IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 172 of 2016 (IMJ)

BETWEEN

MERIDIAN TRUST COMPANY LIMITED

AMERICAN ASSOCIATED GROUP LTD

Applicants

AND

(1) EIKE FUHRKEN BATISTA

(2) 63X INVESTMENTS LTD

(3) 63X FUND

(4) 63X MASTER FUND

(5) MAPLES CORPORATE SERVICE

(6) BANCO BTG PACTUAL S.A.

Respondents

IN CHAMBERS

Appearances: **Mr. G Halkerston of Counsel instructed by Ms. L Hatfield and Mr. J McGee of Solomon Harris. Mr. G Halkerston of Counsel instructed by Mr. McGee only on 20 July 2017.**
Mr. J Golaszewski and Ms. A Dixon of Carey Olsen on behalf of the 2nd to 4th Respondents. Ms. Dixon only on 20 July 2017.

Before: **Hon. Justice Ingrid Mangatal**

Application by Summons filed 1 June 2017 Heard:	**15 June 2017**
Application by Summons dated 29 June 2017 Heard:	**20 July 2017**
Draft Judgment (No. 5) Circulated:	**3 October 2017**
Judgment (No.5) Delivered:	**9 October 2017**

HEADNOTE

WFO - Unless Orders as a result of non-compliance with disclosure orders.

JUDGMENT

The First Hearing

1. On 15 June 2017, I heard an application by the Applicants for a number of orders, including debarring and "*Unless Orders*", as set out in a Summons filed 1 June 2017 ("**the Application**"). The Application took place in the context of a Case Management Conference ("**the CMC**") listed for the Court to address two principal issues:

    1) Orders dealing with the consequences of any non-compliance with the 8 May Order by the Respondents; and
    2) Directions for the determination of the WFO on an *inter partes* basis.

2. I have made a number of Orders previously in this matter, commencing with the Worldwide Freezing Order **("the WFO")** against the First to Fourth Respondents and ancillary disclosure relief made on 28 October 2016 pursuant to section 11A of the ***Grand Court Law*** (2015 Revision) in aid of proceedings that have since been instituted in Florida, United States of America. I have also delivered a number of decisions and rulings and reasons for rulings as follows:

    (A) Unreported reasons for Ruling on WFO, delivered 11 November 2016 (Judgment No. 1);
    (B) Unreported Reasons for Ruling on 24 January 2017, delivered 16 February 2017 (Judgment No. 2);
    (C) Unreported Ruling, delivered 15 March 2017 (Judgment No. 3); and
    (D) Ex Tempore Ruling, delivered 27 April 2017 (Judgment No. 4).

3. I do not intend to set out much background to the instant applications, as they have been addressed in some detail in my earlier judgments/reasons.

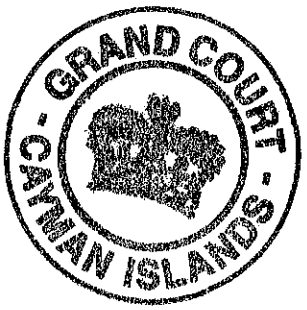
4. Mr. Halkerston, who represents the Applicants, submitted that both Mr. Batista and the 63X Companies are in breach of the disclosure orders which I made on 8 May 2017. It

was also argued that this was the fourth consecutive disclosure order that the Respondents are in deliberate breach of, i.e. the WFO itself, the 24 January 2017 Order, the 25 April 2017 Order, and the 8 May 2017 Order.

The Applicants' submissions are usefully divided into "*Matters to be determined against Batista*", and "*Matters to be determined against the 63X Companies*". I will also adopt those headings in summarising the submissions of the Applicants.

Matters to be determined against Mr. Batista

5. On 27 April 2017, I dismissed Mr. Batista's challenges to jurisdiction and substituted service. On 8 May 2017, I made the following orders (I will adopt Mr. Halkerston's summary of the orders gratefully):



(1) Mr. Batista was ordered (if he so chose) to acknowledge service by 11 May 2017 (paragraph 7);

(2) Mr. Batista was ordered, by 11 May 2017, to provide a more limited sub-set of his disclosure obligations, including disclosure - to the best of his knowledge - of his 10 most valuable assets and 5 biggest bank accounts outside of Brazil (para 8.1), and provision of authority letters in respect of current assets (para 8.2);

(3) Mr. Batista was ordered to comply with the remainder of his disclosure obligations contained in the WFO by 31 May 2017 (para. 9);

(4) To the extent that any of the above compliance might be incomplete, Mr. Batista was ordered to file an affidavit confirming his steps towards compliance by 31 May 2017 (paragraph 10); and

(5) To the extent that Mr. Batista was unable to comply with his disclosure obligations and had identified the same in an affidavit,

Mr. Batista was directed to issue a summons to vary paragraph 9 (paragraph 11).

6. Mr. Batista has not complied with any of the Orders of 8 May 2017. In his 17th Affidavit (Trainer 17), Mr. Trainer identifies Mr. Batista's non-compliance.

