Neutral Citation Number: [2020] EWHC 3474 (Comm)

Case No: CL-2020-000211

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before :

DAVID EDWARDS, QC (sitting as a Judge of the High Court)

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Between :

(1) NJORD PARTNERS SMA-SEAL LP **(2) NPSSF DEBT CO SÀRL** **(3) AIE INVESTMENTS, LP**	**First to Third Claimants/ Respondents**
(4) NORDIC TRUSTEE AS	**Fourth Claimant**
- and -	
(1) ASTIR MARITIME LIMITED **(2) MUHAMMAD TAHIR LAKHANI**	**First and Second Defendants**
(3) MUHAMMAD ALI LAKHANI	**Third Defendant/ Applicant**

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Simon Salzedo QC and Richard Blakeley (instructed by **Milbank LP**) for the **First to Third Claimants/Respondents**
Matthew Cook (instructed by **Greenberg Traurig LP**) for the **Third Defendant/Applicant**

Hearing dates: 30 November - 1 December 2020

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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 18 December 2020 at 10:30.

DAVID EDWARDS, QC (sitting as a Judge of the High Court):

A. Introduction

1. The Plaintiffs in this action are (1) Njord Partners SMA-Seal LP, (2) NPSSF Debt Co SÀRL and (3) AIE III Investments, LP (collectively "the Lenders") and (4) Nordic Trustee AS ("the Trustee").

2. The Defendants are (1) Astir Maritime Limited ("Astir"), (2) Muhammad Tahir Lakhani ("Mr Tahir") and (3) Muhammad Ali Lakhani ("Mr Ali"). I mean no disrespect by using the middle names of the Second and Third Defendants; this has been done, following the course taken by counsel, simply as a matter of convenience because their first and last names are identical.

3. Mr Ali is one of two directors of Astir; his brother Muhammad Hasan Lakhani ("Mr Hasan") is the other. Mr Ali is also a director of, and the ultimate beneficial owner of 50% of the shares in, North Star Maritime Holdings Limited ("North Star"), a company incorporated under the laws of St Kitts and Nevis, of which Astir is a wholly-owned subsidiary. Mr Tahir is Mr Ali's father.

B. The Applications

4. There were two applications before me at the hearing.

5. The first and the principal application was an application by Mr Ali, made by Application Notice dated 18 June 2020, to discharge a world-wide freezing order made against him on 15 April 2020 by Mr Justice Foxton (as continued on 1 May 2020 by Mr Justice Teare and on 22 May 2020 by Mr Justice Jacobs, and as discharged but re-granted on 24 July 2020 by Mr Justice Teare) ("the WWFO").

6. Mr Ali's application was made on two grounds:

   i) He alleged that there had been a failure by the Lenders, when making the application for a WWFO, to comply with their duty of full and frank disclosure; and

   ii) He said that the Lenders could not (and cannot) demonstrate a real risk of dissipation and so, even if there had been no material non-disclosure, the court should not continue the WWFO in any event.

7. The second application was an application made by the Lenders, made by Application Notice dated 25 November 2020, for an order that Mr Tahir and Mr Ali disclose the source(s) of funding for their living and legal expenses as required by the terms of the WWFO.

C. The Lenders' Application

8. Mr Cook, who appeared at the hearing on behalf of Mr Ali and for the purposes of the Lenders' application also for Mr Tahir, indicated that his clients did not oppose the making of an order in the substantive terms sought by the Lenders, but he asked for a longer period than the five days suggested in the draft order for the provision by his clients of the required information.

9. In these circumstances, and for the reasons I communicated to the parties shortly after the conclusion of the hearing on 1 December 2020, I decided that it was appropriate for me to make an order on the Lenders' application straightaway, and I did so, although my order allowed ten rather than the suggested five days for Mr Tahir and Mr Ali to provide the necessary information.

10. The balance of this judgment, therefore, deals with Mr Ali's application to discharge the WWFO on which I reserved judgment at the end of the hearing.

D. Factual Background

11. A good deal of the factual background relevant to Mr Ali's application was not in dispute, although, as I explain below, some at least of the material facts which Mr Ali said that the Lenders should have disclosed to Mr Justice Foxton certainly were.

(i) The Facility Agreement

12. The business of Astir (and its parent North Star) involves the purchase of vessels for on-sale to shipbreakers for recycling.

13. On 28 March 2017 the Lenders entered into a Facility Agreement ("the Facility Agreement") with Astir under the terms of which, as subsequently amended and restated, they agreed to make available a facility of up to $45,000,000 for the purpose of financing the purchase and on-sale by Additional Guarantors – Astir subsidiaries - of Eligible Vessels in relation to Permitted Transactions.[1]

14. As defined in clause 1.1 of the Facility Agreement, Permitted Transactions fell into two categories:

    i) *Permitted As Is Transactions*: these were transactions where an Additional Guarantor purchased and acquired title to a vessel pursuant to an Acquisition MOA and then sold the vessel on at a later date to an Approved Recycler pursuant to a Sale MOA; and

    ii) *Permitted Delivery Transactions*: these were transactions where the Additional Guarantor effectively acted as a broker, arranging back-to-back sales between a shipowner, the Additional Guarantor and an Approved Recycler but never (other than notionally) acquiring ownership of the vessel itself.

15. The definitions of Permitted As Is Transactions and Permitted Delivery Transactions included requirements that the proceeds of sale under the Sale MOA in respect of the relevant vessel should be received by the Additional Guarantor no later than a specified number of days after the conclusion of the Acquisition MOA.

16. Clauses 4 and 5 of the Facility Agreement set out the mechanics and requirements for utilization of the facility. In essence, they provided for sums advanced under the agreement to be transferred into a Funding Account, in the event held at

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[1] My use of initial capitals in relation to the Facility Agreement reflects defined terms.

UnicreditBank AG, Hamburg Branch, from which withdrawals could then be made to finance particular Permitted Transactions.

17. Clause 4.4 set out a number of conditions precedent to Funding Account Withdrawals including that, on the Funding Account Withdrawal Date:

> *"(a) no Default is continuing or would result from the proposed Funding Account Withdrawal;*
>
> *(b) the Repeating Representations [which included a representation of no Default] are true and accurate as at that date with reference to the facts and circumstances then existing;*
>
> *…*
>
> *(g) the Agent, or its duly authorized representative, has received (or waived the requirement to receive) all of the documents and other evidence listed in Schedule 2, Part III (Conditions Precedent to Funding Account Withdrawals in form and substance satisfactory to the Agent …"*

18. The documents listed in Schedule 2, Part III that were required to be provided to the Agent where a Funding Account Withdrawal related to the payment of the balance of the purchase price in respect of an Acquisition MOA included:

> *"1. To the extent not already provided certified copies of the Sale MOA and any addenda/amendments to the Acquisition MOA and/or Sale MOA relating to the Subject Transaction.*
>
> *…*
>
> *7. An original of the Approved Borrower Statement duly executed by chief financial officer of the Borrower."*

19. The description of the first of these types of document speaks for itself. As for the second, an Approved Borrower Statement (an "ABS") was a written statement, in form and substance as set out in Schedule II to the Facility Agreement, which provided various confirmations by the CFO of Astir, including that:

> *"(d) I confirm that no breach of Clause 20.1 (Financial Covenants) of the Facility Agreement is continuing or would result from the proposed Funding Account Withdrawal and:*
>
> *…*
>
> *(iii) All transactions are Permitted Transactions; and*
>
> *(iv) No Default is continuing."*

20. Clause 6 of the Facility Agreement addressed repayment of the loans and transfers into the Funding Account. It provided, amongst other things, in clause 6.2 that:

> *"(a) Subject to paragraph (d) below, the Borrower shall procure that an amount equal to all Funding Account Withdrawals related to any Eligible Vessel is transferred to the Funding Account in full on or before the Refund Date in respect of those Funding Account Withdrawals".*

21. The Refund Date was defined to mean the date falling five Business Days after the earliest of a number of dates, including the date on which the Additional Guarantor received the sale proceeds for the Vessel pursuant to the relevant Sale MOA. Proceeds of sale of financed vessels were, therefore, required to be paid back into the Funding Account fairly quickly after receipt.

22. Initially, sums refunded to the Funding Account were available for re-drawing for other Permitted Transactions. Mr Cook submitted that this feature meant that the facility could be described as a revolving facility, although as Mr Salzedo, QC, who appeared with Mr Blakeley for the Lenders, observed, there were restrictions on the terms on, and the purposes for, which sums could be withdrawn and used.

23. On 29 January 2020, however, an amendment was made to the Facility Agreement by deed ("the 2020 Amendment Deed"), which was signed, amongst others, by Mr Ali, the principal intended effect of which was to ensure that the proceeds of completed vessel transactions were applied in pre-payment of the facility in an agreed order rather than being available for re-drawing.

24. The 2020 Amendment Deed included, in clauses 4 and 5:

    i) A repetition by each Obligor, which included Astir and North Star, of the Repeating Representations, which included a representation of no Default (save that certain existing Defaults identified in Schedule 4 were excluded);

    ii) Additional representations by each Obligor, including the following:

> *"5.1 Insolvency*
>
> *No:*
>
> *(a) corporate action, legal proceeding or other procedure or step described in paragraph (a) of clause 26.7 (Insolvency proceedings) of the Existing Facility Agreement; or*
>
> *(b) creditors' process described in clause 26.8 (Creditors' process) of the Existing Facility Agreement,*
>
> *has been taken or, to its knowledge, threatened in relation to it and none of the circumstances described in clause 26.6 (Insolvency) of the Existing Facility Agreement applies to it."*

25. Astir's obligations under the Facility Agreement, which was one of a suite of Finance Documents, were secured in a number of ways including by mortgages over As-Is Vessels, cross-guarantees from Astir and the Additional Guarantors, a Parent guarantee from North Star, and a Personal Guarantee from Mr Tahir, in the last case a guarantee given in favour of the Trustee, which was the Security Agent.

26. The Facility Agreement was signed by Mr Ali both on behalf of Astir as Borrower and on behalf as North Star as Parent Guarantor. Mr Ali also signed Amendment and Restatement Deeds dated 14 September 2017 and 28 December 2017 and the 2020 Amendment Deed. He does not dispute that he signed these particular documents.

