Neutral Citation Number: [2020] EWHC 2770 (Ch)

Case No: HC-2017-000188

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/11/2020

Before :

DEPUTY MASTER LINWOOD

- -

Between :

DSA INVESTMENTS INC **Claimant**
(a company registered under the laws of the British Virgin Islands)

- and –
(1) OPTIMA WORLDWIDE GROUP PLC

(2) BRANDON HILL CAPITAL LIMITED

(3) GLOBAL PRIME PARTNERS LIMITED

Defendants

- -
- -

Mr Gary Lidington (instructed **by McCarthy Tetrault)** for the **Claimant**
Mr Halstead (instructed by **Direct Access**) for the **1st Defendant** (11th December only)
Mr Guy Adams (instructed by **Capital Law Limited**) for the **2nd Defendant**
The 3rd Defendant did not appear and was not represented

Hearing dates: 11th December 2019 and 14th July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Deputy Master Linwood:

Introduction

1. This is my judgment on various matters arising from the application by the Claimant ("DSA") for a charging order over any beneficial interest of the First Defendant ("OWG") in shares of Oracle Power plc ("Oracle"). The Second Defendant ("BHC") is a merchant bank and a subsidiary of OWG. The Third Defendant ("GPP") provides brokerage and other financial services.

2. DSA obtained judgment from Master Shuman by her order dated 24th January 2019 against OWG in the sum of £1,700,000 plus interest and costs ("the Shuman Order"). The Shuman Order was made during enforcement by DSA of OWG's obligations under a Tomlin form of order which OWG had not met following earlier proceedings by DSA against OWG.

3. As OWG did not pay the debt due under the Shuman Order DSA commenced enforcement action which included an application for a charging order over the Oracle shares, as the latter's public accounts showed OWG held 115,991,444 shares in Oracle. DSA's lawyers pursued enforcement vigorously; Mr Lidington submits that if they had not done so then the agreed debt would never have been paid.

4. DSA applied considerable pressure by their applications, which also included an application to orally examine the Chief Executive of OWG, Mr Neal Griffith. This was listed for 28th June 2019 but OWG paid the judgment debt, interest and assessed costs then totalling £1,815,929.36 on 25th June 2019. However that left, and this application concerns, DSA's claim for their unassessed costs of enforcement which as of the first day of the hearing before me, 11th December 2019, amounted to some £270,000.

5. The essence of DSA's position is that OWG and BHC should pay its costs of its Application dated 25th January 2019 ("the Application") which include costs incurred in the Inquiry ordered by Master Price by his Order of 18th March 2019 into the number of Oracle shares owned by OWG. As I will turn to in more detail below, DSA by letter dated 29th October 2019 said it no longer pursued the Application following their review of disclosure provided by both OWG and BHC.

6. In short, DSA accepted its prospects of success in proving that OWG retained beneficial ownership of the Oracle shares were negligible as the documents eventually obtained from the Defendants were adverse to its claim. BHC say DSA should pay their costs as they are the winner in the Inquiry and costs should follow the event. As well as the costs

of the Application and the Inquiry I am also to determine costs reserved from two separate hearings.

7. I have been considerably assisted by the skeleton arguments of Mr Lidington and Mr Adams for the hearing before me on 11th December 2019, the Chronology submitted by Mr Adams and the detailed closing submissions from both counsel and a transcript of the hearing. Whilst Mr Halstead did appear for OWG on 11th December 2019, he had only been instructed overnight and did not submit a skeleton argument. Nor did he appear on the hearing on 14th July 2020. I have not set out all of the extensive factual background and evidence as I consider it disproportionate and unnecessary in the circumstances of my determination of the Issues below.

THE ISSUES

8. These are:

(1) Whether or not there is an implied undertaking in damages by virtue of the order of 3 April 2019?

(2) If so, can BHC enforce that undertaking?

(3) Should the court order an inquiry as to BHC's damages?

(4) Who should pay the costs of the application and Inquiry and in particular:

(a) was the Inquiry the trial of an issue between DSA and BHC and if so who is to be treated as claimant; or

(b) was the Inquiry a true inquiry; and

(c) should any distinction be drawn between the costs of the application and the costs of the Inquiry;

(d) how should orders that costs be "costs in the Inquiry" be dealt with;

(e) what order should be made in relation to the overall costs of the above;

(f) is BHC entitled as a matter of principle to claim costs in GPP's name or should any other provision be made in respect of GPP's costs;

(g) if so what order should be made.

(5) What order should be made in respect of costs reserved in the order of 3 April 2019?

(6) As between DSA and OWG what order should be made in respect of costs reserved in the order of 21 August 2019?

9. This List of Issues was proposed by Mr Adams but Mr Lidington does not accept they are all issues requiring separate determination, as he submits they fall into four separate groups; first Issues 1-3, secondly Issue 4, thirdly Issue 5 and fourthly, Issue 6. I will determine them in those groups as it is convenient and logical to do so.

Evidence and procedural history

10. For this application, DSA have served 5 witness statements by its solicitor Ms Tina-Marie Benson and 6 by its solicitor Mr Caillan Massey. OWG have served 3 by the aforesaid Mr Neal Griffith and BHC have served 6 by its chairman Mr Karl Hughes and 4 by its solicitor Mr Philip Jones. Where necessary I will refer to them by the deponent's initials, the number of the witness statement in relation to that individual and the paragraph number. Some of the witnesses have made earlier statements in these proceedings but not this application. References in square brackets are to paragraph numbers in this judgment unless the context indicates otherwise.

11. The substantial number of applications resulted in an unusually high number of nine Orders by Masters in this matter:

a) Master Price: 28th January 2019, 18th March 2019, 3rd April 2019 and two on 25th April 2019,

b) myself: 26th June 2019,

c) Deputy Master Collaco Moraes: 21st August 2019 and

d) Deputy Master Arkush: 26th September 2019 and 11th November 2019.

Of those Orders, all but two were disclosure Orders against OWG and/or BHC. I will refer to them by the month save for the April Orders where I will state the date. It is DSA's case that these were all necessary due to failures by OWG and BHC to comply with what had been ordered, and that disclosure was necessary for the just disposal of the Application and Inquiry.

12. Mr Lidington submits that only late in the day did OWG and BHC comply with their obligations, and that the August and September Orders had to be endorsed with Penal Notices addressed to their respective directors to ensure compliance. This wilful refusal, he submits, has led to six months of hearings and substantially increased costs, all of which mirror OWG's failure to meet its obligations under the settlement agreement until the point of no return was reached. In other words, if OWG had complied on a timely basis, no enforcement action on the agreed debt due would have been necessary nor would these enforcement applications.

The Charging Order and Disclosure

13. By his January Order Master Price made an Interim Charging Order over " Any and all shares beneficially owned by OWG in Oracle Power PLC...". The evidence was that DSA had reason to believe that OWG had a substantial holding of 115,991,444 shares from Oracle's directors' statement in their accounts. OWG were aware (and it was stated on the Order) that the third defendant, GPP, had been used to provide

financing on a margin basis. Further, DSA knew that BHC, a merchant bank, was a wholly owned subsidiary of OWG.