7. Mr. Halkerston submits that Mr. Batista has refused to comply, and further, that all that Mr. Batista has done is to raise yet more excuses for his non-compliance. Mr. Batista was, since the last hearing, released from prison on 28 April 2017. He is now under house arrest. Counsel characterised the affidavits of Mr. Batista (Batista 2) and Martins 3, both dated 11 May 2017, as spinning a familiar story: despite being released from prison and only now being subject to a House Arrest Order, Mr. Batista claims to be unable to comply in any manner whatsoever with the Grand Court's Orders. The assertion is that if Mr. Batista takes *any* step towards compliance with his disclosure obligations, this would be a breach of the House Arrest Order and he would be sent back to prison (Martins 3, paragraphs 10, 13; Batista 2, paragraph 15). It was Counsel's contention that Mr. Batista's claims of not being able to comply with his disclosure obligations are strained and opportunistic.

8. Counsel referred to the translation of the House Arrest Order, as approved by the Respondents, and exhibited to Martins 3, which states as follows:

> "*For these reasons, among the precautionary measures provided for under Title IX of the Code of Criminal Procedures, I understand as necessary, moreover in view of what had been decided by the judge competent for the case as set forth above, to decree precautionary measures alternate to preventive imprisonment, starting from the exercise of general precautionary power that is inherent to the regular exercise of jurisdiction.*
>
> *In view of what was set forth and in compliance with the preliminary decision of the Supreme Federal Court in the case files of HC No. 143247 MC/RJ, I order application of the following ALTERNATE PRECAUTIONARY MEASURES to Defendant EIKE FUHRKEN*

BATISTA, without prejudice of a subsequent reassessment by the judge of the competent jurisdiction:

1. *withdraw himself or remain withdrawn from the direction/management of the involved companies, particularly the companies of the "X" Group;*
2. *prohibition on keeping contact with any person that is a Defendant or is being investigated in case files under way before the 7th Federal Criminal Court of Rio de Janeiro, or in other case files related to the "Carwash Operation" (13th Federal Court of Curitiba) and its ramifications:*
3. *Defendant must, since now, agree with the permanent lifting of telephonic and telematic secrecy, for the duration of the precautionary measure;*
4. *integral confinement at home, except for a situation of medical emergency, that should be communicated forthwith to the court;*
5. *heed all judicial communications;*
6. *deliver at the Registrar's Office of Court his passport(s) within 24 hours, if he did not deliver them until now;*
7. *prohibition on change of address without judicial authorization;*
8. *defense shall keep a record of all persons entering the real estate where the measure is being complied with, being certain that visits of people that are neither relatives nor attorneys regularly appointed with their powers of attorney in the case files, are forbidden;*
9. *Federal Police is authorized to perform visits at the real estate where the measure is being complied with, at any day of the week, without previous communication or court authorization, to check if all conditions are being complied with."*

9. It was submitted that on any reading of the House Arrest Order, the extreme position adopted by Mr. Batista is wholly inconsistent with the terms of that order. It was submitted that the fact that Mr. Batista can comply with the Cayman Disclosure Orders is corroborated by a Brazilian criminal lawyer in the affidavit of Fernanda Prates Fraga 1, (filed on behalf of the Applicants), as follows:

    1. The House Arrest Order does not restrict Mr. Batista from complying with his disclosure obligations under paragraphs 8 and 9 of the WFO (Fraga 1, para 9);

2. Although Mr. Batista is required to withdraw from the management of companies allegedly involved in Mr. Batista's bribing the Governor of Rio de Janeiro, he is at liberty to communicate with third parties by telephone and electronic communication, and to use the internet (paragraph 10(c)). Such communications can be monitored by the Brazilian authorities but there is no impediment to those communications taking place;

3. Mr. Batista is allowed personal visits from family members (such as Thor Batista) or attorneys acting for him in respect of the Carwash Operation. These meetings would not be monitored (paragraph 10(d)); and

4. There is nothing in the House Arrest Order which impedes Mr. Batista from disclosing his world-wide assets or identifying - to the best of his knowledge - his ten most valuable assets and five biggest bank accounts (paragraph 13(a)). There is no impediment to Mr. Batista signing authority letters (paragraph 14).

10. It was argued that unless Mr. Batista can establish that compliance with the terms of his disclosure obligations constitute direction or management of a company involved in the criminal case, the House Arrest Order is not engaged at all. Further, that Mr. Batista has not identified any specific basis upon which the disclosure obligations so engage the House Arrest Order.

11. The Applicants, at the paragraphs of the Summons for Directions referred to below, seek the following case management orders against Mr. Batista:

1. An order against Mr. Batista, pursuant to O. 28, r 10 of the Grand Court Rules 1995 (**"the GCR"**) debarring Mr. Batista from

opposing the January Summons, alternatively an Unless Order (paragraphs 1-3) ("**the Batista Debarring Orders**").

2. Save in the event that a sanction in an Unless Order applies, the Applicants' January Summons (for continuation of the WFO) as against Mr. Batista be listed on the first available date on or after 29 June 2017 (paragraph 13).

3. Orders for information to be provided (including from Carey Olsen) on the steps taken by Mr. Batista to comply with his disclosure Orders (paragraphs 4-5) ("**the Renova Orders**").

12. It was Counsel's submission that, since Mr. Batista has failed to file an Acknowledgement of Service, he cannot participate in these proceedings. Ultimately, it was agreed that Summonses filed on behalf of Mr. Batista would be adjourned so that this point would not have to be dealt with.

13. Additionally, it was submitted, that the GCR provides specific procedural mechanisms which the Applicants rely upon in seeking the Orders proposed in the Summons.

