Neutral Citation Number: [2021] EWHC 100 (Ch)

Case No: HC-2015-002989

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

7 Rolls Building
Fetter Lane
London EC4A 1L

Date: 22 January 2021

Before:

MR JUSTICE ZACAROLI

- -

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Claimant**
- and –	
PARUL KESHAVLAL MALDE	**Defendant**

Christopher Brockman (instructed by **Her Majesty's Revenue and Customs**) for the **Claimant**
Howard Watkinson (instructed by **Freeths LLP Solicitors**) for the **Defendant**

Hearing dates: 13 January 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2.00 pm on 22 January 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli :

1. This is an application by the claimants, HMRC, for an order requiring the defendant to produce bank statements relating to 23 accounts with a number of institutions, spanning the period from 2015 to the present.

2. The application is made under CPR 25.1(1)(g), which permits an order to be made directing a party to provide information about, among other things, relevant property or assets which are or may be the subject of an application for a freezing injunction.

Background

3. On 17 July 2015 HHJ Hodge QC made a world-wide freezing order against the defendant. The order was sought in order to preserve assets pending the determination of proceedings commenced in the tax chamber of the first-tier tribunal (the "FTT"). Those proceedings relate to an alleged alcohol diversion fraud by a company controlled by the defendant. On 16 July 2015 HMRC served on the defendant a personal liability notice ("PLN") in relation to the tax claimed from the company, in the sum of approximately £8.7 million.

4. The FTT proceedings are very complex, said to involve 50 witnesses of fact. The trial was due to take place in late 2020 but in light of the difficulties of managing such a large trial during the Covid-19 pandemic, they have been adjourned and are now expected to come on for trial in early 2022. The High Court proceedings, within which the freezing order has been made, have been stayed pending resolution of the FTT proceedings.

5. The freezing order originally prohibited the defendant from dealing with his assets up to a value of £8.8 million. By paragraph 9 of the order, the defendant was ordered to inform HMRC of all his assets worldwide exceeding £5,000, by 22 July 2015. By paragraph 10, he was ordered to verify that information in an affidavit by 29 July 2015.

6. Notwithstanding that HMRC had identified various bank accounts held by the defendant, the order did not include any obligation that he disclose any bank statements. HMRC did not perceive there to be any need at the time to seek any such further order in order to verify the statements made on affidavit or to make the order effective.

7. The defendant complied with the disclosure order and produced an affidavit on 29 July 2015 disclosing numerous bank accounts. Of these, only the accounts with Emirates, Pictet and Canada Life contained a balance over £50,000.

8. There matters rested for a few years, while the FTT proceedings continued. In early 2018, however, the defendant applied to set aside the freezing order on grounds of material non-disclosure and delay. The application was heard by Murray Rosen QC, sitting as a deputy High Court judge, on 27 April 2018. He dismissed the application, but gave the defendant permission to amend the application notice to include an application to vary the freezing order to enable

him to spend up to £1,260,000 on works to a property in London. The expectation was that the variation application would be dealt with shortly thereafter. In fact, it was not finally disposed of until April 2019.

9. On 6 July 2018, the defendant filed an affidavit in support of the variation application. In that affidavit he provided updated disclosure as to his assets. These disclosed material changes to the balances in certain of the bank accounts. HMRC rely upon the following three matters:

   (1) The amount standing to the credit of an account described as a Currency Savings account with Emirates NDB had increased from £1,674,760 in 2015 to £1,913,307 in 2018 (the "Emirates account");

   (2) The amount standing to the credit of an account described as an "Offshore Term Deposit" with Canada Life had increased from £349,597 in 2015 to £411,418 in 2018 (the "Canada Life account"); and

   (3) The amount standing to the credit of an account described as a "Savings Account" with Pictet had decreased from approximately £2.28 million in 2015 to £950,000 in 2018 (the "Pictet account").

10. In the meantime, in December 2017, HMRC had issued a further PLN against the defendant in the sum of approximately £13.8 million. By my order of 10 August 2018, made on a without notice application but not subsequently challenged by the defendant, the limit in the freezing order was extended to £22.75m in light of the further PLN.

11. In the evidence filed in support of the application to increase the limit of the freezing order, it was pointed out that the defendant had not provided any bank statements or other independent evidence of the balances in the bank accounts he had disclosed. The reduction in the balance on the Pictet account was also highlighted. Complaint was made that the defendant had failed to disclose all of his assets. No order for disclosure of bank statements was sought, or made however, at that time.

12. On 12 September 2018, HMRC wrote to the defendant's solicitors alleging breach of the freezing order in relation to the Pictet account and requesting unredacted bank statements for that account. On 19 September 2018, the defendant's solicitors provided copies of what were described as his "Pictet statements" for the period from 1 July 2015 to 1 July 2018. These related to a sterling account described on the statements as a "current account".

13. The variation application came on for hearing in October 2018. HMRC indicated to the judge (Sarah Worthington QC, sitting as a deputy High Court judge) that they were likely to institute contempt proceedings. In light of that, but also for reasons of time, the hearing was adjourned.

