[2023 Gib LR 761]

MATTIN v. DOMAIN VENTURE PARTNERS PCC LIMITED (in cell administration), JUNO FUND SERVICES LIMITED, DOMAIN MANAGEMENT LIMITED and ROACHE

COURT OF APPEAL (Kay, P., Elias and Rimer, JJ.A.): November 23rd, 2023

2023/GCA/017

Civil Procedure—appeals—record of appeal—defendant granted extension of time to file record of appeal—serious delay but not particularly significant because parties had agreed to defer appeal hearing—court had considered merits of defendant's appeal against order to pay money into court and concluded that order wrongly made—not in interests of justice to subject defendant to wrongly made order because of inefficient progress of appeal

The claimant brought a claim in respect of certain investments.

The claimant was one of a number of investors in an experienced investor fund, namely Cell A of Domain Venture Partners PCC Ltd. ("DVP"), which was now in cell administration. DVP was formed to fund applications for top level internet domain names, with each bid made by one of 60 special purpose vehicle companies. The fourth defendant was the primary founder and promoter of DVP. Each of the 60 bid vehicles had an authorized nominal share capital of 100 ordinary shares carrying no economic rights but affording control of the company, and 100,000 redeemable preference shares carrying all the economic rights. A private placement memorandum was issued for each bid vehicle. The Cell A PPM provided *inter alia* that the bid vehicles had been independently valued and that a valuation report ("valuation book") had been produced, estimating the potential revenues of each bid vehicle. DVP issued a PPM to raise capital by selling redeemable shares to investors.

In addition to what was offered by the DVP PPM, prospective investors were offered additional incentives including a letter by the fourth defendant which provided:

> "I hereby confirm that £42,000,000 worth of direct equity (the 'Direct Equity') in the Bid Vehicles of [*sic*] which is held in my name shall be held on trust in the name of T&T Nominees Limited (a fiduciary company regulated by FSC and controlled by partners of Triay and

Triay) for benefit [*sic*] of investors in [DVP] until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has be [*sic*] repaid to them ('the Repayment Event'). Upon the Repayment Event the legal and beneficial title of such equity shall revert to [Mr. Roache]. Should the Repayment Event not take place within 54 calendar months from the Closing Date of [DVP] [*sic*] the Direct Equity shall be transferred to the Participating Shareholders in [DVP] pari passu based on the size of their Capital Commitments in [DVP]."

The claimant and other investors received no distributions from their DVP preference shares. The claimant alleged that the trigger condition for a distribution to be made under the trust to the investors was met in 2016 but that the fourth defendant had failed to make payment.

The claimant alleged that the fourth defendant had received some US$32m. from distributions made by bid vehicles. The claimant sought orders under CPR Part 25.1 and/or the inherent jurisdiction of the court against the fourth defendant for—

"the securing of the property and transfer of assets, monies, dividends or distributions received, transferred or held by [the fourth defendant]; for an Account of the said Trusts [*sic*] Property; for disclosure orders concerning the said Trust Property . . ."

In June 2021, the Chief Justice ordered the fourth defendant to pay £3.75m. into court (2021 Gib LR 348). The Chief Justice described the claimant's application as being "for orders against [the fourth defendant] to secure sums in excess of approximately $32m." and for an account in respect thereof and related disclosure orders. The Chief Justice stated that the claimant had a proprietary claim in respect of the US$32m. distributions received by the fourth defendant from the bid vehicle shares. As proprietary relief was sought, the Chief Justice considered the court's equitable jurisdiction to be engaged and he was not constrained by the provisions of CPR 25.1.

The fourth defendant filed a notice of appeal and grounds in July 2021. The grounds included that the Chief Justice had no jurisdiction to make the payment order. The claimant filed a notice of cross-appeal. Pursuant to r.57(5) of the Court of Appeal Rules 2004, the fourth defendant should have filed the record of appeal by September 13th, 2021. He did not do so and did not file an extension of time application until April 2023. However, the parties had been agreed until January 2023 that the hearing of the appeal be deferred. The Chief Justice refused the fourth defendant's extension of time application. The fourth defendant renewed his application before the full court.

In June 2022, the Chief Justice delivered a judgment on certain preliminary issues. He ruled that "£42,000,000 worth of direct equity . . . in the Bid Vehicles" meant £42m. worth of shares by reference to the valuations of the bid vehicles in the valuation book. The Court of Appeal dismissed the claimants' appeal (2022 Gib LR 298). The interpretation question was to be appealed to the Judicial Committee of the Privy Council. The claimant recognized that the £3.75m. order had given her greater security for her

personal trust letter claim that she was entitled to. She asked the Chief Justice to vary the £3.75m. payment order to an order for the payment into court of US$1.1m. In April 2023, the Chief Justice made the requested variation.

The fourth defendant filed a notice of appeal and grounds in April 2023. The claimant again filed notice of cross-appeal in May. The fourth defendant filed the record of appeal some 23 days late. He again sought an extension of time.

Held, granting the applications for extensions of time, allowing both appeals and dismissing the cross-appeals:

(1) The Chief Justice had been wrong in 2021 to make the £3.75m. order against the fourth defendant. There was no dispute that at least part of the fourth defendant's holdings of bid vehicle shares was held on trust for the investors, including the claimant, under the trusts of the trust letter. There was also no dispute that the investors, including the claimant, had a good arguable claim to an interest in a share of the distributions from such shares that the fourth defendant had received and apparently spent. By her application, the claimant was seeking full disclosure as to what had happened to that money. She was entitled to do so and obtained orders for the provision of information. To the extent that such information might disclose any accounts, funds or assets into which the distributions could be followed or traced, she might then be able to assert a proprietary claim in respect of such accounts, funds or assets. At the time of the hearing of her application she had, however, identified no such accounts, funds or assets. In those circumstances, the Chief Justice was not entitled to order the fourth defendant to pay £3.75m. into court. That figure was advanced as being the basic measure of her claim in respect of the trust assets and/or against the fourth defendant personally. The Chief Justice made it clear that the ordered payment was exclusively for the claimant's benefit. The only function the ordered payment could serve was to give her a security for her still unproved claim against the fourth defendant personally. However, the courts did not order a defendant to give security for a claimant's as yet unproved claim. There were provisions under the Civil Procedure Rules enabling the making of interlocutory payment orders against a defendant, including for the payment of money into court, but such provisions did not apply in this case. The only CPR provisions that the claimant relied upon were the "income" and "specified fund" provisions in CPR 25.1; and the Chief Justice did not purport to make his order under any provision of the CPR. The Chief Justice regarded the order as one he was entitled to make in exercise of the court's "equitable jurisdiction," although he did not identify any principle of equity that so entitled him and the court was not aware of any. He was influenced by his assessment that the claimant had a proprietary claim, *i.e.* a claim in respect of identifiable property. If her evidence had identified a property, fund or other asset into which it was arguable that the bid vehicle distributions could be followed or traced, the court would have had a jurisdiction to make a protective order directed at

safeguarding it. However, she had identified no such property, fund or other asset. The principles of equity did not entitle the Chief Justice to make the order he did. Equity followed the law and did not make orders requiring defendants to give security for still unproved money claims against them (paras. 58–66).

(2) If the fourth defendant were granted extensions of time enabling him to pursue both the 2021 appeal and the 2023 appeal, a successful challenge against the 2021 payment order would entitle him to an order setting aside the 2023 order as well (para. 70).

(3) The court considered the applications for extension of time by reference to the factors identified in *Denton* v. *T.H. White Ltd.*, namely (i) assessing the seriousness and significance of the failure to comply with r.57(5); (ii) considering why the default occurred; and (iii) evaluating all the circumstances of the case so as to enable the court to deal justly with the application, having regard also to (a) the need for litigation to be conducted efficiently and at proportionate cost; and (b) the need to enforce compliance with rules, practice directions and orders. As to the first factor, there was no doubt that the fourth defendant's default in complying with the r.57(5) requirements was very serious. He fell into default in September 2021 and did not seek to remedy it, despite prompting from the claimant's solicitors, until 2023. His explanation that it was an oversight by his solicitors was unsatisfactory. The default was at the lower end of the scale in respect of significance. It had no effect on the progress of the appeal between July 2021 and January 2023 because, for various reasons, the parties did not want it brought on during that period. The fourth defendant had not conducted the appeal efficiently but this had not caused any prejudice to the claimant. The court was required to consider all the circumstances of the case. Where, as in this case, the court had a clear view of the merits of the appeal, that would play a significant part in the balancing exercise when it came to evaluating the third *Denton* factor. In all the circumstances of the case, the court's conclusion that the 2021 £3.75m. payment order was wrongly made tipped the balance into satisfying it that the fourth defendant's application for an extension of time should be allowed. The function of the court was to administer justice. It could not be just to subject the fourth defendant to the burden of a wrongly made order requiring him to pay £3.75m. into court because of the inefficient way in which he progressed his appeal; an inefficiency which caused no prejudice to the claimant or to the fair disposal of the appeal. The court would therefore allow the fourth defendant's application in the 2021 appeal for a retrospective extension of time for the preparation and filing of the record of appeal in compliance with r.57(5) of the Court of Appeal Rules 2004. The court would treat the 2021 appeal as formally before it for decision (paras. 90–98).

(4) The fourth defendant's record of appeal in respect of the 2023 appeal was filed some 23 days late. As to seriousness, the default was surprising given the experience in the 2021 appeal. However, it was fair to note that

the fourth defendant's current solicitors had only recently come on the record. The court would not dismiss a 23-day delay as *de minimis* but would regard it as at the bottom end of the seriousness scale. As to significance, there was no question of it having caused any prejudice to the claimant or to the efficient progress of the hearing of the appeal. The court was in a position to decide the 2023 appeal and was satisfied that the Chief Justice's US$1.1m. payment order was also wrongly made. Again, that was a very significant consideration to place in the scales. The court had no doubt that, in all the circumstances of the case, the just disposition of the fourth defendant's relatively minor breach of the rules demanded that the retrospective extension of time should be granted (paras. 99–102).

Cases cited:

(1) *American Cyanamid Co*. v. *Ethicon Ltd*., [1975] A.C. 396; [1975] 1 All E.R. 504; [1975] R.P.C. 513, considered.
(2) *Denton* v. *T.H. White Ltd*., [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] C.P. Rep. 40, applied.
(3) *Lister & Co*. v. *Stubbs* (1890), 45 Ch. D. 1; [1886–90] All E.R. Rep. 797, followed.
(4) *Mareva Cia. Naviera S.A.* v. *International Bulk Carriers S.A.*, *The Mareva*, [1980] 1 All E.R. 213n; [1975] 2 Lloyd's Rep. 509, considered.
(5) *Mediterranea Raffineria Siciliana Petroli S.p.A.* v. *Mabanaft GmbH*, English C.A., 1978 M No. 4019, December 1st, 1978, unreported, considered.
(6) *Myers* v. *Design Inc. (Intl.) Ltd.*, [2003] EWHC 103 (Ch); [2003] 1 W.L.R. 1642, followed.
(7) *Nippon Yusen Kaisha* v. *Karageorgis*, [1975] 1 W.L.R. 1093, referred to.
(8) *Prince Abdulaziz* v. *Apex Global Mgmt. Ltd.*, [2014] UKSC 64; [2014] 1 W.L.R. 4495; [2015] 2 All E.R. 206; [2015] 1 Costs LO 79, referred to.
(9) *R. (Hysaj)* v. *Home Secy*., [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472; [2015] 2 Costs L.R. 191; [2015] C.P. Rep. 17, followed.
(10) *Slack* v. *Sails Mgmt. Ltd.*, 2021 Gib LR 494, considered.
(11) *Wardour Trading Ltd*., *In re*, 2018 Gib LR 293, referred to.