14. These proceedings were commenced by Originating Summons. Reference was made to Order 28, Rule 10, of the GCR, where the Court has a specific express power, as follows:

> *"If any party to a cause or matter begun by originating summons...does not comply with this Order, or with any order of direction of the Court as to the conduct of the proceedings, the Court may order that the same cause or matter or counterclaim be dismissed or, as the case may be, the defendant be debarred from adducing such evidence in the cause or matter or counterclaim as the Court may specify, or (if it thinks appropriate) that the defence or counterclaim be struck out and judgment entered accordingly."*

15. Reference was also made to Order 28, Rule 4(2) of the GCR which provides for the Court's power to give directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.

16. Mr. Halkerston also referred to the commentary at 28/1A/2 and 28/4/2 of the 1999 ***Supreme Court Practice***, as confirming that the Applicants' request for a final hearing with a debarring order is the appropriate method of obtaining the summary disposal of the Originating Summons and January Summons against Mr. Batista in the circumstances of this case.

17. In addition to the Batista Debarring Orders, the Applicants ask the Court to grant the Unless Orders detailed at paragraphs 2-3 of the Summons for Directions. They rely upon the principles argued at the February hearing and summarized at paragraphs 112 to 168 of the 15 March 2017 Ruling. It was submitted that Mr. Batista cannot now complain about sanctions being imposed for his deliberate non-compliance.

18. Reference was made to paragraphs 112 - 166 of the March Ruling, where I outlined the relevant principles and authorities, and described the position (as at March 2017, when Mr. Batista was imprisoned) that *"this is a difficult, delicately poised set of circumstances"*, and that, at paragraph 166, I stated that <u>at that time</u> it would not be appropriate to make an Unless Order. (Applicants' emphasis).

19. It was submitted that since then, Mr. Batista has deliberately breached two further orders of the Court, namely the 25 April 2017 Order and the 8 May 2017 Order. Moreover, say the Applicants, Mr. Batista has been released from prison and they submit that the conditions of his House Arrest plainly allow him to give disclosure (or at the very least, executed authority letters, some disclosure, and an explanation as to why full disclosure is not possible). Furthermore, it was submitted, Mr. Batista is free to acknowledge service, but has chosen not to do so.

20. The Applicants submitted that the scales are no longer delicately poised; instead, they say, they weigh firmly in favour of imposing a sanction.

21. The Applicants go on to ask that a short hearing be fixed, as sought in paragraph 13 of the Summons for Directions, for the formal determination of the *inter partes* WFO sought against Mr. Batista.

The Renova Orders

22. The Applicants seek the provision of an affidavit from Carey Olsen detailing the steps towards compliance made by Mr. Batista. They rely upon the decision of Foster J in ***Renova Resources Private Equity Limited v Gilbertson and others*** – 25 November 2010 Unreported - FSD 61 of 2010.

Matters to be determined against the 63X Companies

23. The 63X Companies were ordered to rectify the wording of the authorisation letters, so as to include, as they were previously ordered to, the historic disclosure prescribed by the Court. The Applicants assert that the Respondents have not done so, and nor have they applied to vary the 8 May 2017 Order.

24. At paragraphs 13-14 of Trainer 17, Mr. Trainer states the following as being some of the instances of the 63X Companies continuing non-compliance :

> *"13. The 63X Companies have breached, or continue to be in breach, of the WFO and/or the April Order as at the date of my affidavit in the following ways:*
>
> *13.1. The 63X Companies provided the sworn affidavit of Thor Batista dated 23 January 2017 ("**Thor 1**") confirming asset disclosure purportedly in compliance with paragraph 5 and 7 of the WFO. This was untrue- a large asset belonging to the 63X Companies was omitted, such asset being cash in a bank account in*

Luxembourg containing USD 367,118. Thor Batista did not refer to this account until its existence was referred to by the Applicants.

13.2. *The 63X Companies provided a further sworn affidavit, the Sixth Affidavit of Thor Batista dated 6 March 2007 ("**Thor 6**"). In Thor 6, the 63X Companies admitted to omitting the above-referenced bank account from Thor 1, but confirmed (again in purported compliance with paragraphs 5 and 7 of the WFO) that there were "no other assets belonging (directly or indirectly) to the Second to Fourth Respondents".*

13.3. *That confirmation was untrue. The 63X Companies did not disclose, in either Thor 1 or Thor 6 ,or in any other affidavit the fact that 63X Master Fund was and is owed USD2.5 million by CCX Colombia S.A. This receivable matured in April 2017 and remains payable. 63X Master Fund concealed the existence of this asset until it was belatedly disclosed in the Eighth Affidavit of Thor Batista dated 11 May 2017 ("**Thor 8**"). It was admitted, in Thor 8, that the receivable was an "asset" as defined by the WFO. The Applicants note that, once again, the 63X Companies have failed to disclose one of their largest assets and Thor Batista has admitted this but provided no explanation for why the 63X Companies breached the orders of the Court by not disclosing this asset.*

13.4. *This is yet another example of the 63X Companies and Thor Batista not disclosing assets until after those assets have been identified by the Applicants and brought to the attention of the Respondents. It is a fair inference that there are other assets of the 63X Companies which the Respondents have refused to disclose and that such refusal is motivated by a desire to keep those assets hidden from the Court and the Applicants.*

13.5. *Moreover, the 63X Companies have failed, in breach of paragraph 12 of the April Order, to comply with the obligations contained in paragraphs 5, 7, 10(b) and 12 of the WFO. The 63X Companies were obliged to*

comply with these provisions by 11 May 2017, but they have not done so.