14. On 11 October 2018, HMRC wrote to the defendant alleging various breaches of the freezing order, and asking him to provide copies of all bank statements with foreign and domestic banks since July 2015.

15. The defendant's solicitors responded on 18 October 2018, indicating that in the short timescale they had been able to obtain only a limited number of bank statements. They enclosed summary statements for the account with Santander, showing the total monies paid to and from that account. As to the Emirates account, they said: "Our client is not able to provide statements for his Emirates account for the previous two years, as this account has been dormant and therefore the bank is not able to provide statements."

16. On 13 November 2018 HMRC again asked whether the defendant was in a position to provide statements for all his other bank accounts. The defendant's solicitors responded on 16 November 2018, reiterating that there were no available statements for the "dormant Emirates account" and that their client considered he had otherwise complied with HMRC's request and did not intend to provide any further documents.

17. There was then a further delay of some four months until 8 March 2019, shortly before the variation application came on for hearing, when HMRC again indicated that it would institute contempt proceedings, although these had still not been issued. At the adjourned hearing of the variation application, on 13 March 2019, which was again before Murray Rosen QC siting as a deputy High Court judge, HMRC's opposition to the variation order was put primarily on the basis that the defendant was in breach of the freezing order and the court should not entertain the application.

18. The judge granted the variation application. In his judgment, he was critical of HMRC's delay in relation to the threatened contempt proceedings. At [27] he said:

> "HMRC has had something like five months since the letter of 18 October 2018 and four months since the subsequent correspondence, to decide whether or not to pursue production by Mr Malde of any further unredacted bank statements and/or to take a position on alleged contempt by him in failing to disclose more documents or explain the anomalies it has asserted."

19. At [28] to [29] he referred to authorities which stressed that if matters came to the attention of the beneficiary of a freezing injunction and there are grounds for alleging breach, then the appropriate proceedings – e.g. for contempt – are to be initiated "without delay". He described HMRC's approach, in (as he put it) sitting on their hands and then objecting that the defendant could not make the application as he was in breach, as "lamentable". He granted the variation sought.

20. HMRC served the committal application on 22 March 2019, relying on eight alleged breaches of the freezing injunction. The first three were that the defendant had: (1) made payments of school fees in August 2017; (2) failed to disclose a loan made to a Mr Andrew Quay on 14 January 2015; and (3) failed to disclose the existence of a bank account in Spain into which repayments of the loan to Mr Quay had been made.

21. In a letter dated 20 May 2019 HMRC again complained about the defendant's failure to disclose his bank accounts.

22. The contempt proceedings were compromised, as recorded in an order dated 8 November 2019 of Michael Green QC (as he then was) sitting as a deputy High Court judge. The defendant admitted the first three breaches alleged (see above at [20]), admitting that the breaches were reckless. He received a fine of £100,000. HMRC withdrew the remaining five allegations of breach, all of which related to the Pictet account. I will return to these below.

23. HMRC continued, thereafter, to request disclosure of bank statements, by letters dated 15 November 2019 and 14 February 2020. The defendant continued to refuse to do so, again noting (in his solicitors' letter of 27 April 2020) that the Emirates account was dormant and that statements were not available for it.

24. This application was made on 11 August 2020.

The law

25. There was no disagreement between the parties as to the applicable legal principles, save in relation to the privilege against self-incrimination, which I will deal with separately below.

26. First, it is trite law that the court can make orders ancillary to a freezing injunction, for example for disclosure of information or documents, to ensure the freezing injunction is effective.

27. In *JSC BTA Bank v Ablyazov* [2011] EWHC 2664 (Comm), Christopher Clarke J described, at [47], the jurisdiction to order disclosure as "essentially protective: its purpose is to ensure that assets are not disposed of in (disguised) breach of the freezing order. The order may be made if it is just and convenient to make it in order to ensure that the injunction is effective." The purpose has been expressed, in numerous cases, as "policing" the injunction: see, for example, *PSJC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 482 (Ch), per Joanna Smith QC (as she then was) sitting as a deputy High Court judge, at [33], citing Steyn LJ in *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah*, unreported, 1994.

28. Where, as here, a further disclosure order is sought subsequent to the date of the original freezing order, the reasons why an order may be justified, under the umbrella of "policing" the order, include:

    (1) So as to ensure that there are no *continuing* breaches of the order, as in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm), per Popplewell J at [53] to [54], where the purpose was to ensure that the frozen funds were not being used to fund the legal fees of a party in breach of the order;

    (2) Where there is an obvious discrepancy between assets which were at one time held by the defendant and the current assets disclosed in response to a freezing order, which might indicate a real possibility that there are further

assets to which the freezing order may apply: *Public Institution for Social Security v Al Rajaan* [2020] EWHC 1498 (Comm), per Jacobs J at [25];

(3) Where further information might reveal that assets currently outside the scope of the freezing order ought to be included within it: *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, at [58].