(ii) The Utilisation of the Facility

27. The Facility Agreement was concluded in March 2017 and, whilst I have not seen a full list, it is apparent that a number of Permitted Transactions – or at least what the Lenders do not currently allege were not Permitted Transactions – took place over the following 18 months up to around September 2018.

28. The evidence of Arvid Trolle ("Mr Trolle"), a partner of the investment manager of the First Claimant, in paragraph 44 of his first affidavit, was that, whilst in practice the deadlines imposed by the Facility Agreement for the completion of these early transactions were rarely met, the Lenders were not overly concerned about waiving these delays.

29. Mr Trolle explained in paragraphs 45-7 of his first affidavit that, during the course of 2017 and 2018, other breaches of the Facility Agreement occurred, principally, he said, concerning fairly minor, technical matters, which were also waived by the Lenders by a Waiver and Amendment Request Letter dated 2 October 2017 and a cumulative Waiver Letter dated 2 February 2018.

30. As does not appear to be in dispute, however, from around September 2018 a number of transactions entered into under the Facility Agreement ostensibly stalled in the sense that, although Acquisition and Sale MOAs were concluded in the ordinary way, the on-sales to the recycling scrapyards were apparently not completed in a timely manner and receipt of sale proceeds was delayed.

31. From March 2019 onwards statements were made by Mr Tahir to the Lenders as to the reasons for these delays. As I explain below, it is admitted by Mr Tahir and Mr Ali in the single Defence served on their behalf that these statements were false, and that they were known by Mr Tahir to be false. The vessels had, in fact, been delivered to the scrapyards and the sale price already paid.

32. During the period from September 2018 to 3 July 2019 withdrawals were made from the Funding Account in relation to the 16 vessels identified in paragraph 54 of the Particulars of Claim. In accordance with the requirements of the Facility Agreement identified in paragraphs 17-19 above, the application for each such withdrawal included an ABS in each case ostensibly signed by Mr Ali.

(iii) Default

33. On 23 February 2020 the Lenders were notified that North Star had elected to dissolve by reason of insolvency and that an order had been made by the Nevis Circuit court appointing a liquidator.

34. The documentation subsequently obtained by the Lenders shows that a Petition seeking to place North Star in liquidation had been filed on 13 February 2020,

supported by an affidavit made sworn on that date by Mr Ali. In paragraphs 4 and 7 of his affidavit ("the 13 February affidavit"), Mr Ali said the following:

> *"4. As a director of North Star I have been concerned in the matters giving rise to the Petition and have the requisite knowledge of the matters referred to in the Petition. The structure chart on North Star and its subsidiaries can be found at page 4 of 'MAL-2'. North Star is insolvent and unable to pay its debts. I refer to North Star's Provisional Balance Sheet as on 31 December 2019 (at pages 2 to 3 of 'MAL-2') which was prepared by its accountant. This unaudited financial statement shows Total Assets of US$3,029,973.55 against Current Liabilities of US$23,383,869.00 and a Total Net Liability position of US$20,353,895.45. There are also significant contingent liabilities.*
>
> ...
>
> *7. Fleetscape NSMH has taken various enforcement steps under the loan Facility Agreement with Montrose Maritime Ltd (a direct subsidiary of North Star, which is the Guarantor. It declared an Event of Default on 3 December 2019 (at pages 22 to 26 of 'MAL-2') and presented (among other things) an Acceleration Notice on 13 January 2020 (at pages 27 to 29 of 'MAL-2') and a demand under the Guarantee on 13 January 2020 (at pages 30 to 31 of 'MAL-2'). The total sum sought under the Acceleration Notice and Guarantee was US$23,383,869.00 and North Star is unable to meet this obligation."*

35. Mr Salzedo, QC, in the course of his oral submissions, made two observations concerning the statements made by Mr Ali in his 13 February affidavit:

    i) He pointed to Mr Ali's statements in paragraph 4 that he had been "concerned in" and had "the requisite knowledge" of the matters giving rise to the petition, statements, he said, that were at odds with Mr Ali's subsequent protestations that he had no significant knowledge of North Star's affairs;

    ii) The timing: Mr Ali swore his 13 February affidavit only two weeks after signing the 2020 Amendment Deed in which the Obligors, which included Astir and North Star, made the representations identified in paragraph 24 above; the matters identified in Mr Ali's affidavit – the enforcement steps taken by Fleetscape – in fact preceded Mr Ali's signature of the deed.

36. North Star's insolvency constituted an Event of Default under the Facility Agreement, and on 9 March 2020, on the instruction of the Lenders, the Agent served a Notice of Acceleration. The effect of the Notice of Acceleration was that all of the loans, an aggregate amount as at 9 March 2020 of $49,313,350.60 (including accrued interest), became immediately due and payable.

37. No part of this sum has so far been repaid. A demand has been made against Mr Tahir under the Personal Guarantee, but it has also not been met.

E. The Proceedings

(i) The Claims

38. On 15 April 2020 the Lenders and the Trustee commenced proceedings against Astir, Mr Tahir and Mr Ali in this court.

39. As set out in the Particulars of Claim attached to the Claim Form issued on that date:

    i) Claims were made by the Lenders against Astir for payment of the outstanding amounts under the Facility Agreement (paragraphs 62-4);

    ii) A claim was made by the Trustee against Mr Tahir for payment of the same sums under his Personal Guarantee (paragraph 65); and

    iii) Claims were made by the Lenders against both Mr Tahir and Mr Ali in deceit on the basis of false and deceitful statements alleged to have been made by them to the Lenders (see paragraphs 67-88).

40. The claims in deceit against Mr Tahir and Mr Ali were summarised in paragraphs 68 to 70 of the Particulars of Claim in the following way:

> *"68. In outline, the deceit consisted of misrepresenting that the delivery of certain Vessels was delayed (the 'Relevant Vessels'). The true position was that the Relevant Vessels had already been delivered and broken up for scrap. This meant that the Refund Date had occurred in respect of the withdrawals associated with each Relevant Vessel and the Obligors were in breach of the Finance Documents in that no refunds to the Funding Account had been made.*
>
> *69. The true position regarding the Relevant Vessels, as ascertained from port reports and online vessel tracking sources, is as set out in the following 'Breakup Table':*
>
> *[Table setting out dates when vessels were alleged to have been beached or broken up]*
>
> *70. Both Tahir and Ali were involved in the administration of the Facility Agreement and the funding thereunder on behalf of the Group and/or Astir. They knew and/or it is to be inferred that they would have known that the Relevant Vessels were not delayed but had in fact been beached and/or broken up. In any event they held themselves out as so knowing by making the representations below."*

41. Although the claims against Mr Tahir and Mr Ali were explained in this conjoined way, the factual basis for the claims against each of them was rather different.

42. So far as Mr Tahir is concerned, and as set out in paragraphs 71 to 79 of the Particulars of Claim, the deceitful representations alleged concerned communications sent by Mr Tahir to the Lenders on dates from 4 March 2019 onwards concerning the position in respect of particular vessels and the status of particular transactions,

essentially suggesting that completion of the transactions had been delayed when in fact they had not.

43. The deceitful representations alleged to have been made by Mr Ali, in contrast, concerned the ABSs ostensibly signed by him and submitted to the Lenders in order to enable withdrawals to be made from the Funding Account. As set in paragraphs 84-5 of the Particulars of Claim:

    i) The Lenders alleged that representations were made in the ABSs signed by Mr Ali in respect of various vessels between 26 November 2018 (the "Spirit") and 3 July 2019 (the "NCC Jubail") to the effect that all transactions were Permitted Transactions and that no Default under the Facility Agreement was continuing;

    ii) The Lenders said that those representations were false and had been made by Mr Ali without an honest belief in their truth: vessels the subject of previous transactions had been sold and broken up without refunds being made to the Funding Account with the effect that the relevant transactions were no longer Permitted Transactions and that there had indeed been Events of Default.

44. In paragraph 86 of the Particulars of Claim the Lenders alleged that these representations had been made by Mr Ali with the intention that the Lenders should act in reliance upon them, and that the Lenders had in fact acted in reliance upon them in two ways, namely in:

    "(1) Permitting the withdrawals from the Funding Account and Transaction Account in respect of the Vessel to which each Approved Borrower Statement related and each subsequent withdrawal; and

    (2) Not taking steps to enforce their rights under the Security Documents or accelerate the Loans under the Facility Agreement and demand immediate repayment from the Borrowers and Obligors."

45. The loss and damage claimed in paragraph 87 of the Particulars of Claim, was similarly divided into two categories:

    i) $22,130,522.77, representing the amount of withdrawals from the Funding Account made after 17 December 2018 and permitted on the basis of Mr Ali's representations; *plus*

    ii) An unspecified amount in respect of the diminution in value of the Lenders realizable interest under the Security Documents from 17 December 2018 to the date of Acceleration.[2]

(ii) The WWFO

46. On 15 April 2020, at the same time as they issued their Claim Form, the Lenders applied for, and were granted by Mr Justice Foxton, a WWFO against both Mr Tahir and Mr Ali, in the case of Mr Ali preventing him from removing assets from England

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[2] There was also a third category concerning costs and expenses incurred as a result of Mr Ali's deceit.

and Wales, and from disposing of, dealing with or diminishing the value of any of his assets whether inside or outside England and Wales, up to the value of $30,000,000.

47. The application, which was made without notice, was supported by the first affidavit of Mr Trolle and the first affidavit of Mona Vaswani ("Ms Vaswani"), a partner of Milbank LLP, the Lender's solicitors. The two affidavits were accompanied by substantial exhibits. A lengthy, 60-page skeleton argument was lodged by the Lenders' counsel, Mr Blakeley and Mr Woolgar, in advance of the hearing.

48. The order made by Mr Justice Foxton on 15 April 2020 was continued by Mr Justice Teare on its 1 May 2020 return date at which neither Mr Ali nor Mr Tahir appeared, and then again (by consent) by Mr Justice Jacobs on the further return date of 22 May 2020. On 1 June 2020, pursuant to directions given by Mr Justice Jacobs, all three Defendants filed a single Defence.

