in respect of the cross-undertakings by further payment into Steptoe & Johnson's client account, bringing the total fortification to US$2,000,000.

12. This additional fortification was ordered in a short exchange between counsel and Jacobs J right at the end of the Return Date Hearing. The cursory argument addressed to the Judge proceeded on a generalised basis with barely any reference to authority as follows:

[4] The Return Date Order was sealed on 16 July 2019, whereupon the WFO ceased to have effect and was replaced by the Return Date Undertakings.

"*MR. PILLOW: Thank you, my Lord. Finally, fortification of the undertaking. Now, you have not heard me on this point. The amount of loss that is suggested to have arisen already is $2m to $2.5m from the fire sale, as it is called, which may not yet have taken place, I should say, but we do not know. My Lord, we make a simple point in our skeleton what the test is and it requires an intelligent estimate that is informed and realistic of the likely loss that is caused by the order. What my learned friends have not done in their evidence is to take account of the fact that losing all these loans from JP Morgan will save them an awful lot of interest repayments. You cannot possibly quantify the loss side of the equation without working out how much the interest was that is being saved going forwards. So, really, I am not sure that your Lordship is in a position to say you are satisfied of the Malabu Oil test without the evidence as to what the countervailing benefit is of not having large loans outstanding to JP Morgan. There is clear evidence they were loans. There is clear evidence they were ----*

MR. JUSTICE JACOBS: How much are the loans?

MR. PILLOW: We do not know how much the loans were but the positions that were being dematerialised to pay for them, I think – we may have it – it is well over $100m. I think one is $100m plus and the other is $20m. We are talking of loans in the order of about $100m. If the securities that are being used to pay off those loans are going to suffer a loss of 2%, which is the estimate Mr. Mints has put forward, then you do need to bring in to the equation the benefit of not having to pay the interest on such amounts.

MR. JUSTICE JACOBS: But they are going to have to borrow the money from somebody else, are they not?

MR. PILLOW: No, my Lord, because they will not have any need for it unless they want to buy more assets. If they buy more assets, then they are mitigating the original loss and one then gets into the question of what the overall loss is. There is no evidence they are going to replace the sold assets with more assets.

MR. JUSTICE JACOBS: I read this point in your skeleton. I was thinking, if my house is repossessed and sold to pay off my mortgage, on a fire sale, if this is what happens, and I get much less than it was worth, you are much better off because now you do not have to pay the bank.

MR. PILLOW: No, my Lord, you are not better off. It is a serious point, if I may say. You are not necessarily better off. I am not saying you are. I am saying you have to bring it into account when you are assessing your loss.

MR. JUSTICE JACOBS: Have you done a calculation?

MR. PILLOW: We do not know the sums, my Lord. We do not have the evidence, my Lord. This is a simple point, we do not have the evidence to know what these loans were costing and therefore you cannot do the calculation. There we are.

MR. JUSTICE JACOBS: I have to say I was inclined to increase the amount. In the light of the evidence that this injunction has had and may have an effect on a business and there may be foreclosures effectively, or sales, the sum which you estimated and put into court, did you?

MR. PILLOW: We put 250,000 in and we have offered another 250,000 dollars.

MR. JUSTICE JACOBS: I am inclined to increase that, unless you tell me there is a real problem, to US $2m on the basis that there is evidence of a real problem which has been caused by an injunction, which does not surprise me and it is difficult to estimate. I would not have thought that is difficult for your clients to put up.

MR. PILLOW: My Lord, I do resist it in principle because your Lordship is not following the guidance in Malabu Oil by sticking a finger in the air. Having said that, I am not ----
MR. JUSTICE JACOBS: I have some evidence that there is a loss of $2.8m, or something like that, on a proposed sale."

13. The Judge's reference to "*$2.8m*" appears to have been derived from paragraph 4.1 of the First Witness Statement of AM dated 9 July 2019 in which he referred to a loss in the region of US$2,000,000-US$2,800,000 by reason of EGCA estimating that it would need to sell on a 'fire sale' basis securities sufficient to cover repayment of the outstanding loans (made to Tylsoca, EG I and EG IV – with EGI and EG IV owing two funds managed by the ECGA Group shown in the dotted box in Appendix 2).

14. After the Return Date Order was made, on 15 July 2019 IM alleges that JPM confirmed during a call with AM and DM (but not IM) that the replacement of the WFO with the Return Date Undertakings did not cause it to revise its demand for immediate repayment. In order to repay the JPM Loans, the relevant borrowers (i.e. Tylsoca, EG I and EG IV) redeemed the following amounts from a fund launched by the EGCA Group in 2018, namely the EG Emerging Markets Corporate High Yield Fund (the "EG Emerging Markets Fund" or "UCITS"):

    i. Tylsoca redeemed and repaid US$44,340,752.80;

    ii. EG I redeemed and repaid US$23,913,608.81 and EUR5,174,817.87; and

    iii. EG IV redeemed and repaid US$35,392,134.17 and EUR1,919,942.46.

    These redemptions resulted in a significant decrease in the EGCA Group's assets under management.

15. On 11 December 2019, the First to Third Defendants (not IM) were charged *in absentia* in Russia with the criminal offence of embezzlement relating to the Alleged Fraud.

16. On 18 December 2019, an application for IM (alone) to be released from the Return Date Undertakings (the "Discharge Application") was heard by Cockerill J, who dismissed the application by way of a judgment handed down on 6 February 2020.

17. Between the Discharge Application hearing and the handing down of Cockerill J's judgment, on 30 and 31 January 2020 a number of articles were published by Russian and international news outlets reporting that Russian authorities had issued international arrest warrants for the First to Third Defendants on charges of embezzlement in connection with the Alleged Fraud. On 31 January 2020 a Russian court ordered that DM and AM should be arrested *in absentia*, and on 13 February 2020 a Russian court ordered the same as regards BM.

18. Separately, on 10 February 2020 Credit Suisse AG ("CS") proposed that EG IV agree to the voluntary early repayment of outstanding loan amounts which it owed to CS of approximately US$25,000,000 (the "CS Loans"), and EG IV did so. In order to repay the CS Loans, EG IV sold the majority of its securities portfolio, with the result, it is

said, that the ECGA Group suffered a further significant reduction in the value of its assets under management.

19. Permission to appeal the judgment in the Discharge Application having been refused by Cockerill J, on 27 February 2020 IM renewed his application for permission to appeal to the Court of Appeal. Males LJ refused the application in writing on 8 June 2020. The Judge stated in particular as follows:

> "*8. A large part of the applicant's proposed argument on appeal concerns the effect of the undertakings on the business of EGCA. Contrary to the applicant's assertion, it is not an uncontroverted fact that the undertakings are harming this business. As the judge pointed out, the applicant's brother*[5] *is also a director of EGCA who has not disputed that there is a good arguable case of fraud against him, and who has been found by a judge to give rise to a risk of dissipation of assets. Moreover, while the applicant has not been charged with criminal offences in Russia, his brother has been charged with embezzlement. Reputational damage to the company as a result of the applicant having given undertakings is possible but, as matters stand at present, somewhat speculative. In particular, if investors are indeed looking for "a safe pair of hands" in which to invest (the applicant's latest evidence), they are likely to have concerns regardless of the applicant's undertakings.*"

20. Males LJ also referred to IM's First Witness Statement dated 26 February 2020, paragraph 7, in which he stated that, "*The reason why CS made its demand for early repayment, as stated in their letter dated 14 February 2020, was* "*recent events as well as the current circumstances surrounding the company [ECGA] and the beneficiary family*" *which led CS to the conclusion that the* "*overall risk profile of the relationship has changed considerably*."""[6] Males LJ stated that:

> "*That reference to the beneficiary family, although post-dating the judgment, fully justifies the judge's conclusion that EGCA as a business is closely associated with the Mints family, and that damage as a result of the undertakings given by the applicant cannot readily be separated from damage to the reputation of the family as a result of the proceedings against them and the undertakings given by other family members.*"

21. Consistently with this, the Claimants contend in response to this application that the EGCA Group has significant reputational issues independent of the WFO / Return Date Undertakings, precisely because of its close association with the Mints family. It is also said to be significant that IM's own evidence is that EGCA's client base is essentially Russian and would therefore be well aware of the well-publicised Russian criminal proceedings: see IM's Third Affirmation dated 4 October 2019, paragraph 92.6:

> "*I believe that EGCA Group's position has been exacerbated by the extensive media campaign, which I believe the Claimants have been involved in, particularly in the Russian press. This campaign is particularly damaging for EGCA Group's business as most of its clients are Russian-based or Russian-speaking and are constantly seeing my family's name mentioned in the context of the alleged fraud.*" (emphasis added)

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[5] i.e. AM

[6] See paragraph 58 below for CS's letter of 14 February 2020.