Legislation construed:

Civil Procedure Rules, r.3.1(3): The relevant terms of this provision are set out at para. 61.
r.3.1(7): The relevant terms of this provision are set out at para. 43.
r.25.1: The relevant terms of this rule are set out at paras. 20–21.

E. Bennion-Pedley (instructed by Ramparts) for the fourth defendant/appellant, Mr. Roache;
K. Azopardi, *K.C.* and *K. Power* (instructed by TSN) for the claimant/respondent, Ms. Mattin;
None of the other parties was represented.

1 **RIMER, J.A.:**

Introduction

By notices of appeal dated July 9th, 2021 and April 26th, 2023 respectively, the fourth defendant, Iain Roache, appeals (or seeks to appeal) against two decisions of Dudley, C.J. dated June 25th, 2021 and April 18th, 2023 respectively. By his first decision, made on the application of the claimant, Christina Mattin, the Chief Justice ordered Mr. Roache to pay £3.75m. into court (this decision is reported at 2021 Gib LR 348). By his second decision, again on Ms. Mattin's application, the Chief Justice varied his first decision by requiring Mr. Roache instead to pay into court the lower sum of US$1.1m. Mr. Roache paid nothing into court in or towards compliance with the first order; and the Chief Justice imposed a stay on the enforcement of the second order, which we continued pending the delivery of our decision. Mr. Roache was represented before us, as below, by Edward Bennion-Pedley. Ms. Mattin was represented before us, as below, by Keith Azopardi, K.C. and Kelly Power.

2 My above parenthetical qualification reflects that, in both appeals, Mr. Roache was late in filing the records of appeal in compliance with r.57(5) of the Court of Appeal Rules 2004. In the first appeal ("the 2021 appeal"), he was required to file it by September 13th, 2021. He had still not filed it when, on April 18th, 2023, some 19 months later, his application for a retrospective extension of time for its filing was refused by the Chief Justice, sitting as a judge of the Court of Appeal. On some later date unknown to me, he did file the record; and he has renewed his time extension application before us. In the second appeal ("the 2023 appeal"), the record of appeal should have been filed by June 28th, 2023 but was not filed until July 21st, 2023, some 23 days late. He has applied to us for a retrospective extension of time in respect of that filing too. Ms. Mattin opposes both applications. The matters before us, however, are not just the two applications but also, if either or both should succeed, the appeal or appeals themselves. At the hearing on April 18th, 2023, the Chief Justice directed that the parties should be ready to argue the 2021 appeal if the time extension for it were granted. The parties were so ready; and were also ready to argue the 2023 appeal.

3 For short reasons I shall give later, and contrary to an argument Mr. Bennion-Pedley advanced, I consider that the court should approach each application by reference to the trio of factors identified by the English Court of Appeal in *Denton* v. *T.H. White Ltd.* (2), namely by (i) assessing the seriousness and significance of the failure to comply with r.57(5); (ii) considering why the default occurred; and (iii) evaluating all the circumstances of the case so as to enable the court to deal justly with the application, having regard also to (a) the need for litigation to be conducted

efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and orders.

4 The application of the *Denton* factors to applications in, as here, *appeals* in which the appellant has failed to comply with the rules was considered by the English Court of Appeal in *R. (Hysaj)* v. *Home Secy.* (9). Moore-Bick, L.J. added the following guidance as to the extent to which the *merits* of the appeal should play any part in the *Denton* evaluation. He said ([2014] EWCA Civ 1633, at paras. 46–48):

> "46. If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.
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> 47. Support for that conclusion can be found in the recent decision of the Supreme Court in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64, in which the court had to consider the extent to which the merits of a claim or defence were relevant to granting relief from the sanction of striking out in default of compliance with an 'unless' order. Lord Neuberger, with whom Lord Sumption, Lord Hughes and Lord Hodge agreed, held that, even in a case of striking out, the merits of the claim or defence were relevant only when they were so strong that there was no real answer to them, in other words, in cases where an application for summary judgment could be expected to succeed. In Lord Neuberger's view (paragraph 30):
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> > '. . . it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.'
>
> 48. In my view exactly the same considerations apply to applications for extensions of time for permission to appeal."

5 In the events that have happened, the position in relation to each of the applications before us is different from that in the general run of cases that Moore-Bick, L.J. was referring to. There is here no question of the court being tempted into a, perhaps ill-informed, assessment of the merits of the appeals. That is because, in addition to the applications, the issues in both appeals have also been fully argued and the court is in a position to decide them. Of the 86 paragraphs of Mr. Bennion-Pedley's written argument, paras. 37–65 were devoted to the appeals and paras. 66–81 to the applications. Of the 131 paragraphs of Mr. Azopardi's and Ms. Power's written argument, paras. 17–58 were devoted to the applications and paras. 59–131 to the appeals. The court read the written arguments in advance of the hearing and then had oral arguments from both sides. We did not, however, rule on the applications before also hearing the arguments on the appeals; and, at the conclusion of the argument, we reserved judgment on all matters.

6 The argument in both appeals comes down to a single question of principle: was the Chief Justice entitled to make the original and varied payment orders that he did? Mr. Bennion-Pedley says no. Mr. Azopardi says yes. We can now decide that question and I shall explain my decision on it. I say now no more than that I consider that decision to be one that should, and in my judgment will, play a significant part in the evaluation of the third *Denton* factor when I come to consider the applications. That is in line with the guidance given by Moore-Bick, L.J. in the third sentence of his para. 46, supported by what he drew from the *Prince Abdulaziz* v. *Apex Global Mgmt. Ltd.* (8) decision referred to in his para. 47.

7 In the light of these observations, the structure of this judgment will be as follows. I shall (i) set out the background to the litigation; (ii) explain the Chief Justice's two decisions; (iii) give my decisions on the *issues* raised by the appeals but without then also formally deciding the appeals; (iv) give my decisions on the two applications; and (v) in the light of my decisions in (iii) and (iv), give my overall conclusions.

Domain Venture Partners PCC Ltd.

8 Both decisions under challenge were made on interlocutory applications in a claim brought by Ms. Mattin in relation to an "experienced investor fund," namely Cell A of Domain Venture Partners PCC Ltd. ("DVP"), which was established by Mr. Roache in 2012 but is now in cell administration following an order of April 23rd, 2018. Ms. Mattin was one of ten original investors in the fund, who between them made capital commitments totalling some £48.3m., with Ms. Mattin, the largest investor, paying nearly £6m. The investment was not a success and has given rise to three sets of claims, including Ms. Mattin's, by dissatisfied investors against various defendants involved with the fund. Mr. Roache is a defendant in

all claims. They have yet to be tried and on April 9th, 2019 the Chief Justice gave directions for them to be tried together.

9 The details relating to the establishment of the fund are complicated but, for present purposes, an outline is all that is needed. Mr. Roache was the inspiration behind the formation of DVP's Cell A (its only cell in which shares were issued) but the bulk of the money required to launch and operate its business was to be provided by outside investors, one of whom was Ms. Mattin. Their investment was to be in Cell A's redeemable preference (or investment) shares. Such holdings, however, gave the investors no control of Cell A, which was in the hands of Domain Management Ltd. ("DML"), a Roache company. The business objectives of the fund were to be carried out by 60 special purpose subsidiary companies of DVP, so-called "bid vehicles." DVP had the control of each bid vehicle via its holding of 100 ordinary shares in it, being shares carrying no economic rights and in which the investors had no interest. DML was a director of each bid vehicle. Cell A's commercial purpose was to fund applications by each bid vehicle to the domain name registry (ICANN, the International Corporation for Assigned Names and Numbers) in the hope of an award to each of an exclusive "gTLD" (generic top level internet domain name) licence to operate a domain name registry in the names respectively acquired. The economic benefits that each such vehicle might then enjoy would accrue to the holders of its 100,000 redeemable preference (or investment) shares.

10 With a view to raising funds for the venture, each bid vehicle issued a private placement memorandum ("PPM") offering its investment shares for subscription; and Cell A issued a PPM doing likewise in respect of its investment shares. The closing date for offers under each PPM was April 5th, 2012. The outcome was that, under the bid vehicles' PPMs, (i) Mr. Roache became entitled to a majority of the total of 6,000,000 investment shares offered by all such vehicles, amounting to some 65% to 70% of them; and (ii) Cell A became entitled to the remaining minority of such shares. Under Cell A's PPM, and against a total capital commitment by the outside investors of at least £42m., such investors subscribed in various proportions for the 100,000 Cell A investment shares on offer, thereby obtaining interests in Cell A's minority holdings in each bid vehicle's investment shares.

11 As an encouragement to potential investors to invest in Cell A's investment shares, Mr. Roache offered two incentives. One was known as strategic investor direct equity ("SIDE"). To any investor making a minimum capital commitment of £5m. or more, Mr. Roache offered a grant of "direct equity" in the bid vehicles from his own holdings in them, which would be in addition to their holdings of investment shares in Cell A. Paragraph 10.2.4 of the DVP PPM explained the calculation of the shares

the subject of such grant by reference to what was called the "Valuation Book."

12 The other incentive was offered by what I shall call the "trust letter," one written by Mr. Roache to prospective investors on March 5th, 2012. The rights created by it founded the basis of the Chief Justice's two decisions the subject of Mr. Roache's appeals.

The trust letter

13 As it was central to those decisions, I shall set out the terms of Mr. Roache's trust letter. It reads:

> "To whom it may concern
>
> I hereby confirm that £42,000,000 worth of direct equity (the 'Direct Equity') in the Bid Vehicles of [*sic*] which is held in my name shall be held on trust in the name of T&T Nominees Limited (a fiduciary company regulated by FSC and controlled by partners of Triay and Triay) for benefit [*sic*] of investors in [DVP] until such time as the sum equal to the amount of their paid up Capital plus a hurdle rate of 15% of such sum has be [*sic*] repaid to them ('the Repayment Event'). Upon the Repayment Event the legal and beneficial title of such equity shall revert to [Mr. Roache]. Should the Repayment Event not take place within 54 calendar months from the Closing Date of [DVP] [*sic*] the Direct Equity shall be transferred to the Participating Shareholders in [DVP] pari passu based on the size of their Capital Commitments in [DVP].
>
> For the sake of clarity terms defined in or whose interpretation is provided for in any Private Placement Memorandum of the Fund shall have the same meaning when used in this Agreement unless separately defined or interpreted in this Agreement."