14. It also was the case that in the underlying proceedings OWG and BHC were treated as the same entity. OWG said in its List of Documents it had possession, custody and control over BHC's documents and BHC's employees and officers were custodians of OWG's documents. Mr Griffith was a director of BHC as well as Chief Executive and a director of OWG. The Application was served on BHC and GPP.

15. GPP told DSA on 15th February 2019 that BHC was a client of theirs for whom they had in place a prime brokerage agreement which set out the terms on which GPP held cash and assets. Further, GPP said they operated a

> "Title transfer collateral agreement and assets held by [GPP] are held on a title transfer basis whereby the legal and beneficial interest in the assets is transferred by [BHC] to GPP".

OWG did not however have an account with GPP.

16. BHC contradicted GPP as by letter of even date they said they did:

> "...hold shares that are beneficially owned by [OWG] which are custody assets held for [BHC] in a custody account by [GPP] ...not all the Oracle shares held by [GPP] for [BHC] are beneficially owned by [OWG] and [GPP] does not have a breakdown of the underlying ownership of these shares."

17. BHC objected to the interim order being made final. OWG did not make any objection nor did it file any evidence setting out the number of Oracle shares it held and how. GPP also did not object to the interim order being made final. At a hearing on 18th March 2019 OWG did not appear. BHC did and submits this was to assist the Court; DSA say not so; it was added as an objecting party in the usual way, which I think must be right.

The March Order

18. Master Price ordered an Inquiry into the number of Oracle shares beneficially owned by OWG, joined BHC and GPP, ordered that each of them should give standard disclosure by list by 10th April 2019, listed a directions hearing and ordered a Stop Notice on "Any and all shares beneficially owned by [OWG] in Oracle Power plc." The Stop Notice required any notified person to refrain from "(1) Registering a transfer of the securities specified above; or (2) Paying any dividend in respect of the securities... Without first giving 14 days' notice in writing [to] DSA..."

19. The Interim Charging Order ("ICO") over the shares described in Schedule A was to remain in force pending the outcome of the Inquiry. Schedule A described the shares as "Any and all shares beneficially owned by [OWG] in Oracle...".

20. Master Price also ordered OWG to pay all of DSA's costs of the Application to the date of that hearing and that BHC do pay 66% of the cost of the earlier adjourned hearings on 4th and 15th March.

The 3rd April Order

21. This Order arose as a result of an application by DSA's solicitors, McCarthy Tetrault ("MT") for a variation of the March Order due to admissions in KH/2/5, 17 & 18. BHC, notwithstanding those admissions, objected, albeit that at the hearing they only contested certain of the recitals. As this Order is key to determination of Issues 1 – 3 and 5 I set out the relevant parts below:

> "And upon the Second Defendant having not asserted any interest in the shares in Schedule A as set out at paragraphs 5, 17 and 18 of the Second Witness Statement of Karl Alexander Hughes dated 13 March 2019 and having not objected to the making of the Interim Charging Order final over the shares in Schedule A as set out in the first letter from its solicitors, Capital Law Limited, dated 2 April 2019.
>
> And upon hearing Gary Lidington of Counsel for the Claimant, the First and Third Defendants not appearing or being represented and James McKean of Counsel on behalf of the Second Defendant
>
> It is ORDERED that:
>
> 1. The Order dated 18 March 2019 be varied such that the Interim Charging Order is made final in respect of the Shares in Schedule A and that the interest of the First Defendant in the Shares in Schedule A do stand charged with payment of the principal, assessed costs and interest outstanding as at 18 March 2019 in the sum of £1,768,525.00 together with any further interest accruing and further costs to be summarily assessed and the costs of the application.
>
> 2. The Interim Charging Order do continue in respect of the balance of the Shares which shall be the subject of the Inquiry ordered by paragraph 1 of the Order dated 18 March 2019.
>
> 3. The Third Defendant do retain custody of the Shares in Schedule A while they stand charged or until the Court orders otherwise.
>
> 4. The costs of the application are reserved to the hearing on 25 April 2019
>
> SCHEDULE A
>
> 11,072,618 Shares beneficially owned by the First Defendant in Oracle Power PLC (stock symbol ORCP), a company incorporated in England and Wales with company number 05861760 and having its registered office at Tennyson House, Cambridge Business Park, Cambridge, England, CB4 0WZ."

22. In summary, the March Order is varied so that the Interim Charging Order ("ICO") is made final in respect of the shares in Schedule A namely 11,072,618 beneficially owned by OWG with the sum then due of £1,768,525 plus further interest and costs. The ICO continues in respect of the balance of the shares the subject of the Inquiry. GPP are ordered to retain the shares in Schedule A while they stand charged or until further order. Costs were reserved to the hearing listed for 25th April 2019.

The 25th April Order - OWG and BHC

23. Mr Hughes then in KH/3 made on 10th April 2019 changed his position in that he said the entirety of the Oracle shares, to include the 11,072,618 I mention in [22] as being beneficially owned by OWG, were in fact beneficially owned by GPP. Mr Hughes exhibited a Prime Brokerage Agreement ("the PBA"). This he said meant beneficial ownership of the shares were vested in GPP as "Prime Broker Securities" ("PBS").

24. That clearly conflicted with BHC's statement in its letter of 15th February 2019 to MT that the shares were "custody assets" held in a "custody account", as the definition in the PBA of PBS excludes such assets. OWG did not give disclosure as ordered in the March Order, as it relied upon that of BHC and served some 14 pages of additional documents. It did not see fit to serve the standard List of Documents form which includes a disclosure statement, a most important requirement, containing a statement of truth.

25. BHC did provide some disclosure, but as Ms Benson set out in TB/9 that was in her view inadequate especially as entire categories of documents were absent, so further orders for disclosure were sought at the directions hearing listed for 25th April, when Master Price heard counsel for DSA and BHC, but OWG and GPP did not appear and were not represented.

26. BHC submitted that in effect DSA should set out a positive case; that was rejected by Master Price who was especially critical of the disclosure provided by OWG and BHC describing that of OWG of appearing as "smoke and mirrors" and that the Defendants knew the position but that "beans had not been spilled". He said that as a result he accepted that further disclosure was necessary to "flush out" the necessary documents. BHC's request for a preliminary issue as to the effect and meaning of the PBA was rejected.

27. In a solicitors' note of his judgment Master Price found:

> "There has been a change of position from D1 and D2. The latest witness statement from KH says that he has been advised that shares he thought were held on a custody arrangement are prime broker securities under the agreement so no beneficial interest. These matters require explanation (from) D1 for its ownership of the Oracle Shares. Oracle's documents show that the first defendant does have a beneficial interest in the shares. KH also needs to explain by witness statement what his position is, how he was advised and came to understand the case as he does. I will make orders for those witness statements from Mr Griffiths and Mr Hughes…The further disclosure will be substantially in the form of Schedule B to [TB9]...D2 was in fact seeking different

> directions and in particular by way of points of claim and defence...Points of Claim and Defence has nothing to offer in relation to this case".