29. Hildyard J, in a subsequent decision in the *Pugachev* case ([2015] EWHC 1694 (Ch)), in the context of an application for further evidence in relation to a non-proprietary freezing order, said:

> "As it seems to me, the court must be persuaded that there is practical utility in requiring such evidence and that it is necessary to enable the freezing order properly to be policed. It will be vigilant to prevent the abuse of seeking further evidence for some other purpose: such as to expose further inconsistencies, unduly pressurise a defendant who has already been cross-examined, yield ammunition for an application for contempt, or provide further material which might be of assistance, even if not actually deployed, in the main (foreign) proceedings."

30. At [23] of *Al Rajaan* (above), Jacobs J noted a debate between the parties as to whether the test was that further disclosure was "necessary", as in Hildyard J's formulation in *Pugachev* (above) or "just and convenient", as in Christopher Clarke J's formulation in *Ablyazov* (above). In reality I do not think there is a material difference between requiring the claimant (to quote the full sentence from Hildyard J's judgment) to establish a "practical utility" in requiring the evidence "necessary" to police an injunction, and a requirement that it is just and convenient to order the further evidence to ensure that the injunction is effective.

31. As Hildyard J noted in the paragraph from *Pugachev* set out above, the court will not order further evidence if the purpose of obtaining it is to establish past breaches of the order so as to found an application for contempt: see *Bhimji v Chatwan (No.2)* [1992] 1 WLR 1158, per Knox J at 1166 to 1169, citing *Bekhor v Bilton* [1981] QB 923. In that case, Stephenson LJ, at p.955 said:

> "Parker J. described the plaintiffs' application and his order for discovery as in aid or support of the Mareva injunction and so in a sense they were. But in so far as they relate to the defendant's assets at past dates as distinct from their present whereabouts their purpose seems to be not so much to help the court or the plaintiffs to locate and freeze particular assets now, as to open the way to incriminating and ultimately punishing the defendant for contempt of court in formerly disobeying the Mareva injunction and/or breaking his undertaking. This purpose emerges not only from the wide terms of the order but from the judge's comments at the end of his judgment. To that extent the order goes beyond the legitimate purpose of an order

> for discovery in aid of a Mareva injunction and Robert Goff J.'s order in A v. C and is not necessary for the proper and effective exercise of the Mareva injunction."

32. Second, while there is no particular threshold for a claimant to cross in order to obtain a disclosure order, at least where an order is sought subsequent to the making of the original order on the grounds that there was a concern that the defendant was committing breaches of it, there must in general be "grounds to believe that there is a real risk that the injunction may be being broken. Whether the order is in fact made is likely to depend on the strength of those grounds and the considerations which militate in favour and against making such an order": *Ablyazov* (above), per Christopher Clarke J at [47].

The discretion to order further disclosure

The parties' arguments in outline

33. The defendant objects to giving the disclosure sought on numerous bases:

(1) The purpose of the application – relating to bank statements going back five years – cannot be for the purpose of policing the order, but can only be for the purpose of exposing past breaches;

(2) There are insufficient grounds to order further disclosure;

(3) There has been excessive delay on HMRC's part;

(4) The order sought, extending to numerous accounts over a five-year period, is disproportionate;

(5) So far as HMRC rely on matters relating to the Pictet account, it is abusive to do so because similar allegations were made, but then withdrawn, in the contempt proceedings.

34. Separately, the defendant relies on the privilege against self-incrimination given the risk that producing documents would provide grounds for further contempt proceedings. The defendant sought an undertaking from HMRC that they would not use any of the documents sought in order to pursue further contempt proceedings. HMRC, however, while indicating that it has no present intention to institute further proceedings for contempt, said it was not in a position, as a public body, to offer such an undertaking.

35. HMRC's application notice states that the order is sought so that it may properly police the ongoing compliance with the freezing order. It contends that there are grounds for making the order in particular because of the defendant's admitted prior breaches of the freezing order, the discrepancies in the balances on certain of the accounts as between 2015 and 2018 and the inconsistencies in the defendant's explanations for not providing the Emirates bank statements, in particular, in response to earlier requests.

36. I will address HMRC's concerns at the discrepancy in the balances on the three accounts referred to at [9] above in turn.

The Emirates account

37. The increase of £238,547 in the balance on the Emirates account between July 2015 and July 2018 was explained by the defendant, in answer to the contempt proceedings, as due to the fact that he had failed to disclose the loan of €350,000 to Mr Quay which he had made in 2014. His explanation was that the amount of this loan had been included within the balance on the Emirates account as at July 2018. In giving judgment for the purposes of sentencing in the committal proceedings, Michael Green QC described this explanation as "contrived", having been come up with only after the defendant saw HMRC's evidence on the application to extend the limit in the freezing order.

38. Notwithstanding that criticism, the defendant has not, in the context of this application, provided any further elaboration on the explanation provided in the context of the contempt proceedings. No clarification has been offered, for example, to explain how the increase in the Emirates account (£238,547) corresponds to the amount of the loan to Mr Quay (€350,000). Nor has it been explained how a loan due from Mr Quay could properly be categorised as a balance on an account with Emirates bank, particularly when earlier repayments in respect of that loan (made prior to the original freezing order) were made to the Spanish account which the defendant had also failed to disclose (and which formed another of the grounds upon which he was fined for contempt).