14 The closing date of DVP's Cell A PPM was April 5th, 2012 and so the end date for the achievement (or not) of the *repayment event* was October 5th, 2016. It is common ground that the repayment event did not happen by that date and that the investors' absolute beneficial entitlement to the "£42,000,000 worth of direct equity" in the bid vehicles therefore vested on or immediately after it.

15 The trust letter is a poorly drafted document and the trust was never properly constituted. One problem was what was meant by the reference to "£42,000,000 worth of direct equity" in the bid vehicles. Another was that, whatever that did mean, the letter declared Mr. Roache's intention to vest such equity in T&T Nominees Ltd. as trustee, but that never happened. Instead, it remained in his name and he has personally received (and, he says, spent) all the distributions it yielded. There is, however, no dispute that the trust letter *did* create a trust: the Chief Justice, by an order of

January 8th, 2019, declared that the relevant shares "are held on trust" for the investors, meaning that they were and are so held by Mr. Roache on an enforceable trust.

16 The meaning of "£42,000,000 worth of direct equity . . . in the Bid Vehicles" was the subject of the Chief Justice's decision of June 17th, 2022 (one made just under a year after his decision the subject of the 2021 appeal). The claimants in the various claims had argued, *inter alia*, that it meant either (i) equity in such vehicles actually worth £42,000,000, an argument facing the difficulty that in April 2012 Mr. Roache's *entire* holdings in the bid vehicles were worth at most a small fraction of such amount, as everyone knew; and the "direct equity" was obviously also a reference to only a part of his entire holdings; or (ii) all his free shares in such vehicles (*i.e.* all his shares other than those subject to his SIDE and other contractual commitments), whatever their worth may have been in April 2012, an argument reducing the "£42,000,000 worth" reference to meaningless verbiage. The Chief Justice rejected both arguments and accepted Mr. Roache's, namely that, read in context, the relevant words meant £42m. worth of shares by reference to the valuations of the bid vehicles in the valuation book referred to in para. 10.3 of the Cell A PPM.

17 The claimants appealed against that conclusion but on December 9th, 2022, the Court of Appeal (Sir Maurice Kay, P., Sir Colin Rimer, J.A. and Sir Nigel Davis, J.A., in a judgment reported at 2022 Gib LR 298, *sub nom. Rennes Foundation* v. *Domain Venture Partners PCC Ltd.*) delivered its decision agreeing with the Chief Justice's conclusion and dismissing the appeal. In paras. 17 and 40 of my judgment (*ibid.*) (with which Sir Nigel Davis, J.A., in a concurring judgment, and Sir Maurice Kay, P. agreed), I explained the origin of the trust letter's "£42m." figure. Ms. Mattin and other appellants are, however, taking the interpretation question to the Judicial Committee of the Privy Council. If the "£42,000,000 worth of direct equity" is interpreted by reference to the valuation book, the exercise of identifying the number of shares caught by the trust letter is straightforward. The value of each bid vehicle's 100,000 investment shares as at April 2012 can be arrived at by dividing the then net present value of such vehicle by 100,000. The valuation book's values were, it should be said, arrived at on the most optimistic basis, including the making of various improbable assumptions; but that would (or should) have been apparent to the proposing investors. The valuation book was also used for calculating the number of SIDE shares to be allocated to those investors who qualified for such.

Ms. Mattin's claims under the trust letter

18 Ms. Mattin's claim form, seeking relief against four defendants, including Mr. Roache, was issued on April 6th, 2018 and amended on June 14th, 2019, when she also produced amended particulars of claim. An

"overview" of her trust letter claims was pleaded in para. 25, where she calls the trust letter a "Performance Guarantee Trust" (a label that this court, in its decision on the interpretation appeal, held to be inaccurate); and the meat of her claims is pleaded in paras. 56 to 65. Paragraph (2) of Ms. Mattin's prayer for relief seeks an injunction restraining Mr. Roache from (very broadly) engaging in any dealings with the trust letter shares or distributions from them. Paragraph (5) includes claims for directions as to the construction of the trust letter; the execution of its trusts (including a distribution to Ms. Mattin of her entitlement under them); a direction or declaration as to the assets subject to the trust; all necessary accounts, inquiries and valuations; an appointment of new trustees of the trust in place of Mr. Roache; and orders requiring Mr. Roache to account for his administration of the trust and to pay Ms. Mattin any sum found to be due to her on the taking of the account. One of her alternative claims advanced in her pleading is the assertion that, in the events she pleads, she was *solely* entitled to all the trust assets upon their vesting in October 2016.

The Chief Justice's decision of June 25th, 2021

19 This decision is the subject of Mr. Roache's 2021 appeal. It was made a year before the Chief Justice made his decision on the interpretation question. It is important to note the nature of the interlocutory relief Ms. Mattin was seeking. Her application notice was dated October 30th, 2020. By its para. 3, so far as material, she said she was seeking:

> ". . . orders against [Mr. Roache] pursuant to CPR Part 25.1(1)(c)(vi) and/or (g) and/or (l) and/or (n) and/or (o) and/or 29 and/or 40 and/or the Trustee Act and/or the inherent jurisdiction of the Court for:
>
> (i) the securing of property and transfer of assets, monies, dividends or distributions received, transferred or held by [Mr. Roache] ('Trust Property');
>
> (ii) for an Account of the said Trusts [sic] Property;
>
> (iii) for disclosure orders concerning the said Trust Property; . . .'

20 By way of explanation of that, CPR Part 25 is headed "Orders for interim remedies." As for its provisions just referred to, Part 25.1(1)(c)(vi) provides for the making of an order "for the payment of income from relevant property until a claim is decided"; and Part 25.1(2) defines "relevant property" as "property (including land) which is the subject of a claim or as to which any question may arise on a claim." Part 25.1(1)(g), so far as material, enables the making of an order for the providing of "information about the location of relevant property or assets." Part 25.1(1)(l) permits the making of "an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund." Part 25.1(1)(n) enables the making of "an order directing a

party to prepare and file accounts relating to the dispute." Part 25.1(1)(o) enables "an order directing any account to be taken or inquiry to be made by the court." Part 29 ("The Multi-Track"'), Part 40 ("Judgments and Orders") and the Trustee Act are irrelevant for present purposes, no reliance having been placed on them before the Chief Justice or this court. I shall come to what the Chief Justice said about Ms. Mattin's invocation of the "inherent jurisdiction of the Court."

21 All that said, the only provisions of Part 25.1 just summarized in play before the Chief Justice and on the appeals are: (i) that in Part 25.1(1)(c)(vi) enabling the court to make an order "for the payment of income from relevant property until a claim is decided"; and (ii) that in Part 25.1(1)(l), enabling the court to order "a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund." Issues as to court's "inherent jurisdiction" were and are also in play.

22 Ms. Mattin's application notice attached a proposed draft form of bespoke order running to five pages. The inference, therefore, is that para. 3 of her application notice was directed at identifying the jurisdiction she was relying upon for the specific relief she was asking for in the draft order. Paragraph 1 sought an account of all moneys, dividends and distributions (described as "Trust Property") received by Mr. Roache from various bid vehicles from March 5th, 2012 to date. Paragraph 2 sought disclosure as to what had happened to, and the whereabouts of, such trust property. Paragraph 3 sought information as to what had happened to 28 identified payments totalling some US$32m.-odd that Ms. Mattin's evidence proved had been paid to Mr. Roache by the bid vehicles between August 15th, 2014 and April 6th, 2016. Paragraph 4 required him to verify the account and disclosure by affidavit. Paragraph 5 required him to share his account and information, when provided, with eleven other Cell A investors listed in Schedule 1 to the draft order.

23 All these paragraphs were, therefore, directed at obtaining *information* as to what money Mr. Roache had received from the bid vehicles and what had happened to it. None of such claimed heads of relief is relevant to the issues the subject of the appeals. Only para. 6 is marginally so relevant: that is because it is the only paragraph that can be read as seeking orders for the "securing" of the trust property received, or allegedly received, by Mr. Roache, although in the event the Chief Justice made no order based on the relief sought in para. 6. Paragraph 6 reads:

> "Within 35 days from the date hereof [Mr. Roache] shall:
>
> a. pay any Trust Property received, transferred or distributed or made to him in relation to and derived from the Bid Vehicle Shares from 5 March 2012 to date into Court for these to be held to the Court's further order [ALTERNATIVELY to

Edgar Lavarello the Administrator of [DVP] to hold to the Court's further Order];

b. secure any non-cash Assets by depositing any original title deeds [if real property] or original share certificates [if shares] with Edgar Lavarello the Administrator [of DVP] to hold to the Court's further Order."

24 The Chief Justice, in the opening paragraph of his judgment, described Ms. Mattin's application as being "for orders against [Mr. Roache] to secure sums in excess of approximately $32m." (2021 Gib LR 348, at para. 1) that had been paid out to Mr. Roache and derived from the fortunes of the bid vehicles; and "for an account in respect thereof and related disclosure orders." Ms. Mattin's evidence was that Mr. Roache had received US$32,086,798 from bid vehicle distributions.

25 In para. 20 (*ibid.*), the Chief Justice summarized as follows Ms. Mattin's case under the trust letter (his reference to the "PGT," standing for performance guarantee trust, Ms. Mattin's preferred description of the trust letter):

"20. [Ms. Mattin's] core contention is that the effect of the PGT instrument was that [Mr. Roache] declared himself a trustee of all the shares standing in his name in the bid vehicles so as to crystallize and secure the fixed value of £42m. If the event arose which required a determination and distribution in accordance with the PGT instrument, the PGT needed to deliver that fixed value to the entitled investors, subject only to any balance accruing to [Mr. Roache]. If that analysis is correct, [Ms. Mattin] and other claimants with the benefit of the PGT (subject to competing claims between them on the distributions of the assets of the PGT or the PGT shares) have a proprietary claim to the US$32m."

26 I comment as follows on that paragraph. First, Ms. Mattin's said "core contention" was not destined to survive. It is along the lines of an argument Mr. Azopardi advanced to the Chief Justice a year later, in 2022, in relation to the question as to the meaning of the "£42,000,000 worth of direct equity" in the trust letter; and which he was also disposed to advance to the Court of Appeal on the interpretation appeal. It appeared to the latter court, however, to be an impossible interpretation of the trusts of the letter and Mr. Azopardi abandoned it (see paras. 56, 57 and 79 of my judgment in this court's decision in the interpretation appeal, reported at 2022 Gib LR 298). What the trust letter required was (i) the identification as at April 12th, 2012 of the "£42,000,000 worth of direct equity" held by Mr. Roache in the bid vehicles, (ii) the vesting of such shares in T&T Nominees Ltd., and (iii) their holding by T&T on the trusts of the letter. The ultimate beneficial destiny of such shares would turn on the fortunes of the fund. If the repayment event happened by October 5th, 2016, they would all revert

beneficially to Mr. Roache. If it did not, they would all (whatever their then worth) vest beneficially in the investors. Of course, the trust shares were never identified, let alone vested in T&T, but these failures did not change the nature of the trust.