22. Finally by way of background to this application, it is to be observed that the Claimants have now been found, by three separate Commercial Court judges, to have a good arguable case of serious wrongdoing against the Mints family members (i.e. the First to Fourth Defendants).[7] Indeed, for the purposes of the WFO / Return Date Undertakings, IM accepted that there was a good arguable case on the merits of the fraud case alleged against him,[8] and subsequently sought – unsuccessfully – to argue to the contrary that there was no good arguable case that he was involved in the Alleged Fraud at his Discharge Application.[9]

Legal Principles

Recoverability of compensation under undertakings

23. The starting point when considering the recoverability of compensation under undertakings such as those in the present case must be the dictum of Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 361:

> "*The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made on the same basis as that on which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v Day (1882) 21Ch D 421, per Brett LJ, at p 427.*"

24. 11 years after *Smith v Day* was decided, in *Schlesinger v Bedford* (1893) 9 TLR 370 Lindley LJ explained at [370]-[371]:

> "*…all the remote consequences of obtaining an injunction which was afterwards dissolved, were not to be taken into account in assessing the damages to be paid to the defendant under the plaintiff's undertaking. It would be unduly straining such undertaking to include in it damages which did not naturally flow from the injunction…the plaintiffs ought not to be exposed to damages which were not fairly*

[7] Namely Mrs Justice Moulder at the *ex-parte* hearing for the WFO; Mr Justice Jacobs at the Return Date Hearing; and Mrs Justice Cockerill at IM's Discharge Application.
[8] See the judgment of Jacobs J (dated 29 July 2019) [2019] EWHC 2061 (Comm) at [23].
[9] See the judgment of Cockerill J (dated 6 February 2020) [2020] EWHC 204 (Comm) at [71], against which permission to appeal was refused (including as to this point).

consequential on the injunction, and which they could not have foreseen when the injunction was granted."

25. This led McCombe LJ, more than a hundred years later, to summarise the relevant principles as follows in *Abbey Forwarding Ltd v Hone (No. 3)* [2015] Ch 309 (CA) at [63]:

"*In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in the Hoffmann-La Roche case, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant "should be compensated" (to apply the words of the undertaking). Labels such as "common law damages" and "equitable compensation" are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.*"

Principles concerning fortification of undertakings

26. It was common ground between the parties that it is a matter for the Court's discretion as to whether or not to order fortification of an undertaking given by a claimant as the price for it obtaining freezing injunctive relief. In exercising that discretion, the Court will have regard to the principles set out in *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2015] 1 WLR 2309 (CA) at [52]-[54] ("*Malabu Oil*") as follows:

i. The applicant for fortification must show a good arguable case for it, and does not have to prove the need for fortification on a balance of probabilities (*Malabu Oil* at [52]-[53]).

ii. In considering whether to exercise its discretion to order fortification, the Court will take the three criteria – which are inextricably linked factors – into account (*Malabu Oil* at [53], applied in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at [14] ("*Phoenix Group*")):

(a) Can the applicant show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that effect?

(b) Can the applicant show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction?

(c) Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?

27. As for the correct approach in relation to the three criteria:

Can the applicant show a sufficient level of risk of loss?

i. In showing a sufficient level of risk of loss, the mere assertion of risk is insufficient. As *Gee on Commercial Injunctions* (7th Ed.) puts it, "*there must be some real evidence, which objectively establishes that risk*" (paragraph 11-029), citing *JSC Mezhdunarodniy v Pugachev* [2015] EWCA Civ 139 at [98]-[99], to which I would add Popplewell J in *Phoenix Group* at [18] and Mr. Briggs QC in *Harley Street Capital Limited v Tchigirinski* [2005] EWHC 2471 (Ch) at [33] ("*Harley Street Capital*"). I consider that there does indeed have to be a solid, credible evidential foundation that the claimed loss has been or will be suffered, particularly where the loss is said to be that of a third party.

Is the loss caused by the grant of the injunction?

ii. In relation to the causation element:

(a) It is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the order/injunction: *Air Express v Ansett* (1979) 146 CLR 249 per Mason J at [325]; Saville J in *Financiera Avenida v Shiblaq*, transcript, 21 October 1988 (unreported) and *SCF Tankers Ltd v Privalov* [2017] EWCA Civ 1877 at [43] ("*Privalov*").

(b) In order to show that the loss would not have been suffered "*but for*" the injunction, the applicant must show that the freezing order and the undertakings were an effective cause of the third party's loss: *Privalov* at [42]. As Tomlinson LJ stated in *Malabu Oil* at [54]:

> *"[as] to causation, it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered. That is the hurdle which the applicant must surmount. It is of course open to the defendant to demonstrate that it has not been surmounted, as by demonstrating that there is no causal link between the granting of the injunction or order and the loss in question. If however, disproving the asserted causal link as to which a good arguable cause is shown requires the deployment of extensive contentious evidence and argument, that is not an exercise to be attempted at the interlocutory stage.*" (emphasis added)

(c) It is only loss which is caused or would have been caused by the preventative or, as the case may be, coercive effect of the injunction that is recoverable under the cross-undertaking: *Harley Street Capital* at [22]. It follows that if the loss would have been suffered in any event because of an injunction properly obtained in the proceedings against other defendants, that will not be recoverable: *Tharros Shipping v Bias* [1994] 1 Lloyd's Rep 577 at p. 583 ("*Tharros Shipping*").

(d) If the loss would have been suffered regardless of the granting of the injunction, for example because of the bringing of the proceedings, then that is not covered by the undertaking. As was stated by Saville J in

Financiera Avenida v Shiblaq (unreported, but cited in *Tharros Shipping* at 581-2 by Waller J):

> "*The object of the undertaking is to protect a party, normally the defendant, in respect of such damage as he may sustain by reason of the grant of the interim relief. It is no part of the undertaking to protect the defendant against loss or damage which he would have sustained otherwise, as for example, detriment which flows from the commencement of the litigation itself. That is loss or damage which the defendant must bear himself, as he does when no interim injunction is sought or granted. Consequently, it is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction*."

See also *Harley Street Capital* at [35]; and *Bloomsbury International v Holyoake* [2010] EWHC 1150 (Ch) at [18] per Floyd J.

(e) Similarly, a misconceived notion by potential investors in a listed company (or fund), that the grant of a freezing order against (private individual) defendants who are considered to be in control of that company (or fund) lent the Court's credence to the serious allegations made against those defendants is unlikely to be seen as part of a chain of causation between the freezing order and any loss in share value in the company (or fund). "*It is a factor wholly unrelated to any restraint placed by the freezing order on the…defendants or anyone else. It therefore lies outside the quasi-contractual analysis of causation…*": *Harley Street Capital* at [22] and [33].

(f) So far as reputational consequences of being subject to a freezing order are concerned, in *Harley Street Capital* at [34] the deputy judge stated as follows:

> "*Neither I nor counsel were aware of any case in which the purely reputational consequences of being the subject of a freezing order have formed a part of an award of damages under the cross-undertaking, wholly divorced from the consequences of the restraint which the freezing order imposed on the applicant for damages or upon anyone else. In this case, the reputational loss is not even that of the defendants against whom the freezing order was made, but of the fourth defendant. That makes the supposed causative link even more tenuous*." (emphasis added)

(g) However, in *Al Rawas v Pegasus Energy Limited* [2008] EWHC 617 ("*Al Rawas*"), Jack J stated:

> "*35. I consider that there is a close analogy between the stopping of a cheque by a bank and the obtaining of a freezing order. In each case there is an interference with the party's ability to use its money as it wishes. It goes to the heart of the party's ability to use the banking system, which is at the heart of trade. To be on the wrong end of a*

> *freezing order is undoubtedly a stigma – see the Booker McConnell case referred to above: it suggests that the defendant has failed to pay its debts and has been found likely to try to dissipate its assets….*
>
> *39. I conclude that it is in accordance with principle and the above authorities that general damages may be awarded where a search and seizure order has been wrongly obtained, and likewise with a freezing order. Such damages are to compensate the defendant for the consequences of the order which cannot be claimed as special damage. They are not, however, awarded for nothing. It may be obvious that the particular circumstances of the case justify an award, or it may well not be but rather the contrary. In most cases it will be necessary to have some evidence to support the award.*"

(h) In *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), Floyd J, having considered *Harley Street Capital* and *Al Rawas* stated at [23]:

> "*Plainly, the strength of the causative link between the grant of a freezing order and damage to the commercial standing of the defendant will vary from case to case. Harley Street v Tchigirinski was a case where Mr Briggs QC felt able to discount it as an element in the defendants' loss at the interim stage, whereas Al-Rawas was a case where it was ultimately considered to justify an award of damages, once all the evidence was available.*"

(i) Thus, whilst a claim for general damages might in theory be available for reputational damage caused by the granting of a freezing order, it is likely to be a rare case as it will frequently be difficult for the defendant to show that the damage has been suffered as a consequence of the restraint and not as a result of other factors, such as the bringing/existence of the underlying litigation.