49. On 18 June 2020 Mr Ali issued the application now before me to discharge the WWFO on the ground of a failure by the Lenders to make full and frank disclosure and/or because the evidence was said not to establish a real risk of dissipation. The application was supported by the first witness statement from Mr Ali dated the same date.

50. In July 2020 the matter came before Mr Justice Teare on an application made by Mr Tahir and Mr Ali on 30 June 2020 to discharge the WWFO on a different ground,[3] namely that, when making the application before Mr Justice Foxton, the Lenders had failed properly to disclose that they had amended the undertaking in the standard WWFO in the Commercial Court Guide to delete the words shown in square brackets below:

> *"The Applicant will not without the permission of the Court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets]."*

inserting instead language referring to the possibility of the Lenders seeking an interim attachment of assets in the United Arab Emirates.

51. On 24 July 2020 Mr Justice Teare discharged the WWFO order against both Mr Tahir and Mr Ali, but he immediately re-granted it in similar terms save that the omitted language in the standard Commercial Court Guide form was reinstated with some modification. In his judgment, Mr Justice Teare said this:

> *"2. Having been taken to the skeleton argument and witness statement and having heard Mr [Blakeley], it does not appear to me that there was here any attempt by the claimants to hide anything from the judge. On the contrary, they were anxious to inform the judge of what proceedings they intended to take in the UAE and to obtain permission from the judge to do so. However, the form of the undertaking which they provided the judge contained an amendment by way of deletion from the standard undertaking, It also contained an addition*

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[3] I was told by Mr Cook that time did not permit Mr Justice Teare to deal with the application to discharge the WWFO on the grounds presently before me.

to the standard undertaking, namely to identify the proceedings in the UAE which they wished to have liberty to prosecute.

3. However, it is apparent from the skeleton argument and the witness statement and the oral submissions, which I have no doubt were carefully drafted and made, that no reference was made to the deletion of part of the standard form of undertaking. Looking at the amendment now with the benefit of hindsight, it can obviously be seen. Whether that particular deletion and its possible significance were apparent to Mr Justice Foxton, one cannot know. The court has, it seems to me, to be astute to ensure that the duty of full and frank disclosure is complied with when orders of this nature are sought from the court. That is particularly so where deletions are made from the standard form and therefore on the question of whether there has been a failure to make full and frank disclosure on this occasion, I must hold that there has been such a failure."

52. Mr Justice Teare went on to say that, whilst the normal outcome of a failure to make full and frank disclosure on an application for a freezing order would be to discharge and not to re-grant the order, he did not regard the case as one case where such a course was appropriate. He held that:

i) There had been no attempt to hide anything from Mr Justice Foxton;

ii) It was "obvious that this is a case where grounds existed for the grant of a freezing order"; and

iii) The omission did not appear to have caused any prejudice to the Defendants in the sense that nothing that had occurred would have occurred any differently.

53. Mr Justice Teare determined that, on the particular facts of the case, the importance of making full and frank disclosure on an application for a freezing order could be sufficiently emphasised by discharging the original order (and penalizing the Lenders in costs) but then re-granting the order on amended terms.

(iii) The Defence and Reply

54. As I indicated in paragraph 48 above, on 1 June 2020, prior to the hearing before Mr Justice Teare and prior to the issuance of the present application, a single Defence was filed on behalf of all three Defendants, Astir, Mr Tahir and Mr Ali.

55. So far as Mr Tahir is concerned, the Defence admitted (in paragraphs 29 and 30) that false representations had been made by him (or on his instructions) and that they had been made with the intention that the Lenders would act in reliance on them, although no admission was made as to whether the Lenders actually did so. The allegations of loss and damage were denied.

56. As for Mr Ali, paragraph 7 of the Defence introduced his case, at the heart of his present application, that he had had no active involvement in the day-to-day management of North Star or Astir. Having admitted that he was a director of North Star, he pleaded as follows:

"7.

...

b. Although formally a director of North Star and Astir and in those capacities having signed the agreements which are the subject of the present claim [the Finance Documents] on behalf of North Star and Astir on instructions from his father, Tahir, Ali had:

i. No involvement in the day to day management of Astir;

ii. No involvement or detailed knowledge of the Astir Group's maritime recycling business, save that Ali would occasionally assist in finding ships to purchase for recycling;

iii. No detailed knowledge of the provisions of the Facility Agreement, including the conditions precedent for withdrawals and the documents to be submitted;

iv. No knowledge of the Astir Group's overall financial position or the status of the Loans; and

v. No contact with the Lenders or their agents, save for having participated in initial discussions prior to inception of the Facility Agreement.

c. In short, the Astir Group was controlled by Tahir, Ali's father, and Ali had no knowledge of or involvement in the Astir Group's relationship with the Lenders (other than having acted as formal signatory on the agreements). Ali was not in a position to question and did not question his father's management of the Astir Group.

d. As a result, Ali had little or no knowledge of the matters raised in the Particulars of Claim until service of the Claim and injunction documents. Consequently, both in his capacity as a director of Astir and in his personal capacity, Ali pleads to the issues raised in the Particulars of Claim based on the documents and information produced by the Claimants and the investigations he (and his lawyers) have subsequently carried out. For the avoidance of doubt, the fact that Ali is <u>now</u> able to plead to an issue does not constitute any admission that Ali had any contemporaneous knowledge of those matters"

(emphasis in original).

57. I interject, as it is relevant to the No Involvement point explained below, that although Mr Ali alleged in his Defence that he had had no involvement in Astir's maritime recycling business, this was subject to a number of qualifications:

i) Mr Ali admitted that he participated in discussions with the Lenders prior to the inception of the Facility Agreement;

ii) Mr Ali admitted that he signed the Finance Documents under the terms of which the claim against Astir was made, although he denied having "detailed" knowledge of the provisions of the Facility Agreement;

iii) Mr Ali admitted that he would "occasionally assist in finding ships to purchase for recycling"; he thus admitted that he had at least *some* practical involvement in Astir's business.

58. As for his signatures on the ABSs for the vessels that were alleged to have contained false (and fraudulent) representations, in paragraph 19 of the Defence Mr Ali pleaded as follows:

> *"b. It is also admitted that some or all of those Approved Borrower Statements may have purported to have been signed by Ali acting as Chief Financial Officer of Astir.*
>
> *c. However, Ali did not sign any of these Approved Borrower Statements and did not know they were being submitted. Furthermore and as the Claimants were at all times aware, Ali was not the Chief Financial Officer of Astir."*

59. In response to the allegations in paragraphs 84 and 85 of the Particulars of Claim concerning the false representations said to have been made by him by signing the ABSs, Mr Ali said in paragraphs 33 and 34 of the Defence:

> *"33. As to paragraph 84: Ali did not sign any of these Approved Borrower Statements and did not know they were being submitted.*
>
> *34. As to paragraph 85:*
>
> *a. It is admitted that there was a Continuing Default from 30 November 2018 onwards (this being 5 working days after the Equator Peace had been broken up and the sale proceeds in respect of the Equator Peace had been received pursuant to the relevant Sale MOA) and the Equator Peace ceased to be a Permitted Transaction from that date.*
>
> *b. It is also admitted that the same applies mutatis mutandis in relation to the other Relevant Vessels from the date 5 working days after the sale proceeds were received.*
>
> *c. The Lenders are put to strict proof of when they discovered that the Equator Peace (and the other Relevant Vessels) had been broken up. As set out above, Hannaford acted as shipping advisors to the Lenders and were responsible for monitoring all aspects of the underlying transactions. They are, therefore, likely to have discovered from online tracking sources and/or port reports that these Vessels had been broken up shortly after this took place.*

> *d. However, since Ali did not sign any of the relevant Approved Borrower Statements, he did not make any representations (including any false representations) to the Lenders in such Statements.*
>
> *e. In any event, during the period 26 November 2018 to 3 July 2019, Ali did not know that any of the Relevant Vessels had already been delivered and/or broken up for scrap or that sums were still outstanding in relation to the Relevant Vessels. Ali would not, therefore, have known that the Approved Borrower Statements were false in any event."*

Mr Ali thus admitted that the ABSs contained false representations; his position was simply that he had not signed them and, therefore, that he had not made those representations; or that, even if he had, he did not know at the time that the representations were false.

60. Mr Ali similarly denied the pleas of loss and damage. He asserted, in the same way as had been asserted in the Defence in response to the case against Mr Tahir, that some of the supposedly improper withdrawals from the Funding Account had been used to purchase vessels the proceeds of sale of which had been used (in whole or in part) to repay earlier loans.

61. The Claimants subsequently served a Reply. They denied Mr Ali's case that he had no involvement in or detailed knowledge of the relevant business of the Astir Group or the Facility Agreement and no knowledge of the Astir Group's overall financial position. They added, in paragraph 4, in the alternative that:

> *"… if the matters pleaded at paragraph 7(b) [of the Defence] are true, then this suffices to render Ali's representations by way of the Approved Borrower Statements fraudulent in the Derry v Peek sense … On his own pleading, if he made the representations in the Approved Borrower Statements, they were made without his having any regard to the truth of the matters he represented were true."*

62. Mr Ali's case, that he had not signed any of the relevant ABSs, was denied, and a number of matters were relied upon by the Lenders in support of their case that he had indeed signed them, including the fact that Mr Ali was copied into the email by which the ABS in relation to the last vessel, the "NCC Jubail", was sent to the Lenders.

F. The Application to Discharge the WWFO

63. The principal application before me, as I indicated in paragraph 5 above, was Mr Ali's application to discharge the WWFO made against him.

64. The application to discharge the WWFO was made on two grounds:

i) An alleged failure by the Lenders to comply with their obligation to make full and frank disclosure; and

ii) A claim that, even if there had been no material non-disclosure, the WWFO should not be continued because there was (and is) no real risk of dissipation.

65. So far as the first ground is concerned, in Mr Ali's first witness statement his first complaint – described in a letter from his solicitors, Greenberg Traurig LLP, dated 4 September 2020 as "the central premise" of the application – was that the Lenders had failed to disclose to Mr Justice Foxton that Mr Ali had no knowledge of or involvement in the Astir Group's business (the "No Involvement Point").