27 Second, as to the Chief Justice's statement at the end of the paragraph as to the various claimants having "a proprietary claim to the US$32m.," I would say this. The US$32m. of distributions were received by Mr. Roache before the final date for the happening (or not) of the repayment event; and I understand his case to be that, under the trusts, and even though the repayment event did not happen by October 5th, 2016, he was, and remains, absolutely entitled beneficially to all such receipts. By contrast, I understand Ms. Mattin and the other investors to assert that, under such trusts, they had from the outset at least a contingent interest in the distributions referable to the trust shares; and that such interest vested absolutely in them when, by October 5th, 2016, the repayment event had not happened. These differences remain to be decided in the Supreme Court and so I venture no view on them. I do, though, agree with the Chief Justice that Ms. Mattin had, and has, a good arguable case to a beneficial claim to at least a share of Mr. Roache's receipts of the distributions from the bid vehicle trust shares held by him. As, however, such shares did not, according to the Chief Justice's 2022 interpretation decision (upheld by this court), extend to the entirety of Mr. Roache's bid vehicle holdings, but only to a small fraction of them, her claim in her 2020 application to a beneficial entitlement to a share in the entirety of the US$32m. was materially overstated.

28 Third, as for the Chief Justice's observation as to Ms. Mattin and the other investors having a *proprietary* claim in respect of the US$32m. distributions received by Mr. Roache from the bid vehicle shares, that depended on whether they could or can trace or follow his receipts of such distributions into identifiable accounts, funds or other assets. If they could or can, they would or might have a *proprietary* claim in respect of such accounts, funds or assets. If they could not and cannot, they could and can have no more than a *personal* claim against Mr. Roache for compensation for breach of trust or for payment of whatever may be due to them in respect of their entitlement to a share in the US$32m. Such a claim is not a *proprietary* one.

29 Under the heading "Payment into court/securing the alleged trust property: the law," the Chief Justice summarized his approach to the court's jurisdiction to make the types of "securing" orders Ms. Mattin was seeking. He said (2021 Gib LR 348, at paras. 30–31):

> "30 [Ms. Mattin] by her application notice seeks relief pursuant to various provisions in CPR Part 25 and/or the Trustee Act and/or the inherent jurisdiction, although in the event no reliance was placed

upon the Trustee Act. The principal application, for an order to secure what is said to be trust property, evidently is one in which proprietary relief is sought and it follows that the court's equitable jurisdiction is engaged. Therefore, not least given that CPR 25.1(3) makes clear that the court's inherent jurisdiction is preserved, determining whether or not the property is income producing for the purposes of CPR 25.1(c)(vi) or whether the distributions to [Mr. Roache are a 'fund' for the purposes of CPR 25.1(1) is in my judgment, a sterile exercise.

31 In determining whether or not to exercise my discretion in granting injunctive relief the test to be applied is that expounded in *American Cyanamid Co.* v. *Ethicon Ltd.* . . . First, is there a serious issue to be tried? Secondly, would damages awarded at trial or payable under the claimant's undertaking provide an adequate remedy to the party injured by the grant or otherwise of the injunction? If there is doubt as to whether damages can afford an adequate remedy, the court must consider where the balance of convenience lies."

30 The Chief Justice's succinct self-direction in para. 30 shows that his view was that, as he was exercising an *equitable jurisdiction* in relation to an application for what he characterized as *proprietary* relief, he was not constrained by any need to determine whether, under the applicable provisions of Part 25.1(1), there was either any "income from relevant property" that he might order to be paid into court; or any relevant "specified fund" in respect of which he might make a like order. Nor did he do so. His view was that he had jurisdiction to order Mr. Roache personally to make any payment into court he thought just by way of security for Ms. Mattin's claim in respect of the US$32m. odd distributions received by Mr. Roache, which is what he did. As to whether he *should* make any such order, he regarded that as governed by *American Cyanamid* (1) considerations; that is whether (i) against Ms. Mattin's cross-undertaking in damages, he should order Mr. Roache to make a payment into court; or (ii) should decline so to order and simply leave Ms. Mattin to pursue her money claim against him at trial.

31 There is no need to summarize what the Chief Justice said in this latter respect, save to note that his exercise of discretion to order a payment into court was apparently reinforced by his citation from the judgment of Templeman, L.J. in the decision of the English Court of Appeal in *Mediterranea Raffineria Siciliana Petroli S.p.A.* v. *Mabanaft GmbH* (5). That case concerned the disappearance of what was said to be a trust fund and the plaintiffs had obtained various interlocutory orders directing at ascertaining its whereabouts. There was a suggestion that it may have arrived at a bank in Geneva and Lord Denning, M.R. said that the judge "had granted an injunction against any disposal or use of this money," which may have been a reference to the money in that bank, although that is not clear. The Chief Justice, however, drew support in deciding the

American Cyanamid considerations from what Templeman, L.J. said in his concurring judgment, which was as follows:

> "I agree and would only add this. As my Lord said, it is a strong order, but the plaintiffs' case is that there is a trust fund of $3,500,000. This has disappeared, and the gentlemen against whom orders were sought may be able to give information as to where it is and who is in charge of it. A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone."

32 The Chief Justice appears, with respect, to have overlooked that all that Templeman, L.J. was there saying was that equity will readily make all orders necessary to ensure that a trust fund in peril will be kept safe in the stable. The payment order that the Chief Justice was proposing to make was, however, in no manner directed at preserving any trust fund. He had rejected any notion that he needed to identify any trust property or fund that called for a protective order. All he had in mind was whether to make an order for payment against Mr. Roache *personally* in support of what he had mischaracterized as a claim for *proprietary* relief. Nothing in Templeman, L.J.'s judgment provided support for his approach.

33 In para. 40, the Chief Justice returned to his point earlier made in para. 30 that Ms. Mattin's claim was a *proprietary* one. He said (2021 Gib LR 348, at para. 40):

> "It is unnecessary for me to consider the relative strength of each party's case, save to highlight that [Ms. Mattin's] claim is proprietary; that [Mr. Roache] accepts at least in part that some of the shares he holds in the bid vehicles are held by him pursuant to the PGT and are therefore trust property; that notwithstanding that admission (the scope of which has varied over time) he has failed to account to the investors for any distributions received from those shares . . . The only factor which could militate against granting an injunction is delay; however, I accept Mr. Azopardi's submission that given that this is a proprietary claim, delay is irrelevant as it is not necessary to show a risk of dissipation (*Cherney* v. *Neuman* . . .)."

34 The Chief Justice concluded his judgment as follows (*ibid.*, at paras. 41–42):

> "41 For the reasons I have given, I am satisfied that it is proper for me to exercise my discretion and grant injunctive relief. However, the

> relief must be circumscribed to this action. The various actions are being managed together and although some issues touching upon all of them will fall to be determined at the same time, they have not been consolidated. As regards the securing of assets, the injunctive relief is to be limited to [Ms. Mattin's] claim in so far as it relates to the protection afforded to her investment by the PGT. If the parties are unable to agree the amount that is to be secured, I shall hear submissions. Evidently, consequent upon this ruling, claimants in other actions may of course make such applications as they may consider appropriate.
>
> 42 In addition, as is usual in the context of orders to protect and preserve what is said to be a trust fund, I shall order ancillary relief. [Mr. Roache] is to provide an account of all distributions and other financial benefits he may have received, either directly or indirectly from the bid vehicles together with disclosure of the location of those assets and of any substituted property into which it can be traced. For that accounting and disclosure process to be effective, it is unrealistic for it to be limited to [Ms. Mattin's] investment, her proprietary claim is to moneys which are part of a larger fund and the accounting and disclosure will not be capable of being understood unless it is by reference to the whole."

35 Following the delivery of that judgment, there was a further hearing on the same day, of which we have a transcript. At its opening, the Chief Justice confirmed that his use of the word "injunction" in his judgment was "about securing assets . . . it is a mandatory injunction requiring Mr Roache to secure certain monies." It was then in large part devoted (despite an address from Mr. Bennion-Pedley that the making of such an order was wrong in principle) to the amount of money that Mr. Roache should be ordered to pay into court. After hearing argument, the Chief Justice ruled as follows on the form that para. 7 (the payment paragraph) of his order should take. He said (at pp. 39/40):

> 'All right, let me then . . . all right, I'm going to order, again paragraph 7 needs to be varied, it is not to reflect that the Defendants shall be required to provide security for the Claimant's claim. I'm going to order that Mr Roache is to pay into Court the sum of £3,750,000 which is the capital sum invested by Ms Mattin and which is the capital subject to the trust created by the PGT. And we can then have a further hearing if necessary so that I can hear submissions as to whether further sums that take account of . . . as to whether I should order payment in of further sums which take account of the 15% hurdle fee, but only to that limited extent, it will only be a further hearing as to what further sum is attributable to the 15% hurdle fee. But at this stage an Order that Mr Roach pay into Court the sum of £3,750,000."

36 That needs some explaining. The £3.75m. was Ms. Mattin's original investment in Cell A, apparently paid by her in stages. As for the Chief Justice's reference to that sum being "the capital subject to the trust created by the PGT," the only property subject to the trusts of the trust letter (I decline to call it a PGT) was (i) Mr. Roache's holding of the "£42,000,000 worth of [his] direct equity . . . in the Bid Vehicles," whatever that meant, and (ii) the income from such equity. It is, however, the case that, under the trust letter, Ms. Mattin's "Capital Commitments" in Cell A provided the measure of her proportionate entitlement to a share in the trust assets. But the real point reflected in the Chief Justice's remarks is that her case was that her entitlement as a beneficiary included the right to the payment out of the trust assets of (i) an amount equal to her original investment of £3.75m., and (ii) interest at 15% on that sum (the trust letter's "hurdle rate"). The Chief Justice's £3.75m. payment order was therefore an order for the payment into court of a sum measured by reference to her basic trust claim, in respect of which she was also advancing a claim against Mr. Roache personally. The only reason the Chief Justice did not also order the payment in of a sum in respect of her 15% *interest* claim was because, as Ms. Mattin had satisfied her £3.75m. commitment in stages, she had not yet calculated the amount of that claim.

37 The argument that Ms. Mattin's interest under the trust letter entitled her to such payments out of the trust assets was heavily dependent on her and other investors' assertions that the letter created a "Performance Guarantee Trust" directed at guaranteeing such payments. In my judgment in the Court of Appeal's decision on the interpretation question, I disagreed with that characterization of the trust letter and explained my view that, under the relevant 2012 documents, the investors were never promised any particular return on their Cell A investments and that the trust letter guaranteed neither any particular "performance," nor anything else (see 2022 Gib LR 298, at paras. 93–102). I did not, and still do not, understand how the trust letter can be interpreted as giving Ms. Mattin the rights she asserts. Its terms provide for nothing of the sort.