(j) It follows that if the reputational loss claimed is that of a third party who is not subject to the restraint of the freezing injunction, the causative link becomes even more tenuous and the alleged loss is very unlikely to be recoverable. Males LJ made this point in the present case (in refusing permission to appeal against the judgment and order of Cockerill J), in observing that damage to EGCA as a result of the undertakings given by IM cannot readily be separated from damage to the reputation of the family as a result of the proceedings against them and the undertakings given by other family members: "*if investors are indeed looking for "a safe pair of hands" in which to invest, they are likely to have concerns regardless of the applicant's undertakings.*"

(k) Even where general damages for distress or "*stigma*" caused by a freezing order are considered to be due, the Court is likely to be very conservative in its assessment of any such damages: see *Bank St Petersburg v*

Arkhangelsky [2013] EWHC 3529 (Ch) at [38] (overruled on other grounds):

> *"even if "stigma" damages or compensation where a cross-undertaking is enforced may in principle be recoverable, the Court is likely to be very conservative in its assessment [of them]…the reluctance of the Court to make any award in respect of purely reputational consequences is illustrated by the dearth or even absence of other examples in which it has done so*."

(l) Indeed, to the extent that any such awards for general damages have been made (which have always been made to the party which was actually subject to the freezing order), they have always been very modest: £1,000 in *Al-Rawas v Pegasus Energy Ltd* [2008] 1 All ER 346 at [48]; £10,000 in *Columbia Picture Industries Inc v Robinson* [1987] Ch 38; and £15,000 (calculated on the basis of £750 per month) in *Abbey Forwarding Ltd v Hone (No. 3)* [2015] Ch 309 (CA) at [129].

Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?

iii. Again, in my judgment, there must be some solid, credible evidence of future losses (or of losses having been suffered). I would adopt the general approach to this issue of Popplewell J in *Phoenix Group* at [18]. The claim to have suffered loss ought ordinarily to be supported by some underlying material and ought not to be speculative. Without documentary evidence, a mere generalised assertion of loss will be scrutinised carefully by the Court and is unlikely to be sufficient.

Tharros Shipping

28. It is instructive at this juncture to give some consideration to the judgment of Waller J in *Tharros Shipping* because his judgment brings together the three criteria set out in paragraph 26 above in a factual context which is not entirely dissimilar to the present case.

29. The facts of that case were that a company known as "Services" was seeking to enforce the undertaking, given by the claimant in the context of a freezing injunction. As with EGCA here, Services was not a party to the main action. The claimant contended that the monies in Services' Midland Bank, London dollar and sterling accounts belonged to the second and third defendants, and were therefore covered by the injunction. Another company in the group, the first defendant called "Bias", also held an account at the same bank, although the second and third defendants did not. Phillips J (as he was) acceded to an application of Services to make clear that the freezing injunction did not apply to its accounts, and Services then claimed under the cross-undertaking.

30. Services claimed for loss and damage allegedly suffered by reason of a forced sale of dollars in its London dollar account. Services' claim was that *on being notified of the injunction*, Midland Bank exercised its right of set-off forcing Services to sell the dollars standing to the credit of the dollar account so as to reduce the overdraft on Services' sterling account (which it would not otherwise have done). This caused it to

suffer an exchange rate loss. There was no real dispute that it was the notification to the bank of the freezing injunction which triggered the bank's decision on that day to request Services to sell dollars as they did. At p. 583 Waller J (as he was) stated as follows:

> "*The question at this stage is whether Services have demonstrated that they would not have suffered the loss they claim "but for" the grant of the mareva injunction. As I have already indicated there is no doubt that the decision of the bank to seek the sale of the dollars was triggered by the notification of the mareva injunction. However, it is important to appreciate that it is only insofar as the Mareva was effective as against Services that it could be relevant to any claim for damages in relation to the cross-undertaking. It must be remembered that a valid Mareva was granted in relation to [the second and third defendants] and because the same also related to Bias, that injunction would have been served in any event on the Midland Bank [because Bias also held an account there]. In the context of these accounts and although [the Bank] did not feel able to say with any certainty what [it] would have done, it seems to me highly likely that within a short period of the service of such an injunction, the bank would have insisted on the setting-off of the dollar account and the sterling account…. [The bank] made clear in [its] evidence that even without the mareva, the bank would not have allowed the position to remain as it was for very long. It seems to me highly likely that with notification of the mareva in relation to other companies in the group, the bank would have insisted on the set-off. In those circumstances it seems to me that Services do not get over the first hurdle*." (emphasis added)

31. In other words, since the accounts of Services were not in fact frozen as the freezing injunction was not effective as against *it*, the loss caused to Services as a third party was not caused by the freezing injunction but rather by reason of the reaction of the bank to the freezing injunction granted against Bias. Services could not therefore demonstrate that it would not have suffered the loss it claimed but for the grant of the freezing injunction, despite the fact that the decision of the bank to seek the sale of dollars was triggered by the notification to it of the freezing injunction against Bias.

32. Waller J observed that Services' case relied upon the following chain of causation:

> "…"*but for" the bank allowing the accounts to be run with a substantial sterling overdraft secured by a substantial dollar credit; "but for" the mareva injunction; "but for" the bank taking a decision not required by the mareva but because of the mareva to set-off the two accounts; "but for" Services having insufficient funds or credit worthiness to borrow further dollars elsewhere; and but for the change in the exchange rate from Sept 15 onwards, services would not have suffered the loss that they claim*."

33. He said it was therefore only necessary to consider two links in the chain of causation:

> "*First, the plaintiffs did not know that the bank was allowing Services in effect to speculate in currency by allowing an extensive credit overdraft in sterling and a substantial credit in dollars. Furthermore, I do not think the evidence established that the running of the accounts in that way would happen in the majority of cases so as to make it reasonable or fair that the plaintiffs should be taken to have contemplated it.*

> *Secondly, it seems to me clear that the plaintiffs should not be regarded as contemplating that there was to be a dramatic fall in the value of sterling as compared to dollars at the time when they applied for the Mareva injunction.*"

It followed that the claim also failed on that basis. I return to *Tharros Shipping* below.

Application of the facts to the three criteria

34. I turn next to the application of the facts in the present case to the three criteria.

35. The losses claimed as the basis for requiring additional fortification are divided by IM into the following categories:

    i. damage to the EGCA Group due to the loss of fund management revenue and lower profitability than forecast ("Loss 1");

    ii. losses suffered by EG I, EG IV and Tylsoca resulting from a 'fire sale' of assets deemed necessary in order to realise the funds to repay the JPM Loans and the CS Loans ("Loss 2"); and

    iii. loss of investment return by EG I, EG IV and Tylsoca, due to their being deprived of the net return on the investments that they held within the EGCA Group before the WFO / Return Date Undertakings took effect and would have continued to hold if they had not had to redeem them to repay the JPM Loans and the CS Loans ("Loss 3").

Loss 1

36. The elements of the claim for Loss 1 are alleged to be that JPM and CS recalled the JPM Loans and the CS Loans as a result of the granting of the WFO / Return Date Order, and this led to the EGCA Group's profits falling for the following reasons:

    i. In order to realise the funds necessary to repay the JPM Loans and the CS Loans, the relevant borrowers (i.e. Tylsoca, EG I and EG IV) had to redeem investments in the EG Emerging Markets Fund (UCITS) in a 'fire sale' of assets that had until then been under the management of the EGCA Group. This caused a substantial reduction in the total assets under management. That in turn resulted in a reduction in the total fees chargeable by the EGCA Group, which in turn reduced turnover ("Element 1 of Loss 1").

    ii. The EGCA Group's reduced turnover limited its ability to repay loans obtained from Tylsoca, as it had reportedly planned to, and led to an increase in borrowing costs ("Element 2 of Loss 1").

    iii. A number of third-party investors subsequently followed JPM's and CS's lead, choosing to effect redemptions and so remove their assets from the EGCA Group's management ("Element 3 of Loss 1").