28. Master Price therefore ordered that OWG and BHC provide further disclosure by list by 16th May 2019 of categories of documents set out in a schedule to his Order, which is extensive, detailed and wide-ranging in its scope and requirements. Both OWG and BHC were to provide witness statements by Messrs Griffith and Hughes respectively explaining their cases as to ownership and for BHC its relationship with GPP and explaining who is the legal and beneficial owner of the shares and how the entity concerned acquired that interest.

29. A further directions hearing was to be listed. Costs were assessed summarily to be paid by BHC to DSA of £9,000 being the proportionate part of DSA's costs for the hearings on 4th and 18th March of £13,500. OWG was ordered to pay £19,050 to include the balance of the £13,500 plus DSA's further costs assessed as the balance of £5,503.50. The costs of DSA's application of 21st March 2019 were reserved to the Inquiry.

The 25th April 2019 Order - GPP

30. GPP's lawyers, Hogan Lovells, had written a letter dated 24th April 2019 to MT setting out GPP's position. They said that OWG was not a client of GPP and therefore GPP thought it

> "...unlikely to have any documents which would fall within the scope of the [March] Order and in any case none that would be yielded upon an undertaking of a proportionate search for such documents."

31. Master Price in his second Order that day, endorsed with a penal notice, ordered GPP to make and serve a List of Documents by way of standard disclosure as to the Inquiry by 9th May 2019, GPP having failed to comply with his March Order. This Order provided that it was to be personally served upon one of the named officers of GPP, in view of the failure to comply earlier and the penal notice being the appropriate sanction in the circumstances.

The June Order

32. The day before the hearing before me, on 25th June 2019, OWG paid the full amount due of the judgment debt, interest and assessed costs in the sum of £1,815,929. BHC renewed their requests for the hearing of a preliminary issue, which I refused, saying (there is an official transcript) that I could see no benefit to the parties or the court. I found the disclosure by OWG (who did not appear save by junior counsel to take a note) deficient in that relevant documents were missing, and I emphasised the orders for disclosure had to be complied with.

33. As to BHC, who did appear, I found the searches inadequate and a failure to give disclosure in certain categories, which had to be explained by Mr Hughes, beyond his mere assertion that it went beyond that ordered; he had to set out why. In particular, I was especially concerned by the failure of both OWG and BHC to disclose an email

dated 16th September 2015 and accompanying spreadsheet by which it appeared OWG held some 61 million shares in Oracle with a value then of £880,000, contrary to the evidence of both Mr Hughes and Mr Griffiths that OWG's shareholding had been transferred to BHC.

34. I therefore ordered OWG and BHC to take further steps to comply with the March and 15th April Orders, to conduct further searches and provide disclosure by list and copies by 10th and 17th July 2019 respectively.

35. I also ordered that if Mr Hughes believed that disclosure he had to give went beyond the remit ordered he had to make and serve a witness statement by 17th July 2019 giving reasons. The Inquiry was to be listed for 2.5 days.

The August Order

36. DSA considered that notwithstanding OWG filing a further List of Documents and some further documents and BHC providing further disclosure that what was provided was inadequate. In particular, the email/spreadsheet in [33] had not been disclosed. DSA also located on their further review for the period August – October 2015, when OWG supposedly had no interest in the shares, documents which showed that they were treated as owned by OWG, and further available as collateral.

37. DSA therefore made further applications against OWG on 19th July 2019 and BHC on 9th August 2019. As to the former OWG wrote to MT on 15 August 2019 saying that they had not had professional help with the disclosure ordered against them and that counsel, Mr Barnard, advised them that OWG had not employed "...adequate internal resources", and so a discovery management company was being instructed but that there was "...no question of deliberate non-compliance."

38. I do not accept that statement as

    i) OWG had been represented in the underlying claim where

    ii) it had given disclosure and stated (by Mr Griffith in 2018) that the obligations of disclosure were understood

    iii) it had a very close relationship with BHC so it appears it could have availed of advice had it wished to do so and

    iv) in any event chose not to appear at certain of the hearings, effectively burying its head in the sand.

39. Deputy Master Collaco Moraes ordered by consent that unless the matter settled OWG was to comply with specified provisions in the previous disclosure Orders and by 27th September 2019. OWG appeared by counsel; BHC were represented by counsel on a noting brief.

The September Order

40. BHC served PJ/1, which explained away the deficiencies in their disclosure as due to Mr Hughes determining relevance without the assistance of his solicitors, who in effect had done no more than act as a post box and compiler of a list of the documents

Mr Hughes presented as relevant and compliant. The application was heard by Deputy Master Arkush over one and a half days. He found BHC had not complied with its obligations by its own assessment of relevance.

41. His Order accordingly provides that BHC were to give certain specific disclosure and that their solicitors were to "...carry out a review for relevance of the documents identified as responsive to the searches carried out by [BHC pursuant to the three earlier Orders] …" They also were to file and serve a witness statement stating what they had done and what further searches (if any) were necessary.

42. All the above was to be completed by 17th October 2019, and BHC were to pay DSA's costs of this application assessed at £21,500. BHC applied for permission to appeal the costs order which was refused. No further application for permission to appeal was made.

The November Order

43. For OWG Mr Griffith made two further statements totalling 19 pages and disclosed 790 pages of further documents on 16th and 17th October 2019, notwithstanding his statement in NG/1 that neither he nor OWG had anything else to disclose.

44. For BHC Mr Jones in PJ/2 set out in a detailed 24 page statement how the disclosure exercise was carried out. BHC disclosed 2,197 pages of documents and provided a new List of Documents with a disclosure statement.

45. All three statements, the List and the documents themselves followed service of the August and September Orders which were endorsed with penal notices and personally served on directors of each of OWG and BHC.

46. DSA reviewed the disclosure and wrote to the Court and all three defendants on 29th October 2019 and said

> "The Claimant no longer seeks a final charging order over the balance of the Shares such there is no longer a need for the Inquiry and the charging orders can be discharged. This leaves the cost of the Application as the only live issue. The Claimant therefore requests that the trial date be vacated save the first day (11th December 2019)...to resolve the issue of costs".

47. Deputy Master Arkush heard counsel for DSA, OWG and BHC on the 11th November 2019. The recital to his Order states DSA undertakes

> "...it will not hereafter contend in these proceedings or in any subsequent proceedings that [OWG] in fact held any beneficial interest in Oracle shares at the relevant dates...between...28th January 2019 and 11th November 2019 being the date of discharge of the Interim and Final Charging Orders ("the Relevant Dates"), save this undertaking is without prejudice to the Claimant's entitlement to contend it was entitled to proceed between the Relevant Dates on the basis that [OWG] did have a beneficial interest in the Oracle shares."

48. Directions were made for service of evidence and for the hearing on 11th December 2019 to determine costs and any other consequential matters. The matter went part heard and concluded on 14th July 2020.

THE ISSUES

Issue 1: is there an implied undertaking in damages by virtue of the 3rd April Order?