38 My difficulty in that respect is, however, not one for present discussion. The relevant point is that Ms. Mattin's case before the Chief Justice in 2021 was that she had a claim against the trust assets for at least £3.75m.; and a claim against Mr. Roache for such sum to the extent that she could not recover it out of the trust assets. The Chief Justice proceeded on the basis that she had a good arguable claim to that effect and made the payment order against Mr. Roache that he did. In his judgment (2021 Gib LR 348, at para. 41), he had also made it expressly clear that the payment he was proposing to order was *exclusively* for Ms. Mattin's benefit. That can only mean that he was ordering Mr. Roache to make a payment into court by way of *security* for Ms. Mattin's claim in the proceedings against him personally. If, which he was not, the Chief Justice had been ordering

the payment into court of a *fund* representing trust assets, it is obvious that *all* the trust letter beneficiaries, not just Ms. Mattin, would have been entitled to share in it: the Chief Justice could not have bestowed upon Ms. Mattin an exclusive entitlement to such a fund. Whilst the Chief Justice was apparently anxious that his payment order should not be regarded as, or recorded as being, an order directed at providing Ms. Mattin with *security* for her claim against Mr. Roache, that is precisely what it was. It could serve no other purpose. Right at the beginning of the discussion recorded in the transcript he had himself described his proposed order "as a mandatory injunction requiring Mr Roache to secure certain monies."

39 The Chief Justice's consequential order of June 25th, 2021 occupies 11 paragraphs, largely devoted to the ordering of accounts and inquiries as to Mr. Roache's administration of the bid vehicle shares and what had happened to the money derived from them. Those orders were properly made and there is no challenge to them. The only provisions relevant for present purposes are para. 7, by which Mr. Roache was ordered to pay £3.75m. into court by 4 p.m. on Friday, July 30th, 2021; and para. 10, by which he was given permission to appeal against that order.

40 Mr. Roache filed his notice of appeal and grounds on July 9th, 2021. The grounds included that the Chief Justice had no jurisdiction to make the payment order that he did. Ms. Mattin filed a notice of cross-appeal on July 16th, 2021 asserting that it could and should be upheld on grounds other than those on which he had relied, namely by the jurisdiction conferred by (a) CPR Part 25.1(1)(c)(vi), enabling an order "for the payment of income from relevant property until a claim is decided"; and/or (b) by CPR Part 25.1(1)(l), enabling "an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;" and/or (c) by the inherent jurisdiction of the court. Paragraph 1(d) of the notice advanced the imaginative assertion that the £3.75m:

> "constitutes a part of the identifiable fund or funds in respect of which there are disputes (and/or income arising from the Trust Property) and the Court had full power and jurisdiction to order the payment into Court of such a part only or to otherwise secure such a part using the yardstick (as it did) of a sum equivalent to the Mattin Call payments and the '15% hurdle rate' thereon as it was in respect of these sums that the Performance Guarantee Trust was put in place."

Subsequent events

41 On June 17th, 2022, the Chief Justice delivered his judgment on certain preliminary issues, including the meaning of the trust letter's "£42 million worth of direct equity." As noted, he accepted Mr. Roache's argument that it was to be interpreted by reference to the valuations in the valuation book. As also noted, this court upheld that order by its decision

of December 9th, 2022 (2022 Gib LR 298). Although Ms. Mattin is proceeding with an appeal against that decision to the Judicial Committee of the Privy Council, she recognized that it meant that the £3.75m. order had given her greater security for her personal trust letter claim against Mr. Roache than she could reasonably have been entitled to. Whereas she had previously argued that she had a beneficial interest in the entirety of Mr. Roache's bid vehicle distributions, she now accepted that (subject to the outcome of her further appeal), she had a beneficial interest in only a percentage of them. The consequence of the interpretation decision is that only some 3.88% of Mr. Roache's bid vehicle shares were subject to the trusts of the trust letter.

42 Ms. Mattin therefore went back to the Chief Justice, inviting him to vary the £3.75m. payment order to one for the payment into court of US$1.1m. The application was made under CPR Part 3.1(7). The Chief Justice delivered his decision on that application on April 18th, 2023. That is the second decision that Mr. Roache is seeking to appeal. There is no doubt what the US$1.1m. represented: Ms. Mattin's solicitors provided an explanation in their subsequent email of January 20th, 2023 to Mr. Roache's solicitors. In summary, and "without prejudice to the Privy Council Trust Letter Appeal," that figure was explained as being the maximum amount of Ms. Mattin's *personal claim* against Mr. Roache in respect of the known bid vehicle distributions received by him, less a round figure of US$150,000 in respect of possible costs. The revised order sought was not directed at securing or protecting a *fund* any more than the original order had been.

The Chief Justice's decision of April 18th, 2023

43 CPR Part 3.1(7) provides that "A power of the court under these Rules to make an order includes a power to vary or revoke an order." Bearing in mind that the Chief Justice (i) had made his 2021 payment order under what he considered to be the court's *equitable jurisdiction*, and (ii) had refused to decide whether he had any *power* under the Rules to make it, a question may be said to have arisen as to whether he had any jurisdiction under Part 3.1(7) to make the requested variation. It is not, however, apparent whether it was raised.

44 Whilst Mr. Roache supported the discharge of the 2021 £3.75m. order, he opposed its replacement with the US$1.1m order. His grounds were that (i) the variation application ran counter to an agreement he had come to with Ms. Mattin, (ii) the court had no jurisdiction under CPR Part 25.1 to make an order for payment of the revised sum, and (iii) Mr. Roache's evidence showed he was anyway unable to pay it.

45 The Chief Justice rejected Mr. Roache's ground (i). As to ground (ii), he explained his approach to the jurisdiction question by referring to what

he had said in para. 30 of his 2021 decision (quoted in para. 29 above) and then saying (at para. 10):

> "In my judgment that is not an issue which can properly be reargued in the context of what I am treating exclusively as an application pursuant to CPR 3.1(7). I may well have got the jurisdictional point wrong, but that is a matter which needs to properly be resolved on appeal (subject to the full Court of Appeal granting the necessary extensions of time) but it is not appropriate to have it re-litigated before me."

46 As to ground (iii), there was now an accounting report before the court, showing that Mr. Roache had received—and spent—some US$37m. by way of bid vehicle distributions. His evidence was that he did not have US$1.1m. to pay into court and that "I am not sitting on funds (trust property or otherwise) and have had to rely upon my husband to fund my defence of these proceedings so far and to support us as a family."

47 The Chief Justice was unimpressed that Mr. Roache's evidence proved he had no funds, or was unable to raise any money to enable him to make the varied payment. He noted that Mr. Roache's evidence showed that his claimed disbursement of the US$37m. pre-dated the 2021 decision. He took the view that, if this point did provide a defence, it was one that had been available to Mr. Roache in answer to the 2021 application, but he had not taken it then. It was not, therefore, appropriate to allow him to rely on it now in answer to the variation application.

48 Paragraph 1 of the Chief Justice's order discharged para. 7 (the payment order) of the 2021 decision. Paragraph 2 ordered Mr. Roache to pay US$1.1m. "into Court in relation to [Ms. Mattin's] Trust claim" but stayed the payment until the end of this court's autumn 2023 session; and, when we reserved judgment at the conclusion of the hearing, we extended the stay until after our judgment on the applications and appeals or further order in the meantime. Paragraph 4 gave Mr. Roache permission to appeal against the new payment order.

49 Mr. Roache's grounds of appeal again included that the Chief Justice had no jurisdiction to make the payment order he did, since it did not purport to be, nor was it, an order directing at preserving trust property, none having been identified; it was an order for the provision of security against an as yet unproved damages claim. Ms. Mattin filed a notice of cross-appeal on May 31st, 2023, the heart of which was the assertion, mirroring the like assertion in her cross-appeal in the 2021 appeal, that the US$1.1m. ordered to be paid into court:

> "constitutes a part of the identifiable fund or funds and/or Trust Property in respect of which there are disputes (and/or income arising from the Trust Property) and/or property or assets which can be traced

or followed from misapplications of Trust Property and the Court had full power and jurisdiction to order the payment into Court."

The issues raised by the appeals

A. *The 2021 appeal*

50 Neither in her application notice nor in her accompanying draft order did Ms. Mattin ask for an order against Mr. Roache for a payment by him of money into court, being an order requiring him to make a payment out of his own assets. The only *payment* order she sought was in para. 6(a) of her draft order, for a payment into court of "any Trust Property" he had received. Such an order could only bite on trust property that he still held or was in his control. It would in practice be a difficult order to enforce. The Chief Justice made no such order. I have earlier explained the nature of the order that he did make, in the course of which I made various observations about it that anticipated Mr. Bennion-Pedley's argument. There is no need to repeat any of that. The parties' arguments on the issues in the 2021 appeal were as follows.

51 Mr. Bennion-Pedley submitted that the Chief Justice's approach was mistaken. He had said (2021 Gib LR 348, at para. 30) that Ms. Mattin's "principal application, for an order to secure what is said to be trust property, evidently is one in which proprietary relief is sought and it follows that the court's equitable jurisdiction is engaged." Any exercise of such equitable jurisdiction to give such *proprietary relief* required the identification of *property* in respect of which it could be given. The Chief Justice had cited Templeman, L.J.'s statement of principle in the *Mediterranea Raffineria Siciliana* case (5) as to the protective hand that equity will extend to the safeguarding of *trust property*, a hand that also extends to protecting any property, funds or other assets into which such trust property can be followed or traced. The Chief Justice's order, however, had nothing to do with the giving of such relief. All it was directed at doing was requiring Mr. Roache to give Ms. Mattin security for her as yet unproved money claim against him.

52 As for the jurisdiction conferred by the two heads of Part 25.1, namely the "income" and the "specified fund" provisions, Mr. Bennion-Pedley criticized the Chief Justice's assertion that the determination of whether either was in play was a "sterile exercise." They were provisions Ms. Mattin was relying on and did require consideration. Mr. Bennion-Pedley submitted that neither applied.

53 First, he said the historic distributions to Mr. Roache from the bid vehicles (the latest was made more than four years before Ms. Mattin's application and all such distributions were said to have been spent) could not be regarded as "income" within the meaning of the rule in respect of which any order could be made. Mr. Bennion-Pedley said the rule was

focused on the making of an order in respect of income currently accruing and deriving from an asset that was the subject of dispute in the litigation.