The Pictet account

39. HMRC's focus on the Pictet account is on the substantial reduction (of some £1.3 million) between July 2015 and July 2018. As I have noted, the defendant provided, in September 2018, the statements for his GBP account with Pictet from 1 July 2015 to 1 July 2018.

40. These revealed, as at 1 July 2015, a negative balance of £2,012.02 and, as at 1 July 2018, a negative balance of £157,372.29. These statements self-evidently do not relate to the full value of the defendant's investments with Pictet, given that in his affidavit of 29 July 2015 he revealed that the value of his investments with Pictet was in excess of £2.28 million. The statements refer to numerous transfers to and from other accounts of the defendant (identified in the statements as "your accounts") in other currencies (US Dollar, Canadian Dollar, Euro, Norwegian Krona and Swiss Franc). They also detail the receipt of large sums upon the sale of various investments.

41. It was the production of these accounts which prompted HMRC to complain of breaches of the freezing order. The committal proceedings instituted in March 2019 included five grounds of contempt relating to the Pictet account (in addition to the payment of school fees, which were also sourced from the Pictet account, which ground was admitted), as follows:

(1) The defendant had failed to disclose foreign currency accounts held by him at Pictet;

(2) The defendant had failed to disclose that he held assets that were sold with the proceeds being paid into the Pictet account;

(3) The defendant paid quarterly management fees to Aquila Invest Geneva SA ("Aquila");

(4) The defendant made payments to his solicitors from the Pictet account that had not previously been disclosed; and

(5) The defendant made a payment for "taxation clearing" from the Pictet account.

42. In the contempt proceedings, the defendant served a witness statement of Olivier Chedel, a managing partner of Aquila. He explained as follows:

(1) Aquila provided discretionary and advisory portfolio management for clients. In relation to the defendant, Aquila had complete autonomy with regard to investment decisions made on behalf of the defendant. They undertook investment activity at their own discretion and not at the direction of the defendant. The assets under management (according to the investment management agreement exhibited to his statement) were deposited at Pictet bank.

(2) The defendant had a "Capital Account" with Aquila with IBAN no. CH6808755066008300100. This served mainly for the settlement of stock market or similar trades and occasionally for shifting balances into another currency. It had always operated as an investment account. The defendant had sole control over the funds remitted from that account to third parties (for example to pay tax liabilities or legal fees), but he had no control over money coming into the account or where those monies originated from.

(3) There are various currency accounts within the defendant's Capital Account, in order to diversify investments. These included GBP, USD, CHF and EUR. The defendant has the right to access those accounts "via Aquila and Pictet", but he does not make decisions as regards which trades are made by Aquila. The investment agreement authorised Aquila to engage in foreign exchange trading. Mr Chedel said that Aquila did not trade currencies in a speculative manner, but would hedge a currency exposure against GBP.

(4) In relation to various disposals of assets revealed by the Pictet account identified in the points of claim in the contempt proceedings, Mr Chedel said that these were all carried out by Aquila under its discretionary mandate. They were transactions undertaken, without any orders, suggestions or influence from the defendant, in order to produce funds for him. Any payments out (when requested by the defendant) must normally be covered by corresponding sales of investments.

(5) The only outflows of funds from the account were to the defendants' solicitors, HMRC and the Mill Hill School Foundation.

(6) Tax charged on investments in the Account is paid to the relevant fiscal authorities and is referred to in the Account as "tax clearing."

43. The Pictet bank statements revealed, in addition to payments which Mr Chedel referred to, substantial payments to a company called Simply Smile (UK) Limited. HMRC, however, did not pursue a complaint in respect of this. In the order of Michael Green QC of 7 November 2019, HMRC undertook not to bring any further applications in respect of any breaches of the freezing orders pre-dating 5 November 2019 of which they were aware. That would include any breach revealed by the Pictet bank statements.

44. As I have pointed out above, the statements for the GBP account with Pictet do not refer to the totality of the investments contained in the Capital Account, as referred to by Mr Chedel. That is because the statements relate only to the movements in cash held with Pictet, as opposed to the underlying investments managed by Aquila.

45. It is tolerably clear, however, that the totality of the reduction of £1.3 million in the investments held in the Pictet account (as referred to in the defendant's disclosure affidavits of July 2015 and July 2018) is explained by the transactions set out in the bank statements disclosed in September 2018. The transactions include the sale of underlying investments, the payment into the account of the proceeds of sale and the withdrawal of amounts from the account to various third parties.

46. In particular, at the end of the statements is a line entry: "Deposits/withdrawals … -1,302,369.22". In light of the explanation in Mr Chedel's witness statement, I understand this to refer to the aggregate amount of deposits paid into the account (resulting from realising investments) which have then been withdrawn by the defendant, pursuant to the transactions detailed in the account statements (including for legal fees, HMRC liabilities, payment of school fees and in favour of Simply Smile Limited).