13.6. I explain the ways in which their compliance is deficient in the paragraphs below:

13.6.1. The 63X Companies have refused to deliver up Asset Documents in respect of their assets and, in particular, bank statements dating back to September 2012 for at least those accounts listed at paragraph 13 of the Fifth Affidavit of de Araujo dated 17 February 2017. The 63X Companies were obliged to deliver up such Asset Documents by 11 May 2017 but they have not done so in breach of paragraph 10(b) of the WFO.

13.6.2. The 63X Companies have refused to sign authority letters in respect of the accounts referred to at paragraph 13 of the Fifth Affidavit of Mr. Thomas de Araujo dated 17 February 2017 (to the extent that any of those bank accounts were open after 1 September 2012). The 63X Companies were obliged to sign such authority letters by 11 May 2017 but, again, they have not done so in breach of paragraph 12 of the WFO.

13.6.3. The 63X Companies have refused to disclose their current assets held indirectly outside the Cayman Islands and have failed to provide a sworn affidavit of such asset disclosure in breach of paragraph 6 and 7 of the WFO. The 63X Companies were obliged to disclose such current assets and provide the associated affidavit by 11 May 2017 but, again, they have not done so.

14. The 63X Companies have repeatedly failed to comply with paragraphs 5 and 7 of the WFO; they have failed to deliver up particular asset documents; and they have refused to sign various authority letters and disclose particular current assets. The 63X Companies continue to treat the WFO with the "scant regard" noted by Mangatal J at the hearing on 26 to 27 April 2017."

25. It is the Applicants' further contention that remarkably the only evidence adduced by the 63X Companies is Thor 8. The Applicants say that in this Affidavit, Thor Batista admits that the 63X Companies failed to disclose the $2.5.M Loan Receivable due to the 63X Master Fund from CCX Columbia S.A., which, Mr. Halkerston submits, is an admission

that there was a breach of the disclosure orders and that the contents of Thor's prior affidavits were false. Counsel says that no explanation has been given for this failure which is yet another example of assets which should have been disclosed in the first place.

26. It was argued that the natural inference is that there are other assets of the 63X Companies which have not yet been disclosed. Further, that *"the staunch refusal of the 63X Companies to provide historic disclosure and to execute authority letters in the terms of this Court's orders can only be explained on the basis that the Respondents know that such disclosure will lead to the identification of the existence and whereabouts of current assets."*

27. Accordingly, the Applicants say that they seek the following relief against the 63X Companies:

(1) An order pursuant to O.28, r.10 debarring the 63X Companies from opposing the January Summons, alternatively an Unless Order (paragraphs 6 - 7) (the **63X Debarring Orders**).

(2) Orders for information to be provided (including from Carey Olsen) on the steps taken by the 63X Companies to comply with the disclosure orders (paragraphs 9 -10) (the **Renova Orders**).

(3) Disclosure of particular documents referred to in Thor 5 and in relation to the $2.5 Million Loan Receivable (paragraph 8) (the **Additional Disclosure Order**).

(4) An order that Mr. Golaszewski of Carey Olsen is authorised to execute the Annex letters on behalf of the 63X Companies (paragraph 11) (the **Annex A Order**).

(5) An Order that Thor Batista attend the Grand Court for cross-examination on his first to eighth affidavits (paragraph 12) (the **Cross-Examination Order**).

(6) Save in the event that a sanction in an Unless Order applies, appropriate directions for the determination of the Applicants'

January Summons (for continuation of the WFO) as against the 63X Companies (paragraphs 14-16).

The 63X Debarring Orders

28. The Applicants say that, arguably, the case for a Debarring Order or Unless Order against the 63X Companies is *a fortiori*, in light of the fact that they are Cayman companies who have no impediment to compliance yet are in breach of their fourth successive disclosure order. It was submitted that Thor 8, is, with respect, evidence of the contempt in which the 63X Companies hold the Grand Court and its Orders.

29. Paragraphs 14 - 16 of the Summons for Directions set out suggested directions for the determination of the *inter partes* WFO against the 63X Companies.

30. Further, it was contended that, pursuant to ***GCR*** O. 28, r.1A(4) the 63X Companies ought to have served their evidence by 6 February 2017, (i.e. within 28 days of service).

31. It was submitted that it was appropriate for the 63X Companies to serve their evidence on the timetable set out in the Summons for Directions.

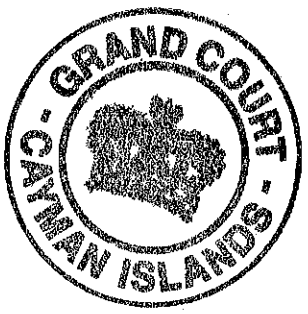
The Renova Orders

32. The Applicants submit that their submissions in relation to the Renova Order relief sought in respect of those steps taken by Mr Batista (see above) applies with equal force to the 63X Companies.

The Additional Disclosure Order

33. The Applicants have indicated that they seek disclosure of certain specific documents which are necessary in order to police the WFO and should be ordered as necessary and ancillary disclosure for the purposes of the WFO. The Court has inherent jurisdiction to

order disclosure to ensure the effectiveness of its orders as well as pursuant to section 11A of the ***Grand Court Law***. In particular, the Applicants seek disclosure of:



A. Documents in relation to the Magno Transfers and 63X Transfers. The Applicants say that Thor 5 has put in issue purported explanations for the transfer of very significant sums of money, including to wealth preservation counsel in Miami (Mr. Magno). Thor 5 has also indicated that "*Mr. Magno subsequently transferred USD $33 million back to the 63X Corporate Respondents between May and October 2015, and the 63X Companies have applied this cash in the ordinary course of business.*" It is the Applicants' contention that the disclosure of the documents evidencing these transfers, and the use to which the monies paid have been put, are central to identifying the 63X Companies' current assets.