37. An additional element of the claim for Loss 1 is alleged to be that negative publicity generated by the WFO / Return Date Order led to the EGCA Group being unable to

raise projected additional third-party investment ("Element 4 of Loss 1"). This element of Loss 1 stands apart from the others, as IM suggests that this aspect of the loss can be attributed directly to publicity relating to the WFO / Return Date Order, and so it is not reliant on proof of a causal link between this loss and the recalling of the JPM Loans and the CS Loans.

(i) Sufficient level of risk of loss (or actual loss) to require additional fortification?

38. With regard to Element 1 of Loss 1, IM states in paragraphs 23.2-23.3 of his Third Witness Statement dated 4 February 2021 that the EGCA Group's total assets under management decreased in the wake of the WFO / Return Date Order based upon actual income compared to budgeted income. The alleged quantum of this loss is, however, disputed by the Claimants by reason of the fact that IM has put forward a number of different and inconsistent management budgets at different stages in these proceedings; of those provided in the hearing bundle for this application, a management budget exhibited to IM's Third Affirmation dated 4 October 2019 differs from the management budget exhibited to IM's Third Witness Statement. However, accepting that there was at least some degree of reduction in assets under management, which was to be expected following the redemptions effected in order to repay the JPM Loans and the CS Loans, a good arguable case can be made that this led to a reduction in fees chargeable by the EGCA Group, which in turn led to a reduction in turnover.

39. As to Element 2 of Loss 1, the Court has not been provided with any specific figures regarding the alleged increase in borrowing costs. Instead, in his Third Witness Statement at paragraph 27.2, IM puts forward an increase in borrowing costs on a general basis as one of the factors contributing to an overall reduction in the EGCA Group's profits, stating **[A/3/18]**:

> "*Historic budgets (prepared before the Return Date Undertakings and WFO came into effect) made provision for existing loans provided by Tylsoca to EGCA Group to be repaid in 2019 and thereafter, and did not make provision for any further financing to be provided by Tylsoca. Instead of now being in a position to repay those loans, EGCA Group has had to rely on further financing from Tylsoca, which means that, in order for it to survive, it will require increased levels of funding.*"

40. Accepting IM's evidence on this point, a good arguable case can be made that the EGCA Group experienced an increase in borrowing costs, which it reasonably follows would have an impact on its profitability.

41. In relation to Element 3 of Loss 1, there is very limited evidence provided of third-party investors choosing to effect redemptions and so remove their assets from the EGCA Group's management in the aftermath of the WFO / Return Date Order. Only two redemption requests are provided[10], and no figures are offered as to the value of each of these two redemptions. Indeed, the figures that are provided by IM in his Third Witness Statement in fact indicate that third-party assets under management *increased* during the relevant period[11]. On this basis, a good arguable case has not been made out that Element 3 of Loss 1 has in fact been incurred. There is therefore an insufficient level of

[10] at **[A/12/243]** and **[A/12/244]**
[11] **[A/3/12; A/3/14; A/8/116]**

risk of loss (or indeed actual loss) in relation to Element 3 of Loss 1 to require additional fortification beyond that provided by the Claimants pursuant to the Return Date Order.

42. As to Element 4 of Loss 1, this element is entirely reliant on the ambitious projections of additional third-party investment set out in a management budget prepared by the EGCA Group's in-house accountants, apparently providing the actual and projected financial figures for the EGCA Group from January 2019 to December 2020 (the "Budget")[12].

43. The Budget is unreliable for a number of reasons. It is an unsigned, undated, single-page document providing forecasts for which no underlying material has been provided, it is said on grounds of confidentiality and commercial sensitivity, despite the fact that the Court is well used to overcoming such concerns by the use of confidentiality clubs and the like. Its projections are therefore unverifiable. As noted above, the Budget also features discrepancies with other management budgets put before the Court at earlier stages in these proceedings (see for example [B2/26/892]).

44. IM seeks to bolster the credibility of the Budget by relying on the report of Paul Smethurst, a forensic accountant, dated 4 February 2021. However:

i. IM did not apply for permission to instruct Mr Smethurst as an expert pursuant to CPR Part 35. I consider that he ought to have done, following *BB Energy (Gulf) DMC v ABB* [2018] EWHC 2595 at [48]-[50]; *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666; *Helice Leasing A/S v PT Garuda Indonesia* [2021] EWHC 99 (comm). It is true to say that it has been held that expert evidence can be adduced outside of Part 35 for the purposes of a security for costs application (*Pipa v BGEO Group Ltd* [2019] EWHC 325 (Comm)), although it may be that the better analysis is that this is an example of dispensation under CPR 35.5(1) and in that sense still regulated by Part 35.

ii. Mr Smethurst recognises at paragraph 1.5 of his report that he had "*not been appointed as a reporting expert in accordance with CPR Part 35 and the format and structure of my report does not accord with that which a reporting expert would submit to the Court.*" In these circumstances, and as Mr. Smethurst is neither a witness of fact nor an expert witness, I do not consider his "report" to be a solid evidential basis upon which I can base any factual finding as to the alleged losses of the EGCA Group.

iii. In any event, Mr Smethurst's "report" offers limited analytical assistance to the Court. In relation to Loss 1, Mr Smethurst notes, "*In my view, there are many factors that may have had an impact upon the actual financial outcome achieved by EGCA subsequent to July 2019*" and that (as IM himself says) "*in principle it is not straight-forward to isolate the financial effect of the WFO and the Return Date Undertakings upon EGCA's business from other market and investor influences*". **[A/5/46]** However, he then goes on simply to accept the assertion of IM in his evidence that, "*the Return Date Undertakings is the only major event that has had a lasting detrimental effect on EGCA's performance since July 2019.*" **[A/5/46]** In spite of this apparent contradiction between Mr Smethurst's

[12] **[A/12/233]**.

view and IM's evidence, no attempt is made to assess whether IM's assertion is in fact correct, and this assertion serves as the basis for the report's reliance on the projections in the Budget for the purposes of establishing Loss 1. I do not consider this to be a reliable evidential foundation.

45. On this basis, a good arguable case has not been made out that Element 4 of Loss 1 has in fact been incurred. In other words, there is an insufficient level of risk of loss (or indeed actual loss) in relation to Element 4 of Loss 1 to require additional fortification beyond that provided by the Claimants pursuant to the Return Date Order.

(ii) Causation

46. The starting point so far as Loss 1 is concerned is that there is no evidence that the Claimants knew anything about the banking arrangements of the MF Trust and the EGCA Group. Whilst they did have some idea of the banking arrangements in relation to the JPM Loans by the Return Date Hearing, by that stage the alleged damage in relation the JPM Loans had already been suffered (with the JPM Loans having been recalled). At the point at which the Claimants applied for the WFO, there is no evidence that they had any knowledge that:

i. first, the JPM Loans and the CS Loans existed;
ii. second, JPM and CS would or might recall the JPM Loans and the CS Loans subsequent to the granting of the WFO / Return Date Order;
iii. third, Tylsoca, EG I and EG IV held assets in the EG Emerging Markets Fund;
iv. fourth, those assets were under the management of the EGCA Group;
v. fifth, Tylsoca, EG I and EG IV would have to sell assets in the EG Emerging Markets Fund in order to repay the JPM Loans and the CS Loans;
vi. sixth, that would result in a reduction in fees chargeable by the EGCA Group;
vii. seventh, a resultant reduction in fees chargeable by the EGCA Group would lead to reduced turnover, which in turn would limit the EGCA Group's ability to repay loans as planned, causing an increase in borrowing costs;
viii. eighth, other third-party investors would follow the lead of JPM and CS and chose to remove their assets from the EGCA Group's management; and
ix. ninth, negative publicity relating to the WFO would lead to the EGCA Group being unable to raise projected additional third-party investment.

47. The losses said to have been suffered are accordingly far too remote. But even in the absence of remoteness as an obstacle, in order for causation to be made out, IM would have to establish to the standard of a good arguable case that the preventative or, as the case may be, coercive effect of the WFO / Return Date Undertakings is or was a cause without which Loss 1 would not be or would not have been suffered: *Harley Street Capital* at [22].

