Neutral Citation Number: [2024] EWHC 2522 (Comm)

Case No: CL-2024-000450

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/10/2024

Before :

MR JUSTICE CALVER

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Between :

(1) RICARDO BENJAMIN SALINAS PLIEGO **(2) CORPORACION RBS SA DE CV**	**Claimants**
- and -	
(1) ASTOR ASSET MANAGEMENT 3 LIMITED **(2) WEISER GLOBAL CAPITAL MARKETS LTD** **(3) TAVIRA MONACO SAM** **(4) VLADIMIR "VAL" SKLAROV** **(5) CORNELIUS VANDERBILT CAPITAL MANAGEMENT LTD** **(6) ASTOR CAPITAL FUND LIMITED**	**Defendants**

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Charles Béar KC, Edward Levey KC and Tom De Vecchi (instructed by **DWF Law LLP**) for the **First, Third, Fifth and Sixth Defendants / the Applicants**
Rajesh Pillai KC and Gretel Scott (instructed by **Holman Fenwick Willan)** for the **Second Defendant**
Stephen Robins KC, Henry Phillips and Matthew Abraham (instructed by **Enyo Law LLP**) for the **Claimants / the Respondents**

Hearing dates: 20 September 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Monday 07 October 2024.

Mr Justice Calver :

The Discharge Application: Introduction

1. This is the application dated 20 August 2024 of D1 ("**Astor 3**"), D4 ("**Mr. Sklarov**"), D5 ("**Vanderbilt**") and D6 ("**Astor Capital**") (together, the "**Sklarov Defendants**") by which they seek to discharge or set aside the worldwide freezing and proprietary injunctions granted by Mr. Justice Jacobs on 2 August 2024 and 7 August 2024 and by HHJ Pelling KC on 13 August 2024 (together, the "**Injunctions**") by reason of the Claimants' alleged breach of their duty of full and frank disclosure (the "**Discharge Application**").

2. The application before Jacobs J on 2 August 2024 was made without notice to Astor 3, D2 ("**Weiser**"), D3 ("**Tavira**") and Mr. Sklarov; the application on 7 August 2024 before Jacobs J was made on very short notice to Vanderbilt (who did not attend); and the application on 13 August before HH Judge Pelling KC was made against Astor Capital (who did not attend but who were given informal notice of the hearing). Before me, the parties have proceeded on the basis that each of the defendants should be treated in the same way for the purpose of determining whether or not the injunctions were wrongly obtained on the ground of breach of the Claimants' duty of full and frank disclosure. For that purpose, both parties focussed upon the presentation of the Claimants' case before Mr. Justice Jacobs on 2 August 2024.

3. The Claimants' case, when they obtained the Injunctions, was that as a result of fraudulent misrepresentations, the First Claimant ("**Mr. Salinas**") was persuaded to transfer his shares in a Mexican company called Grupo Elektra SAB De CV ("**Elektra**"), which is listed on the Mexican stock exchange and which were worth more than US$400 million ("**the Collateral**") to two custodians, Weiser and Tavira, as security for loans ("**the Loans**") which were to be advanced by Astor 3 to the Second Claimant ("**RBS**") under a Stock Loan Agreement dated 28 July 2021 ("**the SLA**"). As part of the security, the custody documents entitled Astor 3 to give instructions in respect of the Collateral. Unbeknownst to the Claimants, Mr. Sklarov began to misappropriate and sell the Collateral, using a large portion of the proceeds thereof to fund the very Loans which were to be made to RBS under the SLA and paying away the remainder of the proceeds of sale to himself and various third parties.

4. The Claimants maintain that as soon as Mr. Salinas discovered that Astor 3 was not (as he had been led to believe) a reputable financial institution associated with the well-known Astor family from the United States but was instead a vehicle for fraud by Mr. Sklarov, they applied for the Injunctions.

5. The Sklarov Defendants take issue with this. They maintain that they were entitled to trade the Collateral under the terms of the SLA and in September 2021 they told Mr. Salinas's financial adviser that this was what they would do, as is customary in the stock lending market. They further argue that the Claimants delayed in seeking their injunctive relief, because their real motive in urgently seeking it was to justify to the market the sudden fall in the value of the Elektra shares.

The factual background

6. The relevant factual background to the Discharge Application is as follows.

(i) The negotiations and the alleged representations

7. During the spring of 2021, Mr. Salinas wanted to refinance a loan from BNP Paribas. Mr. Salceda of Grupo Salinas was responsible for dealing with this. He had been liaising with Mr. Torti of Fininvesta, who acted as a financial adviser for Mr. Salinas. In turn, Mr. Torti dealt with Ms Akbar, a financial adviser liaising with Mr. Sklarov. In his first affidavit (subsequently dated 5 August 2024) which was before Jacobs J at the without notice hearing, Mr. Salceda stated as follows at [30]:

> *"During the course of the negotiations of the SLA, I believed that Astor was a legitimate lending firm. I was told by Mr. Torti that Astor was owned by the wealthy Astor family in the United States (and I understood that he had been told this by Ms Akbar)*."

8. Mr. Salceda also explained how the key personnel were identified to him as being Thomas Mellon and Gregory Mitchell, said to be respectively the CEO and Managing Director of Astor Wealth Group. During and after the negotiations for the SLA, emails from Astor Capital Fund to Mr. Torti and Ms Akbar were copied to thomas.mellon@astorassetgroup.com and gregory.mitchell@astorassetgroup.com. Before Jacobs J, the Claimants maintained that neither of these individuals in fact exists (this is now admitted by Mr. Sklarov, at least so far as Mr. Mitchell is concerned – see further below).

9. Before me, the Claimants drew attention to what they called "an internet puff-piece" which they reasonably suggested is likely to have been derived from the Sklarov Defendants themselves (a point with which Mr. Béar KC (leading Edward Levey KC and Tom De Vecchi) for the Sklarov Defendants did not take issue), which states that Astor Asset Management is a "*top financial company*" which "*bear the heavy responsibility of carrying on the family name and legacy. Thomas Mellon … is a descendent of the famed Astor family, a fact not lost on the prestigious financier*"; "*With a financial legacy dating back 200 years, the Astor name is legendary. That legend comes with privilege, but also carries a great responsibility. Thomas Mellon works tirelessly on behalf of his loyal clients and investors. But it is never far from his mind, that he has a duty also, to live up to the name and the legacy*"; "*As the CEO of Astor Asset Management, Thomas Mellon has continued the bold legacy built by his ancestors over 200 years ago*".

10. There is clearly a good arguable case that prior to entering into the SLA, the Claimants made clear through Mr. Torti that they would provide the Elektra shares as the Collateral for the proposed loan but the shares should not be lent or sold absent a default on the part of the Claimants. That is clear from an email sent on 6 April 2021 by Mr. Torti to Mr. Salceda in which he confirmed the parameters for the loan which had been agreed with the Sklarov Defendants ("*prohibited to sell (unless there is a default) and lend the shares as collateral*"); and an email from Mr. Torti to Ms Akbar dated 4 May 2021 ("*securities lending restriction and short selling restriction considering the volume of Electra shares, we want to make sure that not only the lender, but also the custodian has a formal restriction on short selling or lending Electra stock. As discussed, a clause referring to this in the pledge document could probably meet this purpose*").

11. The Term Sheet dated 29 March 2021 for the proposed lending, which Mr. Salceda stated in paragraph 45 of his first affidavit was circulated to him in April 2021 and was the basis upon which he decided to pursue a stock-backed lending arrangement with Astor Fund, also stated as follows:

> "**Custodian**
>
> A fully licenced and regulated brokerage firm shall serve as the custodian, with the pledged securities deposited into the Borrower's brokerage account on a per-tranche

basis. Lender, in its sole and absolute discretion, shall identify a custodian broker dealer that shall retain and hold the collateral during the loan term"

Restrictions on Lender

During the loan term and while the loan remains in full force and effect, Lender shall not engage in short selling or selling of the Securities.