B. Reference was also made by the Applicants to the fact that Thor 8 simply admits that the documents evidencing and relating to the $2.5 Million Loan Receivable was not disclosed by the 63X Companies. As no explanation was given as to why this asset was not disclosed, nor as to the current status of this asset, the Applicants seek disclosure so as to be able to police the WFO.

34. The Applicants also sought an order that Mr. Golaszewski sign the Annex A letters that the 63X Companies have refused to sign. Those letters were provided in a specific form annexed to the Summons for Directions.

35. It was submitted that such orders are vital tools to progress the policing of freezing orders when parties refuse to comply with orders to sign documentation. Reference was made to sections 11 and 11A of the ***Grand Court Law***, ***Astro Exito Navegacion v Chase Manhattan Bank*** [1983] 2 A.C. 787 at 802 as summarised in Gee, 6th Edition,

paragraphs 7-010 and 19-024. Reference was also made to ***Danchevsky v Danschevsky*** [1975] Fam 17, at 22.

The Cross-Examination Order

36. It was pointed out that Thor Batista has sworn eight affidavits on behalf of EBX, as the sole registered director of each of the 63X Companies. He has also sworn affidavits on behalf of his father, Mr. Batista. Thor 1 spoke to the assets of the 63X Companies.

37. It was submitted that it was well-established that the Court may order cross-examination of a person (including a non-defendant third party) in aid of a Mareva injunction, for the purpose of obtaining information about the location, value or details their assets. Reference was made to *Gee*, 6th Edition, 23-026-23-038, ***Kensington International Ltd. v Congo*** [2006] EWHC 1848(Comm.); ***McGrath, Commercial Fraud in Civil Practice***, 2nd Edition, at 20.124-20.134.

38. It was further submitted that such an order is appropriate in this case because there is uncontested evidence that Thor Batista has not disclosed the true asset position of the 63X Companies, and there is every reason to believe that there are still assets not yet disclosed. Information as to these assets would further the purpose of the WFO in revealing further assets that might otherwise be dissipated so as to prevent an eventual judgment against the Respondents going unsatisfied. After four separate disclosure Orders have been breached, the Applicants submit that cross-examination is a just and proportionate measure. It was submitted that the contents of Thor 8 demonstrate the contempt with which Thor Batista holds the Orders of the Grand Court.

39. Reference was made to two authorities. It was submitted that in ***JSC BTA Bank v Solodchenko*** [2011] EWHC 843, [38] – [56], Henderson J outlined the general principles governing an order for cross-examination, its purpose being to ascertain whether the affiant had fully and properly complied with their disclosure obligations and, insofar as they had not done so, to elicit the missing information which should have been supplied.

Orders for cross-examination were made on the basis that there were strong grounds for believing that the disclosure given thus far was incomplete.

40. Reference was also made to the ***Access Bank v Rofos Navigation*** litigation, where an order for cross-examination was made. It was submitted, that after non-compliance with disclosure obligations, of which the Court took a very serious view, the Court made an Unless Order to provide disclosure by 2:00 p.m. the following day, in default of which the defendants would be ordered to attend for cross-examination: [2012] EWHC 4065 (Comm). The defendants then applied to adjourn the cross-examination, which was refused, with the Court noting (at [8]) that there was no evidence on the attempts which had been made to comply with the disclosure order: see [2013] EWHC 441 (Comm).

Leave to Appeal

41. The Applicants also referred to the Respondents' Application seeking leave to appeal paragraphs 1 and 2 of the 8 May 2017 Order, which I made. My reasoning for those Orders appears in the *Ex Tempore* Ruling which I made on same date. It was the Applicants' submission that any appeal would be utterly hopeless. The Orders which I made at paragraph 1 and 2 are as follows:

> *"1. The Withdrawal Summons and the Adjournment Summons are dismissed.*
>
> *2. The Jurisdiction and Substituted Service Summons and the Discharge Summons are dismissed.*
>
> *....."*

The Respondents' Arguments

42. The Respondents made a number of submissions, which I rejected, as to why I ought to grant leave to appeal.

Unless Order Relief

43. In relation to the Applicants' Application, it was pointed out that the submissions were being advanced on behalf of the 63X Companies only.

44. It was highlighted by the Respondents that whether or not the Court should make an Unless Order is a matter of discretion for the Court. It was submitted that the sanction sought by the Applicants will likely have very serious consequences for the 63X Companies and therefore the Court should, before imposing this kind of sanction, carefully consider whether such sanction is appropriate in all the circumstances of the case. In particular, it was argued that the Court should not make an order that imposes an obligation to do something that is impossible or that requires a party to perform an act which is not within its power.