48. For the purposes of causation, each of *Elements 1, 2 and 3 of Loss 1* depend on the premise that the recalling of the JPM Loans and the CS Loans was caused by the granting of the WFO / Return Date Order.

49. Yet the damage claimed under Loss 1 was allegedly suffered by third parties (the IM Companies) who are not themselves subject to the WFO / Return Date Undertakings. As appears to be recognised in IM's evidence in reply to the Claimants' evidence in this

application, specifically at paragraph 6 of the Fifth Witness Statement of Alan Bercow dated 26 March 2021, the WFO / Return Date Undertakings do not restrict the ordinary business activities of these third parties.

50. The position here is similar to that which pertained in *Tharros Shipping*, in that IM's case relies upon a chain of causation, which is far too tenuous and remote. IM cannot show that the damage he has sustained would not have been sustained but for the injunction. His case necessarily runs as follows: but for EGI, EG IV and Tylsoca running their accounts subject to very substantial loans from JPM and CS; but for the freezing injunction; but for AM notifying JPM and CS of the freezing injunction; but for JPM choosing to block all of the MF Trust's company bank accounts despite AM pointing out to it that normal business could continue because the freezing order's restraint was only imposed on the Mints family members; but for JPM and CS deciding to call in the loans; but for EG I, EG IV and Tylsoca having insufficient liquid funds to be able to borrow elsewhere; but for other third-party investors choosing to follow the lead of JPM and CS in removing their assets from the EGCA Group's management; and but for the ECGA Group's consequent inability to repay its own loans from Tylsoca leading to increase in its borrowing costs, the ECGA Group would not have suffered its losses.

51. The only other argument of IM in support of the contention that the WFO / Return Date Undertakings caused the recall of the JPM Loans and the CS Loans is that the recalling of the loans was rooted in the reputational damage caused to the borrowing entities by reason of their association with the First to Fourth Defendants, who were intimately involved with the borrowing entities, both through the MF Trust and AM and IM's management of the EGCA Group.

52. But as I have explained above, if the alleged reputational loss claimed is that of a third party who is not even subject to the restraint of the freezing injunction, the causative link becomes even more tenuous and the alleged loss is very unlikely to be recoverable, and in my judgment that is undoubtedly so in the present case. In other words, this is a *Harley Street Capital* case, not an *Al Rawas* case.

53. Furthermore, so far as Element 3 (and, indeed, Element 4[13]) of Loss 1 is concerned, as was stated by the Deputy Judge in *Harley Street Capital* at [33], a misconceived notion by potential investors in a listed company (or fund), that the grant of a freezing order against (private individual) defendants who are considered to be in control of that company (or fund) lent the Court's credence to the serious allegations made against those defendants is unlikely to be seen as part of a chain of causation between the freezing order and any loss in share value in the company (or fund).

54. There are, moreover, further (evidential) problems with IM's argument under Elements 1, 2 and 3 of Loss 1.

[13] As to which, see paragraphs 73-74 below.

The Evidence: the CS Loans

55. It is convenient to turn first to the CS Loans (despite the fact that they post-date the JPM Loans[14]). In his Third Witness Statement at paragraphs 25-26, IM suggests that the timing of the recall of the loans on 10 February 2020 indicates that CS were spurred to terminate their relationship with EG IV on the basis of Cockerill J's refusal of the Discharge Application which took place four days earlier on 6 February 2020. I do not accept this suggestion. Cockerill J's judgment merely confirmed the *status quo*, which had existed by that stage for over seven months. Moreover, even had IM's Discharge Application succeeded, the First to Third Defendants would have remained subject to the Return Date Undertakings, so any concerns CS might have had about the WFO / Return Date Undertakings would not have been materially affected. The position is akin to that which obtained in *Tharros Shipping* (it is also unclear from the evidence put before the Court whether CS had even been notified of Cockerill J's judgment by the time they requested early repayment on 10 February 2020, but I do not base my decision on that fact). I do not therefore consider that CS's request for early repayment of the CS Loans was caused by the outcome of the Discharge Application.

56. The far more pressing concern of CS around this time is very likely to have been the publication on 30 and 31 January of a number of articles in the Russian and international press, reporting that Russian authorities had issued international arrest warrants for the First to Third Defendants on charges of embezzlement in connection with the Alleged Fraud, as discussed in paragraphs 31-32 of the Tenth Witness Statement of Neil Patrick Dooley dated 12 March 2021, to which he exhibits the various press articles.

57. It is considerably more likely that CS was concerned as to the veracity of the claims against the First to Fourth Defendants regarding the Alleged Fraud, and, once international arrest warrants were issued for the First to Third Defendants, CS decided they could no longer continue their relationship with the Mints family through EG IV. On this assessment of events, any resultant loss would be wholly divorced from the preventative or, as the case may be, coercive effect of the WFO / Return Date Undertakings, and would instead be attributable to the broader reputational damage suffered by the Mints family in light of the underlying cases against them both in England and Wales and in Russia. This was the very point which Males LJ made in rejecting IM's application for permission to appeal the Order of Cockerill J.

58. Indeed, as Males LJ noted, CS's own account of their reasoning for requesting early repayment of the CS Loans was set out in a letter dated 14 February 2020. CS stated that, "*the bank took note of certain recent events as well as the current circumstances surrounding the company and the beneficiary family…and came to the conclusion that the overall risk profile of the relationship has changed considerably.*" This offers a clear indication that CS had in mind something other than merely the preventative/coercive effect of the WFO / Return Date Undertakings when deciding to recall the CS Loans.

59. At paragraph 25 of his Third Witness Statement, IM states that he believed that CS's reference to "*recent events*" was a reference to the continued operation of the Return

[14] Addressed in paragraphs 62-72 below.

Date Undertakings against him, since Cockerill J's decision had been published two working days before CS requested repayment of the CS Loans. In support of this view, IM seeks to rely on later correspondence received from CS on 20 September 2020 notifying him of the decision to cease effecting payments to third parties from his personal account at CS from 6 October 2020. IM states that "*other members of my family, and the companies that banked with CS AG and are part of the MF Trust structure, also received similar letters*", although these letters have not been provided and the specific companies said to have received these letters are not listed. CS's letter to IM is exhibited to IM's Third Witness Statement. In it CS states as follows:

> "*The process of ensuring compliance with the Return Date Undertaking (the "Undertaking" related to the Order of the High Court of Justice of England & Wales (CL-2019-000412) dated 11 July 2019 (the "Order") is – as you know – very complex. This complex process lead* [sic] *the Bank to the conclusion to cease the payment service on the account as outlined above with a grace period so that you have sufficient time to make the necessary arrangements.*"

60. In my judgment IM's assumption in this respect is not justified. CS's decision to block IM's and the Mints family's personal accounts in September 2020 may or may not be attributable to the preventative or, as the case may be, coercive effect of the WFO / Return Date Undertakings. But this does not speak to their rationale for requesting early repayment of the CS Loans by EG IV some seven months earlier, when CS "*took note of certain recent events as well as the current circumstances surrounding the company and the beneficiary family…and came to the conclusion that the overall risk profile of the relationship has changed considerably.*"

61. With respect to loss allegedly arising out of the early repayment of the CS Loans, therefore, there is no good arguable case that the granting of the WFO / Return Date Order is or was a cause without which Elements 1, 2 and 3 of Loss 1 would not be or would not have been suffered.

The Evidence: the JPM Loans

62. Turning next to the JPM Loans, for the purposes of establishing the necessary causation element, IM again seeks to rely on the timing of the recall of the loans. At paragraph 23 of IM's Third Witness statement, he explains that JPM made its initial decision to demand early repayment of the JPM Loans on 4 July 2019, two days after AM notified JPM of the existence of the WFO. JPM demanded immediate repayment of the JPM Loans that day, but, following discussions with AM and DM, agreed to postpone the demand for repayment until after the Return Date Hearing. Following the Return Date Hearing, IM states at paragraph 23.2 of his Third Witness Statement that JPM confirmed, during a call with AM and DM on 15 July 2019, that the replacement of the WFO with the Return Date Undertakings did not change their demand for immediate repayment.