49. Mr Jones at PJ/2/113, the concluding paragraph in his 38-page statement, says the Stop Order and Stop Notice in the March Order and the order that GPP should "...retain custody of..." any shares referred to in the Final Charging Order, "...were injunctive relief in respect of which DSA gave an implied undertaking in damages. In the circumstances there should be an inquiry as to whether BHC has suffered any damage as a result of the making of such orders."

50. Mr Adams accepted in his oral submissions and his skeleton argument that a Stop Notice is not an injunction, but he submits it is a notice or caution, which is effective and binds those concerned until warned off. However, he also submits that, as the March Order contains the ICO I have set out at [19], this is in the nature of injunctive relief and therefore there must be an implied undertaking in damages by DSA.

51. The 3rd April Order being the Final Charging Order at [3] provided that "The Third Defendant do retain custody of the Shares in Schedule A while they stand charged or until the Court orders otherwise." Schedule A refers to "11,072,618 shares beneficially owned by the First Defendant in Oracle Power plc...".

52. Mr Lidington submits that paragraph 3 is not an injunction at all, or, in the alternative, if it is, then it is a final injunction so the question of an implied undertaking does not arise. He emphasised a) how his application was not an application for injunctive relief, let alone interim relief, but an application to vary the March Order, b) Master Price did not deal with it as an injunction ie by application of the *American Cyanamid v Ethicon* [1975] 1 AC 386 principles. It was therefore an order made by the Court in its discretion, and an order in itself is not always an injunction even where it can be enforced by committal.

53. In addition, Mr Lidington submits that this is an order made under procedural jurisdiction and not under CPR Part 25. Further, BHC can have suffered no loss nor damage as, as the recital to the 3rd April Order states, BHC did not assert any interest in those shares, as BHC say they are shares that but for the PBA would be beneficially owned by OWG, not BHC.

54. In the final alternative, Mr Lidington submits that the 3rd April Order was in part made on the basis of admissions by BHC in KH/2 and so could not have been wrongly granted, or else if there is an implied undertaking then "...the court retains a discretion not to enforce the undertaking if it considers...it inequitable to do so" - see *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock at p361D, being an exception to the general rule as referred to in *Lunn Poly Ltd v Liverpool and Lancashire Ltd* [2006] EWCA Civ 430 at [44].

55. Mr Adams' starting point is the review of the history of the implied undertaking in damages set out by Mr Justice Munby (as he then was) in *W v H (Family Division:*

without notice orders) [2001] 1 AER 300, from 318j – 319g, which commences with the invention of the undertaking in damages in ex parte orders for injunctions which was extended to all interlocutory injunctions and

> " So settled was the practice by the 1870s, and so much a matter of course, that the undertaking in damages became an implied term in every order for an interlocutory injunction ...In consequence the court would enforce the implied undertaking or cross-undertaking as to damages in cases even if it had for some reason been omitted from the order unless the contrary had been agreed..."(319 c-d).

56. As a result, in the Chancery Division,

> "...a Claimant who wishes to protect himself from what would otherwise be the implied undertaking or cross-undertaking as to damages, must as *Practice Note* [1904] WN 208 makes clear, stipulate to the contrary and make sure his reservation is expressly stated in the order." (319 e-f).

57. Therefore, Mr Adams submits, whilst the order was directed at GPP as it "held" the shares, it directly affected BHC. An analogy would be where a bank was ordered on the application of A to hold sums credited to the account of B pending resolution of the underlying dispute; that clearly affects B as it cannot use the funds and the order is primarily aimed at B. Further, here, a) the relief was temporary pending the outcome of the Inquiry and b) this was the basis upon which BHC had not objected to the making of the Interim Charging Order as set out in the recitals to the 3rd April Order.

Issue 1: Discussion and Decision

58. The Final Charging Order in [3] of the 3rd April Order is an order of this Court that GPP – a third party otherwise joined only for disclosure – must "...retain custody of the Shares...while they stand charged or until the Court orders otherwise." In simple terms, the order was directed at GPP as at the time the order was made it held the shares and so it was on the face of the Order injuncted from transferring the shares. Arguably, that included otherwise permitting dealing in them, subject to the basis on which they were held by GPP.

59. The position is however very different to the authorities referred to in *W v H* as here there is and indeed for the operation of CPR 73 there has to be a final judgment. The *Cyanamid* principles have, in effect, been considered and disposed of by that final judgment. However, there is still the potential for loss to be occasioned to those subject to such an order which may include a third party or the judgment debtor if, for example, assets considerably in excess of the judgment debt were seized, some commercial relationship interfered with and loss occasioned as a result.

60. I consider (no authority on this point was put to me) that in general terms an order the same or similar in effect to that at [3] is in the nature of an interim injunction and therefore an undertaking in damages can be implied as a matter of long-established practice for these reasons:

i) its very nature is an enforceable order of this court which prevents the free dealing and/or access in property which could cause loss and damage to persons, not limited to the owner of the asset;

ii) it would be wrong to give an applicant in the position of DSA a commercial advantage or interest at no risk to itself when it may turn out not to be entitled to such relief;

iii) the interests of justice are served by timely and effective remedies for those who would otherwise not be able to secure or detain such assets but

iv) the corollary is that responsibility for interference in the property rights of others means the applicant must be ready, willing and able to compensate those who may suffer loss and damage in the exercise of such remedies;

v) to do otherwise could result in injustice to those who comply with such orders which cannot be right.

61. However, I do not think that an implied undertaking arises on the particular facts which obtain here as far as BHC are concerned. First, this was an application to vary the March Order, to make the ICO Final, in respect of the 11,072,618 shares in Oracle which arose due to the combination of a) the admission by BHC that those shares were owned by OWG and b) OWG not objecting.

62. Secondly, I accept Mr Lidington's submission that this was a mistaken omission from the March Order as shown by Master Price's view that this should have been resolved by the parties under CPR 40.12 (the slip rule).

63. Thirdly, this was not an interim injunction as [3] in the 3rd April Order concerns a) only the 11,072,618 shares defined in Schedule A (as opposed to the balance of the shares which were subject to the continuing ICO) which b) were by [1] made subject to a Final Charging Order. It is trite law that an undertaking in damages is only implied or required when an interim injunction is made but will not apply when a final order or injunction is made.

64. I do not accept Mr Adams' submission that [3] was as he put it in the nature of temporary relief as GPP were to retain custody while the shares "...stand charged or until the Court orders otherwise" as, as I have set out above, this was a Final Order.

65. In summary, I see no reason why a judgment creditor who obtains an interim charging order should not in principle be deemed to give an implied undertaking in damages to those who could be adversely affected by the grant of such an order. Here, for the above reasons, an implied undertaking does not arise by virtue of the 3rd April Order.

2. Can BHC enforce the undertaking?

66. If I am wrong as to that and there is an implied undertaking I must consider whether BHC can enforce it. Mr Lidington submits that it cannot, as an implied undertaking can only extend to the respondent – see CPR PD25A at 5(1) which provides that the undertaking is a requirement for the respondent alone. He also referred me to *Gee on Commercial Injunctions (6th Edition) (2016)* at [11-019] which states the respondent

is the "...person to be enjoined, but not anyone else, whether other parties to the proceedings or non-parties."