66. See, in particular, paragraphs 15-7, 24 and 26-8 of his first witness statement, in which Mr Ali said this:

> *"15. I had no involvement in the day to day management of North Star or the Astir Group and I had no involvement or detailed knowledge of the Astir Group's maritime recycling business, save that I would occasionally assist in finding ships to purchase for recycling.*
>
> *16. As a result, although I signed the Facility Agreements on behalf of North Star acting on instructions from my father, I had no knowledge of the provisions of the Facility Agreements, including the conditions precedent for withdrawals and the documents to be submitted and no knowledge of the Astir Group's overall financial position or the status of the Loans.*
>
> *17. Save for an initial introduction at the commencement of the relationship between North Star, Astir and Njord, so far as I can recall I had no direct contact with Njord, or its advisors. Instead, it was my father who was the main point of contact overseeing the relationship with Njord, and with Njord's advisors, Hannaford Turner LLP (Hannaford) and Njord's legal representative, Milbank LLP (Milbank).*
>
> *…*
>
> *24. In circumstances where the Claimants were alleging that I had engaged in deceit (i.e. made representations knowing them to be false with the intention of deceiving the Claimants), I consider that these are significant matters that ought to have been brought to the Court's attention by the Claimants.*
>
> *…*
>
> *26. The skeleton argument filed on behalf of the Claimants for the ex parte hearing makes no reference to:*
>
> *(1) My father, Tahir, controlling the Astir Group, including being closely involved in the day to day management of Astir and being the main Astir Group point of contact for the Lenders;*
>
> *(2) My total lack of involvement in the Astir Group's business or its relationship with Njord, Hannaford and Milbank.*
>
> *27. Instead, it is simply asserted (at paragraph 83) that 'the Lenders' case is that Ali must have known what he was saying was false. It was his job to*

> *know. It is also implausible to think that he did not [know] that the Relevant Vessels had been broken up.'*
>
> *28. I consider that was very misleading given my lack of involvement and the Claimant's knowledge of this."*

In paragraph 20 of his witness statement, Mr Ali relied upon a number of passages in Mr Trolle's first affidavit in which Mr Trolle had referred to the Lenders' communications with Mr Tahir in support of his case that he had no relevant involvement in Astir.

67. In the skeleton argument filed by on behalf of Mr Ali by Mr Cook for this hearing, this first ground of complaint was relegated to second place. The argument put by Mr Cook in his skeleton argument first, but made in Mr Ali's witness statement second, concerned the nature of the signatures on the relevant ABSs. What was said in that regard was that:

i) Mr Ali's signatures on the ABSs for the relevant vessels were not handwritten (or "wet") signatures but electronic signatures – essentially a picture or image of Mr Ali's signature had been inserted into the document;

ii) That this was so, it was said, should have been drawn to the attention of Mr Justice Foxton since "at the very least, it raised serious doubt about whether Ali made the relevant representations at all".

This has been referred to by the parties as the "Electronic Signatures Point".

68. Ordinarily, of course, although one might expect an advocate to put what he or she perceives to be the client's best point first for forensic reasons, the order in which arguments are advanced is of no particular importance. In this case, however, the Lenders suggested in their skeleton argument that the reason for this change in priorities was rather different.

69. The basis for this suggestion concerns the fact that the WWFO made by Mr Justice Foxton is not the only freezing order made against Mr Ali in relation to North Star. A WWFO was also made against Mr Ali, Mr Tahir and Mr Hassan on 2 April 2020 by Mr Justice Butcher in proceedings commenced by YS GM Marfin II LLC and others, Case No. CL-2020-000192 ("the Yield Street proceedings").

70. The Yield Street proceedings involved a claim by different lenders, who had advanced some $74,600,000 to North Star subsidiaries, to enforce personal guarantees given by Mr Tahir, Mr Ali and Mr Hassan to secure other ship finance lending. The loans were subject to non-payment Events of Default, and further Events of Default occurred in February 2020 when North Star was put into liquidation.

71. On 22-23 September 2020, *i.e.*, after the date when the present application was issued but before the hearing before me, Mr Justice Jacobs heard two applications in the Yield Street proceedings:

i) An application by the claimant lenders for summary judgment; and

ii) An application by Mr Ali and Mr Hassan to discharge the WWFO for non-disclosure.

As Mr Salzedo, QC pointed out, one of the non-disclosures alleged in the skeleton argument served (again by Mr Cook) in support of the application to discharge the WWFO in the Yield Street proceedings was Mr Ali's suggested non-involvement in North Star's business, *i.e.*, the same No Involvement Point.

72. As Mr Justice Jacobs explained in paragraphs 126-9 of his judgment handed down on 5 October 2020 ([2020] EWHC 2629 (Comm)), however, although the No Involvement Point had been raised in Mr Ali's skeleton argument, by the time of the hearing before him the point (or at least most of it) had been abandoned. The point was, in Mr Justice Jacobs' view, in any event without substance:

> *"126. The point that there had been a failure by the Claimants to 'explain that Ali and Hassan had little or no involvement in the ship re-cycling business' was not pursued, and in my view was wholly unsustainable. That case depends upon a disputed assertion by Ali and Hassan that they had no such involvement, That assertion is flatly contradicted by what was said to Njord in 2016 as to the active involvement of both brothers in the business. There is also other clear evidence, to which I have already referred, of Ali's participation. His witness statement admits involvement in the acquisition of vessels, and his signature of a number of MOAs provides further support. That is consistent with the Tradewinds articles, the industry award to Ali, and the presentation to the Claimants in 2019.*
>
> *127. The second point, that the Claimants failed to disclose that Ali and Hasan had little or no involvement in 'the day to day operations of the borrowers', was also not pursued. Again, that involves essentially the same disputed assertion as the first point. Furthermore, as will become apparent, the Claimants did not present their case to the judge at the WFO application on the basis that there was an extensive documentary trail showing the involvement of Ali and Hasan in the day to day operations of the borrowers. Rather the Claimants' case identified those documents which showed some involvement, and relied upon inferences from other circumstances of the case; in particular, that the relevant frauds were for the benefit of the sons, who were closely connected with their father and who were the owners and sole directors of the relevant business.*
>
> *128. The third point made in paragraph 11 was the argument that was pursued by Mr Cook. The substance of the case was that the Claimants had not fairly explained that Ali and Hasan had little or no involvement in the relationship with Yield Street.*
>
> *129. In my view, this non-disclosure argument can be readily dismissed. …"*

As paragraph 111 of Mr Justice Jacobs' judgment reflects, the application to discharge the WWFO in the Yield Street proceedings had also alleged that there was insufficient evidence of a risk of dissipation, but that point was also not pursued by Mr Cook at the hearing.

73. So, Mr Salzedo, QC said, the No Involvement point had been the first point in Mr Ali's witness statement (and, indeed, the first point taken in the skeleton argument filed by Mr Cook on 9 September 2020 for the purposes of a hearing of this application that was ultimately adjourned). But, having abandoned or lost the point in the Yield Street proceedings, the point was now, unsurprisingly, put second.

74. Mr Cook quite properly reminded me, however, that the decision of Mr Justice Jacobs in the Yield Street proceedings is not admissible as proof of the underlying facts: see *Hollington v F. Hewthorn & Co. Ltd* [1943] KB 587, 595-6 (Goddard LJ); *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1 at [28]-[33], [79] and [103] (Lord Hope) and [130]-[133] (Lord Hutton). Mr Cook also submitted that the claim made in the Yield Street proceedings was different from the claim made in these proceedings: it involved, he said, different agreements, a different time period and different allegations of wrongdoing. Mr Cook also said that the evidence before Mr Justice Jacobs was, in certain respects, different to the evidence before me.

75. So far as *Hollington v Hewthorn* is concerned, the proposition that Mr Justice Jacobs' decision is not evidence of the underlying facts was not disputed by Mr Salzedo, QC, and I accept it. Mr Ali's application in the present action must be assessed on its own merits, and it must be determined on the basis of the evidence served in this action. That is exactly the basis upon which I have approached it.

76. I have mentioned the first two of the suggested non-disclosures: the No Involvement point and the Electronic Signatures point. The third complaint advanced on Mr Ali's behalf is what was described in the Lenders' skeleton argument as "the Repayments point" – a shorthand expression which, it seems to me, will do as well as any other. What was said in paragraph 70(c) of Mr Cook's skeleton argument was that:

> *"… the Lenders made no attempt to explain the serious difficulties that existed in relation to the quantum of their claim, including evidence showing that the Lenders had not in fact suffered a loss."*

77. As I indicated in paragraph 64.2 above, aside from these three alleged non-disclosures, Mr Ali also said that, even if there had been no material non-disclosure, the WWFO should not be continued because there was (and is) no real risk of dissipation.

G. The Allegations of Non-Disclosure

78. I deal first with the submission that the WWFO should be discharged because of a failure by the Lenders to comply with their obligation to make full and frank disclosure.

(i) Principles

79. There was little of substance between the parties as to the relevant legal principles, which are well known.

80. The application made to Mr Justice Foxton was made without notice. That being so, the Lenders, as applicants, owed a duty to make full and frank disclosure of all the material facts. In his judgment in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at

1356F-1357 Ralph Gibson LJ summarised the principles in the following way (internal citations omitted):

> *"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.*
>
> *(1) The duty of the applicant is to make "a 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 advisers.*
>
> *(3) The applicant must make proper inquiries before making the application. The duty of disclosure 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 such 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 including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant.*
>
> *(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] 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. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*
>
> *(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded'. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.*
>
> > *"when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an*

injunction could properly be granted even had the facts been disclosed".

81. Mr Salzedo, QC also drew my attention to the following passage in the judgment of Slade LJ in *Brinks-Mat* at 1359B-E:

> *"Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v. Kensington Income Tax Commissioners [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."*

The present application, Mr Salzedo, QC submitted, was an example of what Slade LJ described: a party with nothing better than a barely arguable defence grasping at straws.

82. Whilst *Brink's Mat* remains the leading authority, there are a large number of subsequent cases that have explained or expanded upon particular aspects of the principles there identified.