63. Upon this application, IM argues that the inference to be drawn from the timing of JPM's second demand for repayment is that the key factor in JPM's decision-making was whether the WFO or equivalent would continue in operation. However, given that the underlying claim was issued at the same time as the WFO, the timing of JPM's decision could just as well indicate that their concerns related to the underlying

allegations against the First to Fourth Defendants. JPM's postponement of the loan recall until after the Return Date Hearing might very well have been because they were concerned with the implications of the continuation of the WFO or equivalent *for the strength of the underlying allegations against the First to Fourth Defendants*, and so were willing to wait to hear the Court's finding once the First to Fourth Defendants had had a chance to put forward their interim case.

64. In his Second Witness Statement dated 25 February 2020, Robert Suss, the Non-Executive Chairman of and a non-executive director at EGCA UK, seeks to attribute the damage inflicted on the EGCA Group up to that point to the inferences drawn from the granting of the WFO / Return Date Order for the strength of the underlying allegations of fraud. He states at paragraph 9 **[B/18/520]**:

> "*Further, as I have already explained at paragraph 9 of my first witness statement, it is the Return Date Undertakings, rather than the underlying claims, which are causative of the damage which has been inflicted on EGCA over the last few months. The public perception, as reflected in a number of press articles, is that the Freezing Order and the Return Date Order amount to a preliminary determination by the English Court that the defendants (including Igor) committed a fraud. At this stage, I understand that the underlying claims are mere allegations brought by the Claimants. It not unusual for international and successful entrepreneurs, with international business interests, to attract litigation. What Is damaging to EGCA is the widely reported view that the Return Date Order is, in effect, an early finding of fraud. I exhibit at pages 1 - 6 of RS1 an example of an article in the Russian press, projecting this view. In my experience, EGCA's existing clients and potential investors would have been materially less concerned had Igor not been subject to the Return Date Order.*" (emphasis added)

65. Mr Suss gave a similar statement in his First Witness Statement dated 4 October 2019 given in support of the Discharge Application. He stated at paragraph 9 **[B/14/476]**:

> "*As Igor has pointed out in paragraph 96.2 of his third affirmation, the problems we have experienced with J.P. Morgan Bank Luxembourg S.A. ("JPM") began with the Freezing Order. I share Igor's view that what is particularly concerning for investors (and potential Investors) is the existence of a restrictive court order, such as the Freezing Order or now the Return Date Undertakings, which creates the false impression that what would otherwise be mere unproven allegations against Igor actually have some merit.*" (emphasis added)

66. Whether this is a correct interpretation of the relevant events or not, the fact remains that the alleged reputational loss claimed is that of a third party who is not even subject to the restraint of the freezing injunction and IM accordingly faces the same difficulty that the causative link between the restraint and the loss is insufficient as a result.

67. The only other first-hand evidence relied upon by IM in support of his contention that it was the preventative or, as the case may be, coercive effect of the WFO / Return Date Undertakings which led to the recalling of the JPM Loans is contained in paragraph 3.9 of the First Affidavit of AM which was made on 9 July 2019 and served in respect of an earlier application. IM puts his own (hearsay) gloss on this in paragraph 23.1 of his Third Witness Statement. AM stated this:

> *"… [In a call on 4 July 2019] Mr. Hawkins [of JPM] stated that, since the order, MF Trust's risk profile as a client was significantly changed, and so the Bank had taken the decision to demand repayment of the three loan facilities described above, with immediate effect*."

68. Again, this does not tell one anything as to what it was that caused JPM to consider that the risk profile of the MF Trust had changed. What was known by JPM was that serious allegations were being made against the First to Fourth Defendants and neither the MF Trust nor the EGCA Group were themselves restrained by the terms of the freezing injunction.

69. In paragraph 23.2 of IM's Third Witness Statement he seeks to add to AM's account by saying this:

> "*On 15 July 2019, JPM confirmed during a call with Alexander and Dmitry that the replacement of the WFO with the Return Date Undertakings had not changed the demand for immediate repayment…*"

70. Again, this does not tell one anything as to what it was that caused JPM to consider that the risk profile of the MF Trust had changed. Moreover, it is notable that neither AM nor DM has made a witness statement confirming the truth of this hearsay account; indeed, they do not even join in this application of IM.

71. Furthermore, no contemporaneous documents or notes recording these or any alleged discussions with JPM have been provided, nor has any internal correspondence to that effect been disclosed. Indeed, the only primary evidence available is an email from JPM to AM dated 17 July 2019, apparently written in response to a request to provide the rationale for JPM's recall of the JPM Loans. In that email JPM acknowledge that they were made aware of the existence of the WFO on 1 July 2019, but then go on expressly to state that they "*are not able to provide any further confirmation with respect to the reasons for JPM exercising its discretion to terminate the On Demand Facilities at this time.*" **[A/15/705]**

72. In the absence of any clear and/or reliable evidence indicating that the recalling of the JPM Loans was caused by the preventative or, as the case may be, coercive effect of the WFO / Return Date Undertakings, it is reasonable to take account of CS's approach as to how a rational financial institution would conduct itself in these circumstances. CS's conduct does not suggest that the recalling of the loans was caused by the injunction granted against the Defendants. On this basis, with respect to loss allegedly arising out of the recalling of the JPM Loans, there is in my judgment no good arguable case that the WFO / Return Date Order is or was a cause without which Elements 1, 2 and 3 of Loss 1 would not be (or would not have been) suffered.

73. Turning to the issue of causation in respect of *Element 4 of Loss 1*, IM states in his Third Witness Statement at paragraph 23.4 that the downturn in the EGCA Group's activity (its inability to raise projected third-party investment) was "*caused by the negative publicity generated by the Return Date.*" The evidence is very thin: the examples of "*negative publicity*" referred to in IM's Third Witness Statement consists of two press articles, dated 11 and 12 July 2019, which refer not only to the grant of the

WFO but also to the underlying claims. The same is true of later articles in the Russian and international press exhibited to Mr Dooley's Tenth Witness Statement. Once again, it is not possible to disentangle loss flowing from the reputational damage caused by publicity surrounding the WFO as compared to the reputational damage caused by publicity surrounding the underlying claims. Even then, the alleged reputational loss claimed is that of a third party who is not even subject to the restraint of the freezing injunction.

74. There is therefore no good arguable case that the WFO / Return Date Order is or was a cause without which Element 4 of Loss 1 would not be or would not have been suffered.

(iii) An intelligent estimate of the likely amount of loss

75. The "*intelligent estimate*" of Loss 1 put forward by IM is based on Mr Smethurst's calculation of the quantum of loss in his report dated 4 February 2021. Mr Smethurst calculates Loss 1 as being US$7,868,102.

76. For the reasons given above, Mr Smethurst's report and the Budget on which its calculations are based are unreliable, and cannot form a basis for this Court to make an intelligent estimate of the quantum of losses. In so far as any single one of Elements 1, 2, 3 and 4 of Loss 1 might have overcome the obstacles of sufficient risk, remoteness and causation, on the evidence it is not possible for the Court (and IM did not attempt) to disentangle an intelligent estimate of the quantum of any single element from the broader calculation of the fall in profitability of the EGCA Group attempted for the purposes of Loss 1.

77. In the light of the Court's findings in respect of Loss 1, its findings on Loss 2 and Loss 3 can be taken more shortly, as much of the same reasoning applies.

Loss 2

78. The basis of the claim for Loss 2 is that, as a result of JPM and CS recalling the JPM Loans and the CS Loans, EG I, EG IV and Tylsoca suffered certain losses, including:

i. in respect of the JPM Loans, the payment of an anti-dilution levy of US$964,320 (the "ADL"); and

ii. in respect of the CS Loans, a loss amounting to US$65,285 arising from a forced sale of assets (at a sub-optimal price) that would otherwise have been retained.

(i) Sufficient level of risk of loss (or actual loss) to require additional fortification

79. At paragraph 38 of his Third Witness Statement, IM explains that in order to repay the JPM Loans, EG I, EG IV and Tylsoca had to redeem a large volume of assets out of the EG Emerging Markets Fund (UCITS) and that, in the exercise of its duty to protect the interests of the remaining investors, the EG Emerging Markets Fund had to impose an additional charge (the ADL). The basis for the imposition of the ADL is set out in the Prospectus Supplement of the EG Emerging Markets Fund. It is not disputed that the

ADL was in fact paid, so a good arguable case can be made that this loss was in fact actually suffered by EG I, EG IV and Tylsoca.

80. At paragraphs 41-46 of his Third Witness Statement, IM explains that EG IV had to sell certain securities at sub-optimal value in order to repay the CS Loans. While questions have been raised by the Claimants as to an intelligent estimate of the loss arising from the sale of these securities, there is at least a good arguable case to be made that this loss was in fact actually suffered by EG IV.