67. Therefore, as only GPP is subject to the Order, and only against it can the Order be enforced, it is only GPP who can enforce the implied undertaking. Mr Lidington cites *W v H* at 321f-g "the court cannot compel her to give an undertaking she is not prepared to volunteer". But he omitted the next sentence "All [the court] can do in that event is refuse relief".

68. Here, with an implied undertaking, whilst DSA did not have the opportunity to decide whether to give the undertaking, they had the commercial advantage of the Order and therefore in my judgment they are bound by the implied undertaking. In the alternative, they could have made their reservation clear, but they did not. In the circumstances at the time, it seems to me highly unlikely that they would want the benefit but would refuse to accept the risk expected by the court in such circumstances.

Decision: Issue 2

69. I do not think BHC can enforce the implied undertaking for these reasons:

    i) it was not the respondent to the Order – see CPR PD25A 5.1(1) and *Gee* at [11-019] and

    ii) BHC in any event said it had no proprietary interest in the 11,072,618 shares so it would be wholly illogical and indeed quite wrong for DSA to give an undertaking in damages to BHC when it was GPP who was injuncted.

Issue 3: Should the court order an inquiry as to any damage BHC suffered?

70. If I am wrong in that there is an implied undertaking and BHC can enforce it I then must consider if I should order an inquiry into any damage or loss it may have suffered.

71. It is common ground that where

    "...the court decides at trial that a permanent injunction should not be granted, the defendant can normally expect, virtually as of right, to have an inquiry as to the damages to which it is entitled pursuant to the cross-undertaking..." and "...that "special circumstances" are required before an inquiry can be properly refused." (*Lunn-Poly* at [42 and 43]).

72. Mr Lidington submits that there must be credible evidence of both loss and a causal connection between that loss and what the Order injuncted. He relies upon the Court of Appeal decision *Yukong line Ltd of Korea v Rendsberg Investments Corporation* [2001] 2 Lloyds Rep 113 where at [35] Potter LJ said

> "If the Defendant shows that he has suffered loss which was prima facie or arguably caused by the Order, then the evidential burden of any contention that the relevant loss would have been suffered regardless of making the order in practice passes to the defendant and an inquiry will be ordered."

73. There, it was found that the evidential threshold was not met. Mr Adams submits that puts the matter too high and cites *Yukong* at [33] as showing that the purpose of the inquiry is to ascertain whether loss *may* have been suffered:

> "However, if it is established that the injunction was wrongly granted, albeit without fault on the plaintiff's part, the court will ordinarily order an inquiry as to damages in any case where it appears that loss *may* have been caused as a result."

74. Here, Mr Adams submits there is evidence that the freezing of the account had a detrimental effect, but he did not identify it in his oral submissions. Mr Hughes in his "Objection" document at [7] says "As a direct result of the inaccurate and ambiguous wording of the Application, beneficial owners of 324,414,468 Shares have been deprived of rights arising from their ownership of Shares". Then at [19] he says "The wording of THE SCHEDULE to the Interim Order is unclear. This is causing detriment to persons other than the Defendant."

Issue 3: Decision

75. I find that BHC meets neither the evidential nor the causal burden as:

    i) this statement was made on 25th February 2019 almost two months before the FCO on 3rd April; so as such losses and detriment pre-dated it the necessary causal link is absent,

    ii) likewise GPP segregated over 400,000,000 shares but in response to the ICO, not the FCO,

    iii) the alleged loss is not set out as would be expected initially in solicitors' correspondence and if not resolved then by witness statement, updated as necessary,

    iv) no alleged loss is supposedly caused by [3] of the 3rd April Order and

    v) notwithstanding the foregoing, and proceedings lasting some nine months after DSA withdrew their application, with hearings on 11th December 2019 and 14th July 2020, and then closing submissions, there is no evidence before me of either loss nor causal connection.

76. In my judgment as BHC has failed to produce credible evidence of both loss and the causal connection and so I will not order an inquiry. Mr Adams submits that it is only the inquiry that can determine those matters and justice requires an inquiry. I disagree; it would be unusual to say the least for a potential claimant or injured party to demand the setting up of a judicial process in the absence of evidence. Furthermore, such an approach flies in the face of the "cards on the table" approach to litigation in the CPR and the spirit of the pre-action protocols.

77. If I am wrong as to all the above, there is one final hurdle BHC must overcome; my exercise of discretion as to which see *Lunn-Poly,* where at [44] Lord Justice Neuberger said a special circumstance was, for example, where

> "...the claimant would have been entitled to an injunction at the time of the interlocutory hearing but has become disentitled to it as a result of events that occurred between the interlocutory hearing and trial".

78. Mr Lidington submits that here, the basis for the application and the 3rd April Order was BHC's own evidence and submissions, as particularly shown in the recitals. Therefore, DSA was entitled to the injunction at that time. I agree, and for the reasons he states.

Issue 4: Who should pay the costs of the application and Inquiry?

79. Before I turn to the sub-issues the principal question is where and upon whom do the costs of this Application and Inquiry fall? Mr Lidington does not accept that it is necessary as Mr Adams submits for me to determine sub-issues (a)-(d) inclusive, as he says the correct approach is the exercise of my discretion under CPR Part 44. That, he submits, should result in an order that OWG and/or BHC should pay DSA's costs, but if in the alternative if I find DSA should be liable for any of BHC's costs, they should be recoverable from OWG.

80. Mr Adams submits that as costs follow the event, BHC is the winner and DSA should pay its costs. One point that the parties do agree is that the vast bulk of the costs have been incurred in connection with disclosure - I consider this is also shown by the fact that, as I mentioned above, six of the eight orders concern disclosure. Further, Mr Adams submits that as the costs of the disclosure process were incurred in the Inquiry they should form part of the costs, in addition to the costs of the disclosure hearings.

81. Mr Lidington submits that the failure by OWG and BHC to comply with the orders for disclosure resulted in four orders being made against each of those parties; namely as against OWG and BHC the orders of Master Price of March and 25th April, mine of June, Deputy Master Moraes of August as to OWG and Deputy Master Arkush of September as to BHC. As a result, the vast majority of costs would not have been incurred had those parties complied properly when they were first ordered to.

82. Mr Lidington, rightly in my view, emphasises the deliberate attempts by OWG to avoid paying the settlement sums it had agreed to as long ago as November and December 2018. Mr Lidington refers to the twelve separate hearings by way of enforcement, all of which could have been avoided had OWG paid what was due upon the dates agreed. OWG only paid the principal debt at the last possible minute as I have set out at [4] above.

83. Mr Lidington also emphasises the close connection between OWG and BHC, especially that BHC is wholly owned by OWG, that BHC has acted as proxy for OWG, and is not in the position of an innocent party who has become mixed up in wrongdoing (as for example a respondent in *Norwich Pharmacal* relief).