The Canada Life account

47. The increase in the balance on the Canada Life account is relatively modest, being only £61,821. I was not referred to any attempts by HMRC to seek an explanation for this increase since they became aware of it in July 2018.

Grounds for making an order

48. I first consider the strength of HMRC's case that there is a risk that there are further assets not so far disclosed or that there are otherwise continuing breaches of the freezing order.

49. As to HMRC's first point, namely the fact of the defendant's admitted prior breaches, I do not think this gives rise to any real risk of continuing breaches. First, the admitted breaches were only of reckless failure to disclose the relevant and assets (the school fees, the loan to Mr Quay and the Spanish account). Michael Green QC's view – having considered the prior breaches in some detail for the purposes of arriving at the appropriate sentence – was that in light of the nature of the breaches there was "no serious risk of re-offending".

50. Second, if HMRC were seriously concerned about ongoing breaches of the injunction by reason of the admitted past breaches, then they could have been expected to seek further disclosure as soon as possible. As Murray Rosen QC pointed out in his judgment dated 13 March 2019 it is incumbent on a claimant who suspects that the defendant is in breach of a freezing order to initiate proceedings without delay. While he specifically referred to contempt proceedings, the same applies in my judgment to proceedings requiring further disclosure. In that respect, a claimant with any substantial concern as to continuing breaches of a freezing order would be bound to act quickly to obtain relief intended to police the order.

51. As to the decrease in the balance on the Pictet account between 2015 and 2018, for the reasons I have set out above, I consider that the reduction is adequately explained by the bank statements that have already been disclosed. So far as those reveal past breaches, I have dealt with that above, and by reason of the undertaking given at the time of the settlement of the contempt proceedings, no application can be made in respect of those breaches. Otherwise, I do not think the contents of the disclosed Pictet bank statements or the defendant's refusal to provide further Pictet bank statements suggest any real possibility of continuing breaches or of there being further assets that are, or should be, within the scope of the freezing order.

52. As to the increase in the balance on the Emirates account, I accept in principle that a significant increase in the balance on an account might indicate another asset or bank account, from which the increase is derived, which is or ought to be within the scope of the freezing order.

53. The defendant has had ample opportunity to provide a credible alternative explanation for the increase which would rule out that possibility. The only explanation, however, has been the one given to the court in the contempt proceedings referred to at [37] above. As to that, I share Michael Green QC's scepticism – all the more so since the defendant has not provided any subsequent clarification, despite the comments made in the judgment of 7 November 2019.

54. In addition, the defendant's contention that he has been unable to produce statements for this account because it is dormant does not, in my view, withstand scrutiny. HMRC does not accept that even if the account is dormant that means that statements cannot be obtained for it, citing a reference on the bank's website to the fact that customers can re-activate dormant accounts by sending a letter together with a self-attested passport. Moreover, in March and

April 2020, according to the defendant's solicitors, payments were made to them from the Emirates account, so that it has not remained dormant.

55. The lack of prior focus by HMRC on the Canada Life account means that there is nothing other than the bare fact of an increase in the balance on the account between 2015 and 2018 which gives rise to the possibility that there are other assets that are or should be within the scope of the order.

Whether it is just and convenient to order disclosure to ensure the freezing order is effective

56. For the above reasons, I conclude that there are sufficient grounds for ordering disclosure of at least some further bank statements, but that those grounds relate only to the increase in the balances on the Emirates account and (to a lesser extent) the Canada Life account and the inadequate explanations given for the increase on, and the failure to obtain statements for, the Emirates account.

57. The first point to note therefore, in considering the overall exercise of discretion, is that the grounds for making an order at all relate only to those two accounts. While this might indicate utility in ordering disclosure of past statements in respect of those two accounts, it provides little support for the need to disclose statements in relation to the numerous other accounts where the balances (as disclosed in 2015 and 2018) were relatively small and where there was no material change in those balances.

58. Second, although delay is not necessarily a reason in itself to refuse to order disclosure, the longer the delay the more compelling should be the need demonstrated for the disclosure. As I have already noted, if disclosure is required to police the ongoing effectiveness of a freezing order, then a claimant can be expected to act quickly having first identified a potential need. The delay in this case is more than two years. In relation to all of the accounts other than the Emirates account, there is no explanation offered for that delay.

59. Third, specifically in relation to the Pictet account, the delay is compounded by two matters. First, in the contempt proceedings HMRC asserted, but then withdrew, claims that the Pictet account statements revealed numerous other breaches of the freezing order. Second, the obvious time to have sought further disclosure in relation to the Pictet accounts would have been at the time of the contempt proceedings. I do not go so far as to say that it would be an abuse of process for HMRC to rely, to support an application for disclosure, on complaints they had previously made, then withdrawn, in the context of the contempt proceedings. I consider, however, that HMRC's conduct in that respect counts strongly against exercising the discretion in its favour, in relation to the Pictet account. In any event, as I have already noted, I consider that the account statements already provided in relation to Pictet adequately explain the diminution in the overall value of the defendant's investments managed by Aquila over the period July 2015 to July 2018. This reinforces the view that there is little if any utility in ordering disclosure of statements for any other Pictet bank account.