Loan Termination and Return of Collateral

Within three (3) business days after the end of the Loan Term and upon Borrower's payment in full of the Principal Balance and any outstanding Interest Payments and any other costs and fees, Lender shall return the Collateral to the Borrower in the same format as the collateral was originally delivered to Lender." (emphasis added)

12. The Claimants' case is that it was accordingly led to believe that the relevant Astor company which entered into the SLA (Astor 3) would not sell or trade in the Collateral prior to maturity of the loan or an event of default, and that the collateral would be safeguarded.

13. The SLA was drafted by Mr Sklarov and it was concluded on 28 July 2021 between Astor 3 (as Lender), RBS (as Borrower) and Mr. Salinas (as Guarantor). Consistently with the Term Sheet, in the "Lender Warranties and Representations" section (Clause V) it is expressly provided as follows:

(i) In clause 4b:

"***Dealing with Securities***

During the Loan Term, provided that there has not been an Event of Default, the Lender will not sell or short-sell the shares of the Pledged Collateral on any publicly traded securities exchange. However, upon the occurrence of an incurable Event of Default, the Lender reserves the right to dispose of the Collateral on any publicly traded securities exchange but is not obligated in doing so."

(ii) In clause 6:

"***Transfer of Securities***. *The Lender will not transfer the securities to its own account unless an incurable Event of Default has taken place…*"

14. Mr. Salceda stated in his first affidavit that these provisions of the SLA (which are the provisions upon which the Claimants particularly rely) and the statements in the Term Sheet (set out above) were very important to him and Mr. Salinas (so that the Elektra share collateral was safeguarded) and without them they would not have entered into the SLA.

15. In his first affidavit, Mr. Salceda concluded as follows:

"*42. In light of the matters set out above, I understood Astor 3 to have made the following representations (prior to the execution of the SLA on 28 July 2021):*

(1) that Astor 3 was a legitimate and honest financial institution which engaged in legitimate and honest stock-lending activities; and

(2) that Astor 3 intended to comply with its obligations under the SLA including in particular its obligations not to sell the Elektra shares prior to maturity or default.

(Together, the "Key Representations".)

43. The Applicants executed the SLA on 28 July 2021 in reliance on the Key Representations."

(ii) The events of September/October 2021

16. The Claimants maintain that their belief that these alleged representations were being adhered to was reinforced by the events of September/October 2021, shortly after the SLA was concluded.

17. On 10 September 2021 at 2.32pm, Mr. Torti emailed Weiser, Ms Akbar and Astor 3. He stated "*Based on some activity in Elektra shares [on the securities exchange], we would like to confirm by return of email that none of the Elektra shares pledged by Weiser has been lent (securities lending) as per our agreement*."

18. Gregory Mitchell (whom it is now known is in fact Mr. Sklarov himself) replied at 8.53pm on the same date. His response was, as Mr. Robins KC (leading Henry Phillips and Matthew Abraham) for the Claimants described it, "jargon filled":

"*Astor will merge or pool collateral rights as a portfolio and underwrites derivatives to hedge its risk and liquidity leverage. This leads to collateral shares being made available for lending to its liquidity providers and other financial institutions who wish to borrow the shares. As we had discussed previously, the shares may be rehypothecated which is standard practice (share borrow-lending between institutions). This can't be stopped or restricted in all cases where the shares are free trading. Otherwise, the shares are restricted and we don't lend against restricted shares. I have never heard of free trading shares being restricted to borrow. When you custody shares with major banks, they all can and do engage in share borrow to each other.*

...

Also, our loan agreement is transparent, the "Encumbrance" clause explains what can potentially take place with the stock, most of which we have no confirm over.

If you log into the account at Weiser, you will see that all the stock is there. We have not sold any of it, which is in accordance with the loan agreement.

Please speak to Mr. Salinas and advise us if this is not an issue. If it is an issue, we would need to revisit internally how to proceed, cause we can't stop or restrict others from borrowing free-trading unrestricted stock." (emphasis added)

19. Whilst Mr. Sklarov spoke about "rehypothecation" being standard practice, Mr. Torti was also told that the stock had not been sold; it was all there. He appears to have been reassured by this as he responded by email later that same evening, stating:

"*As long as all the terms of the contracts signed are duly respected, we are fine*."

20. The Claimants maintain that they were further reassured that the representations were being adhered to by reason of the events of October 2021 (being one month later) as follows.

21. On 5 October 2021 Weiser informed Mr. Salceda that the 935,913 shares which Mr. Salinas had transferred to Weiser after the signing of the SLA, had been transferred from Mr. Salinas's account to an account in the name of Astor Capital.

22. This was a cause of concern to Mr. Salceda, who instructed Mr. Torti to send an email to Weiser seeking clarification, which Mr. Torti did. In the absence of a satisfactory resolution to this issue, Mr. Torti emailed Weiser on 19 October 2021 stating that the transfer to Astor Fund had taken place in breach of clause V of the SLA[1] and that the shares should be transferred back to Mr. Salinas's account without delay. Weiser responded on 22 October 2021 but merely stated that they had acted upon Astor 3's instructions under their Custodian Management Agreement. Mr. Torti then emailed Ms Akbar on 23 October 2021 in which he stated as follows:

> "*It is very important that you have the sensibility of the necessity for the shares to return to the collateral contract until no later than in this week since if the account statement is issued without the shares there could be trigger an alienation with great tax implications.*
>
> *Please we really need your help to make Astor and Weiser understand that they are breaching and violating the contracts*".

23. Significantly, on 25 October 2021, Ms Akbar told Mr. Torti that Astor 3 had agreed to reverse the instructions to Weiser and to arrange for the shares to be returned to Mr. Salinas's account within 24 hours.

24. The consequence of this was that Astor 3 agreed to sign an addendum to the SLA on 6 December 2021 ("**Addendum 2**") confirming that it would only issue instructions to the custodians in accordance with the terms of the SLA and not otherwise. It is strongly arguable that this would have reinforced the impression in Mr. Salceda's mind that Astor 3 would not deal in the shares in such a manner during the term of the loan (in the absence of an event of default).

25. In light of this incident, Mr. Salinas then insisted that any further tranches of collateral shares should be held by a different custodian in place of Weiser, and Tavira was appointed for that purpose under a control agreement dated 30 November 2021 between (i) RBS; (ii) Astor 3; (iii) Mr. Salinas and (iv) Tavira.

(iii) The transfer of the Collateral tranches by Mr. Salinas

26. As stated, the parties had entered into the SLA on 28 July 2021. Thereafter, Mr. Salinas transferred the Collateral for the Loans as follows:

    (1) 935,913 shares to Weiser;

    (2) 2,350,000 shares to Tavira on 15 December 2021;

    (3) 314,087 shares to Tavira on 20 January 2022;

[1] It may also have been a breach of clause V6 of the SLA

(4) 1,431,700 shares to Tavira on 22 June 2022;

(5) 128,207 shares to Tavira on 3 April 2023;

(6) 1,600,000 shares to Tavira on 4 April 2023;

(7) 444,389 shares to Tavira on 12 September 2023.

(iv) The fate of the Collateral which was transferred to Tavira

27. This made a total of 6,268,383 shares transferred to Tavira. The evidence of Mr. Salceda was that as at 2 August 2024 a combined total of 7,204,296 shares were held by Weiser and Tavira which were worth Mexican Pesos (MXN) 7.6 billion or US$415m, in respect of Loans of only MXN 2,154,218, 522 or US$115m.