83. So far as the present case is concerned, and having regard to the authorities cited to me (all of which I have considered, but not all of which I refer to below), the points I would emphasise are the following:

i) The test of materiality is objective and depends upon the nature of the application and the matters relevant to be known by the judge when hearing it: *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep. 731 at [25] (Toulson J);

ii) A fact is material if it would be relevant to the exercise of the court's discretion in the sense that it is a fact which a judge would need or want to take into account when deciding whether to make the order sought: *Alliance Bank JSC v Zhunus* [2015] EWHC 714 (Comm) at [65] (Cooke J); *National Bank Trust v Yurov* [2016] EWHC 1913 at [18(a)] (Males J);

iii) Facts are not material only if their disclosure would have caused, or would have been likely to have caused, the judge to reach a different decision, although that may be a relevant matter when considering whether an

injunction should be discharged and/or re-granted: *Behbehani v Salem* [1989] 1 WLR 723 at 729E-F (Woolfe LJ);

iv) The duty to make full and frank disclosure is not confined to material facts that the applicant actually knows but extends to material facts that the applicant would have known had it made proper enquiries: *Brinks Mat* (above); *Konamaneni v Rolls Royce Industrial Power* [2001] EWHC 470 (Ch), [2002] 1 WLR 1269 at [180] (Lawrence Collins J);

v) The court should be told of points that have been raised by the respondent, or that there is reason to anticipate the respondent would have raised if it had been present: *Konamaneni* (above) at [180] (Lawrence Collins J); *Re Stanford International Bank Ltd* [2010] EWCA Civ. 137, [2011] Ch. 33 at [191] (Hughes LJ);

vi) It is inappropriate to seek to set aside a freezing order for non-disclosure where proof of the non-disclosure depends upon proof of facts which are themselves in issue in the action, unless the facts are so plain that they can be readily and summarily established: *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381 at [36] (Longmore LJ);

vii) Where facts are material in the broad sense, it should be recognised that there are degrees of relevance. It is important to preserve a due sense of proportion and not to lose sight of the wood for the trees: *Kazakhstan Kagazy* (above) at [36] (Longmore LJ) (adopting the approach taken by Toulson J in *Crown Resources AG v Vinogradsky*) (15 June 2001)); and

viii) The ultimate touchstone is whether the presentation to the judge was fair in all material respects: *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 (Comm) at [52] (Popplewell J); *Federal Republic of Nigeria v Royal Dutch Shell Plc* [2020] EWHC 1315 (Comm) at [90] (Butcher J).

84. I also take into the account the following passage in the judgment of Males J in *National Bank v Yurov* (above) at [19], in particular the final sentence:

> *"19. It is important also not to allow a dispute about full and frank disclosure to turn into what is sometimes euphemistically described as a "mini" trial of the merits. That danger has not been avoided in this case, where the defendants' evidence ran to some 130 pages of written evidence and over 1,500 pages of exhibited documents and the bank responded in kind, in addition to the substantial volume of material on which it had initially relied. In a case where the defendants accept that the bank has a good arguable case and where it is impossible for disputed allegations to be resolved on an application of this nature, much of this material was unnecessary. It is understandable that a defendant accused of misconduct will wish to give his account, not least to avoid any suggestion that he has failed to answer the accusations against him. However, unless both parties exercise restraint, there is a danger that applications for the grant or discharge of freezing orders may become unmanageable. Thus the claimant must disclose material facts, which will include making the court aware at the without notice stage of the issues which are likely to arise*

and the possible difficulties in its case, but need not extend to a detailed analysis of every possible point which may arise; and the defendant must identify with clarity (and if necessary restraint) the failures of which it complains, rather than adopting a scatter gun approach."

85. Insofar as an applicant on a without notice application is found to have failed to comply with its duty of full and frank disclosure, in *OJSC Ank Yugraneft v Sibir Energy Plc* [2008] EWHC 2614 (Ch) at [102]-[103] Christopher Clarke J approved the following guidance given in an earlier case as to the approach to deciding the appropriate sanction:

> *"(1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.*
>
> *(2) Notwithstanding that general rule, the Court has jurisdiction to continue or re-grant the order.*
>
> *(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.*
>
> *(4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.*
>
> *(5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.*
>
> *(6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.*
>
> *(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.*
>
> *(8) The jurisdiction is penal in nature and the Court should therefore have regard to the proportionality between the punishment and the offence.*
>
> *(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the Court should take into account all relevant circumstances."*

86. Whilst emphasising the penal element of the sanction, the need for proportionality was echoed by Popplewell J in his judgment in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 (Comm) at [82]:

> *"Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply."*

(iii) Ground 1 – The No Involvement point

87. I propose to deal with Mr Ali's three points in the order in which they were addressed in his first witness statement, starting with the No Involvement point.

88. The complaint, as it was summarised in paragraph 70(b) of Mr Cook's skeleton argument, was that there was a failure by the Lenders to disclose to Mr Justice Foxton that:

> *"… Ali had not had any involvement in the dealings with the Lenders during the relevant period and there was nothing in those dealings to indicate that he had any active role at all."*

89. The point was expanded upon in paragraphs 85 to 100 of Mr Cook's skeleton argument and in similar terms orally. Mr Cook accepted in those paragraphs that the documentation shows that:

i) Mr Ali played a limited role during the negotiation for, and in the due diligence process leading to the conclusion of, the Facility Agreement in March 2017; and

ii) Mr Ali was copied on emails in relation to transactions under the Facility Agreement between April 2017 and April 2018 which attached a number of documents ostensibly signed by him, either by hand or electronically, concerning transactions during that period.

There was also, of course, the acceptance by Mr Ali in his own pleading – see paragraph 57 above – that he had had some involvement in Astir's affairs.

90. Mr Cook submitted, however, that the fact that Mr Ali was not copied on any communications with the Lenders after November 2018, save for the one transaction in July 2019, should have indicated to the Lenders that Mr Ali was not involved in any deceit and confirmed Mr Ali's evidence that he had no active involvement in Astir's business or its relationship with the Lenders during the period relevant to the claim.

91. In paragraph 95 of his skeleton argument, Mr Cook said that the following facts, in particular, were material to disclose to Mr Justice Foxton but were not, in fact, disclosed:

> *"a. First, that Ali had no active involvement at all in the dealings with the Lenders during the relevant period.*
>
> *b. Second, that Ali was not copied in on any communications (other than one email in relation to the final vessel) during the period during which the Lenders contend that deceitful representations were being made, including the communications which the Lenders contend were deceitful,*
>
> *c. Third, that there was nothing in the interactions between the Lenders and Astir during the relevant period to indicate that Ali had any active role at all (other than his electronic signature on documents)."*

92. The point made in sub-paragraph (c) was modified by Mr Cook in the course of his submissions in reply when he accepted that, in addition to receiving ABSs ostensibly bearing Mr Ali's signature, the Lenders also received during the relevant period, *i.e.*, the period from November 2018 onwards, a number of Acquisition and Sale MOAs ostensibly signed by Mr Ali by hand.

93. So far as this is concerned:

i) The only transaction specifically addressed by Mr Ali in his first witness statement (see paragraph 42) was the "Path Star", which had been dealt with in Mr Trolle's first affidavit by way of example. Mr Ali denied signing any documents relating to this vessel;

ii) Ms Vaswani explained in paragraphs 32-88 of her fifth witness statement, however, that Mr Ali had ostensibly signed documents in relation to a large number of other vessels, including a significant number of documents that appeared to have been signed by him by hand; and

iii) Mr Cook said, on instructions, that Mr Ali did not accept that he signed documents in relation to these other vessels either, but the absence of any evidence from Mr Ali in reply to Ms Vaswani on this point was striking. I was not persuaded by Mr Cook's suggestion that there was no need for Mr Ali to serve reply evidence to deal with this point.

94. I am quite satisfied that this complaint of non-disclosure is without foundation. I say that for the following reasons.

95. First, this is not a case where the application for a WWFO was presented to Mr Justice Foxton on the basis that Mr Ali had had a substantial day-to-day involvement in Astir's business when in fact the Lenders knew, or ought to have known, facts which suggested that he had no such involvement. I do not think the presentation to Mr Justice Foxton could be said to have been misleading in that respect.

96. On the contrary, the different positions of Mr Tahir and Mr Ali were, in my judgment, fairly made clear to Mr Justice Foxton by the Lenders in the affidavits of Mr Trolle and Ms Vaswani and in the presentation by counsel.

97. Dealing first with Mr Tahir, Mr Trolle's affidavit explained in paragraph 12 that, although Mr Tahir was not a director of North Star:

> *"… he seems to have had overall control of the North Star group and was closely involved in its day to day management, including in relation to Astir".*

Similarly, in paragraph 52-3, dealing with the delays in the completion of transactions after September 2018, Mr Trolle said that the contacts between the Lenders' representatives and the Astir group were principally with Mr Tahir or a junior employee.

98. These paragraphs mirrored what had been alleged in paragraph 14 of the Particulars of Claim, where the Lenders pled:

> *"Tahir does not have a formal role within the 'Astir Group', being Astir, the Astir Subsidiaries and Astir's parent company North Star Maritime Holdings Limited ('North Star'). Nonetheless, Tahir is the Astir Group's patriarch and appears to the Claimants to have de facto control of it. Tahir was closely involved in the day-to-day management of Astir and was the (or a) main Astir point of contact for the Lenders and their shipping counsel Hannaford Turner LLP (Hannaford)."*

In circumstances where Mr Tahir had no formal position in Astir, the fact that, in practice, he had played a significant role had to be explained.

99. There was, in contrast, no suggestion in Mr Trolle's first affidavit that Mr Ali had had extensive, direct dealings with the Lenders. On the contrary, his alleged involvement – see, for example, paragraph 96.1, 96.2, 96.4, 106.1, 106.2, and 106.6 - was in signing ABSs confirming that all transactions were Permitted Transactions and that there was no continuing Default.

100. A similar distinction was drawn in the first affidavit of Ms Vaswani, which separately identified the lies allegedly told by Mr Tahir in the communications in which he suggested that completion of transactions had been delayed (see paragraphs 17-23) and the lies allegedly told by Mr Ali when, in his capacity as a director of Astir, he signed the ABSs (see paragraphs 24-6).