45. It was submitted that there are three relevant factors which bear on the Court's exercise of discretion in the current circumstances and which point firmly against the making of an unless order. These factors were stated to be as follows:

A. The Respondents have been granted leave to appeal the historical disclosure aspects of the WFO. It was submitted that it cannot be correct on the one hand to accept that there is a real prospect that the historical disclosure provisions of the WFO ought not to have been included, and on the other hand to grant an unless order requiring compliance with such provisions;

B. The Respondents have sought leave to appeal Mangatal J's order dismissing, *inter alia*, the Substantive Summonses. Accordingly, the challenges to the WFO remain active. The Respondents, it was submitted, will suffer prejudice if they are forced to comply further with disclosure provisions where it is subsequently determined that the WFO should not have been made (or should not have been made in that form); and

C. Mr. Batista's current circumstances mean that it is impossible for the 63X Companies to comply with an *unless order* in the terms sought by the Applicants. In those circumstances, the debarring sanction would be inevitably triggered.

46. On behalf of the 63X Companies, Mr. Golaszewski also pointed out that Mr. Batista was being detained in a high security prison in Brazil (known as "*Bangu 9*") from 30 January 2017 until 30 April 2017. On 30 April 2017, Mr. Batista was released to his home in Rio de Janeiro under Court imposed precautionary measures (the **"House Arrest Order"**).

47. It was submitted that the conditions of Mr. Batista's House Arrest Order and the practical consequences which affect compliance with the terms of the WFO, are that, in particular, Mr. Batista is prohibited from engaging in the direction, management or administration of any companies which he is a director of or that he has control of, or interest in.

48. Reference was made to Mr. Martin, Mr. Batista's criminal lawyer's evidence that if Mr. Batista were to take any steps toward complying with the obligations in the WFO, in particular the disclosure obligations, it would constitute a breach of the House Arrest Order. Further, it was argued, that in circumstances where Mr. Batista breached the House Arrest Order, it would result in Mr. Batista's immediate return to prison at Bangu 9.

49. Reference was made to the affidavit evidence filed on the Applicants' behalf from their Brazilian Law Expert, Fernanda Fraga. Ms. Fraga's evidence, in essence, is that the House Arrest Order does not restrict Mr. Batista from complying with the disclosure requirements under the WFO.

50. It was submitted that, with respect, Ms. Fraga does not appreciate the actual situation faced by Mr. Batista and seems to ignore: (i) the reality of the seriousness of any

purported breach of the House Arrest Order; (ii) how closely Mr. Batista is being monitored by authorities; or (iii) how certain actions could be perceived by the authorities.

51. It was argued that the Court has before it competing opinions from two experts of foreign law as to whether certain steps will constitute a breach of a foreign Court Order. It was submitted that that is not an issue which the Court is capable of resolving summarily on the papers. It was submitted that in the premises, and bearing in mind the severe consequences which a breach of the House Arrest Order would have to Mr. Batista, it was submitted that a cautious approach should be adopted. It was the position advanced by the 63X Companies that it would be wrong and unfair to make the Unless Orders sought.

Attorney Affidavit Relief

52. It was submitted that the relief by which the Applicants seek to have a Partner of the firm Carey Olsen file and serve an affidavit explaining the precise steps taken by each of the 63X Companies in compliance with their disclosure obligations is draconian relief and ought to be refused.

53. As regards the decision of Foster J in the ***Renova*** case, relied upon by Applicants, it was submitted that there is a fundamental distinction between that case and this case.

54. Counsel submitted that the ***Renova*** case deals with the primary obligation that underpins the principle of justice in litigation: that parties produce for inspection by way of discovery all documentation that is relevant to the issues in dispute. It was posited that the general litigation obligation for litigants to give disclosure is enshrined in the GCR and is one of the "*first principles*" of litigation. The reason for that rule, it was submitted, was that a lack of discovery renders a fair trial of the action no longer possible. However, it was submitted, there is no such concern in this case.

55. It was argued that the disclosure obligations under the WFO are not general litigation discovery obligations at all. The disclosure obligations are orders made by the Court which are ancillary to the Freezing Order. A failure to comply with the disclosure obligations does not therefore affect the fair trial of the Cayman Proceedings (the freezing element is not impacted) or the Florida Proceedings.

56. It was further submitted that such an affidavit would be inadmissible as it would not be within the direct personal knowledge of any partner at Carey Olsen. Further, such an affidavit would have little practical utility as it would consist entirely of hearsay evidence and simply restate the clients' instructions.

Cross-Examination Relief

57. Mr. Golaszewski submitted that the Court should refuse to order cross-examination relief for the following reasons:

(A) An order for cross-examination is itself "*unusual*" and the Applicants have not provided compelling reasons which ought to persuade the Court to make such an order;

(B) An order for cross-examination is unnecessary and disproportionate;

(C) The Applicants have not demonstrated that there is any practical utility in requiring Mr. Thor Batista to travel to the Cayman Islands for cross-examination.

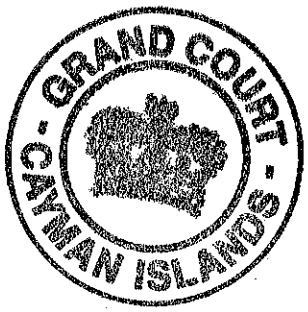
58. It was submitted that it is entirely disproportionate for Mr. Thor Batista to be compelled to travel to the Cayman Islands for cross-examination. It was submitted that, as Mr. Thor Batista resides in Rio de Janeiro, in Brazil, the costs for him to travel to the Cayman Islands and to stay for an undefined period of time will not be insignificant and will have to be borne by the 63X Companies.

Directions for the Continuation of the WFO

59. It was the Respondents' submission that Mr. Batista's input and explanations are necessary in order to address a number of transactions relied upon by the Applicants in support of their contention that he has engaged in the improper dissipation of the Respondents' assets.