28. It is now apparent from paragraph 19 of Mr. Sklarov's first affidavit of 2 September 2024 (sworn on 5 September 2024), which he was ordered to swear by way of asset disclosure pursuant to the worldwide freezing injunction, that as soon as the Collateral was transferred to Tavira in the six tranches set out in paragraph 26 above, Astor 3 immediately rehypothecated[2] each tranche of Collateral on to Vanderbilt pursuant to "Rehypothecation Agreements" between them as follows:

a. On 17 December 2021, Astor 3 rehypothecated 2,350,000 Collateral Shares to Vanderbilt.

b. On 18 January 2022, Astor 3 "rehypothecated" 314,087 Collateral Shares to Vanderbilt.

c. On 15 June 2022, Astor 3 "rehypothecated" 1,431,700 Collateral Shares to Vanderbilt.

d. On 5 April 2023, Astor 3 "rehypothecated" 1,728,207 Collateral Shares to Vanderbilt.

e. On 13 September 2023, Astor 3 "rehypothecated" 444,389 Collateral Shares to Vanderbilt.

29. It is the Claimants' case that these "rehypothecations" to Vanderbilt were not, however, reflected in the monthly account statements sent by Tavira to the Claimants; and that it was only in an account statement provided to the Claimants on 1 August 2024 by Tavira that the Claimants were informed that on 29 July 2024 all 6,268,383 shares were subject to "FOP Delivery Out" (meaning "free of payment" by Vanderbilt) "*to Astor's account as per Astor's instructions*". In paragraph 11d of his first affidavit Luke Harris of Tavira appears to accept that this transfer out took place, although he appears to suggest that the transfer out of the shares to Astor 3's account only took place on 29 July 2024, which the Claimants dispute. Either way, Mr. Sklarov admits, in paragraph 20 of his first affidavit, that "*from the shares rehypothecated to Vanderbilt, Astor 3 received proceeds from Vanderbilt's sale and short sale of these shares. From these proceeds, Astor 3*

[2] Mr. Sklarov's (disputed) evidence in paragraph 58 of his first witness statement is that he understood that "*Tavira's practice was not to transfer shares from Mr. Salinas's account when shares were rehypothecated from that account by Astor 3 to Vanderbilt*."

withdrew USD 43,025,048 by way of a cash redemption, which … was then transferred to the Juris IQ account" (which is referred to in paragraph 33 below).

30. It appears from Mr. Sklarov's affidavit evidence that Vanderbilt began selling ~~trading in~~ the Collateral on to third parties immediately upon receipt in small tranches on and continued to do so on almost every trading day between 16 December 2021 and 2 April 2024 via many different Mexican brokers. Mr. Robins KC suggested that these were sales on a publicly traded securities exchange. Mr. Béar KC did not deny that and it seems likely that at least some of them were, as Mr. Sklarov accepts in paragraph 25 of his first witness statement of 1 September 2024 that:

> "…*Vanderbilt, to which Astor 3 lent the shares for a period of 60 months, instructed that the shares be traded but does not know whether these trades were executed by Tavira on-market (i.e. on-exchange) or privately in an OTC (or block) trade since those trades were executed by Tavira*."

31. Mr. Sklarov suggests in paragraph 24 of that witness statement that this was not a breach of clause V(4)(b) of the SLA because it was not Astor 3 which sold the Collateral; rather it was Vanderbilt. But it is clearly arguable that Astor 3 instigated the sale of the Collateral, not least because a substantial part of the proceeds made their way back to Mr. Sklarov (see paragraphs 33-34 below).

32. Significantly, in paragraph 53 of his 4th witness statement of 16 September 2024, Mr. Sklarov admits that as a result of the sales of the Collateral between 20 December 2021 to 29 July 2024 referred to above, a total sum of almost US$360m was received by Vanderbilt into its account at Tavira (which is no longer there). *He also accepts that the 3rd, 4th and 5th tranches of the Loans, which were provided to RBS, were funded from the very proceeds of the disposals of Mr. Salinas' own shares (ie. the Collateral) by Vanderbilt, being around $64.5m*.

33. In paragraph 53c and 54 of his 4th witness statement, Mr. Sklarov states that the balance of the proceeds of the sale of the Collateral was disposed of by way of a transfer of US$271,685,472 from Tavira to client accounts controlled by Mr. JT Singh through his company Jurist IQ or his US Law Firm. Mr. Singh is an associate of Mr. Sklarov. Mr. Singh then apparently transferred back US$216,069,214 to Tavira and some of these monies were, according to paragraph 5 of Mr. Sklarov's second affidavit dated 5 September 2024, paid into different accounts of different companies for which Mr. Sklarov says he provides "consulting services".

34. Further still, Mr. Sklarov also admits that between 28 July 2021 and 2 August 2024 (when the Injunction was granted), US$9,149,781 was paid to him personally from the Singh Law Firm and Jurist IQ accounts. Of this sum, US$4,388,736 was paid to Bank Hapoalim in Israel.

35. Mr. Sklarov states in his first affidavit that this left Astor 3 holding about $13.5m, being US$963,000 in cash with Tavira and US$12,604,476 with Weiser.

36. Meanwhile, Vanderbilt is left with virtually no assets: see paragraph 25 of Mr. Sklarov's first affidavit.

(v) The fate of the Collateral which was transferred to Weiser

37. On 9 August 2024 Weiser served an affidavit of Christos Livadas in which Mr. Livadas stated (in paragraph 17) that Astor 3 had sold 935,716 of the Elektra shares held by Weiser

to Astor Capital on 30 July 2024 for MXN 233,929,000, equivalent to US$12,604,476.49. The Claimants maintain that this was a sale at a significant undervalue, in that the true market value of the said shares at that time was approximately MXN 982,501,800 (based on a share price on the open market was MXN 1,050 per share), equivalent to around US$ 52.1 million. Weiser has disclosed that it holds US$12,604,476.49 for Astor 3.

38. However, it is not clear what Astor Capital has done with the 935,716 shares. Mr. Sklarov has failed to explain satisfactorily what happened.

39. It is difficult to reconcile the evidence of Mr. Livadas with the Weiser account statements exhibited by Mr. Sklarov to his fourth witness statement. Those statements appear to show that Astor Capital sold a total of 687,000 shares in Elektra between 27.07.21 and 15.08.21, generating total cash proceeds of MXN 815,025,252. That is equal to 98% of the principal sums advanced to RBS by Astor 3 under the first two tranches of the loan. *On that basis, the Claimants contend that the first two tranches of the loan were, it seems, funded in the same way as the third, fourth and fifth tranches – namely, by selling the Collateral belonging to Mr. Salinas*. (This also makes it difficult to see how it can be true that 935,716 of the shares held by Weiser were sold in July 2024, as asserted by Mr. Livadas). Mr. Béar did not dispute this.

(vi) Conclusions concerning the transfer of the Collateral

40. Accordingly, the foregoing evidence (including in particular that of Mr. Sklarov himself) suggests as follows:

    (1) Upon receipt of the Collateral, Astor 3 immediately started "rehypothecating" or transferring it to Vanderbilt, who then immediately started selling it to third parties, likely in at least some cases on a publicly traded securities exchange;

    (2) Astor 3 does not appear to have provided the Loans itself; rather it sold Mr. Salinas's own Collateral via Vanderbilt and used those funds to provide the Loans.

    (3) A significant tranche of the proceeds of the sale of the Collateral was paid over to Mr. Sklarov himself (including US$9,149,781 being paid to him personally from the Singh Law Firm and Jurist IQ accounts).

The case as presented before Mr Justice Jacobs

41. Before Jacobs J, the Claimants sought both an interim proprietary injunction and a worldwide freezing injunction against the Sklarov Defendants. They accepted, and the parties agreed before me, that it was necessary for the Claimants to satisfy the court that their claims against the Sklarov Defendants raise a serious issue to be tried (for the purposes of the proprietary injunctions) and that they are good arguable claims (for the purposes of the freezing injunctions).