84. Deputy Master Arkush in his judgment at the September hearing said BHC:

> "...is not really in reality a third party. It is a wholly owned subsidiary of [OWG]. Assets are moved seamlessly between

> [OWG and BHC] for commercial purposes, I dare say entirely legitimately, but the fact remains they are closely associated."

85. The force in this duality of interest between OWG and BHC is simply demonstrated by the fact that the March Order recitals after referring to the ICO of January 2019 state "And upon...BHC objecting to the making of the Interim Charging Order final;". OWG did not appear at that hearing – by deliberate choice I must assume as there was no later complaint – but BHC did, by Mr Egerton, as their representative.

86. So but for BHC's objection there would have been no Inquiry, as the ICO would have been made final, and BHC were and are not before the court to assist it nor in any sense are they an innocent third party.

87. I reject Mr Adams' submission that "...BHC was not under any legal duty to assist the court but was required by court order to assist the court and it would, on the face of it, be an injustice and a disproportionate interference with its possessions if it was compelled by such public authority to incur substantial costs without compensation" for these reasons

    i) BHC's objection to making the ICO final occasioned the Inquiry,

    ii) this objection appears to have been at the suit of its owner, OWG, who has it appears deliberately stood back from these enforcement proceedings, as it could at any stage have taken part and

    iii) BHC has never been in the position of a true third party; see the finding from Deputy Master Arkush's judgment in [84] above.

88. OWG's sole submission by Mr Halstead (no witness statement was served) at the hearing before me on 11th December 2019 was that it would not seek its costs but it should not pay those of DSA. I endeavoured to accommodate Mr Halstead who had been instructed overnight by allowing him to go last during the hearing so he could develop his submissions. But OWG then chose not to appear on the 14th July 2020, and so no submissions have been made by or on its behalf.

89. But the matter does not end there; I must have regard to the Issues, the law and the framework of CPR 44.2 to determine the incidence of costs:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.

(3) The general rule does not apply to the following proceedings –

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.
>
> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

Issues 4(a): Was the Inquiry the trial of an issue between DSA and BHC and if so who is to be treated as claimant? or 4(b) was the Inquiry a true inquiry?

90. Mr Adams submits BHC's position as objector to making of the ICO final means it should be treated as the claimant in the trial of the issue - in *Rosseel NV v Oriental Commercial and Shipping (UK) Ltd* (1991) WL 838487 which was an appeal against the discharge of a charging order, Parker LJ said:

> "Where there is a real dispute, it is, as it seems to me, necessary to do justice that an issue should be tried and the court can in the exercise of its power to regulate its own procedure direct such issue",

and that the objector has the burden of proof and hence is the claimant.

91. Mr Lidington submits that *Rosseel* is a pre-CPR authority in circumstances where under the RSC there was, in contrast to the powers available under CPR 73.10A(3)(d), no express discretion to order the trial of such an issue, and that Master Price specifically in his March Order at [1] ordered there "...be an Inquiry as to what number of shares are beneficially owned by [OWG] ("the Inquiry").

Issue 4 (a): decision

92. In my judgment this is an inquiry and not a trial of an issue for these reasons:

    i) the process is clear in that Master Price at no time ordered a trial of an issue but an inquiry

    ii) BHC's requests for pleadings was rejected by Master Price as unnecessary in the circumstances of an inquiry into beneficial ownership so as to make the ICO final (or not)

    iii) *Rosseel* does not assist Mr Adams as it is a pre-CPR authority and Master Price specifically chose to order an inquiry despite several requests by BHC for the determination of a preliminary issue, all of which were refused.

93. The question as to who the claimant is accordingly not relevant.

Issue 4 (b): decision

94. In my judgment Master Price ordered an Inquiry in the true sense with only the Defendants giving standard disclosure so that beneficial ownership of the shares could be determined efficiently in a pragmatic and cost-effective manner as opposed to DSA also being so ordered as the necessary documents were only available from the Defendants.

95. His reasons for this and expectations of what the Defendants were to produce can be seen in his comments such as disclosure should crack the issue, the beans had not been spilled, the Defendants held all the information and BHC's disclosure at one point had not cracked the issue. This demonstrates this was a one-way street; an inquiry in the true sense, not a determination of issue(s) with pleadings and full disclosure by all parties.

Issue 4(c): Should any distinction be drawn between the costs of the Application and the Inquiry? Decision.

96. As I cannot see how any proper distinction can be drawn between the two as the Inquiry was ordered to answer the Application my answer is no.

Issue 4(d) How should orders that costs be "costs in the Inquiry" be dealt with? Decision.

97. As part of the overall costs of the Application, as, as I have stated at [96], there is no proper distinction between the two.

Issue 4(e): what order should be made in relation to the overall costs of the above?

98. I take this Issue as being the determination of all of the costs of the enforcement proceedings namely the Application and the Inquiry save those costs reserved as appear in Issues 5 and 6. Mr Adams submits that a party takes enforcement proceedings at its own risk if insufficient recovery is made as a debtor has no control over what enforcement proceedings are undertaken, save as to the extent it can pay the judgment debt. As a result, generally, only fixed costs of £110 plus certain disbursements can be claimed but the judgment creditor can add its reasonable costs to the debt and add them to any charge it obtains.

99. That is as provided in s.15 of the Courts and Legal Services Act 1990:

> "(3) Where a person takes steps to enforce a judgment or order of the High Court... for the payment of any sum due, the costs of any previous attempt to enforce that judgment shall be recoverable to the same extent as if they had been incurred in the taking of those steps
>
> (4) Subsection (3) shall not apply in respect of any costs which the court considers were unreasonably incurred (whether because the earlier attempt was unreasonable in all the circumstances of the case or for any other reason)."

100. Mr Lidington submits that that is all DSA seeks as against OWG and that DSA's costs have all been reasonably incurred. As to CPR 44.2(2)(a) he submits that the purpose

of the Application was to enforce the judgment debt against OWG and as part of the enforcement actions including the Application OWG paid its debt, so DSA is the successful party. That, he says, is supported by the orders for costs already made against OWG and BHC.

101. The difficulty for Mr Lidington in my judgment is answering, on the question of success, "who has won?". Here DSA obtained payment of the judgment debt but its enforcement proceedings in respect of the shares ultimately came to nothing. I therefore must consider CPR 44.2(2)(b) as to whether I should make a different order.

Issue 4(e): Discussion and decision.

102. To do so I need to look at the circumstances. The clear point of the Application and all that flowed was to enforce the judgment DSA had obtained against OWG following the wholesale failure of OWG to pay the agreed debt by agreed instalments on the agreed dates. I am in no doubt that the actions DSA took especially the order for oral examination of Mr Griffith, CEO of OWG and a director of both OWG and BHC resulted in payment finally being made of the sums due under the Shuman Order.

103. But that left the costs of enforcement. It appears – in the absence of any evidence to the contrary - that OWG again deliberately decided not to pay whatever was due but force DSA to continue its pursuit. I say deliberately because OWG has whenever it wishes availed itself of legal advice and, like BHC, will be represented as and when it appears to consider it is to its advantage. It may have had a good reason to feel that it should not have to pay anything beyond the judgment debt and interest, but if so, it has kept that to itself, and at no stage has ever appealed to the single judge any order made against it.