101. In the context of the claim against Mr Ali in paragraph 31 of her first affidavit Ms Vaswani furthermore acknowledged the possibility that Mr Ali might say that he did not know the true circumstances, although neither she nor the Lenders at that stage were in a position to know exactly how much Mr Ali knew:

> *"31. It is possible that Ali did not know the true circumstances. But if that is right, then he would be in serious dereliction of his duties as a director of Astir and he would have signed the Approved Borrower Statements without taking any steps to satisfy himself of the true position. If he was really ignorant of the breakup of the Vessels, then the only plausible reason that would be so is if he was misled by Tahir. At present, there is no evidence of that."*

102. So far as the skeleton argument is concerned, the claims in deceit made against Mr Tahir and Mr Ali were explained separately and in detail, in both cases addressing both the ingredients of the claim and potential defences that might be raised:

i) The claim against Mr Tahir (see paragraphs 47-74) was based on representations made in communications sent by him (or on his instructions) from March 2019 onwards. So far as his state of mind is concerned, Mr Tahir was identified in paragraph 57 as "the Lenders' point of contact";

ii) In contrast, the claim against Mr Ali (see paragraphs 75-94) was put squarely on the basis of his status as a director of Astir and the representations made in the ABSs that he was said to have signed on and after November 2018. There was no suggestion that Mr Ali had been involved in extensive correspondence with the Lenders over the relevant period;

iii) As for Mr Ali's state of mind, what was said in paragraph 83 was that:

> *"As with Tahir, the Lenders' case is that Ali must have known what he was saying was false. It was his job to know. It is also implausible to think that he did not know that the Relevant Vessels had been broken up."*

In circumstances where Mr Ali was a director of Astir, the ultimate beneficial owner of 50% of its shares, and where he had ostensibly signed ABSs that referred to the need to undertake diligent review and consideration before making certain of the representations, the case that "it was his job to know" the position in relation to the vessels was an obvious one.

The position was, thus, that whilst the claim against Mr Tahir was presented to Mr Justice Foxton on the basis of his extensive involvement and communications with the Lenders, the claim against Mr Ali was not.

103. Secondly, although Mr Ali's direct dealings with the Lenders during the period from November 2018 onwards appear to have been limited, it is not right that he had *no* involvement with the Lenders during that period. The suggestion, furthermore, that there was nothing in those dealings to suggest that Mr Ali had any active involvement in Astir's business, is either wrong or at best in dispute and, as such, cannot found an allegation of non-disclosure.

104. So far as that is concerned, Mr Cook accepted that the Lenders had (and still have) a good arguable case of deceit against Mr Ali, and he accepted, for the purpose of this application at least, that the Lenders have a sufficiently arguable case that Mr Ali had a relevant involvement in Astir's maritime business during the relevant period: see paragraph 94 of his skeleton argument where he said:

> *"It is obviously correct that an applicant cannot be liable for a material non-disclosure for failing to disclose as a fact something which is disputed. It is not suggested that the Court is in a position, on this application, to determine on a summary basis that Ali's evidence that he had no relevant involvement in Astir's maritime recycling business during the relevant period is correct."*

105. What was said by Mr Cook, however, as I understood his case, was that:

i) Although the *overall extent* of Mr Ali's involvement may be in dispute, and although a complaint of non-disclosure cannot be made in that regard, certain

specific facts, *viz.*, Mr Ali's limited direct contact with the Lenders and the fact that he was not (generally) copied in on emails to the Lenders during the relevant period, cannot be disputed;

ii) Those specific facts were material to disclose because they indicated that there was reason to anticipate that Mr Ali might say that he did not sign (or authorize the application of his signature to) the ABSs, or that, if he did, Mr Ali did not know of the underlying facts that rendered the representations made in the ABSs false; and

iii) Even if, as Mr Cook accepted, the Lenders would still have been able to surmount the good arguable case threshold, the existence of these facts, and the evidential basis for a possible defence, bore on "the quality of the case in relation to fraud", which was relevant to the risk of dissipation and also to the broader question of whether the court should exercise its discretion in favour of granting a WWFO.

106. In making these submissions Mr Cook accepted that, in presenting the case to Mr Justice Foxton, the Lenders were entitled to comment on these allegedly undisclosed facts, pointing out, for example, that, even if Mr Ali was not copied in on emails, numerous documents ostensibly bearing his signature were still being produced. He accepted, thus, that the supposedly undisclosed facts had to be viewed in their context.

107. Mr Cook's acceptance of this proposition was consistent with authority: see *R (Jordan) v Chief Constable of Merseyside Police* [2020] EWHC 2408 (Admin), where (admittedly in a different context) Chamberlain J said (at [35]) that, in assessing whether a non-disclosure on a without notice application was material, the court should:

> *"… focus on the information that should have been given to the magistrate, not merely the information that <u>it is alleged</u> should have been given. What should be before the magistrate is a fair and accurate summary of what is known by the applicant. That includes any points that can properly be made against the grant of the warrant, but also any answers to those points which could properly have been deployed at the time. All this must be considered in the context of the whole of the information before the magistrate so that the salience of the omitted matters can be assessed"*
>
> (emphasis in original).

108. Even if one considers the specific facts complained of by Mr Cook in isolation, however, in my judgment his argument faced substantial difficulties. Taking the three matters complained of in paragraph 95 of Mr Cook's skeleton argument, set out in paragraph 92 above, in turn:

i) It is not right that Mr Ali had no active involvement at all in the dealings with the Lenders during the period relevant to the claim:

a) On 29 January 2020, for example, Mr Ali signed the 2020 Amendment Deed in which representations were made, amongst other things, that there were no defaults;

b) The proposition, in any event, depends upon what is meant by "active involvement". Even if Mr Ali did not communicate with the Lenders directly, he ostensibly signed a large number of documents that were, and that the Lenders were entitled to think that, as a director of Astir, he knew were, going to be supplied to the Lenders for the purposes of the Facility Agreement;

ii) The suggestion that Mr Ali was not copied in on any communications during the period in which the Lenders contend deceitful representations were made is gainsaid by the email in relation to the "NCC Jubail" on which Mr Ali accepts he was copied, but about which Mr Ali had little to say in his first witness statement. (It is unknown, of course, whether Mr Ali was sent or copied in on emails internally); and

iii) The suggestion, that "there was nothing in the interactions between the Lenders and Astir during the relevant period to indicate that [Mr] Ali had any active role at all (other than his electronic signature on documents)" is, in my judgment, plainly wrong.

109. So far as this last point is concerned – and this was the broad No Involvement point articulated in Mr Ali's first witness statement and in his Defence – the evidence put before me suggested that there was ample material on the basis of which the Lenders could legitimately have thought that Mr Ali was actively involved in Astir's business, as they say they did. Whether he was or not *actually* involved is in dispute, but the non-disclosure of a disputed fact is no basis for setting aside the WWFO.

110. I start with Mr Ali's involvement with the Lenders prior to the conclusion of the Facility Agreement. So far as that is concerned, Mr Ali said in paragraph 17 of his first witness statement that:

> *"Save for an initial introduction at the commencement of the relationship between North Star, Astir and Njord, so far as I can recall I had no direct contact with Njord, or its advisors."*

111. This sentence, however, ignores an email sent by Mr Ali to Njord on 23 December 2016 in which Mr Ali provided answers to a number of questions raised by Njord following a meeting on 13 December 2016 that Mr Ali accepts in his third witness statement he attended. One of these questions asked why Mr Tahir was not a director of North Star; the answer passed on by Mr Ali was that:

> *"Apart from the reason listed above, North Star was formed also with forward succession planning in mind with Tahir Lakhani's sons Ali Lahkani and Hasan Lakhani <u>who are now fully active in the business.</u>"*
>
> (my emphasis).

Mr Ali accordingly represented to the Lenders in December 2016 that he (and his brother) were then "fully active in" North Star's business.

112. Ms Fletcher of Njord explains Mr Ali's participation in the meeting on 13 December 2016 in paragraphs 13-14 of her witness statement, including the issues on which Mr

Ali apparently led the discussion. At paragraphs 18-20, she explains that she believed then and subsequently that Mr Ali was fully involved in the business, and that nothing subsequently came to her attention to alter that view.

113. Mr Ali's explanation of this in paragraph 12 of his third witness statement is that, looking back, the attachment to his 23 December 2016 email involved him

> *"… setting out what he understood would be the case going forward on what his father had told me was his plan for North Star".*

That was not, however, what the email said, and there is, in my judgment (for the purposes of this application, at least) no reason why the Lenders should not have taken it at face value. Mr Ali does not suggest that he ever communicated to the Lenders that what had been said in the email was false or that, as things had turned out, he was not actively involved in North Star's business at all.

114. Moving forward, on 28 March 2017 Mr Ali signed the Facility Agreement, and on 14 September 2017, 28 December and on 29 January 2020 he signed the various amendment deeds. He also appears to have signed the Waiver and Amendment Request and Waiver Letters on 2 October 2017 and February 2018 and an Agent Substitution Deed on 25 April 2018.

115. So far as the individual transactions financed under the facility are concerned, as set out in paragraph 14 of Ms Vaswani's fifth witness statement Mr Ali signed, or ostensibly signed:

i) The ABSs for all 68 of the vessels submitted (save for one cancelled transaction); and

ii) Acquisition MOAs for all but 4 of the vessels submitted for financing and the Sale MOAs for 11 vessels.

Some 328 documents ostensibly signed by Mr Ali were submitted to the Lenders, some 87 of which (approximately 25%) appeared to have been signed by him by hand.

116. In some cases, furthermore, Mr Ali was copied in to the emails whereby transaction documents were submitted to the Lenders, although the practice appears to have be inconsistent. As it appears from Ms Vaswani's fifth witness statement:

i) Mr Ali was not been copied in to the email on 11 April 2017 concerning the first proposed vessel "Trader";

ii) He was then copied in to emails in respect of the next 12 vessels from 18 April 2017 to 26 September 2017;

iii) There was then a period between 28 September 2017 to 21 February 2018 in which Mr Ali was not copied in on emails;

iv) Mr Ali was copied on emails on 10 April 2018 emails concerning the vessels "Riga", and the "Maya";

v) Mr Ali was not copied on emails in relation to transactions after 1 May 2018, save for the email on 3 July 2019 concerning the "NCC Jubail".