42. The Claimants made their urgent application to Jacobs J having been informed by Tavira on 1 August 2024 that, as described in paragraph 29 above, on 29 July 2024 all 6,268,383 shares of which Tavira was custodian were subject to "FOP Delivery Out" "*to Astor's account as per Astor's instructions*".

43. In their skeleton argument before Jacobs J, the Claimants put their case on the following bases:

(1) Fraudulent misrepresentation;

(2) Breach of contract;

(3) An intention to cause harm by unlawful means and/or conspiracy to cause harm using unlawful means;

(4) A proprietary injunction to restrain the Sklarov Defendants from dealing with or disposing of the Collateral shares or the proceeds thereof.

44. Mr. Béar KC submitted that Jacobs J granted the Injunctions against the Sklarov Defendants based on the central propositions that trading in the Collateral had occurred and constituted a dishonest misappropriation of those shares, and that the Claimants had only recently discovered this. He submitted that those propositions were false and that the two orders of Jacobs J, as well as that of HHJ Pelling KC were granted "*because of serial and egregious misrepresentations and non-disclosures of both fact and law by Mr. Salinas through his witness … Mr. Salceda … and, regrettably, by [the Claimants'] counsel*."

45. Mr. Béar KC submitted that the entire claim of fraud was and is based on Astor 3 putting the Collateral into circulation, resulting in them being traded on the market. The Claimants' case is that this contravenes the terms of the SLA and that, absent an Event of Default, Astor 3 was permitted only to retain the shares *as collateral* – to keep them in a 'locked box' which could not be opened. On that approach, any step by Astor 3 which led to the shares being traded would be a breach of the SLA.

46. But, Mr. Béar KC submits, an allegation of a simple breach of contract, however fundamental, is not enough for a claim of fraud, or for the proprietary claim to the shares which depends entirely on rescission for the alleged fraud.

47. Indeed, Mr. Béar KC maintains that Astor 3 is not in breach of the SLA at all. As Astor 3 stated in its letter to RBS and Mr. Salinas dated 12 June 2024 ("**the 12 June letter**"), it advances a different construction of the SLA by reference to different provisions, which construction it relies upon as justifying its trading in the collateral in this case. It stated as follows in the 12 June letter:

> "Pursuant to the SLA, and as a condition to funding, you granted the Lender an Encumbrance and Lien over the Shares. Section IV.7 states as follows:
>
> *As of the date of this Agreement, the securities constituting the Pledged Collateral are owned by Guarantor free and clear of any Liens, Encumbrance or contractual, statutory, or regulatory limitation or restriction of whatever nature; are in good standing in accordance with their country of issue; and are freely tradeable and transferable securities and Guarantor hereby grants absolute first position Security Interest as a Lien and Encumbrance rights to Lender in exchange for Borrower receiving a Loan*.
>
> Thus, throughout the loan term, you granted the Lender a first position Security Interest in the Shares. Security Interest is defined in Section I(51) of the SLA:
>
> *Security Interest shall mean a Lien or Encumbrance granted by Guarantor to Lender in real property such as securities as Collateral for a Loan to Borrower. The Security interest granted to Lender prevents the Guarantor from disposing or transferring the*

property or securities until such time as the Loan is repaid by Borrower to Lender and all Obligations of Borrower to Lender are discharged.

Encumbrance is defined in Section I(21) of the SLA:

Lender's legal claim on Pledged Collateral that affects the Borrower's ability to transfer ownership to anyone or to dispose of the Pledged Collateral without Lenders prior written authorization. For purposes of this definition, Encumbrance shall mean lien, mortgage, charge, hypothecation, rehypothecation, rights, barter, pawn, trade, dispose, deal-in, pledge, re-pledge, repo, borrow or transfer of security interest in Collateral. The Pledged Collateral will be restricted to Guarantor and Encumbrance rights exclusively granted to Lender.

Thus, the SLA is express and clear that you granted the Lender the right to exercise its Encumbrance rights over the Shares during the loan term. Indeed, this is further supported by the definition of Lien which the SLA states is "*any Encumbrance of any kind referenced herein concerning the Pledged Collateral of Guarantor. A lien is the Lender's right to retain possession of property belonging to Guarantor until a debt owed by that Borrower is fully discharged per this Agreement.*" As such, the Lender is fully authorized to exercise its Encumbrance rights until such time that your debt is fully repaid in due course in accordance with the SLA.

The Lender's rights in the Shares are further defined in Section V.4, Dealing with Securities, of the SLA. Specifically, Section V.4(c) states that "*the Borrower acknowledges and agrees that the Pledged Collateral will be utilized by Lender to assert its preferential Lien over it.*" Therefore, the Lender has the right to deal-in the Shares to the extent that is defined within the meaning of Encumbrance. The Lender has, at all times, fully complied with and adhered to the language within the SLA.

Moreover, Section X, Required Disclosures, states, in part, that:

During the Loan Term, all benefits and proceeds of the Pledged Collateral inure to Lender. Lender reserves the right to maintain dominion over the Collateral during the Loan Term, which affords Lender the right to deal-in, dispose, or convert over the Pledged Collateral.

Therefore, by executing the SLA, you repeatedly re-affirmed the Lender's dominion and Encumbrance over the Collateral."

48. On any view the SLA is ambiguously worded. However, it is the Claimants' case that it is deliberately so worded, being an instrument designed to allow Mr. Sklarov to perpetrate one of his trade-mark stock-lending frauds (as to which see below), this time against Mr. Salinas.

The alleged non-disclosures

49. Before me, Mr. Béar KC argued that in obtaining the injunctions the Claimants were in breach of their duty of full and frank disclosure in respect of the following six separate matters:

(1) The way in which the Claimants' case was put concerning the key representations;

(2) The way in which the Claimants presented the terms of the SLA;

(3) The failure to explain that it is Astor 3's understanding of the contractual terms which matters;

(4) The Claimants' case on there having been no delay in seeking the relief;

(5) The Claimants' failure to inform the court of its true motive for applying for injunctive relief

(6) The Claimants' case as to Mr. Salinas's wealth and probity.

(1)/(2)/(3) *The Claimants' case concerning the key representations; presentation of the terms of the SLA/failure to explain relevance of Astor's subjective understanding of the terms*

50. I shall take these three points together as they overlap.

51. The misrepresentation case advanced before Jacobs J in the Claimants' skeleton argument was as follows:

> "***(1) Misrepresentation***
>
> *97. The Applicants have rescinded the SLA on the basis that it was induced by fraudulent misrepresentations, and they seek to recover the Elektra shares on a proprietary basis. They also seek damages against Astor 3 and Mr. Sklarov for the tort of deceit.*
>
> *…*
>
> *99. In the present case, the key representations were:*
>
> *(1) that Astor 3 was a legitimate and honest financial institution which engaged in legitimate and honest stock-lending activities*[3]*; and*
>
> *(2) that Astor 3 intended to comply with its obligations under the SLA including in particular its obligations not to sell the Elektra shares prior to maturity or default*[4]*.*
>
> *100. The first of those representations was implicit in the circumstances of Astor holding itself out as a legitimate and honest financial institution which engaged in legitimate and honest stock-lending activities when offering to enter into the SLA.*
>
> *101. As regards the second of these representations, Chitty explains at [10-14] (by reference to Kingscroft Insurance v Nissan Fire & Marine Co [2000] 1 All ER (Comm) 272 and SK Shipping Europe Ltd v Capital VLCC 3 [2022] EWCA Civ 23): "Making an offer may amount to a representation that in general terms the offeror intends and has the ability to perform the proposed contract, as they understand it". See Civil Fraud at [1-045] ("by entering into the contract the company impliedly represents that it has the present intention, and capacity, to perform its obligations"). In Kingscroft Insurance, for example, Moore-Bick J held that "the representation is likely in most cases to come down to no more than one of honesty in entering into the bargain". Males LJ confirmed in SK Shipping at [51]: "There are some circumstances where an offer to contract on certain terms carries with it an implied representation as to the party's honesty in relation to the proposed transaction. It is not necessary to see why this should*

[3] "key representation 1"
[4] "key representation 2"

be so. Such honesty is the necessary substratum for all commercial dealings. It goes without saying". See, e.g., Property Alliance Group v Royal Bank of Scotland plc [2018] 1 WLR 3529 at [132]-[144]; UBS AG v CWL [2014] EWHC 3615 at [733]-[740]; and Lindsay v O'Loughane [2010] EWHC 529 at [103].