60. Further, it was contended that the Respondents are unable fairly to oppose the Applicants' application to continue the WFO without effective access to Mr. Batista. Therefore, the argument continues, the proper course is to direct that the Summons to continue the WFO is fixed to be heard on a date to be confirmed (by the parties and the Court) after Mr. Batista is no longer subject to the House Arrest Order. Counsel continues, that when Mr. Batista is released from the House Arrest Order, it is envisaged that the Respondents will file their evidence in relation to the Summons six weeks thereafter and that the parties can then liaise with a view to agreeing directions, for the exchange of evidence and other matters.

61. It was also argued that to deal with the Summons for Continuation in that manner would fairly balance the competing interests of the parties. In particular:



(A) A hearing of the Summons after Mr. Batista is no longer subject to the House Arrest Order will cause no real prejudice to the Applicants. This is because the WFO will continue in the meantime, as it has since it was first notified to the Respondents in January, without its effectiveness being in any way impaired.

(B) On the other hand, if the Summons were to be heard before Mr. Batista is properly able to give his instructions, the prejudice to the Respondents, it was submitted, would be manifest, as their ability effectively to oppose the application would be seriously and unfairly undermined.

62. On 15 June 2017, I dealt with some of the applications sought, and reserved my decision with respect to other aspects. On that date, I refused the applications by the 2nd to 4th Respondents for leave to appeal from my decision dismissing the Respondents' substantive Summonses.

The Second Hearing

63. The second hearing which was held on 20 July 2017, was brought by way of Summons dated 29 June 2017, in which the Applicants sought Unless Orders against the 63X Companies consequential on the refusal of the 63X Companies to comply with the Order I made on 15 June 2017 ("**the June Order**"). At that time I had not yet been in a position to make a ruling on the "*Unless Order*" relief sought.

64. The relevant terms of the Order for the purpose of the second hearing application are as follows:

> "……
>
> *1. The Second to Fourth Respondents shall provide by 4:00 pm on 23 June 2017 disclosure of:*
>
> *1.1 Documents evidencing the two transfers of $15M referred to in paragraph 49 of the Fifth Affidavit of Thor Batista (the **Magno Transfers**), and correspondence relating to the same.*
>
> *1.2 Documents evidencing instructions or directions given to or by the Second, Third or Fourth Respondent in respect of the Magno Transfers, and correspondence relating to the same;*
>
> *1.3 Documents evidencing the transfer of the sum of $33M to the Second, Third or Fourth Respondents between May and October 2015 referred to in paragraph 49 of the Fifth Affidavit of Thor Batista (the **63X Transfers**) and correspondence relating to the same.*

1.4 Documents evidencing the application by the Second, Third and Fourth Defendants of the monies received by them pursuant to the 63X Transfers and correspondence relating to the same.

1.5 Documents evidencing the use to which the monies paid pursuant to the Magno Transfers were put between the payment of the Magno Transfers and the receipt of the monies pursuant to the 63X Transfers and correspondence relating to the same.

*1.6 Documents evidencing and relating to the loan from the Fourth Respondent to CCX Colombia SA referred to paragraph 53 and 54 of the Sixth Affidavit of Thomas de Araujo (the **CCX Receivable**), including but not limited to documents relating to the repayment or renegotiation of the CCX Receivable and correspondence relating to the same.*

2. *Mr. Jan Golaszewski of Carey Olsen shall execute on behalf of each of the Second to Fourth Respondents, by signing his name to, the letters attached at Annex A hereto and shall provide a signed copy of each letter to the offices of Solomon Harris by 4:00 pm on 16 June 2017.*
3. *The Second to Fourth Respondents shall by 4:00 pm on 23 June 2017, provide to Solomon Harris the bank names and addresses in respect of the Second to Fourth Respondents bank accounts detailed in the letters attached at Annex B hereto.*
4. *Solomon Harris shall by 4:00 pm on 26 June 2017, provide to Mr. Jan Golaszewski of Carey Olsen, for signature the letters of attached at Annex B for which the Second to Fourth Respondents provided the information in accordance with paragraph 3 above.*
5. *Mr. Jan Golaszewski of Carey Olsen shall execute on behalf of each of the Second to Fourth Respondents, by signing his name to, the letters provided to him pursuant to paragraph 4 hereof and shall provide a signed copy of each letter to the offices of Solomon Harris by :00 pm on 27 June 2017."*

65. Mr. Halkerston submitted that Paragraph 1 of the June Order imposed limited specific disclosure obligations upon the 63X Companies by 4 pm on 23rd June 2017. Furthermore, no application was made to extend the time for compliance with the June Order.

66. The Applicants argued that the 63X Companies had plenty of opportunity to comply with the June Order and nothing short of an "*Unless Order*" will have any effect on the controlling minds of the companies.

67. It is the Applicants firm view that there is overwhelming evidence that the 63X Companies are deliberately refusing to comply with the Orders made by this Court and that this is part of Mr. Batista's strategy to frustrate the core purpose of the WFO.