81. However, even if the claim for Loss 2 overcame the requirements of remoteness, causation and an intelligent estimate (which it does not), Loss 2 alone would be insufficient to require additional fortification beyond that provided by the Claimants pursuant to the Return Date Order, given it is estimated as totalling US$1,029,605, which falls below the US$2,000,000 already in place.

(ii) Causation

82. For the same reasons given in relation to Loss 1, Loss 2 was not caused by the preventative or, as the case may be coercive effects of the injunction and is too remote to be recoverable.

83. Considered in terms of foreseeability, at the point at which the Claimants applied for the WFO, there is no evidence that they had knowledge that:

i. first, the JPM Loans and the CS Loans existed;
ii. second, JPM and CS would recall the JPM Loans and the CS Loans subsequent to the granting of the WFO / Return Date Order;
iii. third, Tylsoca, EG I and EG IV held assets in the EG Emerging Markets Fund;
iv. fourth, Tylsoca, EG I and EG IV would have to sell assets in the EG Emerging Markets Fund in order to repay the JPM Loans and the CS Loans;
v. fifth, redemption of a large volume of assets from the EG Emerging Markets Fund would result in the imposition of the ADL; and
vi. sixth, EG IV would have to sell certain securities at sub-optimal value in order to repay the CS Loans.

84. Moreover, the causation issues that arise in relation to Loss 2 overlap with the causation issues that arise in relation to Loss 1, as Loss 2 is premised on the notion that the recalling of the JPM Loans and the CS Loans was caused by the WFO / Return Date Undertakings.

85. Accordingly, for the same reasons set out in relation to the issue of causation for Loss 1, there is no good arguable case that the WFO / Return Date Order is or was a cause without which Loss 2 would not be or would not have been suffered.

(iii) An intelligent estimate of the likely amount of loss

86. On the basis that it can be established that the ADL of US$964,320 was in fact paid, the Court can make an intelligent estimate of the likely amount of this aspect of Loss 2.

87. As to the losses arising out of the sale of securities in order to repay the CS Loans, these have been calculated on the basis of the difference in price between the valuation price of the assets and the trade price at which they were sold, that difference being US$65,285. According to paragraph 45 of IM's Third Witness Statement, the valuation price was calculated on the following basis:

> "*The valuation price is derived from the mid-price of the securities. The price source for determining the mid-price of the securities is the published Bloomberg Generic Price ("BGN"). This is the market standard measure for determining the valuation of securities.*"

88. Adopting this approach, the Court can make an intelligent estimate of the likely amount of this aspect of Loss 2.

89. However, as already explained, IM cannot establish to the requisite standard that any of these losses were caused by the injunction.

Loss 3

90. The basis of the claim for Loss 3 is that EG I, EG IV and Tylsoca have been deprived of the opportunity to earn a return on investments that they sold in order to repay the JPM Loans and the CS Loans, which has resulted in loss of US$13,265,052, consisting of:

i. US$12,233,257 in respect of estimated annual loss of net investment return as a result of assets sold to repay the JPM Loans; and

ii. US$1,031,785 in respect of estimated annual loss of net investment return as a result of assets sold to repay the CS Loans.

(i) Sufficient level of risk of loss (or actual loss) to require additional fortification

91. At paragraph 48 of his Third Witness Statement, IM states that the redemption of investments effected in order to repay the JPM Loans and the CS Loans has given rise to an actual and continuing loss of investment return from which the borrowing entities (i.e. EG I, EG IV and Tylsoca) would otherwise have benefited.

92. Whilst the Claimants question whether an intelligent estimate of Loss 3 can be made, I consider that there is a good arguable case on the evidence that this loss was in fact actually suffered by EG I, EG IV and Tylsoca.

(ii) Causation

93. However, for the same reasons given in relation to Loss 1 (and 2), Loss 3 was not caused by the preventative or, as the case may be coercive effects of the injunction and is too remote to be recoverable.

94. Considered in terms of foreseeability, at the point at which the Claimants applied for the WFO, there is no evidence that they had knowledge that:

i. first, the JPM Loans and the CS Loans existed;
ii. second, JPM and CS would recall the JPM Loans and the CS Loans subsequent to the granting of the WFO / Return Date Order;
iii. third, Tylsoca, EG I and EG IV would have to sell assets in order to repay the JPM Loans and the CS Loans; and
iv. fourth, this would lead to specific losses as a result of lost opportunity to earn a return on those assets.

95. Moreover, the causation issues that arise in relation to Loss 3 overlap with the causation issues that arise in relation to Losses 1 and 2, as Loss 3 is premised on the notion that the recalls of the JPM Loans and the CS Loans were caused by the WFO / Return Date Undertakings.

96. For the reasons set out in relation to the issue of causation for Loss 1, there is no good arguable case that the WFO / Return Date Order is or was a cause without which Loss 3 would not be or would not have been suffered.

(iii) An intelligent estimate of the likely amount of loss

97. At paragraphs 51-57 of his Third Witness Statement, IM explains the basis on which Loss 3 has been calculated. The loss has been determined by using the actual total rate of return on investment achieved during the period by the EG Emerging Markets Fund, from which financing costs have been deducted in order to arrive at a figure for net lost investment return. IM explains the basis for using the EG Emerging Markets Fund's performance as a benchmark as follows:

> "*54. EGCA have used the* [EG Emerging Markets Fund] *as the benchmark Fund for the loss calculation for both the JPM Loan redemptions and the CS redemptions for the following reasons:*
>
> *54.1 As regards the JPM Loan repayment, the redemption was made from the* [EG Emerging Markets Fund].
>
> *54.2 As regards the CS loan repayment, the redemption was made by EG IV. The* [EG Emerging Markets Fund] *is the core asset in the portfolio of EG IV and the two funds share the same investment strategy. Therefore, the total returns of the* [EG Emerging Markets Fund] *is the appropriate benchmark for the CS Loan redemption as well.*
>
> *Accordingly, EGCA have used Bloomberg to confirm the total return generated by the* [EG Emerging Markets Fund] *for the purposes of calculating the losses.*"

98. This is a reasonable basis on which to calculate the loss of return on the investments that EG I, EG IV and Tylsoca sold in order to repay the JPM Loans and the CS Loans.

99. Regarding the specific figure of US$13,265,052 put forward by IM for Loss 3, the Claimants challenge IM's calculation on the grounds that it contains an error that reduces the alleged loss by US$1,651,817 to US$11,613,235. Specifically, the Claimants point out that IM's calculation of Loss 3 appears to have deducted a

management fee in the form of "*fund costs*" with respect to the redemptions effected in order to repay the CS Loans, but not with respect to the redemptions effected in order to repay the JPM Loans. At paragraph 23.2 of his Fourth Witness Statement dated 26 March 2021, IM refutes this stating:

> "*Moreover, the management fee which EGCA would have charged in relation to its management of MF Trust assets (but did not in fact charge, resulting in a saving for Tylsoca, EG I and EG IV) is already reflected in the calculations for Loss 3, which deduct fund costs, which include management fees, from the overall investment return (see page 33 of IBM7).*"

100. Counsel for IM, Mr. Matthews QC, elaborated upon this point in his oral submissions, explaining that the starting point for the calculation with respect to the JPM Loans was a net figure (i.e. no further deductions were required, as the figure already accounted for them), whereas the calculation with respect to the CS Loans was the figure for assets under management (i.e. deductions were therefore required in relation to charges). On this basis, the Court can make an intelligent estimate of the likely amount of Loss 3 (i.e. US$13,265,052).