54 Nor, said Mr. Bennion-Pedley, was there any identifiable "specified fund" within the meaning of Part 25.1(1)(l) in respect of which the Chief Justice could make any protective order. In support, he cited the decision of Lightman, J. on that rule in *Myers* v. *Design Inc. (Intl.) Ltd.* (6). In that case, the claimant had lent the defendant £900,000, a sum deriving from the proceeds of a property that had been sold. The defendant had then spent much of the money so lent and failed to comply with a repayment demand. The claimant became concerned that the defendant would render himself judgment proof. He did not, however, apply for a freezing order. He instead applied for an order under CPR Part 25's "specified fund" rule, requiring the defendant to pay the full sum claimed into court. On an *ex parte* application, Hart, J., whilst admitting to doubt about whether such an order could be made under that rule, nevertheless made it, recognizing that its correctness could be challenged on an *inter partes* hearing, as it was. On that hearing, Lightman, J. held that the case was not within the relevant rule and set aside Hart, J.'s order. He said ([2003] EWHC 103 (Ch), at paras. 10–13):

> "10. I turn to the use of the term [*i.e.* "fund"] in the context of the Rule. The provisions of the Rule require as conditions for exercise of the jurisdiction to make the order that at the date of the order (1) the person against whom the order is to be made has legal title to or is in possession or control of an actual identifiable fund, colloquially the fund must be in his hands; (2) there is a dispute as to a party's proprietary entitlement to or interest in the fund; (3) the circumstances are such that the fund should be secured by payment into court or in some other way. The requirement that the person against whom the order is to be made should be the legal owner or in possession or control of the specified fund is implicit in the form of relief: the mandatory order could not be made unless it could be complied with. The reference in the Rule to the party's right to the fund connotes the existence of a proprietary right or interest in the fund.
>
> 11. [Counsel for the plaintiff] first submits the debt in this case represented the proceeds of sale of property by the Deceased and that those proceeds constituted the necessary 'specified fund'. But, as I have said, though they may have constituted such a fund on receipt by the Defendant, that fund no longer exists and further the Claimant never had any proprietary or other right in that fund.
>
> 12. In the alternative [counsel] submits that the debt owed by the Defendant to the Claimant constituted the specified fund. This is likewise unmaintainable. Any debt owed by the Defendant to the Claimant is a chose in action vested in the Claimant. It is not itself a

> specified fund nor does it give rise to the existence of a specified fund in which the Claimant has a proprietary interest. Nor are there any monies (let alone a specified fund) held by the Defendant over which the Claimant has any proprietary rights.
>
> 13. I therefore hold that upon the true construction of the Rule the Claimant cannot invoke the Rule. It is not sufficient that the Claimant has any interest in preserving the assets of the Defendant and preventing the Defendant by disposing or dealing with his assets from making himself judgment proof. That protection can be secured by a freezing order . . ."

55 Mr. Azopardi's and Ms. Power's written argument in support of the Chief Justice's order focused primarily on the assertion that the bid vehicle distributions paid to Mr. Roache *were* represented by an identifiable fund and that the Chief Justice had been entitled to make the order he did. The essence of the argument ran thus: (i) when Ms. Mattin's application was made, there was an identifiable "trust fund" consisting of the trust shares and distributions made under them; (ii) Mr. Roache had not questioned that there was such a fund, since he had not sought to appeal the various orders the Chief Justice made by his June 2021 order directed at ascertaining what had become of the distributions under it; and (iii):

> "Not having appealed that disclosure order it is inconsistent for Mr. Roache to argue against the definition of Trust Property inherent in the disclosure order or to say that there was no identifiable fund when the fund had been precisely identified as was [*sic*] that part of the overall fund that Mr. Roache was ordered to pay into Court."

56 A further part of the written argument was as follows:

> "(9). In making the Order the Chief Justice sought to protect a smaller identifiable trust fund of £3.75m in respect of [Ms. Mattin's] trust claim and because the claim was proprietary in nature. This formed part of the USD $32M received by [Mr. Roache] and was equally identifiable;
>
> (10). The argument that there is no identifiable fund ignores that property can be traced from the original USD $32M received by Mr. Roache."

57 Mr. Azopardi's oral submissions at the hearing did not add materially to that argument. I doubt whether there was anything he could have said that would have done so.

58 My views on the Chief Justice's order will by now be apparent but I should formally set out my conclusions on the issues in the 2021 appeal. There is no dispute that at least part of Mr. Roache's holdings of bid vehicle shares was held on trust for the investors, including Ms. Mattin, under the trusts of the trust letter. I also understand there to be no dispute that the

investors, including Ms. Mattin, had a good arguable claim to an interest in a share of the distributions from such shares that Mr. Roache has received and, apparently, spent. By her application, Ms. Mattin was seeking full disclosure as to what has happened to all that money. She was entitled to do so and obtained orders for the provision of information. To the extent that such information might yield intelligence as to any accounts, funds or assets into which the distributions could be followed or traced, she might then be able to assert a proprietary claim in respect of such accounts, funds or assets. At the time of the hearing of her application she had, however, identified no such accounts, funds or assets.

59 In those circumstances, was the Chief Justice entitled to order Mr. Roache to pay £3.75m. into court? The answer is no. That figure was derived from the amount of Ms. Mattin's original investment in Cell A. It was advanced as being the basic measure of her claim in respect of the trust assets and/or against Mr. Roache personally. The Chief Justice made it clear that the ordered payment was exclusively for Ms. Mattin's benefit. The only function the ordered payment could serve was to give her a security for her still unproved claim against Mr. Roache personally.

60 The courts have, however, for long set their face against ordering a defendant to give security for a claimant's as yet unproved claim. In *Lister & Co.* v. *Stubbs* (3), Cotton, L.J. said (45 Ch. D. at 13):

> "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff would establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree . . .
>
> Then there is said to be a second point, namely, that there is in this case such an admission by the Defendant that this sum of money is due, that we ought to order it to be paid into Court, as security for the debt which, *primâ facie*, the Plaintiffs will make out to be due to them. In my opinion, however, there is no case at all for anything of that sort being done, unless it is done as a condition of allowing the debtor to defend. But that is not what is asked for here."

61 Lindley, L.J. gave a concurring judgment and Bowen, L.J. also agreed. Part of the interim relief that was also sought (unsuccessfully) in *Lister* was an order restraining the defendant from disposing of certain assets. In 1975, *Lister* was regarded as potentially hampering the embracing of the newly conceived *Mareva* jurisdiction (see *Nippon Yusen Kaisha* v. *Karageorgis* (7); and *Mareva Compania Naviera SA* v. *International Bulkcarriers SA* (4)). In the event it did not. But whilst a *Mareva* injunction (now a freezing order) provides a measure of protection to a claimant against the risk of the defendant making himself judgment proof by the time a judgment is obtained against him, it is well settled that it does not

provide the claimant with *security* for his claim. The basic principle endorsed by *Lister* remains good law. Of course, under the Civil Procedure Rules 1998 there are provisions enabling the making of interlocutory payment orders against a defendant, including orders for the payment of money into court. For example, CPR Part 3.1(3) provides that, when the court makes an order, it may "make it subject to conditions, including a condition to pay a sum of money into court." Under CPR Part 24 ("Summary Judgment"), the court can make a conditional order, including requiring a party to pay money into court and, subject to the satisfaction of various conditions, CPR Part 25.6 provides for the making of "interim payments." But such provisions have no application to this case. The only provisions in the CPR that Ms. Mattin was relying upon were the "income" and "specified fund" provisions in Part 25.1; and the Chief Justice was not purporting to make his order under *any* provision in the CPR.

62 The Chief Justice regarded the order as one he was entitled to make in exercise of the court's "equitable jurisdiction." He did not identify any principle of equity that so entitled him and I am unaware of any. He was much influenced by his assessment that Ms. Mattin had a *proprietary* claim. That simply means a claim in respect of identifiable *property.* If her evidence had identified a property, fund or other asset into which it was arguable that the bid vehicle distributions could be followed or traced, the court would have had a jurisdiction to make a protective order directed at safeguarding it: see Templeman, L.J.'s judgment in the *Mediterranea Raffineria Siciliana* case (5). But she had identified no such property, fund or other asset; and Mr. Azopardi's assertions in his skeleton argument did not begin to fill the gap. They amounted to no more than the mistaken proposition that a personal claim against a recipient of trust money who has since spent it can be characterized as claim in respect of a "fund" (a point to which I return in para. 65 below, when dealing with the "specified fund" rule in CPR Part 25.1(1)(l)). The principles of equity did not entitle the Chief Justice to make the order he did. A court of equity will readily lend a protective hand to the protection of trust property in peril. But equity follows the law and does not make orders requiring defendants to give security for still unproved money claims against them.

63 What about the provisions of CPR Part 25.1? Taking first the provision in Part 25.1(1)(c)(vi), for "the payment of income from relevant property until a claim is decided," I would accept that the distributions to Mr. Roache, when originally made, may have been "income." But they had been received by him years before Ms. Mattin made her application and there was no evidence as to what had happened to them. If, improbably, they had still been sitting in bank accounts that Ms. Mattin had been able to identify, I regard it as probable that the court could have made an order under the relevant rule; although in such an instance Ms. Mattin would also have had a good claim to protect the money in each account as a "specified

fund" under Part 25.1(1)(l). As these are not, however, the facts, I express no firm view on the application of the "income" rule to such a situation.

64 We had no authority cited to us (if indeed there is any) as to the application, and potential extent, of the "income" rule, but I am disposed to agree with Mr. Bennion-Pedley that it is probably directed at the catching of a *current* stream of income deriving from an asset as to which there are disputed or competing claims. Whatever the correct analysis of the rule, however, it had and has no application in this case. In a case such as this in which income has been received but its current whereabouts have not been traced or followed, there is no scope for an order under the rule. It does not empower the court to make an order against the recipient of the income compelling him to pay the equivalent amount into court.

65 As to the "specified fund" provision in Part 25.1(1)(l), the exercise that rule sets is simple. It requires the identification of an account, or other repository, holding a fund of money in respect of the title to which there is a dispute: see again the *Myers* decision (6). It does not entitle the court to make a personal order for payment against an individual who originally received the money in dispute but cannot be shown still to be holding it. As Lightman, J. explained in his judgment in the *Myers* case ([2003] EWHC 103 (Ch), at para. 12), any claim that Ms. Mattin has against Mr. Roache personally is a chose in action; and such a claim is not one in respect of a "specified fund." The Chief Justice had no jurisdiction under this rule to make the payment order he did against Mr. Roache. Nor, of course, did he claim to be exercising such a jurisdiction.

66 With respect to the Chief Justice, he was wrong to make the £3.75m. order against Mr. Roache. The order was unprincipled and unjustified.

B. ***The 2023 appeal***

67 I can deal with this relatively shortly. I have explained how Ms. Mattin's application for a variation of the 2021 order came about. The Chief Justice took the view that he had jurisdiction under CPR Part 3.1(7) to vary his earlier payment order and did so, by discharging para. 7 of that order and substituting for it an order requiring Mr. Roache to pay US$1.1m into court.

68 Mr. Bennion-Pedley, whilst not opposing the discharge of the earlier order, sought to oppose the making of the varied order on the same jurisdiction grounds as he had opposed the earlier order. The Chief Justice took the view that he could not and should not re-open the jurisdiction argument. Whilst acknowledging, in para. 10 of his judgment of April 18th, 2023, that he may have got the jurisdictional point wrong in his 2021 decision, he adopted the view that that was a question that should be resolved by this court on Mr. Roache's appeal against the earlier order, subject to the court granting the necessary extensions of time.