117. So far as the knowledge of the Lenders is concerned, it is important to note that, although Mr Ali may not have been copied in on emails after May 2018, save for the "NCC Jubail", all or almost all of those emails attached copies of ABSs and/or Acquisition and Sale MOAs that Mr Ali had ostensibly signed. The Lenders were thus entitled to believe that Mr Ali was involved in the relevant transactions.

118. I will come on to the Electronic Signatures point in a moment, but a number of the documents attached to these emails had ostensibly been signed by Mr Ali by hand. Some had been signed electronically, but in the period prior to May 2018 Mr Ali had been copied in on emails that attached documents signed by him electronically and at no stage had he suggested that the documents attached to those emails had not been signed by him or with his authorisation.

119. Mr Cook resisted the suggestion that Mr Ali had told a palpable lie in paragraph 40 of his first witness statement, where he had said:

> *"I do not recall ever having been asked to provide an electronic signature to be used on documents."*

He prayed in aid what he referred to orally as "the practical reality", that people rarely comb through documents attached to emails on which they are copied, although Mr Ali had given no evidence to this effect himself.

120. Mr Cook relied in the course of his argument on the fact that, in paragraph 21.2 of her first affidavit, Ms Vaswani had suggested that addenda to the Sale MOAs had been fabricated to support the excuses given by Mr Tahir for delivery delays; so, he said, the Lenders should have been suspicious of whether Mr Ali's signatures on these documents were genuine.

121. I am sceptical about this:

i) The proposition, that a forger would copy the forged document to the person whose signature had (unknown to him) been forged, here Mr Ali, is a somewhat surprising one; there is an obvious risk that the forgery would be discovered;

ii) This case, furthermore, does not just involve *one* email copied to Mr Ali attaching a copy of a document ostensibly signed by him but which he now claims he did not sign, but a whole series of such emails. Mr Ali's case must be that he did not open up the attachments to any of them;

iii) There is nothing in the material put by Mr Ali before the court evidencing the fact of Mr Ali's discovery of what, on his own case, was the widescale, unauthorised forging of his signature, any protestation or expression of concern by him when he found out about it, or what he did about it. Mr Ali has declined to say who he believes was forging his signature.

122. It is not necessary for the purposes of this application, however, for me to find that Mr Ali's statement, that he did not recall having been asked to provide an electronic signature to be used on documents, was a lie. It is enough for me to say that, in circumstances where Mr Ali was repeatedly copied in to communications attaching documents on which his signature had, according to him, been forged, but made no comment, the suggestion that the Lenders should have been suspicious about such signatures has little, if any, force.

123. Mr Ali was also one of two signatories on Astir's bank accounts, he signed the documents opening the accounts on 20 February 2017, and it was accepted by Mr Cook that he signed a number of transfers at least in the early days of the facility. By the time the application for a WWFO came to be made, the Lenders were also in possession of Mr Ali's 13 February 2020 affidavit in which he professed knowledge of Astir's business.

124. Thirdly, whilst I have dealt with the three points identified in paragraph 95 of Mr Cook's skeleton argument, I was unimpressed with the argument that, even though the facts relating to the No Involvement point were generally in dispute, as they plainly were, the facts could be parsed, specific facts relevant to the No Involvement point could be identified as undisputed, and the WWFO set aside on the basis that these specific facts were not disclosed.

125. This approach, it seemed to me, suffers from a number of obvious problems having regard to the principles summarised at paragraphs 80-85 above.

126. First, it ignores the fact that any assessment of the materiality of the allegedly undisclosed facts must involve viewing those facts in their context, having regard to the nature of the case, the facts that were disclosed, and any comment on the allegedly undisclosed facts that could legitimately have been made at the same time, something Mr Cook himself accepted was appropriate. See paragraphs 106-7 above.

127. Secondly, as Males J said in *Yurov*, whilst proper disclosure involves making the court aware of the issues that are likely to arise and the possible difficulties with the applicant's case, disclosure need not extend to a detailed analysis of every possible point that may arise. As Longmore LJ said, adopting remarks previously made by Toulson J, it is important not to lose sight of the wood for the trees.

128. Thirdly, the ultimate question is whether the presentation to the judge was fair in all material respects. So far as the No Involvement point is concerned, I am quite satisfied that it was.

(iv) Ground 2 – The Electronic Signatures point

129. The second ground of complaint – the first in Mr Cook's skeleton argument – was the Electronic Signatures point: the suggestion that the Lenders should have disclosed to Mr Justice Foxton that Mr Ali's signature on the ABSs in respect of the relevant vessels was an electronic and not a wet signature.

130. This point is, in reality, a facet of the No Involvement point; what was said by Mr Cook was that, if this fact had been disclosed to Mr Justice Foxton, then, whilst he accepted the Lenders would still have been able to surmount the good arguable case

threshold, a possible defence by Mr Ali that has was not involved in Astir's business, had not signed the ABSs and did not have guilty knowledge would have had more concrete support.

131. So far as the basis for the complaint is concerned, although Ms Vaswani explained in paragraph 116 of her fifth witness statement that neither the Lenders nor their legal team had alighted upon it at the time, it is accepted that Mr Ali's signature to the relevant ABSs appears to have been applied electronically, and it is accepted that this fact was not disclosed to Mr Justice Foxton.[4]

132. Mr Salzedo, QC fairly admitted, first, that, although the Lenders had not spotted that Mr Ali's signature on these documents was an electronic signature, they could have discovered this if they had turned their mind to the point; and secondly, that, if this had been spotted, it probably would have been disclosed to Mr Justice Foxton out of an abundance of caution.

133. Mr Salzedo, QC did not accept, however, that the fact that Mr Ali's signature on the documents was an electronic signature was something that the Lenders should have discovered, *i.e.*, that there was a failure to make proper enquiries, or that it was material and something that that the Lenders were *required* to disclose (even if, as a matter of practice, they would have done so). He submitted that:

i) Mr Ali's evidence, that he did not know and approve of the application of his electronic signature to documents, was a lie;

ii) But, even if I were not prepared to go that far, given:

a) The fact (which was not disputed) that it was commonplace for documents to be signed electronically in this type of business;

b) The substantial number of documents that had been provided to the Lenders bearing Mr Ali's electronic signature, sometimes accompanied by documents ostensibly signed by Mr Ali by hand; and

c) The fact that, in many cases, documents bearing Mr Ali's electronic signature had been provided to the Lenders under cover of emails copied to Mr Ali himself without there ever having been any complaint by him

there was no reason for the Lenders to think that Mr Ali might deny that he had signed the ABSs and no reason, therefore, for them to turn their mind to the format of the signatures; and

iii) For essentially the same reasons, the fact that the signatures were electronic was not material: as Mr Salzedo, QC put it, against the full background, if it had been disclosed, it would have signified nothing; it was not something that

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4 As a result of a technical error, the application of final page numbers to the bundle for the without notice hearing appears to have had the effect of cropping the signatures from the ABSs. The versions that the Lenders had all bore Mr Ali's signature, and the submissions made to Mr Justice Foxton, which described the ABSs as signed, were correct.

could have influenced a judge in deciding the principal issue, which was whether the Lenders had a good arguable case against Mr Ali in deceit.

134. It seems to me, although not without a little hesitation, that Mr Salzedo, QC is correct about this. Whether a fact is material to disclose on a without notice application (and the related question of what enquiries should properly be made) depends on the context and is a fact-sensitive question. In some circumstances, the fact that a document had been signed electronically and not by hand would be material; in other circumstances, it would not.

135. Mr Cook submitted orally that, when making an application for a WWFO, an applicant has "a duty to speculate". Thus, he submitted, the Lenders should have speculated that Mr Ali might say that he had not signed the ABSs at all, and they should, therefore, have turned their mind to the format of the signatures and disclosed the fact that they were electronic.

136. But, put in this way, his submission goes too far:

i) What the authorities in fact say – see paragraph 83 v) above – is that the court should be told both of points that have been raised by the respondent or that "there is reason to anticipate" would be raised;

ii) Mr Cook's skeleton argument was closer to the correct position in saying, in paragraph 38(a), that an applicant was under a duty to identify any defences that would be available to be taken by the respondent if the defence is one "which can reasonably be expected to be raised in due course" by the respondent.

137. Applying that test, I ask myself whether, at the time they applied for the WWFO, the Lenders had reason to anticipate that Mr Ali might say that he did not sign the ABSs, and that a defence to this effect was one that Mr Ali could reasonably be expected to raise. The answer to that question, in my judgment, is no; given the facts summarised in paragraph 133 ii) above, they had no reason to anticipate that at that time.

138. Mr Cook's submission was that, although it may have been reasonable for the Lenders to rely upon electronic signatures for ordinary business purposes – here, lending transactions involving millions of pounds – when it came to making their claim against Mr Ali and when applying for a WWFO the Lenders should have been suspicious of the signatures. That does not seem to me to follow at all.

139. I agree, therefore, with Mr Salzedo, QC's submission that, in the particular circumstances of the case, the Lenders did not fail in their duty in not turning their mind to, not discovering and not disclosing to the court when applying for the WWFO, the fact that the signatures on the ABSs ostensibly signed by Mr Ali were electronic signatures.

(v) Ground 3 – The Repayments point

140. As I indicated in paragraph 76 above, the third suggested non-disclosure is the Repayments point.

141. The point, as articulated in paragraphs 101-113 of Mr Cook's skeleton argument concerned a spreadsheet in the possession of the Lenders at the time they applied for the WWFO which, it is said, showed that the Lenders had benefited from some of the additional transactions made after 17 December 2018 in that part at least of the sale proceeds of those transactions had been paid back to the Lenders.