102. As set out above, the SLA involved the deposit of high-value shares as collateral for loans. Counterparty honesty is obviously highly important in such circumstances. A representation that the lender, who is given control over those shares, has the intention of complying honestly with its contractual obligations, including his obligation not to dispose of them wrongfully, is so obvious that it goes without saying and will therefore be readily implied. Indeed, no one would contract on any other basis."

52. Mr. Béar KC submitted that the 'key representations' are not based on anything alleged to have been specifically said or done by Astor 3, but merely on the fact that what became cl. V of the SLA was put forward as part of the pre-contractual discussions.

53. He argued that to establish fraud the Claimants needed to show not just that these purported misrepresentations were made, but that they were made dishonestly, and that the Claimants accordingly allege that the Sklarov Defendants must always have known that the contract prohibited the dealings which later took place and which they always intended. Accordingly, Mr. Béar KC submitted that the Claimants' case requires them to establish as follows:

(1) the SLA, and in particular cl. V, prohibited the share dealings of which the Claimants now complain;

(2) The Claimants understood the contract in that way;

(3) the Sklarov Defendants (or at least D1 and D4) also understood the contract in that way; and

(4) the Sklarov Defendants never intended to comply with the terms (allegedly) prohibiting the share dealings.

Mr. Béar KC submits that each of these propositions begs the question as to whether the SLA is to be construed as the Claimants suggest. He argues that the existence of a reasonable alternative interpretation of the SLA is fatal to the Claimants' case that Astor 3 could not have honestly believed that its dealing in the shares was permitted.

54. I do not accept Mr. Béar KC's submissions. Jacobs J had before him not only the fact that the parties had entered into the ambiguously worded SLA (which was drafted and put forward by Astor 3); the Claimants also relied upon the following features of the transaction in support of its fraudulent misrepresentation case.

55. First, Mr. Torti was led to believe (by Ms Akbar who had been liaising with Mr Sklarov) that the Claimants were negotiating and contracting with a company owned by the wealthy Astor family in the United States and accordingly that it was a legitimate and honest financial institution.

56. In fact, it was nothing of the sort. Rather (and there is strong evidence to suggest that), Mr. Sklarov used the Astor name precisely in order to mislead the Claimants into believing that this was so, and this was his *modus operandi* for stock-lending frauds perpetrated by him.

57. Second, there was evidence before Jacobs J that Astor 3 was controlled by Mr. Sklarov: see paragraphs 71-87 of the Claimants' skeleton argument for the hearing before Jacobs J).

58. Indeed, subsequent to the hearing before Jacobs J, in paragraph 12 of his witness statement of 1 September 2024 Mr. Sklarov sought to distance himself from the alleged fraud by suggesting that he was merely a "technical consultant" for Astor 3, Vanderbilt and Astor Capital and so on a day to day basis he had "limited knowledge" of the precise transactions entered into by those entities and limited access to their correspondence. He said he was "*not an owner, beneficiary nor employee or officer of those entities*". But that arguably appears to have been false, as he then swore two affidavits on 5 September 2024 on behalf of each of those companies as to their respective assets which he states is within his own knowledge. Similarly, his 4th witness statement of 16 September 2024 demonstrates that the "Elektra deal" as he calls it was his idea and his "business strategy."

59. Third, before Jacobs J the Claimants maintained that Mr. Mellon and Mr. Mitchell (with whom the Claimants dealt in their correspondence with Astor 3 /Astor Capital) did not exist. Significantly, Mr. Sklarov was forced to admit in paragraph 87 of his 4th witness statement that Gregory Mitchell was in fact Mr. Sklarov himself. His purported explanation for this lacks any credibility. He states that he used this pseudonym because the use of his name "Vladimir" had led to him being discriminated in business. But that makes no sense in circumstances where the Claimants have discovered that he legally changed his name to Mark Simon Bentley on 22 April 2018, being long before the SLA was concluded. Indeed, Mr. Sklarov was also compelled to admit in paragraph 88 of the same witness statement that he had given his own solicitors false instructions in this regard, which led them (falsely) to inform the Claimants' solicitors by letter dated 5 September 2024 that "*Mr. Sklarov never dealt directly with Mr. Mitchell but understood he was someone who worked with Mr. Mellon*." It is clearly arguable that using this pseudonym was an attempt of Mr. Sklarov to distance himself from the company through which he perpetrated the alleged fraud.

60. So far as Mr. Mellon is concerned, who was the other person with whom the Claimants dealt in respect of this transaction, he too does not appear to exist, with the name being an alias for a Mr. Aleskei Skachkov, a business associate of Mr. Sklarov, as Mr. Sklarov now admits in paragraph 85 of his 4th witness statement. Mr. Allen explains in his 3rd witness statement dated 18 September 2024, served on behalf of the Claimants, that Mr. Skachkov is someone with a significant criminal record.

61. It appears likely therefore – and certainly there is a good arguable case to such effect - Astor 3 and Astor Capital are creatures of Mr. Sklarov, rather than being legitimate and honest financial institutions which engaged in legitimate and honest stock-lending activities, as Mr. Sklarov sought to portray them as being[5].

62. Perhaps most significantly, there was evidence before Jacobs J (as there is now before me) that, consistently with his use of the Astor name, Mr. Sklarov has gained some notoriety for setting up companies to which he then gives misleading names (being the

[5] Accordingly I do not consider that the Sklarov Defendants can draw any support for their case by reference to the Supreme Court's summary of a typical, bona fide stock lending practice in *Coal Staff Scheme v HMRC* [2022] 1 WLR 2359.

names of well known, reputable financial companies) and which he then uses to perpetrate stock-backed loan frauds. There are numerous instances of this, as follows.

63. Dr Brent Satterfield owned shares in a listed company called Co-Diagnostics, Inc ("**CDI**"). In early 2018, Dr Satterfield was introduced to Mr. Sklarov who said that his company, America 2030, would make a loan to Dr Satterfield in the sum of US$3.5 million, secured over Dr Satterfield's shares in CDI, which were then worth more than US$7 million. Dr Satterfield handed over the shares, but America 2030 provided only US$67,000 of the loan. Dr Satterfield then discovered that America 2030 had already sold over US$1million of his shares in CDI. On 13 March 2019 Dr Satterfield commenced proceedings against Mr. Sklarov in New York. The New York court referred the dispute to arbitration in New York, pursuant to an arbitration clause in the loan agreement. On 9 July 2021 the AAA tribunal issued an award in favour of Dr Satterfield, holding that Mr. Sklarov had fraudulently induced Dr Satterfield to enter into the loan agreement by knowingly making false representations. The tribunal ordered Mr. Sklarov to return the CDI shares to Dr Satterfield. However, Mr. Sklarov failed to comply. On 12 November 2021 the New York court ordered Mr. Sklarov to return the CDI shares. Again Mr. Sklarov did not comply. On 2 May 2022 the New York court held that Mr. Sklarov was in contempt of court and directed him to purge his contempt, warning that an arrest warrant would be issued if he did not purge his contempt by 6 May 2022. Still Mr. Sklarov failed to comply. On 3 June 2022 the New York court issued a warrant for Mr. Sklarov's arrest. On 19 October 2023 the Supreme Court of the State of New York, Appellate Division, First Judicial Department, dismissed Mr. Sklarov's appeal against the issuing of the arrest warrant, which remains outstanding.