69 In my judgment, the Chief Justice was correct not to re-open the jurisdiction issue. The Chief Justice had decided that issue against Mr. Roache in his 2021 decision; and it operated as an estoppel between the parties. The 2021 decision was, of course, open to challenge by Mr. Roache by way of an appeal and he has appealed against it. I doubt, however, whether, in advance of any decision in his favour on that appeal, it was open to him to invite the Chief Justice to reconsider the jurisdiction point. Until he had successfully challenged the jurisdictional basis for the 2021 decision, he was bound by it.

70 It follows in my view that, if (i) Mr. Roache is unable to obtain an extension of time in his 2021 appeal and is, in consequence, unable to pursue that appeal, but (ii) *is* able to obtain an extension of time enabling him to pursue the 2023 appeal, he would be in difficulty in that appeal in challenging the jurisdictional basis on which the Chief Justice made his 2023 decision. If he was estopped from re-arguing the jurisdiction point before the Chief Justice on the 2023 application, how can he argue such point in the 2023 appeal? On the other hand, if he is given time extensions enabling him to pursue *both* appeals, a successful challenge against the Chief Justice's para. 7 order in the 2021 application must entitle him to an order setting aside the 2023 order as well.

71 I come to the time extension applications.

The time extension applications

A. *The application in the 2021 appeal*

72 Although Mr. Bennion-Pedley's skeleton argument proceeded on the basis that Mr. Roache's time extension applications should be determined by the consideration of the three *Denton* factors to which I referred in para. 3 of this judgment, in opening his case to us at the hearing he advanced a new, unheralded submission. It was to the effect that Gibraltar's Court of Appeal Rules 2004 impose no automatic sanction for the late filing by an appellant of the record of appeal, nor had Ms. Mattin sought to impose any sanction upon Mr. Roache's for his default in that respect. Under r.9 of the Rules, the Registrar was bound to accept the record for filing even though it was filed late, and he did so. There is therefore no reason why Mr. Roache should not be entitled to have his appeal heard without more ado.

73 Mr. Azopardi's response was that although the 2004 Rules include no express sanction in relation to the late filing of a record of appeal, there is an implied sanction. A late filing does not cure the default of not filing in time. A retrospective extension of time under r.8 is still required. If no such extension is sought or given, the sanction is that the appeal will not be listed for hearing.

74 I would accept Mr. Azopardi's submission. In my view, the consequence of a late filing of the record of appeal is akin to that of the late filing of a notice of appeal. In both cases an extension of time is required to entitle the appellant to proceed with the appeal and, if no extension is obtained, he cannot do so. That is the implied sanction that applies in both cases.

75 We were not referred to it at the hearing, because Mr. Bennion-Pedley's submission was apparently something of a flight of last minute inspiration. But, as regards the approach to the late filing of a notice of appeal, this court reminded itself that it has held that an application for a retrospective extension of time *is* one for relief from an implied sanction and that the determination of the application is governed by an evaluation of the *Denton* factors: see *In re Wardour Trading Ltd.* (11) (a decision of Sir Maurice Kay, P., Sir Colin Rimer, J.A. and Dame Janet Smith, J.A.). I consider that a like approach must apply to a late filing of the record of appeal.

76 I add that I should be surprised if the sanction identified by Mr. Azopardi is the only one. Take a case in which the appellant apparently loses interest in the pursuit of his appeal, fails to file the record of appeal, takes no further steps in the appeal and the appeal is not listed for hearing. Without more, that may be of less than full comfort to a respondent, who will be likely to have incurred costs in responding to the appeal. One would think that, in such a case, the respondent ought to be entitled to apply to the court for the striking out of the appeal and for an order for costs against the reluctant appellant. We were not shown any provision in the Court of Appeal Rules expressly providing for that, but it would be odd if the court had no jurisdiction to entertain such an application. As, however, that question does not arise for decision, I say no more about it.

77 Coming to the substance of the time extension application in the 2021 appeal, the story is as follows. Mr. Roache filed his notice of appeal on July 9th, 2021. Ms. Mattin filed her cross-appeal on July 16th, 2021. Under r.57(5) of the Court of Appeal Rules 2004, Mr. Roache should, by September 13th, 2021, have filed with the Court Registry four copies of the record of appeal. He did not do so. This did not, however, have the consequence that the earliest possible hearing of the appeal was thwarted. That is because there was, at any rate until January 2023, agreement between both sides to a deferment of the hearing of the appeal.

78 First, it was not listed in late 2021 for hearing because there was then a Covid-19 backlog and neither side sought to argue that the appeal needed to be heard as a matter of urgency. Second, nor, by agreement, was it listed for hearing in the Court of Appeal's spring 2022 session. By 2022, the parties were awaiting the Chief Justice's reserved decision on the meaning of "£42,000,000 worth of direct equity" in the trust letter since it was recognized that it could have a material impact on the quantum of his 2021

payment order. The parties therefore agreed that the appeal should not be heard in the Court of Appeal's 2022 spring session. Ms. Mattin also agreed that, in the meantime, she would not seek to enforce the payment order.

79 It is, however, relevant to note that, during the inter-party exchanges, on January 20th, 2022 Ms. Mattin's solicitors reminded Mr. Roache's solicitors that they had still not received a record of appeal and observed that it "will obviously have to be prepared well in advance of any appeal hearing." They asked for confirmation as to whether Mr. Roache intended to ask the court for an extension of time for complying with r.57(5). He was, by then some four months out of time for filing the record. There was no agreement between the parties as to deferring its filing; and, in the event, Mr. Roache filed no time extension application until April 5th, 2023, over a year later.

80 On June 17th, 2022, the Chief Justice delivered his reserved judgment on the meaning of "£42,000,000 worth of direct equity" in the trust letter. It was adverse to Ms. Mattin and, among other things, meant she had overstated her claim in her 2021 payment application. Ms. Mattin, and the other disappointed claimants in a like interest, appealed against the Chief Justice's decision on the interpretation question. The appeal was due to be heard by the Court of Appeal on October 12th and 13th, 2022.

81 On August 22nd, 2022, Ms. Power, for Ms. Mattin, sent an email to Mr. Roache's solicitors, of which the first two paragraphs read:

> "As we set out in our email to you dated 19th July 2022, if your Client agrees to defer his appeal to the next Court of Appeal session [*i.e.* the Spring 2023 session] our Client would agree not to take any steps to seek the payment into Court of the sum of £3.75M ordered under paragraph 7 of the order of the 25th June, 2021 until your Client's appeal is determined. Our Client's agreement as set out above was and is subject to your Client seeking to have his appeal dealt with at the March 2023 session [if it is going to be pursued] and until the close of that session only.
>
> In respect of your request for our Client to agree to a discharge of paragraph 7 of the Order of the 25th June 2021, we would repeat our position as clearly expressed in our email of the 19th August, 2022. If the Chief Justice's judgment on the Preliminary Issues is maintained by the Court of Appeal in all its respects and the investor Claimants' appeal rights are thereafter exhausted, it would then follow that we would agree to a discharge of paragraph 7 of the Order of the 25th June, 2021. We again repeat and make clear that our Client's stance in this regard is expressing no view at all on and does not amount to a concession in any form of the Grounds of Appeal as advanced by your Client in his appeal. Rather, it would have arisen as

a consequence of the impact of the Chief Justice's ruling on the Preliminary Issues being upheld as described above . . ."

82 Ms. Mattin then applied to the Court of Appeal for a deferment of the hearing of Mr. Roache's appeal until after the court had delivered its judgment on Ms. Mattin's and her co-investors' appeals. Her application was granted. Such application might perhaps be said to be implicitly inconsistent with any then stance by her that Mr. Roache's continuing default with regard to filing the record of appeal, and the fact that he had still not applied for a retrospective extension of time for such filing, would stand in the way of his appeal proceeding to a hearing. On December 9th, 2022, the Court of Appeal delivered its reserved judgment dismissing Ms. Mattin's and the other claimants' appeals against the Chief Justice's decision on the interpretation question.

83 By January 2023, Ms. Mattin had had something of a change of heart. In August 2022, her stance had been that, if her appeal failed and "the investor Claimants' appeal rights are thereafter exhausted," she would agree to a discharge of the 2021 £3.75m. payment order. Following the Court of Appeal's decision on December 9th, 2022, Ms. Mattin decided to take the case to the Judicial Committee of the Privy Council; and she was no longer interested in a consensual discharge of the £3.75m. order. She now wanted it to be varied to the lower sum of US$1.1m. Her solicitors sent an email to Mr. Roache's solicitors on January 20th, 2023 explaining her revised position with regard to a proposed variation of the 2021 payment order and closed the email as follows:

> "We would invite your client to consent to the variation of para 7 of the Order of 25 June on this basis. If he does the order can be entered relatively swiftly by making an application by consent in the Mattin claim. The Payment Appeal can then be withdrawn as it would be unnecessary.
>
> If your client does not agree by 27 January we put you on notice that we will be filing an application to vary para 7 of the Order of 25 June 2021in the form set out above and ask for this application to be listed before the Chief Justice at the hearing set for 27 February 2023. In any event we will seek a stay of the hearing of the Payment Appeal until the variation application is determined by the Chief Justice.
>
> We await to hear from you by the date indicated."

84 The response, on January 23rd, 2023, was an assertion that Ms. Mattin was seeking to depart from the position set out in the second sentence of the last paragraph of the email of August 22nd, 2022. The rejoinder was that Ms. Mattin's then position was based on the premise that, upon the Court of Appeal's decision, her appeal rights were "thereafter exhausted," whereas they were not. She had a right of appeal to the Privy Council. The

further point made on behalf of Mr. Roache was that, in light of Ms. Mattin's wish

> "to derive whatever advantage she can from the [2021 payment] order . . . we must therefore prosecute the appeal and have it set aside . . . It is not right for the parties continually to defer. You will recall that our client was previously criticised for failing to prosecute the appeal."

85 The rival positions by the end of January 2023 were, therefore, that (i) Mr. Roache wanted the appeal heard in the Court of Appeal's spring 2023 session, and (ii) Ms. Mattin wanted it deferred until after the determination of her variation application, which she filed on February 3rd, 2023, which in practice was likely to mean a deferral of the hearing of Mr. Roache's appeal until the Court of Appeal's autumn 2023 session. In the event, Mr. Roache's wish was denied and Ms. Mattin's granted. The appeal was not listed for hearing in the spring 2023 session when it became apparent at the prior call over session that the record of appeal had still not been filed, nor had any retrospective time extension application been filed. Such an application was then filed on April 5th, 2023. It was supported by Mr. Roache's witness statement of the same day, one that also contained his response to Ms. Mattin's application to vary the 2021 payment order, which came on for hearing before the Chief Justice on April 18th, 2023.

86 Mr. Roache's witness statement dealt somewhat cursorily with the time extension application. He explained his failure to comply with r.57(5) by saying he was unaware of that procedural requirement and his solicitors did not advise him of it. He said that thereafter, because he and Ms. Mattin had agreed "in effect" to stay his appeal pending the determination of the preliminary issues and Ms. Mattin's appeal against the Chief Justice's interpretation decision, "my focus was on those elements of the proceedings." He gave his apology to the court and said it would be just in all the circumstances to grant the retrospective extension for which he asked. He said he had recently circulated a proposed list of documents and that there was "no doubt that I shall be able to produce the record in good time for the Autumn session."