142. The spreadsheet was referred to in paragraph 89 of Mr Trolle's first affidavit. It had been provided to the Lenders by the liquidators of North Star on 7 April 2020 approximately a week before the application for a WWFO. It was referred to in the skeleton argument filed for the application in a number of places, in particular in paragraph 159 where it was said:

> *"The only information [the Lenders] have received is the very recent provision by the Liquidator of a spreadsheet that appears to show when funds were paid and to what use they might have been put. The Lenders however do not know whether this is accurate, how it was prepared, by whom and on the basis of what information. For all they know, it is a further example of deceit by Tahir and Ali."*

143. The transcript of the hearing (see pages 6-8) makes clear that Mr Justice Foxton was shown the spreadsheet and was taken to certain specific entries within it in support of the proposition that vessels had been scrapped and the sale proceeds received at times when Mr Tahir was suggesting that the transactions had yet to be completed and that proceeds of sale had not been paid into the Funding Account but applied for other purposes.

144. Mr Ali's complaint is that, although the spreadsheet was disclosed, it was not explained to Mr Justice Foxton that, if its contents were correct, some $2,769,835.06 of the proceeds of sale of the vessels for which funds had been advanced on the basis of allegedly fraudulent ABSs signed by Mr Ali[5] had, in fact, been repaid to the Lenders, albeit to repay sums drawn in respect of other vessels.

145. This point, it was said, bore on the realistic quantum of the Lenders' claim in deceit against Mr Ali (it appeared under the heading "quantum" in Mr Cook's skeleton argument):

i) The first limb of the Lenders' claim on quantum (see paragraph 45 above) was the $22,130,522.77 that the Lenders said they had allowed to be withdrawn from the Funding Account after 17 September 2018 on the basis of Mr Ali's representations;

ii) As some $2,769,835.06 of the proceeds from the transactions financed by those withdrawals had been returned to the Lenders, the claim in the $22,130,522.77 amount was unsustainable;

iii) If Mr Justice Foxton had known about this it is unlikely that he would have made a WWFO with a maximum sum of $30,000,000 – a figure that Mr Justice Foxton acknowledged was a rough-and-ready figure, but which

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[5] $540,000.00 from the proceeds of sale of the "Wan Hai", $1,264,835.06 from the proceeds of sale of the "Puffin" and $965,000.00 from the proceeds of sale of the "NCC Jubail".

assumed that the first limb of the Lenders' claim was worth more than $22 million.

146. Mr Salzedo, QC submitted that, had the Lenders known or realized (which, he says, they did not), that the spreadsheet purported to show sums coming back to them in the amount of $2,769,835.06, they would still have asked for a WWFO in the amount of $46,000,000 as they did given that:

i) They had not had the opportunity to interrogate or seek to verify the matters in the spreadsheet;

ii) There was no independent evidence for the matters underlying the spreadsheet, which, although provided by the liquidators had been prepared by North Star (and, therefore, by the Lakhanis) and which contained little more than assertions; and

iii) The Lenders would, in any event, have relied upon the second limb of their claim – the diminution in the value of their realizable interest under the Security Documents, which was unaffected by the content of the spreadsheet.

147. All these points may be true, but they do not negate the fact that the spreadsheet – a short, two-page document – ostensibly showed that $2,769,835.06 of the proceeds of sale of transactions funded by post-December 2018 withdrawals had been returned to the Lenders, something they ought to have been able to cross-check from their own records.

148. In my judgment, while the Lenders disclosed the spreadsheet to Mr Justice Foxton, they should have specifically drawn the judge's attention to this particular point, which, as it was relevant to the realistic quantum of their claim, was plainly material for Mr Justice Foxton to know. I consider that there was a material non-disclosure in this respect. I will address the question of sanction in a moment.

149. At the hearing Mr Cook pursued a broader complaint, based on paragraph 160 of Mr Ali's witness statement, that the total sum outstanding under the Facility Agreement did not increase during the period during which the Lenders say they were deceived into allowing further withdrawals, and so the Lenders should have disclosed to Mr Justice Foxton they had, or may not have, suffered any loss at all.

150. Mr Salzedo, QC's response, which he developed by reference to the first affidavit of Mr Trolle, was that the Lenders had understood, as at the date of their application, that, if they had brought an end to the use of the facility at the time of the first misrepresentation, they would have prevented further drawings of some $22,000,000 but that money would have flowed back from the proceeds of the sale of the vessels in respect of which funding had already been provided.

151. The Lenders, Mr Salzedo, QC submitted, had not understood then and did not necessarily understand now – and had certainly never been told by Mr Ali – that there had been some more extensive fraud that had been practiced upon them from the outset involving funds routinely being misused for other purposes. They did not know where any funds from other vessels had gone.

152. Accordingly, Mr Salzedo, QC said, there were no further material facts known or which ought to have been known to the Lenders which they should have disclosed. Mr Ali could not rely upon some wider alleged fraud, of which the Lenders were at the time unaware, in seeking to have the WWFO discharged. I agree with this, and I reject the wider complaint.

(vi) Sanction

153. The effect of my findings so far is that:

i) I reject the No Involvement and Electronic Signature points; in my judgment, there was no material non-disclosure by the Lenders in those respects;

ii) I consider that there was a material non-disclosure by the Lenders of the fact that $2,769,835.06 of the proceeds of the vessels acquired as a result of the post-17 December 2018 drawdowns had in fact been returned to the Lenders. I reject the broader Repayments point.

154. In circumstances where I have found that there was a material non-disclosure, albeit in relation to only part of one of the points advanced, it is necessary for me to consider the appropriate sanction. The principles that I apply are those set out in paragraphs 85-6 above.

155. I accept that the general rule is that an order obtained as a result of a breach of the duty of disclosure should be discharged, and that the discretion to continue the order is one that should be exercised sparingly. In my judgment, however, it would plainly be inappropriate for me to discharge the WWFO here.

156. Specifically:

i) The non-disclosure that occurred was culpable, in the sense that the fact that the spreadsheet suggested that $2,769,835.06 million had been returned to the Lenders was obvious, but it was certainly not deliberate. The spreadsheet as a whole was disclosed;

ii) It cannot seriously be suggested that the non-disclosure cast doubt on the appropriateness of granting a WWFO *at all*; the impact of the point, as I have indicated, was on the realistic quantum of the Lenders' claim, which was principally relevant to the maximum sum imposed on that order;

iii) That being so, and in circumstances where, as in my judgment was the case, this was an obvious case where grounds existed for the granting of a freezing order, for me to discharge the WWFO entirely on the basis of a failure to disclose a comparatively minor matter in relation to quantum would be disproportionate and extreme.

I recognise the importance of parties complying with their disclosure obligations. But I do not consider that the interests of justice would be served by discharging the WWFO in the present circumstances.

157. In my judgment, the appropriate course would be for me to continue the WWFO, but with a reduced maximum amount to reflect the impact of the $2,769,835.06 repayment.

158. So far as that is concerned, on 2 September 2020 Milbank LLP wrote to Greenberg Traurig LLP arguing that there had been no material non-disclosure on the Repayments point but saying that, in order to avoid expending further time and costs, the Lenders would agree to dispose of Mr Ali's application on the basis, *inter alia*, that the $30,000,000 maximum sum in the WWFO was reduced to $20,000,000. The offer was rejected by Greenberg Traurig on the basis that it ignored the "central premise" of Mr Ali's application, the No Involvement point that I have rejected.

159. Milbank LLP's offer involved a reduction in the maximum value on the WWFO of more than three times the $2,769,835.06 repayment, which might be regarded as generous although it was obviously designed to encourage a compromise of Mr Ali's application. Given the limited evidence seemingly available in relation to the second limb of the Lenders' claim, I consider that a cautious approach to the realistic quantum of the Lenders' claim is warranted in any event.

160. Taking all these matters into account, but subject to the point that I deal with next, I decline to discharge the WWFO, but I order that it should be varied and continued with a reduced maximum value of $22,000,000.

H. Risk of Dissipation

161. It is necessary, finally, for me to deal with the suggestion that the WWFO should be discharged because there was and is no sufficient risk of dissipation.

162. This point is, in my judgment, unsustainable. I note that the allegation to this effect was abandoned by Mr Ali in the Yield Street proceedings, although I do not rely upon that in reaching the conclusion that I do.

163. The position in the present case, as it seems to me, is this:

i) The Lenders have a good arguable case against Mr Ali in deceit. The conduct they allege involves dishonesty, and is of a type that is suggestive of a risk of dissipation;

ii) There is evidence that there has already been an attempt by Mr Ali to dispose of assets to defeat creditors. On 20 February 2020, at about the time North Star was put into liquidation, and in circumstances where claims by creditors were plainly being made or likely to be made, Mr Ali and Mr Tahir transferred their shares in DTI Maritime to Mr Tahir's wife;

iii) Mr Ali says that his shares in DTI Maritime were not of substantial value, and that the transfer was a legitimate transfer for value, but there is no independent evidence of those facts. Furthermore:

a) No explanation has been given as to why, if the shares were worthless, Mr Tahir's wife would agree to pay approximately $40,000 for both Mr Tahir's and Mr Ali's shares;

b) No explanation has been given about the commercial rationale for the transfer, and in particular as to why it was made at the time it was; the fact that it coincided with North Star's liquidation is striking;

c) If the transaction was a legitimate commercial transaction, I would expect to have been provided with evidence to show that the approximately $40,000 purchase price was paid. I have not. There is no evidence that this amount has been paid, or, if it has, what has happened to it;

iv) There is, in addition, the concerning fact that Mr Ali signed the 2020 Amendment Deed in which Astir and North Star made the representations identified above, including representations that there were no anticipated financial difficulties, yet only a few weeks later Mr Ali swore his 13 February affidavit explaining that North Star was insolvent and that it had received a demand on 13 January 2020 that it had been unable to meet;

v) Mr Ali, I note, disputes that he knew about matters disclosed in his 13 February 2020 affidavit at any earlier time. That is an issue for trial. But, on his own case, there is a good arguable case that Mr Ali was at least reckless in relation to the representations made in the 2020 Amendment Deed.

164. Thus, and for essentially the same reasons as those set out in Mr Justice Foxton's 15 April 2020 judgment, I am satisfied that there is solid, objective evidence of a real risk of dissipation of assets by Mr Ali.

I. Disposition

165. Mr Ali's application to discharge the WWFO is denied, but the WWFO will be varied and continued with a reduced maximum value of $22,000,000.

166. I will hear counsel in relation to any consequential matters.