60. Fourth, I consider it would be disproportionate, balanced against the above points, to order disclosure in respect of some 23 bank accounts over a five-and-a-half-year period.

61. So far as the Emirates account is concerned, however, in light of the still unexplained increase and the unsatisfactory reasons given by the defendant for not obtaining statements, there is sufficient utility in requiring disclosure of the statements since July 2015 for the purposes of policing the order. I do not accept the submission of the defendant that the only purpose in ordering further disclosure of past statements in respect of this account is to identify past breaches of the freezing order. The historic bank statements are likely to shed light on the source of increased funds on the account, and so might assist in identifying further assets which are or should be covered by the freezing order. Whereas issues of proportionality and delay are strong factors militating against making an order more generally (as I have noted above) they do not carry sufficient weight so far as the Emirates account is concerned:

    (1) As to delay, although the increase first came to light in July 2018, and notwithstanding that the defendant's contention that statements could not be obtained because the account was "dormant" is unconvincing, it is only as from March or April 2020 that it was clear the account was no longer dormant. I therefore do not consider that HMRC's failure to act earlier than August 2020 should count against it so far as the application relates to the Emirates account.

    (2) Arguments of disproportionality have little weight in relation to statements for the Emirates account alone, even extending over a five-year period, given that, on the defendant's case, it has seen little activity for much of that time.

62. Accordingly, I consider it appropriate to order disclosure of statements in respect of the Emirates account for the period 17 July 2015 to date.

63. So far as the Canada Life account is concerned, there has been no explanation for the increase in the balance between 2015 and 2018. The lack of explanation for the increase is as much down to the fact that HMRC have not sought one as to any failure on the defendant's part. The case for disclosure is therefore much weaker than in relation to the Emirates account. On balance, however, I have concluded that it is appropriate to order disclosure of past statements in relation to the Canada Life account, taking into account in particular two factors. First, it remains the case that the increase in the balance is unexplained. Having concluded that it is appropriate to order disclosure in respect of the Emirates account on this basis, I think it is appropriate to do so in relation to the one other account where there is a similarly unexplained increase. Second, the additional burden on the defendant is likely to be insignificant, so it adds little in terms of disproportionality.

Privilege against self-incrimination

64. Given my conclusion above, the remaining issue is whether the defendant is able to rely upon the privilege against self-incrimination in relation to the

application for disclosure of the statements for the Emirates and Canada Life accounts.

65. It has been clearly established, by Court of Appeal authority, that although a defendant to a freezing order is entitled to rely upon the privilege against self-incrimination in relation to *information* which the order requires to be provided, the privilege does not extend to the production of documents which have an existence independently of the relevant order.

66. The authorities on this point were considered by Popplewell J in *JSC BTA Bank v Mukhtar Ablyazov and others* [2014] EWHC 2788 (Comm) at [115] to [116]:

> "115. Mr Smith advances a number of points in answer to the claim to privilege. The first is that the privilege does not attach to the compulsory production of documents which have an existence independently of the relevant order compelling their production; it is limited to statements or other material which is brought into existence in consequence of the compulsion of the Court. I considered the jurisprudence on this issue at paragraphs [52] to [87] of an extempore judgment I gave in relation to an earlier application in this litigation relating to Gaziz Zharimbetov: [2012] EWHC 2784 (Comm). I concluded:
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> > "72. In my view, it has been established by the authorities that the privilege against self-incrimination does not extend to provide a person with protection against the risk of incriminating himself by the provision of a document or documents which come into existence independently of any order, statute or other instrument of law which compelled their production. It does not normally cover documents other than those which come into existence by an exercise of will pursuant to a testimonial obligation imposed upon the party. I derive that formulation in particular from the passages I have identified at paragraphs 68 and 69 of *Saunders v United Kingdom* [1998] 1 BCLC 362, (1996) 23 EHRR 313, paragraphs 28, 31, 36, 38, 46, 63 and 64 of *C Plc v P* [2008] Ch 1, paragraph 18 of *R v S (F)* [2009] 1 WLR 1489, and paragraph 53 of *R v Kearns* [2002] 1 WLR 2815, cited with approval by the Court of Appeal in *R v S* ."
>
> 116. Mr Béar submitted, with his characteristic skill and tact, that this was an erroneous conclusion to draw from the authorities. Having had the benefit of his submissions and an opportunity for further reflection, I remain of the view that although the authorities do not all speak with one voice, their effect is as I endeavoured to summarise."

67. In *R (River East Supplies Ltd) v Crown Court at Nottingham* [2017] EWHC 1942 (Admin), the divisional court of the Queen's Bench Division held, at

[83] to [84] that the decision of the Court of Appeal in *C Plc v P* (one of those relied upon by Popplewell J in *Ablyazov* (above)) remained binding authority.