64. In or around 2019, Mr. Sklarov was sued by Rothschild & Co in respect of his attempts to masquerade under the Rothschild name. Rothschild & Co complained that his use of the Rothschild name to engage in fraud in connection with stock-backed loans was damaging Rothschild & Co's reputation. The U.S. District Court, N.D. Georgia, Atlanta Division, granted a preliminary injunction against Mr. Sklarov. Subsequently, Mr. Sklarov signed a consent order which permanently enjoined him from using the Rothschild name.

65. On 9 October 2020, Barclays plc sued Mr. Sklarov in respect of his attempts to masquerade under the Lehman name, which had been acquired by Barclays plc, alleging that Mr. Sklarov was the ring-leader of a fraudulent scheme to mislead and to deceive members of the public by "*seeking to … pass themselves off as the legitimate Lehman Brothers*". Barclays observed that Mr. Sklarov had previously sought to operate under various other well-known names with which he had no genuine association, including Credit Suisse First Boston; BNP Paribas Fortis; PricewaterhouseCoopers; Bear Stearns; George Soros Capital; and Warren Buffet Capital. On 19 March 2021 Mr. Sklarov signed a consent order enjoining him from using the Lehman name.

66. Barclays plc described the nature of the frauds conducted by Mr. Sklarov:

> "*Although Sklarov has used various shell companies to perpetuate each alleged fraud, the fact patterns underlying each of the schemes are nearly identical: a Sklarov-related entity promises to provide a loan to a borrower backed by securities owned by the borrower; the borrower pledges the shares as collateral to the Sklarov-controlled entity; the Sklarov-controlled entity provides little if any of the*

promised loan funds to the borrower and then sells or attempts to sell the shares proffered only as collateral, and retains the proceeds".

67. In 2020 Sunpower Business Group Pte Ltd and Tournan Trading Pte Ltd (the "**Sunpower Shareholders**") owned shares in Sunpower Group ("**Sunpower**"), a listed company in Singapore. They were introduced to Mr. Sklarov (who appears to have been operating under the name "Mark Bentley", presumably as a result of his name change in April 2018), who told them that his company, America 2030 Nevis, could make a loan on attractive terms, secured over their shares in Sunpower. They transferred their shares in Sunpower to Weiser to be held as security for the loan. Subsequently, they discovered that their shares had gone missing from the account. It became clear that Weiser had sold the shares on the instructions of Mr. Sklarov. The Sunpower Shareholders commenced proceedings in Nevis accusing Mr. Sklarov of fraud and obtained a worldwide freezing order against him. Mr. Sklarov applied to strike out the claim but the Nevis court dismissed his application. Subsequently, Mr. Sklarov ceased to participate in the proceedings, and, in June 2020, the Nevis court issued a judgment in default against him. Mr. Sklarov sought to set aside the judgment in default, but his application was dismissed. The Nevis court held that Mr. Sklarov had carried out a stock-backed loan fraud and that the loan agreements were vitiated due to fraud. Mr. Sklarov's appeal was dismissed by the Court of Appeal of the Eastern Caribbean Supreme Court. On 9 August 2023 the Supreme Court of the Bahamas made an order for the registration and enforcement of the Nevis judgment in the Bahamas.

68. To similar effect, Prescient Investment Limited ("**Prescient**") executed a loan agreement for $117 million with Mr. Sklarov's company, America 2030, and transferred shares worth £200 million as collateral for the loan. Prescient alleged that Mr. Sklarov had wrongfully ordered a broker to sell some of the shares and to pay the proceeds to America 2030. Prescient obtained an interlocutory injunction from the Hong Kong court to prevent any further disposals of the shares. Mr. Sklarov responded by causing America 2030 to bring a claim in the United States District Court, N.D. Georgia, asserting that the loan agreement permitted America 2030 to sell the collateral immediately, even before it had advanced any of the loan monies. The federal court dismissed America 2030's claims with prejudice and sanctioned Mr. Sklarov personally and enjoined him and his entities.

69. Again to similar effect, ZS Capital Fund SPC ("**ZS**") owned shares in Zhejiang Cangnan Instrument Group Limited ("**Zhejiang**"). During early 2020 ZS was introduced to an entity named Astor Asset Management 3 Limited (incorporated in St Kitts and Nevis ("**Astor Nevis**") but for the avoidance of doubt, not Astor 3); and, on 12 May 2020 ZS entered into a stock loan agreement with Astor Nevis for a loan of US$31.8 million, secured over the shares in Zhejiang. On 17.06.20 ZS discovered that Astor Nevis had wrongfully dissipated almost 1 million of the shares in Zhejiang. ZS obtained an injunction to restrain Astor Nevis from disposing of any further shares. The dispute was referred to arbitration in Jamaica; and the arbitrator subsequently issued an award in favour of ZS.

70. Again to similar effect, Fortunate Drift Limited ("**FDL**") owned shares in Yangtze River Port & Logistics Limited ("**YRIV**"). Mr Sklarov's company, America 2030, agreed to lend US$8 million to FDL, secured over shares in YRIV. FDL pledged the shares to America 2030, but America 2030 did not provide the promised loan. FDL then cancelled the loan agreement. However, America 2030 refused to return the shares and instead

began to sell them to third parties. FDL obtained a preliminary injunction to prevent America 2030 from disposing of the shares pending an arbitration in Hong Kong.

71. And finally to similar effect, Chenming Holdings (Hong Kong) Limited ("**Chenming**") owned shares in Shandong Chenming Paper Holdings Limited ("**Shandong Paper**"), which is listed on the Hong Kong Stock Exchange. Chenming was introduced to Astor Asset Management 2 Limited ("**Astor 2**"), which agreed to make loans secured over Chenming's shares in Shandong Paper, which were lodged with Weiser by way of collateral. The loan agreements were signed by Astor 2 using a fictitious name. Chenming repaid the loan in full, but Astor 2 refused to return the shares in Shandong Paper. Chenming obtained *Norwich Pharmacal* relief from the Hong Kong court and subsequently discovered that almost all of its shares had been fraudulently transferred or sold by Astor 2 shortly after they were deposited with Weiser. On 08.02.24, Chenming commenced proceedings against Astor 2 and others (including Vanderbilt) in the United States District Court Southern District of New York, stating: "*This action … involves a carefully designed scheme by Defendants to enter into sham loan transactions with Plaintiff under the cover of separate shell companies, and fabricate defaults by Plaintiff under the loan agreements, in order to ultimately take possession and control of the Collateral and deprive Plaintiff of its rights to and interest in the same*". These proceedings are ongoing.

72. It can be seen therefore that Mr. Sklarov and his companies appear to have a well-established *modus operandi* in the case of stock-based loan fraud.

73. In summary, I consider that there is (and was before Jacobs J) clearly a good arguable case that it was impliedly represented to the Claimants, through Mr. Torti and Ms Akbar, that Astor 3 was a legitimate and honest financial institution which engaged in legitimate and honest stock-lending activities (i.e. key representation 1); that that representation was false and the Claimants were induced as a result to enter into the SLA (as to which, the evidence is summarised in paragraph 108 of the Claimants' skeleton argument before Jacobs J). The fact that (as Mr. Béar KC points out) Astor 3 was a newly-formed company specifically incorporated in Canada at the request of Mr. Salinas for the purposes of this transaction does not undermine the fact that, on the Claimants' case, it was led to believe that it was part of the highly reputable and well-known Astor group of companies engaged in honest stock-lending activities, when it was not.

74. I also consider that there is a good arguable case, particularly in the light of the pre-contractual negotiations set out above, that it was impliedly represented to the Claimants that Astor 3 intended to comply with its obligations under the SLA including in particular its obligation not to sell the Elektra shares prior to maturity or default (i.e. key representation 2).