87 On April 18th, 2023, the Chief Justice delivered his extempore judgment on Ms. Mattin's variation application. On the same day, he also gave his reasons for refusing Mr. Roache a retrospective extension of time for filing the record of appeal in the 2021 appeal. He said that Mr. Roache's explanations for what the Chief Justice called "a serious and significant breach" were wholly insufficient. Mr. Roache had blamed his lawyers and said he was focusing on another aspect of the litigation. The Chief Justice cited the following observations of Sir Nigel Davis, J.A. in *Slack* v. *Sails Mgmt. Ltd.* (10) (2021 Gib LR 494, at paras. 19–20):

> "19 Moreover, in modern times, having in mind the principles and approach adopted in cases such as *Denton* v. *White* . . ., a party should

> not be surprised when the courts take a firm view in cases of material non-compliance with the rules, where, as in the present case, no satisfactory explanation is given. Rules of court are not to be regarded as tiresome optional extras for litigants. They are designed to promote a clear and consistent procedural code applicable to all litigants and for the better enhancement of the good administration of justice.
>
> 20 Mr. Finch sought to say that substantive justice should prevail over procedural justice and it would be unfair on his clients if they were simply to be deprived of an appeal which he says is an appeal based on substantial grounds. But such arguments cannot be advanced as a complete answer to the need to comply with the procedural requirements of the rules."

88 The Chief Justice said that citation seemed to provide the answer to Mr. Roache's application and he refused it. He added, however, that the parties should be ready to argue the 2021 appeal if, as he did, Mr. Roache chose to renew his application before the full court.

89 After that no doubt unusually long preamble to a decision on a time extension application, I come to my conclusion. We are, of course, not sitting in appeal against the Chief Justice's decision to refuse an extension. This is a renewed application before the full court, which decides the matter afresh, although the court of course has regard to the Chief Justice's reasons.

90 The first *Denton* factor requires the court to consider the "seriousness and significance" of the default. There is no doubt that Mr. Roache's default in complying with the r.57(5) requirements was very serious. He fell into default by September 14th, 2021 and, despite the prompting from Ms. Mattin's solicitors in January 2022, did not remedy it, or seek to do so, until earlier this year. That is very serious by any standards and his only explanation is that it was an oversight by his solicitors, one that apparently continued despite the express prompting they had from Ms. Mattin's solicitors in January 2022. That explanation provides the answer to the second *Denton* factor, although it is an unsatisfactory one. The court has had no fuller explanation from the solicitors as to why, despite such prompting, they continued to fail to file the record and why it was not until April 5th, 2023 that the time extension application was filed. That said, it may be that the provision of any such evidence would have presented difficulties for the solicitors in light of their confidentiality and legal professional privilege obligations to their client.

91 Returning, however, to the first *Denton* factor, how *significant* was the default? "Significance" in this context must, I consider, largely be measured by the practical impact the default has had on the progress of the appeal and the extent to which it has prejudiced the innocent party. In the circumstances of this case, my assessment is that such significance is at the lower end of the scale.

92 In elaboration, the default had no effect on the progress of the appeal between July 2021 and January 2023 because, for various reasons, the parties were at one that they did not want it brought on during that period. It was only in January 2023 that differences developed between the parties as to bringing on the appeal. Ms. Mattin's then stance was that she wanted it heard *after* the hearing of her variation application, which she filed on February 3rd, 2023 and which was decided on April 18th, 2023. It is improbable that, in January, Ms. Mattin could have had any confident expectation that her variation application could or would be heard and decided *before* the Court of Appeal's spring 2023 session. Her position must, therefore, have been that she was content for the 2021 appeal to be heard in the court's 2023 autumn session. She was also not then advancing any suggestion that, by reason of Mr. Roache's default, it should not be heard at all. By contrast, Mr. Roache's stance in January 2023 was that he wanted the appeal to be heard in the spring 2023 session. His hope in that regard was, however, dashed when, on the call-over session for then pending appeals, the emergence of his failure to have filed the record of appeal resulted in the court's refusal to list the appeal for the spring 2023 session.

93 On April 18th, 2023, the Chief Justice refused Mr. Roache's extension of time application. In case, however, as he did, Mr. Roache should wish to renew his application before the full court in the autumn 2023 session, the Chief Justice directed the parties to be ready for the 2021 appeal *also* to be heard then. The parties therefore had to prepare for the substantive appeal, both did so and both were so ready. We had written and oral arguments from both sides as to their respective cases on both the time extension application and the appeal. Formally, the appeal was argued before us on a contingent basis. But we were left, and are now, in a position to decide the substantive issues it raised, and I have given my decision on them.

94 The third *Denton* factor requires the court to consider all the circumstances of the case so as to enable the court to deal justly with the application, having regard also to (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and orders. Mr. Roache has certainly not conducted the appeal efficiently but, for reasons given, I am satisfied that his inefficiency has not, in the end, caused any prejudice to Ms. Mattin. The court must also have regard to the importance of the need to comply with its rules, and there is no doubt that Mr. Roache has fallen seriously short in that regard too. I would respectfully endorse Sir Nigel Davis, J.A.'s observations in *Slack* v. *Sails Mgmt. Ltd.* (10) as to the importance of the need for litigants to comply with the rules.

95 We are, however, enjoined by the third *Denton* factor to consider *all* the circumstances of the case. Because of the course that this application

and appeal have taken, we have moved on materially from the position I understand the Court of Appeal to have been in when dealing with the application in *Slack* v. *Sails Mgmt. Ltd.* As I said in para. 5 above in relation to the guidance given by Moore-Bick, L.J. in *R. (Hysaj)* v. *Home Secy.* (9), there is here no question of us being tempted into assessing the merits of Mr. Roache's appeal. We *know* its merits and can now decide it. And, as Moore-Bick, L.J. explained in his judgment in the *Hysaj* appeal ([2014] EWCA Civ 1633, at para. 46), if the court has a clear view of the merits of the appeal that will play a significant part of the balancing exercise when it comes to make its evaluation of the third *Denton* factor.

96 My decision on the issues in the 2021 appeal is that, with respect to the Chief Justice, he made an order that was unjustified and wrong. He should not have ordered Mr. Roache to pay anything into court, let alone £3.75m.—a sum that even Ms. Mattin was later to recognize was vastly higher than (subject to the outcome of her appeal to the Privy Council) one she could reasonably argue for against Mr. Roache. In all the circumstances of the case, my conclusion that the 2021 £3.75m. payment order was wrongly made is the consideration that tips the balance into satisfying me that the just disposition of Mr. Roache's application for a time extension requires it to be allowed. I recognize that his serious shortcomings with regard to the filing of the record of appeal must also be put on to the scales. But the function of this court is to administer justice. It cannot be just to subject Mr. Roache to the burden of a wrongly made order requiring him to pay £3.75m. into court because of the inefficient way in which he progressed his appeal: an inefficiency which, I am satisfied, has caused no prejudice to Ms. Mattin or to the fair disposal of his appeal.

97 In so concluding, I do not overlook that the £3.75m. payment order was varied by the 2023 order to the lower, but still considerable, sum of US$1.1m. But, for reasons given, the latter order was also wrongly made; and, as I explained when dealing with the issues in the 2023 appeal, it is, I consider, essential for Mr. Roache to be able to succeed on his 2021 appeal if he is also to succeed on his 2023 appeal. A just disposition of Mr. Roache's time extension application must have regard also to this consideration. I say now that, when coming to the 2023 time extension application, I shall be giving my reasons why I would also grant the extension of time that is sought and, in consequence, treat the 2023 appeal as formally before the court for decision.

98 For these reasons, I would allow Mr. Roache's application by his notice of motion dated April 5th, 2023 in the 2021 appeal for a retrospective extension of time for the preparation and filing the record of appeal in compliance with r.57(5) of the Court of Appeal Rules 2004. I would extend his time accordingly. The consequence is that I would treat the 2021 appeal as formally before us for decision.

B. ***The application in the 2023 appeal***

99 The story here is shorter. The Chief Justice's decision under appeal was given on April 18th, 2023, Mr. Roache filed his notice of appeal on April 26th, 2023 and Ms. Mattin filed her notice of cross-appeal on May 31st, 2023. On May 25th, 2023, Mr. Roache proposed a list of documents to be included in the record of appeal, to which Ms. Mattin's solicitors responded on June 8th, 2023. Mr. Roache should have filed the record on June 28th, 2023, but only did so on July 21st, 2023, some 23 days late, and again following an email from Ms. Mattin's solicitors on July 13th, 2023 pointing out his default. His witness statement of July 20th, 2023, in support of his notice of motion filed that day for an extension of time, explains that he missed the deadline in part because of the significant quantity of documents Ms. Mattin wanted to add to the record, which added considerably to the administrative burden on his solicitors, who had only recently come on to the record as acting for him. He also said that, given the quantity of such documents, it was necessary to have the records printed by third party printers, which added to the delay.

100 As to "seriousness," the default is surprising because, in light of his experience in the 2021 appeal, one might have expected Mr. Roache and his solicitors by June 2023 to have been acutely sensitive to the need to comply promptly with the r.57(5) requirements. Once bitten, but apparently still not shy. It is, however, fair to note that Mr. Roache explains in his witness statement that his current solicitors had only recently come on to the record and "did not yet have a full set of papers." I would not dismiss a 23-day delay as *de minimis*, but would regard it as being at the bottom end of the seriousness scale. As to "significance," there is no question of its having caused any prejudice to Ms. Mattin or to the efficient progress of the hearing of the appeal.

101 As for the second *Denton* factor, Mr. Roache offers at least some explanation for the delay, albeit not a comprehensive one. As to the all-important third *Denton* factor, this court is also in a position to decide the 2023 appeal, and I am satisfied that the Chief Justice's US$1.1m. payment order was also wrongly made. Again, that is a very significant consideration to place in the scales. I have no doubt that, in all the circumstances of the case, that the just disposition of Mr. Roache's relatively minor breach of the rules demands that the time extension for which he applies should be granted.

102 I would accordingly also allow Mr. Roache's application by his notice of motion of July 20th, 2023 and grant him a retrospective extension of time for the preparation and filing of the record of appeal in the 2023 appeal. In consequence, I would treat the 2023 appeal as also formally before us for decision.

Overall disposition

103 I would allow both Mr. Roache's time extension applications. I would treat both his appeals, and also Ms. Mattin's cross-appeals, as before the court for final decision. For the reasons I have given, I would allow both appeals and dismiss both cross-appeals. I would set aside para. 7 of the Chief Justice's order of June 25th, 2021 and paras. 1 and 2 of his order of April 18th, 2023. I would invite counsel to endeavour to agree forms of order for the disposal of the applications and the appeals, including all questions of costs. In default of agreement, they may apply to the court for the determination of any differences.

104 **ELIAS, J.A.:** I agree.

105 **KAY, P.:** I also agree.

Judgment accordingly.