68. The defendant contends, however, that in light of the recent decision of the Privy Council in *Volaw Trust and Corporate Services Ltd v The Office of the Comptroller of Taxes* [2019] UKPC 29, the privilege may now in certain circumstances be invoked in relation to documents with an independent existence.

69. That case concerned notices issued by Jersey authorities, in response to requests from Norwegian authorities, for documents in the possession of Volaw, an entity which administered the affairs of a Mr Larsen and companies associated with him. Mr Larsen had been convicted of tax fraud in Norway and he, his associated companies and Volaw were all subject to a further criminal investigation in Norway. The Norwegian government authorities could not guarantee that documents obtained would not be used in criminal proceedings against Volaw or its employees, owners or board members. Failure to comply with the notices constituted an offence, punishable by imprisonment or a fine. Volaw, and the other defendants, contended that the notices, although they required production of pre-existing documents, were incompatible with Article 6 of the European Convention on Human Rights.

70. In the English authorities, pre-*Volaw*, the conclusion that the privilege against self-incrimination did not extend to documents with an independent existence relied, so far as Article 6 is concerned, on the European court decision of *Saunders v United Kingdom* (1996) 23 EHRR 313. In *Volaw*, however, Lord Reed, at [44] concluded that in light of more recent authority of the European court, in particular *Ibrahim v United Kingdom* (Applications Nos 50541/08, 50571/08, 50573/08 and 40531/09) a more nuanced approach is to be taken. The Grand Chamber in *Ibrahim*, at [266], said:

> "The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saunders v. the United Kingdom*, 17 December 1996, §§68-69, Reports 1996-VI; *Jalloh*, cited above, §§100 and 102; and *Bykov*, cited above, §92). The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see *John Murray*, cited above, §45; *Jalloh*, cited above, § 100; and *Bykov*, cited above, §92)."

71. Accordingly, the privilege protected against the obtaining of evidence by coercion or oppression. At [267] the Grand Chamber said that the European court had identified at least three kinds of situations which give rise to concerns about improper compulsion in breach of Article 6:

> "The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence (see, for example, *Saunders*, cited above; and *Brusco v. France*, no. 1466/07, 14 October 2010) or is sanctioned for refusing to testify (see, for example, *Heaney and McGuinness*, cited above; and *Weh v. Austria*, no. 38544/97, 8 April 2004). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (see, for example, *Jalloh*, *Magee* and *Gäfgen*, all cited above). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (see *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX)."

72. Lord Reed, at [45] of *Volaw* noted that the fundamental difference between real evidence and statements is that as the former has an existence independent from any compulsion placed on the suspect, its reliability as evidence is not affected by the use of compulsion to obtain it. That explains why the focus is on the use of *improper* compulsion by the authorities. At [46] he pointed out that the only situation concerning real evidence which the court in *Ibrahim* mentioned was "physical or psychological pressure, often in the form of treatment which breaches Article 3." Article 3 prohibits torture and other forms of ill-treatment.

73. Mr Watkinson, who appeared for the defendant, pointed to other decisions of the European court which have relied on the privilege, in connection with the production of real evidence such as bank statements, where the compulsion relied upon consisted of a threat of imprisonment: see, for example, *Funke v France* in 1993, in which Mr Funke, while under investigation for possible offences under the customs code, was prosecuted for his failure to provide foreign bank statements. No civil proceedings for the recovery of tax or criminal proceedings for any offence (other than the failure to produce documents) were ever brought.

74. Lord Reed, in *Volaw*, noted (at [48] to [49]) two points of difficulty the English courts had had with *Funke*. The first was in identifying the relevant criminal proceedings in which Mr Funke was deprived of his right to a fair trial. The answer to that, however, was that the right not to incriminate oneself could be violated contrary to Article 6, "by the prosecution and punishment of a person for his refusal to incriminate himself in pre-trial investigations."

75. The second difficulty was the apparent inconsistency with the later case of *Saunders v UK*. Lord Reed commented that as later judgments of the European court had made clear, "there may be a violation of article 6 where real evidence is obtained by means of what was described in *Ibrahim* as

"physical, psychological pressure…", but that in other cases the court had continued to find violations of article 6 in cases resembling *Funke* where persons were prosecuted and punished for refusing to produce real evidence which would incriminate them.

76. At [59], Lord Reed described the reasoning and effect of the judgments in *Funke* and two other cases with a similar outcome, as remaining "unclear":

> "One would hesitate to conclude that the court intended in these cases to establish an absolute rule that the prosecution and punishment of a person who refuses to provide incriminating real evidence in pre-trial investigations will contravene article 6. Such a rule would fatally undermine the court's acceptance in *Saunders*, at para 69, that a suspect can properly be required to provide other types of real evidence, such as samples of breath, blood, urine and DNA: a requirement which is normally underpinned by the threat of a sanction in the event of non-compliance. It may be that these judgments should be understood, consistently with the general approach adopted by the Grand Chamber in such cases as *Jalloh v Germany*, *O'Halloran and Francis v United Kingdom* and *Ibrahim v United Kingdom*, as reflecting the nature and degree of the compulsion or coercion used in order to obtain documents and information from the applicants (documents which might, in *Funke* at least, have been obtained by other, unobjectionable, means). Understood in that way, these cases might be fitted into the general pattern of later cases concerned with the use of oppressive methods of obtaining real evidence."