75. As Mr. Robins KC submitted to Jacobs J at the without notice hearing on 2 August 2024 (transcript, p.10G), "*In summary, it appears from the facts that Astor 3 is not a legitimate and honest financial institution and it is to be inferred, particularly in light of Mr. Sklarov's prior stock lending frauds and his modus operandi, that Astor 3 never honestly intended to comply with its obligations under the SLA, including in particular its obligations to sell or otherwise deal with the Elektra shares prior to maturity or default*."

76. Contrary to Mr. Béar KC's submission, the Claimants' case before Jacobs J was not simply that a representation that Astor 3 would comply with its obligations under the

SLA follows from the fact that it entered into the SLA on the terms which it did. It was that Mr. Sklarov's use of the Astor name, and his track record of similar stock lending frauds (whereby he disposed of collateral and failed to return it), allowed the court to infer that Astor 3 (Sklarov's company) did not intend to comply with his obligations under the SLA, in particular that it would not sell or short sell the Collateral on any publicly traded securities exchange, as it was clearly the case that Astor 3 understood that it could not do that under the terms of the SLA. I consider that the Claimants had, and have, a good arguable case to that effect.

77. Accordingly, Mr. Béar KC is wrong to submit that the way the case is put by the Claimants "is a naked attempt to turn a breach of contract claim into a (fraudulent) misrepresentation claim." It goes much further than that.

78. Mr. Béar KC also criticised the Claimants' summary of the law contained in paragraph 101 of its skeleton argument before Jacobs J., in which they stated as follows:

> "*101. … In Kingscroft Insurance, for example, Moore-Bick J held that "the representation is likely in most cases to come down to no more than one of honesty in entering into the bargain". Males LJ confirmed in SK Shipping at [51]: "There are some circumstances where an offer to contract on certain terms carries with it an implied representation as to the party's honesty in relation to the proposed transaction. It is not necessary to see why this should be so. Such honesty is the necessary substratum for all commercial dealings. It goes without saying."*"

79. Mr. Béar KC argued that the authorities "do <u>not</u> support the existence of such wide and, indeed, vague representations of the kind alleged by the Claimants in paragraph 101". He contended that by selectively quoting from *SK Shipping Europe v. Capital VLCC 3* [2022] 2 All ER (Comm) 784 in the manner set out above, the Claimants' counsel inexplicably:

> (1) omitted a critical part of the sentence quoted from [51] of Males LJ's judgment (underlined below):
>
> > "51. <u>While these cases illustrate a general principle that, in the absence of words of representation, the mere offer of contractual terms will not amount to any representation</u>, there are some circumstances where an offer to contract on certain terms carries with it an implied representation as to the party's honesty in relation to the proposed transaction."; and
>
> (2) failed to mention that at [48] of *SK Shipping*, Males LJ specifically <u>disagreed</u> with Moore-Bick J's suggestion in *Kingscroft* of a general rule that a party represents that it is able and willing to perform the contract.

80. Moreover, Mr. Béar KC referred to the fact that in [52] of *SK Shipping* (also omitted by the Claimants), Males LJ emphasised that any implied representation made by a party about its honesty or integrity is limited to the transaction in question. Referring to *Property Alliance Group v. Royal Bank of Scotland* [2018] 1 WLR 3529, Males LJ explained at [52] (emphasis added):

> "… the implied representation made by the bank was limited to sterling LIBOR (the currency of the proposed swap) and did not extend to a representation as to the bank's honesty, either in relation to other LIBOR currencies or generally. <u>It</u>

was the bank's honesty in relation to the particular transaction proposed which mattered."

81. I agree with Mr. Béar KC's analysis of the relevant authorities, namely that merely by offering to contract, a party does not (without more) thereby impliedly represent that it is able and willing to perform the contract as he understands it. However, *in some circumstances* an offer to contract on certain terms may carry with it an implied representation as to the party's honesty in relation to the proposed transaction.

82. Whilst the Claimants very properly referred to the three relevant authorities on this question in their skeleton argument before Jacobs J (*Kingscroft*; *SK Shipping* and *Property Alliance Group*) it would have been preferable had their skeleton argument made the point in paragraph 81 above clear (in particular the first sentence). However, I do not think it matters in this case. As Mr. Robins KC made clear in his submissions to Jacobs J, the Claimants' case is that on the facts of this case, the Claimants' offer to contract on the terms of the SLA *did* carry with it an implied representation as to Astor 3's honesty in respect of the stock-lending transaction, in particular that it did not intend to dispose of the Collateral wrongfully (see paragraph 102 of the Claimants' skeleton argument before the Judge). That representation, upon which the Claimants relied, was false. Evidence of falsity was provided by Mr. Sklarov's numerous other, similar stock-lending frauds and his use of the Astor name. The vehicle of Astor 3 was being used by Mr. Sklarov to perpetrate a stock-lending fraud. The Claimants had (and have) a good arguable case to this effect. Of course, it is now known by the Claimants that not only was the Collateral sold but Mr. Sklarov used the sales proceeds to fund the Loans themselves to RBS, as well as retaining substantial sums for himself.

83. Mr. Béar KC also submitted before me that the Claimants failed to explain to the Judge that a party cannot act dishonestly by doing what it subjectively understands the contract to permit. But that is wrong; the Claimants expressly dealt with this point in paragraphs 214-216 of their skeleton argument, in the "Full and Frank Disclosure" section:

> "***(3) No dishonesty***
>
> *214. Astor 3 and Mr. Sklarov may take the position that there was no dishonesty in a representation that Astor 3 intended to comply with the terms of the SLA insofar as it relates to the use of the shares in Elektra.*
>
> *215. In particular, they may contend that they honestly believed that the SLA permitted Astor 3 to cause the Pledged Collateral to be sold or disposed of at any time.*
>
> *216. However, any such contention would be a factual allegation which would have to be established by them at trial in due course. On the basis of information available, and having regard to the evidence suggesting the involvement of Mr. Sklarov (a convicted felon) in the transaction, it is submitted that there is a good arguable case of dishonesty*."

84. Nor do I accept Mr. Béar KC's criticism of the Claimants that they failed to draw the Judge's attention to the Sklarov Defendants' alternative construction of the SLA, as entitling them to do what they did with the Collateral. On the contrary, in the section on "Full and Frank Disclosure" in the Claimants' skeleton argument before Jacobs J, the Claimants expressly drew the Judge's attention to the 12 June Letter and sufficiently

explained the likely gist of the alternative construction arguments advanced by Astor 3 (see for example paragraphs 184-194).

Summary

85. In short, I do not consider that there was any breach of the Claimants' duty of full and frank disclosure in respect of (i) their implied misrepresentation case; (ii) their explanation as to the contractual arguments open to Astor 3 under the SLA; or (iii) whether they adequately explained that a party cannot be said to have acted dishonestly by doing what it subjectively understands the contract to permit.

(4) Delay

86. Nor do I consider that the Claimants delayed in seeking their injunctive relief. The evidence demonstrates that the factual background to the making of the application before Jacobs J was as follows.

87. On 1 April 2024, in advance of the Elektra shareholders' meeting on 16 April 2024, Mr. Gayo of Fininvesta emailed Tavira to ask it to obtain passes permitting entry to the shareholders' meeting. Tavira delayed in responding but eventually said that this was impossible.

88. This gave rise to a concern on the part of the Claimants as to whether Tavira was still actually holding the shares (and accordingly able to grant such passes). Accordingly, on 5 April 2024 Mr. Salceda emailed Tavira stating: "*We need now the evidence of the custody of the 6,263,994 Elektra shares that we deposit in Tavira, without excuses!*"

89. In response, on 5 April 2024 Tavira provided him with an account statement for Mr. Salinas's account as at 28 March 2024, showing that 6,268,383 Elektra shares were supposedly still held in Mr. Salinas's account.