104. Mr Adams submits that a debtor should not be made to pay the costs of any and all enforcement proceedings that a creditor takes as long as they are not unreasonable – S.15 Courts and Legal Services Act 1990 - [99]. He emphasises a) BHC has a separate legal personality to OWG and b) there are no proper grounds on which the corporate veil can or should be pierced, both of which must be incontrovertible. However, he then submits that BHC had no legal duty to assist the court but as I have set out above at [87] I rejected that submission.

105. Mr Adams also submits that here, costs have been unreasonably incurred by DSA ,not acting in a co-operative way but seeking to incur excessive costs and looking for information in a speculative manner so as to ambush BHC, and which as set out by Mr Jones in a letter of 30th August 2019 amounted to pursuit on a speculative basis, in circumstances where BHC did he says try to engage in alternative dispute resolution.

106. As to the latter I think the answer is simple; OWG did not settle the matter when they could have done, and DSA say OWG did not engage at all and BHC did not accede to a settlement meeting, albeit DSA refused mediation as disproportionately expensive. Certainly no offers were made and rejected. I think there is nothing in this point.

107. The first circumstance in CPR 44.2(4) is conduct. I have mentioned how OWG could have engaged at the very start with DSA as to payment of the costs then at June 2019 of enforcement, but they chose not to. The actions of DSA in commencing the

charging process over the Oracle shares it then had good reason to believe were beneficially owned by OWG cannot in my judgment be criticised. BHC were brought in as a necessary party as I have explained.

108. But then BHC, possibly at the suit of OWG, almost certainly with their knowledge if not approval, did not give full and open disclosure but was found on successive occasions before this court to have failed to comply with what they were ordered to do, hence the penal notices. In that respect, there was substantial judicial criticism of OWG and BHC by Master Price on 25th April and further by me on 26th June.

109. Then Deputy Master Collaco-Moraes in his August Order approved a consent order by which default of OWG as to disclosure was accepted by it. Deputy Master Arkush when he heard the matter over the 4th and 26th September was critical of the disclosure by BHC. The judicial criticism also appears from the costs orders made at those hearings and the penal notices against BHC and Mr Griffith, Mr Hughes and others.

110. If those criticisms in judgments and Orders which then followed had been wrong they would no doubt have been appealed but the single Judge was never troubled. Charitably the disclosure failures by OWG and BHC may have been inadvertent, due to lack of attention to detail or knowledge, or a failure to take timely and/or proper legal advice but it matters not; there was a failure to comply resulting in substantial and extensive judicial criticism, necessitating further orders with penal notices.

111. In my judgment, OWG and BHC could and should have done more to disclose documents at the earliest possible time, but analogous with OWG's refusal to meet its agreed debts as and when they fell due they appear to have decided not to do so. As set out above clearly they are separate legal entities but they have a communality of directors and shareholdings, and especially importantly OWG had all the documents concerned in its possession, custody and control as shown by OWG accepting BHC's disclosure as its own.

112. BHC cannot be regarded as separate and distinct from OWG in the ordinary course of two different legal personalities due to that joint interest; as Deputy Master Arkush observed to BHC:

> "Let's get real. You are a wholly owned subsidiary. Your two companies, as we can see from the documents accumulate, marshal their assets, including holdings appropriate to either – to both D1 and D2 for the purpose of a commercial enterprise in which clearly you are in it together. So trying to put past the Court, some suggestion that you are not really the first Defendant for this purpose [the Inquiry] doesn't really carry a lot of conviction for me".

113. I find that I should make a different order and the conduct of OWG and BHC as I have found above is such that it extinguishes the prospects of a costs order in their favour, both before and during these enforcement proceedings. - see CPR 44.2(5)(a).

114. I find that under CPR 44.2(5)(b) it was reasonable for DSA to pursue OWG as to the beneficial ownership of the Oracle shares on the basis of what was known to them at the time and likewise to pursue OWG and BHC over the deficiencies in their

disclosure. I further find that DSA conceded the issue at the first opportunity it properly had.

115. I do not think DSA has pursued those defendants in an unnecessarily or unreasonably aggressive manner in the circumstances of the failure to pay the admitted and agreed debt; had that not been the case, I may have found against DSA under CPR 44.2(5)(C) and there is clearly no exaggeration for the purpose of (d.)

116. Before turning to my discretion under CPR 44.2(6) I must consider in the context of costs the final result. In a nutshell, DSA's seizure of the shares was to no avail but OWG and BHC's failures which appear to have been deliberate greatly extended the time period and especially the costs. The remedy was in their hands.

117. One other point I should mention is Mr Adams' point as to proportionality; due to an arithmetical error those at or representing DSA misplaced a decimal point in the share value resulting in the Oracle shares in issue being worth very much less – a fraction – of what was thought by DSA as of March 2019. I do not think there is anything in this as whilst the shares under Schedule A numbered 11,072,618, the total number in issue was 120,000,000 – with a value of £300,000 at the correct price in June 2019 which would have secured the then debt.

118. Taking all the above into account and for those reasons I order that OWG and BHC be jointly and severally liable for DSA's costs on the standard basis, but there should be a percentage reduction to reflect the fact that DSA's application was ultimately not successful in seizing the shares. It is not possible to allocate precise periods of time and therefore costs and I am expected to consider a proportion in preference – see CPR 44.2(7).

119. I find in the above circumstances that a proportionate and proper reduction to reflect the fact that DSA were ultimately not successful to be 20%. OWG or BHC will therefore pay DSA 80% of their costs in so far as they relate wholly to or were incurred in respect of OWG and BHC, but not GPP for reasons I turn to below.

Issue 4(f): is BHC entitled as a matter of principle to claim costs in GPP's name or should any other provision be made for GPP's costs?

120. Mr Adams submits – his closing submissions at [19] - that GPP is a third party against whom a costs order was made to assist the court and DSA should pay those costs. I cannot see that such an order was made, and I assume he meant that a disclosure order was made.

121. Mr Jones at PJ/3/101 says:

> "I am instructed by my client there is a very close personal relationship between...the CEO at DSA and a director in GPP which may account for DSA's unwillingness to seek costs against GPP for its clear default. I should also point out that GPP has indicated to BHC that it **may** seek its costs of compliance with the Application under the contractual indemnity under the Prime Brokerage Agreement. BHC, being subrogated to GPP's claim for costs, therefore seeks an order that DSA pay GPP's

> costs or, at least, an indemnity for such costs from DSA." (my emphasis).

122. Mr Adams submits that "GPP has stated that it **will** be enforcing its indemnity under the PBA..." (again my emphasis). I have not been taken to the appropriate clause permitting same in the PBA but at PJ/4/14 Mr Jones refers to WhatsApp messages which, he says, are evidence that a verbal claim was made by GPP against BHC. On 7th June 2019 Mr Parker of GPP messaged Mr Hughes the chairman of BHC as follows:

> "GPP external legal Fees circa £60k Over this DSA/OWG bullshit. We are auto debiting [BHC]. Gives me no pleasure but I did warn in advance. J" (sic).