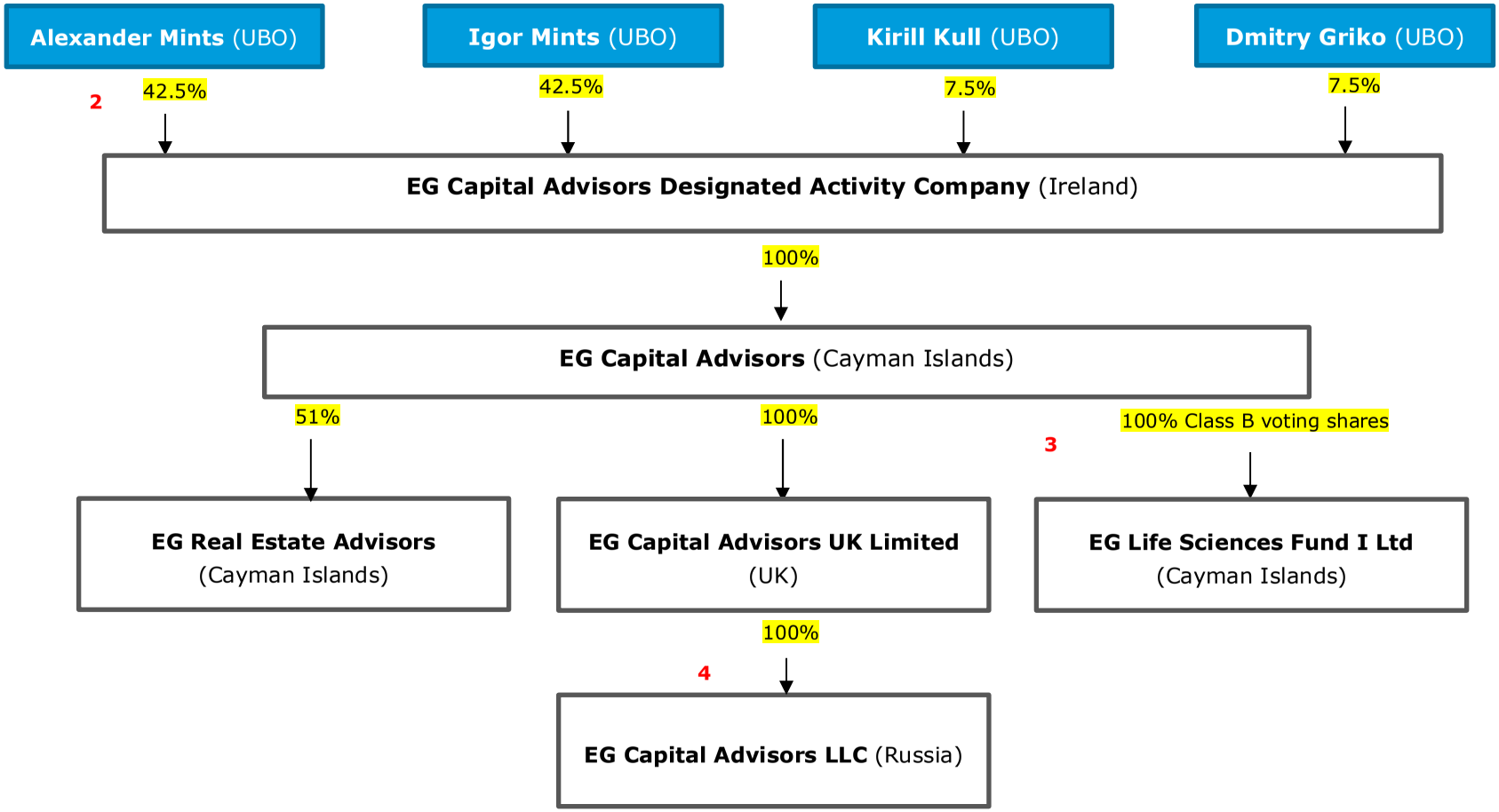
101. However, as already explained, IM cannot establish to the requisite standard that any of these losses were caused by the injunction.

Conclusion

102. In all the circumstances, the application for additional fortification is dismissed.

Appendix 1
EGCA Group structure chart

EGCA Group Structure Chart[1]



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[1] Certified structure shown on page 3 of Exhibit IBM8 dated 26 March 2021 ("**IBM8**") [**A/15/706**] and also found at Appendix 1 to IM's skeleton argument; see further paragraph 3(a) of IM's skeleton argument and paragraphs 10-13 of the Third Witness Statement of Igor Mints dated 4 February 2021 ("**Igor W/S 3**") [**A/3/12-13**]

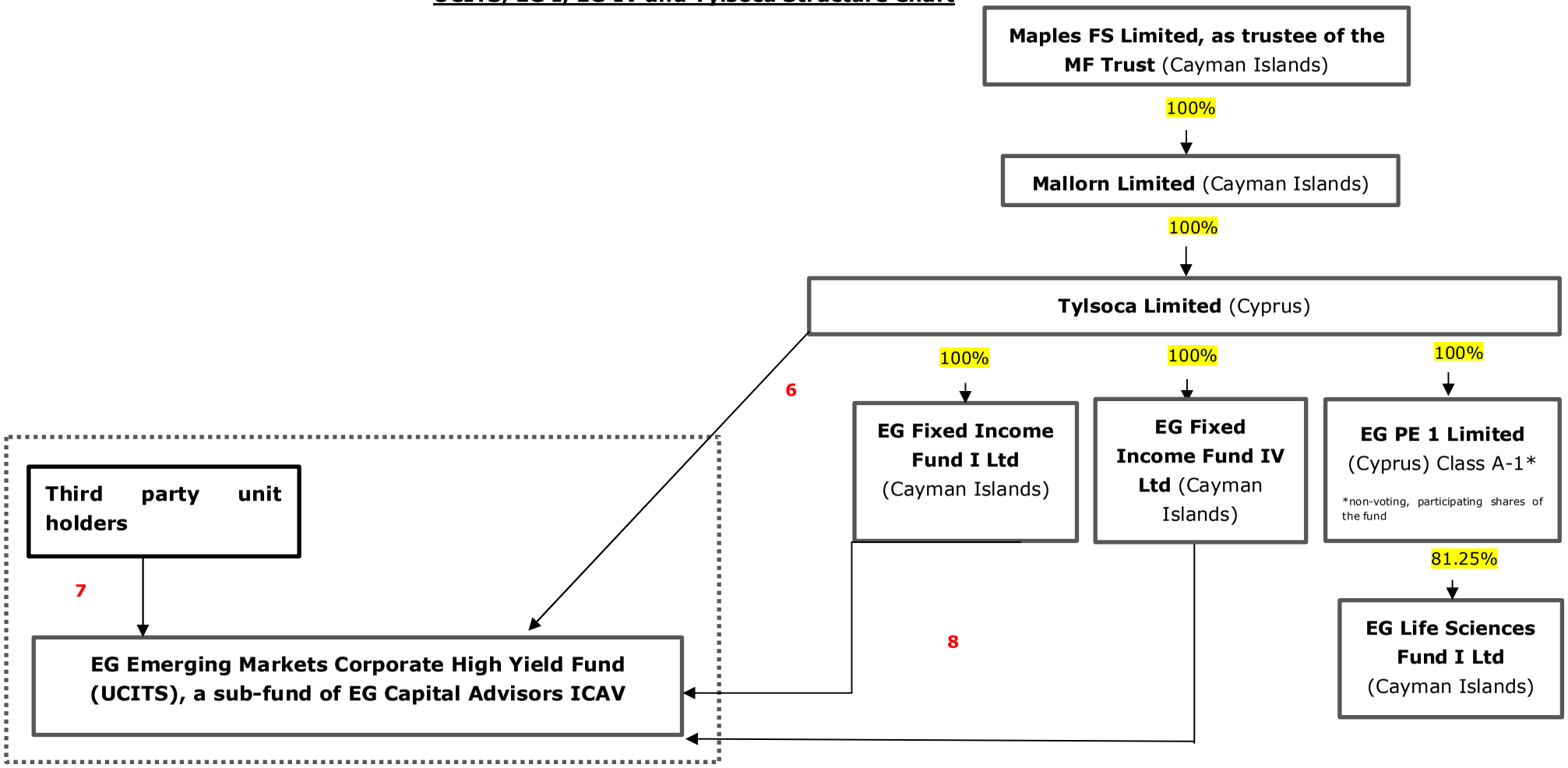
[2] Paragraph 2.2 of the First Witness Statement of Alexander Mints dated 9 July 2019 [**B/10/343**]

[3] Paragraph 16.1 of the Fourth Witness Statement of Igor Mints dated 26 March 2021 ("**Igor W/S 4**") [**A/9/142**]

[4] Paragraph 10 of Igor W/S 3 [**A/3/12**]

Appendix 2
Tylsoca, EG I and EG IV structure chart

UCITS, EG I, EG IV and Tylsoca Structure Chart[5]



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[5] Certified structure shown on page 4 of IBM8 [**A/15/707**] and also found at Appendix 2 to IM's skeleton argument; see further paragraph 3(b) of IM's skeleton argument
[6] Paragraph 3.2 of Igor W/S 3 [**A/3/11**]
[7] Para 38 of Igor W/S 3 [**A/3/21**]
[8] Paragraph 16.1 of Igor W/S 4 [**A/9/142**]