77. At [60], however, he said that the *Funke* line of cases was in any event distinguishable, because it concerned situations where the applicant was prosecuted and punished for his failure to produce self-incriminating evidence, and that was not the situation in *Volaw*.

78. At [61], Lord Reed said that it was appropriate to consider the appeals before the Privy Council in light of the four factors to which the European court in *Ibrahim* had directed attention. Those are:

> "the nature and degree of compulsion used to obtain the documents in question, the weight of the public interest in the investigation and punishment of the offences at issue, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained may be put."

79. The application of those factors to the circumstances in *Volaw* was considered at [62] to [67]:

(1) It was difficult to regard the compulsion arising from the service of the notices as falling within any of the three kinds of situations identified in [267] of *Ibrahim*. Nor were they comparable with the conduct held to be oppressive in the *Funke* line of cases, "even if those cases were of any

relevance in a situation where no prosecution for failure to provide the documents has taken place."

(2) There was substantial weight to be given to the public interest in effective international co-operation in the investigation of possible tax avoidance and, while this did not outweigh the right not to incriminate oneself when that right crystallises at trial, it may be a strong justification for requiring the provision of information and documents at the stage of pre-trial investigations.

(3) Considering the use to which the documents may be put, since the case concerned pre-trial investigations, it was not known what the documents might contain and what use might be made of them. If charges were brought and the Norwegian authorities sought to rely on the documents obtained at trial, then it would have been open to Volaw to object to the admission of the evidence. It was not for the courts of Jersey to anticipate the response of the Norwegian court at that later stage (or, for similar reasons, what a Jersey court might do in any subsequent criminal prosecution in Jersey).

80. At [70] the conclusion of the Privy Council was stated as follows:

> "In the light of all these considerations, the Board sees no reason to find at the present stage, which has not yet progressed beyond the service of notices as part of an investigation into possible offences, that the requirements of article 6 will not be met in relation to any proceedings brought against any of the appellants in Jersey, or that those requirements would not have been met in relation to any proceedings brought against them in Norway. The notices do not in themselves deprive any of the appellants of their right to a fair trial. The complaint based on article 6 of the ECHR is therefore rejected."

81. Mr Watkinson accepted that I am bound by the Court of Appeal authority in this jurisdiction to which I have referred above. At best, the decision of the Privy Council in *Volaw* is of persuasive effect only.

82. As in *Volaw*, this is not a case where the defendant is subject to prosecution for any offences. Further, unlike in *Volaw*, this is not even a case where documents are sought in connection with any pre-trial investigation. As I have already noted, disclosure can only be ordered ancillary to a freezing order for the purpose of ensuring the effectiveness of the order, and that does not include investigating whether there have been prior breaches of the order. At most, therefore, there is a possibility that as a by-product of the disclosure sought for a different purpose, HMRC might become aware of material to found further contempt proceedings.

83. In such a case, the principle I derive from the Board's opinion in *Volaw* is that a party may rely on the privilege against self-incrimination to avoid disclosing documents having an independent existence only where the compulsion under which they are obtained is of the type mentioned at [267] of *Ibrahim*, as

involving a breach of Article 3. There is no suggestion that the compulsion arising from an order that the defendant provide further disclosure in this case falls within that category.

84. Since the *Funke* line of cases is distinguishable in this case (as in *Volaw*) and there is no clear endorsement of them in *Volaw*, I do not find anything in them which provides any persuasive reason for departing from the authorities binding on me in this jurisdiction, referred to at [66] and [67] above.

85. If it were necessary to consider the application of the other factors identified in *Ibrahim* (see [61] of *Volaw*), then I consider that they point heavily towards the defendant being unable to rely on the privilege here:

(1) The public interest in the court ensuring that its orders are effective carries great weight.

(2) At this stage there is no certainty as to what the documents might reveal and whether any committal proceedings would be instituted even if the documents revealed past breaches. I do not regard HMRC's refusal to give an undertaking *not* to bring further committal proceedings as relevant in this regard. Without knowing what the documents might reveal it is perfectly understandable for a claimant not to tie its hands by undertaking not to bring any further committal proceedings, however serious the breaches that might later be revealed.

(3) If incriminating documents are produced, and committal proceedings are brought in reliance on them, then the defendant has the significant safeguard under Article 6 to seek to exclude the evidence. As in *Volaw*, it is not for me to anticipate how the defendant's rights under Article 6 might be protected in that event.

86. Accordingly, I conclude that the defendant is not in this case entitled to rely on the privilege against self-incrimination to refuse to disclose the bank statements for the Emirates and Canada Life accounts from 17 July 2015 to date.