123. Mr Jones also accepts that no such claim had been made as of when he made his fourth statement, namely 10th December 2019. Mr Adams in his oral submissions on 14th July submitted:

> "Mr Lidington in opening pointed out that, on the authorities, there is only a vested entitlement to be subrogated if a debt has been paid, and I accept he is probably right about that. But that - and the way I put it for the purposes of today's hearing is that there is a threat of enforcement under that indemnity. D3 has claimed, I think, some £60,000 worth of costs that have been incurred and has written - and Hogan Lovells on behalf of D3 have written to D2 saying that those will be collected under the indemnity. But they have not been to date."

124. So almost one and a half years have passed since that WhatsApp message, but no claim or debit has occurred. No letter from Hogan Lovells is in evidence and so DSA do not accept the existence of same. BHC's case in this respect is therefore lacking in substance; no clause of indemnity in the PBA has been identified, nor is how the right of subrogation arises. BHC have not received a formal demand on the evidence before me let alone satisfied it.

125. In *Page v Scottish Insurance Corporation* 1929 (140) LT 571, at 576 Scrutton LJ when rejecting a submission that partial satisfaction of claims is sufficient stated:

> "…the right to be subrogated to the rights of the assured does not pass…until he has satisfied all of the claims under the policy in respect of the particular subject-matter".

Mr Lidington submits therefore that the indemnity has to be fully satisfied for the right to arise. I agree.

126. Mr Adams relies on *Esso Petroleum Ltd v Hall Russell & Co [*1988] 1 AC 643 at 672E-F as establishing that any person who makes payment under a contractual indemnity is subrogated to any claims the indemnified has against third parties in respect of the loss. But again, there is no payment and no proper demand notwithstanding the passage of almost one and a half years.

127. Further, as Mr Lidington submits, BHC has not obtained GPP's permission to be subrogated, or – if it refused – brought an action to compel GPP (*Esso Petroleum)* nor agreed a costs indemnity for GPP's costs.

128. Also in his oral submissions Mr Adams cited Lord Millett's judgment in the Hong Kong case of *Waddington Ltd v Chan Chun Hoo Thomas & Ors* [2008] HKCU 1381 as authority that anybody with sufficient interest in a remedy has standing, so he asked that GPP's claim for costs against DSA be adjourned and BHC have liberty to restore that application in GPP's name in the event it was required to pay under the indemnity.

129. This was a multiple derivative action in which a shareholder sought to bring a claim in the name of a subsidiary of a company of which he was a member, so very different from the potential position here. Mr Lidington referred me to [74] in which Lord Millett stated in respect of the standing to bring a claim:

> "…the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it".

130. I accept Mr Lidington's submission that here there can be no such losses as subrogated rights have not arisen as I have set out above.

Issues 4(f) and (g): decision

131. In all the above circumstances and for the above reasons BHC has no right to claim costs in GPP's name. Nor will I adjourn any possible claim of GPP against DSA in circumstances where none has been made, and when GPP has had every opportunity of making such a claim, if it was advised it could do so. The position in my judgment is analogous to a claim for a declaration; it is trite law that the court will not make a declaration in circumstances where it would serve no useful purpose.

132. Therefore I will make no order.

Issue 5: What Order should be made in respect of costs reserved in the Order of 3rd April 2019?

133. I set out the relevant parts of this Order at [21]. As can be seen at [4] of the Order "The costs of the application are reserved to the hearing on 25th April 2019." At that hearing they were reserved by [8] to the Inquiry. Mr Adams in oral submission on 14th July 2020 said (and I quote again from the transcript as this is not in his written submissions):

> "And on that basis the charging order was made finally in relation to that limited number of shares and the costs of the application were reserved for the hearing on 25 April and have been onwardly reserved to you, Master. We say they are merely costs in - they, they are essentially costs in, in the inquiry as far as BHC is concerned and now this order has been unpicked and discharged the costs of this application, together with all the costs, should be paid by the claimant."

134. I have already determined that there is no distinction between costs of the Application and costs of the Inquiry - Issue 4(c) above, so I need not consider that further.

135. Secondly, Mr Adams submits that BHC's position that it contested the ownership of the 11,072,61 Oracle shares was reasonable in all the circumstances. I disagree; as I have set out above BHC at the hearing did not put forward evidence in opposition to this application of 21st March 2019 and their only point concerned the wording of the recitals – which point Master Price said "made no difference."

Issue 5: decision

136. In view of the above facts there is no reason in my judgment for the costs of this application and thereby hearing to be treated differently to my overarching finding above. OWG and BHC will therefore be jointly and severally liable for 80% of DSA's costs on the standard basis.

Issue 6: As between DSA and OWG what order should be made in respect of costs reserved in the August Order?

137. By the August Consent Order (the recitals acknowledging "... [OWG] not consenting to the Penal Notice endorsed on this Order") Deputy Master Collaco Moraes approved [4] which provided:

> "There be no order in respect of the Penal Notice Application, save that the costs of and occasioned by the Penal Notice Application be reserved."

138. OWG had taken a neutral position, but they had not properly complied with Orders for disclosure. DSA, reasonably in my judgment in view of OWG's conduct over the preceding two years, took the view a penal notice was necessary to ensure compliance. A common misconception is that the addition of a penal notice has to be sanctioned by the court on application and thereby evidence; that is wrong in that it is a matter for the party in whose favour the order is made.

139. However DSA could not by CPR 81 at that time (but now it has been replaced) endorse it on a prospective order, so it had to re-apply to enforce compliance with the March, April and June Orders. DSA say their application of 19th July 2019 was therefore necessary due to OWG's failure to comply with the disclosure Orders of March, 25th April and June. As DSA say, the relief was granted and compliance followed.

Issue 6: Decision

140. Mr Halstead when he appeared on 11th December 2019 submitted that OWG was not seeking its costs but opposed being liable for those of DSA. No other submission has been made by or for OWG. In the above circumstances I consider there is no reason why OWG (alone in this respect) should not be responsible for DSA's costs of its proper and reasonable actions in respect of this penal notice. Again, in the above circumstances, DSA is entitled to 80% of these reserved costs on the standard basis.

Summary

141. To summarise:

i) BHC's application for an inquiry into the alleged damages it alleges it has suffered pursuant to the implied undertaking is dismissed;

ii) OWG and BHC are jointly and severally liable for 80% of DSA's costs in so far as they relate to OWG and BHC but not GPP to be assessed on the standard basis

iii) I make no order in respect of GPP's costs save that I specifically reject BHC's claims to be subrogated, for a declaration as to an indemnity or likewise whether by way of derivative action or otherwise and

iv) OWG are liable for 80% of DSA's costs of DSA's application of 19th July 2019.

142. I will make an order for a payment on account of costs and will hear counsel on the remote hand down of this judgment as to the amount and the terms of the final order, unless that can be agreed so attendance is unnecessary.

DEPUTY MASTER LINWOOD 12th November 2020