68. The Applicants therefore sought an Order in the following terms:-

> "*..1. Unless each of the Second to Fourth Respondents comply with the paragraph 1 of the Order dated 15 June 2017 by 4:00 pm two days following the grant of the order sought by this summons, the Worldwide Freezing Order dated 28 October 2016, as varied by further orders on 16 November 2016, 14 December 2016, 22 December 2016, 6 January 2017, 13 January 2017, 24 January 2017, 15 March 2017, 27 April 2017 and 15 June 2017, be continued on an inter partes basis as requested in the Applicants' Summons dated 16 January 2017 against each of the Second to Fourth Respondents until 28 days after the granting of any final judgment in the Florida Proceedings against all of the First to Fourth Respondents.*
>
> *2. The Second to Fourth Respondents do pay the costs of this Summons forthwith on an indemnity basis.*"

69. The Applicants filed the Eighteenth Affidavit of Richard Trainer in support of their application, which provided an update on the situation since the hearing on 15 June 2017,

in which he states "*....the Respondents have not disclosed any documentation relating to the issues referenced above in breach of paragraph 1 of the June Order.*"

70. In their response to this Summons, the 2nd to 4th Respondents essentially repeat their submissions that they made in June opposing the grant of Unless Orders.

Discussion and Analysis

71. The Court notes that in relation to the Application on 15 June 2017, the Respondents relied upon the fact that they then had extant appeals in relation to the historic disclosure order, as well as an application to the Court of Appeal for leave to appeal the dismissal of the Respondents' substantive summonses. However, all appeals and applications for leave have since been abandoned.

72. In my judgment, it is now clear that the Respondents have failed to comply with the Court's Orders upon a number of occasions. Whilst it is not easy to unravel precisely what the House Arrest Order applies to, it seems plain to me that there is nothing in that Order to have stopped Mr. Batista from giving disclosure of some of the matters he was previously ordered to give. His extreme position taken that he cannot provide any disclosure whatsoever as a result of the House Arrest Order, is not justified. For example, the Order made 11 May 2017, requiring Mr. Batista to provide minimal compliance, including disclosure, to the best of his knowledge, of his ten most valuable assets, and five biggest bank accounts outside of Brazil, is to my mind, plainly an Order that he could have complied with, or alternatively sought to explain his steps toward compliance. He has not done either of these things.

73. It is also plain that the 63X Companies have made no effort to comply with a number of the Court's Orders, including the 15 June 2017 Order. No documents have been provided as required by that Order, and no application has been made to extend the time for compliance.

74. In my Ruling on 15 March 2017, I had indicated that considerations relevant to the grant of Unless Orders were delicately poised. At this stage, there is no longer any delicate balance. In addition, as I said in my Ex Tempore Ruling of 27 April 2017, delivered 28 April 2017, at paragraph 5:

> *"The Respondents have treated the Court's Orders with scant regard. This is not the first time that they are acting as if the Court had never made orders, with no satisfactory explanation as to why or what efforts have been made to comply."*

75. I accept that the 2nd to 4th Respondents have failed to comply with the Court's Orders, as set out in paragraphs 13 - 14 of Trainer 17. I am also of the view that in Thor 8, it has been conceded that the 63X Companies failed to disclose the US 2.5M Loan Receivable discussed at paragraph 25 (above) and that no proper explanation has been given for this.

76. In addition, the manoeuvres of these Respondents have been very telling. They filed substantive Applications challenging the jurisdiction of this Court, and seeking to set aside the Order for Substituted Service. They subsequently filed summonses for Adjournment and for Leave to Withdraw those Applications. They also filed Appeals and Applications for Leave to Appeal, all of which have now been abandoned. The Respondents have plainly engaged in tactical behaviour aimed at avoiding disclosure and have deliberately flouted the Orders of this Court.

77. In my judgment, it is plain that nothing short of Unless Orders are appropriate to deal with the noncompliance with the Court's Orders evidenced herein – see ***JSC BTA Bank v Ablyazov*** [2010] EWHC 2219 (QB), paragraph 38. I am of the view that Unless Orders are preferable to debarring relief, since in fact the Applicants would potentially stand to benefit from compliance with disclosure, albeit far beyond the time previously ordered. I am not satisfied that a debarring order should be made in addition to Unless Orders.

78. As regards, Mr. Batista, I am therefore prepared to grant the relief sought at paragraphs 2 and 3 of the Summons filed 1 June 2017, save that the dates for compliance shall be by 4 p.m. on 13 October 2017 and 20 October 2017, respectively.

79. As regards the 63X Companies, I am minded to grant the orders sought at paragraph 1 of the Summons filed 30 June 2017 and paragraph 7 of their Summons filed 1 June 2017, with time for compliance being 13 October 2017. Save in the event that the sanctions of the Unless Orders apply, the Applicants' Summons dated 16 January 2017, is to be listed for the purpose of determining relief sought therein on the first available date after 10 November 2017, with a time estimate of two days.

80. As I have not had detailed submissions made in respect of the request for indemnity costs, I am minded to grant costs on the standard basis against the Respondents.

81. I do not think in all of the circumstances, that it is appropriate to grant the order sought requiring a Partner of Carey Olsen to swear any affidavit explaining the precise steps taken by the 2nd to 4th Respondents (the **Renova Orders**). We are beyond that field of enquiry now.

82. If the Respondents fail to comply with the terms of the Unless Order, then the WFO, as varied, will continue as requested in the Applicants' Summons dated 16 January 2017 against the Respondents, until 28 days after the granting of any final judgment in the Florida proceedings against all of the Respondents.

83. In my view, it would be disproportionate to grant the Cross-examination Order sought against Thor Batista and I therefore decline to make that Order.

84. I invite the parties to settle an order that complies with this Ruling.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

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