90. Luke Harris of Tavira confirmed in an email dated 5 April 2024 that "*Your shares are held in custody at Tavira and as per your statement you have visibility on the positions you hold with Tavira*". None of the matters in paragraphs 28, 30 and 32-35 appear to have been made known to Mr. Salceda.

91. Tavira's inability to provide any *independent* corroboration of this fact continued to be a cause of concern to the Claimants. As a result, on 10 June 2024 Mr. Salinas sent letters to Tavira and Weiser pointing out that under the contracts "*it is forbidden for you to carry out trades, loan of Shares or any temporal or permanent transfer of such Shares*" and requiring Tavira and Weiser to "*confirm the number of Shares held in the Contract as of the Date of this Letter and provide with proper evidence of the said position. If the Shares are held by custodians and/or sub-custodians, please provide evidence of the number of Shares held by each of them*".

92. Neither Tavira nor Weiser responded to these letters. Instead, on 12 June 2024 Astor 3 responded to Mr. Salinas, asserting that the "*letters to the Custodians constitute interference which is prohibited by the SLA*" and contending that Astor 3's lien or encumbrance over the Elektra shares gave it the right to "*deal-in, dispose, or convert*" them.

93. Thereafter, Mr. Salceda explained in paragraphs 84-86 of his first affidavit that:

> "*84. On 2 July 2024, I contacted Gregory Mitchell (of Astor 3) by telephone and explained that the Applicants wished to prepay all sums owing to Astor 3 (in exchange for the return of the Collateral Shares). I followed up with Mr. Mitchell by email on 5 July 2024… where I reiterated the same proposal in writing. Albert Yuen provided a vague response on 8 July 2024: "Your request will be forwarded to the committee as appropriate for consideration".*
>
> *85. I chased for a response on 12 July 2024. On 15 July 2024, Albert Yuen (of Astor 3) responded as follows: "The request we received from you was sent onward and we are currently waiting for further information/instructions. We will be sure to follow up".*
>
> *86. I felt that I was being fobbed off. A few days later, the Applicants instructed Paul Weiss to provide legal advice on this situation, and Paul Weiss instructed Counsel. On Thursday 25 July 2024, I attended a (privileged) consultation with Paul Weiss and Counsel. This resulted in the immediate appointment of Forward Risk…*"

94. Forward Risk, who were investigators, reported to Mr. Salceda on 31 July 2024. They informed him amongst other matters that companies in the Astor Group appeared to belong to Mr. Sklarov and that Mr. Sklarov had been guilty of numerous stock-backed loan frauds (set out above). The Claimants were also informed on 1 August 2024 by Tavira that on 29 July 2024 all 6,268,383 shares of the collateral of which Tavira was custodian were subject to "FOP Delivery Out" "*to Astor's account as per Astor's instructions*".

95. The Claimants then sought their urgent injunctive relief before Jacobs J on 2 August 2024.

96. In the circumstances, I do not consider that the Claimants delayed in seeking their injunctive relief.

97. The Sklarov Defendants contend, however, that the Claimants delayed for more than three years (since September 2021) before seeking the Injunctions and that this inexplicable delay "*was glossed over in their evidence and not properly drawn to the Court's attention*" (Sklarov 1, [5f] and [61]).

98. I do not accept this criticism.

99. The criticism is based upon the alleged fact that in the email sent by "Gregory Mitchell" (Mr. Sklarov) to Mr. Torti on 10 September 2021 (referred to above), he was told "*in the clearest possible terms—that: (a) Astor 3 intended to do the very thing now alleged to be dishonest; and (b) that this was entirely in accordance with the terms of the SLA*". And yet, submits Mr. Béar KC, Jacobs J was not even told about this email.

100. The short answer to this point is that, as Mr. Salceda states in paragraph 16-26 of his 4th witness statement, he and the Claimants were unaware of the material parts of this email exchange and the information contained in it until Mr. Sklarov referred to it in his 1st witness statement of 1 September 2024. Mr. Torti failed to forward it to Mr. Salceda at the time. There was, therefore, no reason for the Claimants to have been aware of it 3 years later when seeking their urgent freezing relief.

101. Mr. Béar KC submits that this is a "wholly inadequate explanation" and "inherently unlikely and not credible". But the court plainly cannot make a finding at this interlocutory stage that the Claimants did receive this email, despite Mr. Salceda's denial

in his witness statement, or that they failed to make reasonable enquiries of Mr. Torti and had they done so they would have discovered it. It may very well have been, for example, that Mr. Torti did not forward the email because he was reassured by the contents of the 10 September 2021 email that Astor 3 was not selling the Collateral and that it was all still in Weiser's account ("*If you log into the account at Weiser, you will see that all the stock is there. We have not sold any of it, which is in accordance with the loan agreement*"); whereas a few weeks later the stock began to be moved out of Weiser's account, sold, and the proceeds used to make the Loans or paid away to third parties including Mr. Sklarov. Either way, the Claimants have given sworn evidence through Mr. Salceda that he and they did not know that the email existed. It is not open to the court to infer otherwise at the interlocutory stage simply because in the email Mr. Torti was told to "*speak to Mr. Salinas and advise us if this is not an issue*".

102. As set out above, Mr. Torti and the Claimants were also reassured that the Sklarov Defendants were not doing anything untoward with the Collateral as a result of the events of October 2021. When the Claimants complained to Astor 3 and Ms Akbar about the transfer of 935,913 shares by Weiser to Astor Capital in October 2021, their concerns were assuaged at that time by Astor 3's agreement (i) to return the shares to Mr. Salinas's account, (ii) that further tranches of shares would be held with a different custodian and (iii) to the terms of Addendum 2 which confirmed that Astor 3 would comply with the terms of the SLA.

103. Subsequently the Claimants were provided with regular account statements from Weiser and Tavira showing that the shares were in Mr. Salinas's account and had not been moved. They had no reason to believe at the time that the account statements were inaccurate.

104. In short, the Claimants have a good arguable case that there was no reason for Mr. Torti or the Claimants to believe that Astor 3 was acting dishonestly in all the circumstances; nor that there was reason to believe that the Collateral was being sold. It follows that the 10 September 2021 email accordingly does not undermine the Claimants' case on key representation 2 in any event, viz that the stock-backed loan transaction was a vehicle for Mr. Sklarov's well-practised fraud and in particular that Astor 3 never intended to comply with its obligation not to sell the Elektra shares prior to maturity or an event of default.

105. Contrary to Mr. Béar KC's submission, this conclusion is not affected by the WhatsApp messages referred to in the 4th witness statement of Mr. Sklarov which passed between Ms Akbar and Mr. Sklarov on 14 June 2024. These are exchanges to which the Claimants and Mr. Torti were not even parties and so obviously the Claimants could not have disclosed them at the hearing before Jacobs J. Moreover, they apparently concern the Claimants' complaint that Astor 3 was short selling or engaging with third parties to sell. Ms Akbar asks Mr. Sklarov if this is indeed true. Mr. Sklarov responds that "*We already made it clear that Astor is not selling*" – although by this stage it arguably appears that it was. Ms Akbar then tells Mr. Sklarov that Mr Torti spent an hour on the telephone with Mr. Salceda on the 13th June and advised him to review the SLA, and that whilst Mr. Torti "*gets it*", Mr. Salceda is "*a little bit of a loose cannon*". However, precisely what she discussed with Mr. Salceda and/or Mr. Torti in this regard will clearly be a matter for trial.

106. It follows that I reject Mr. Béar KC's submission that these email and WhatsApp exchanges demonstrate that it was misleading for the Claimants to suggest to Jacobs J that they only discovered the fraud at the consultation with their legal advisers on 25 July

2024 and that rather "there has been an extraordinary and unexplained failure to act or investigate their own purported concerns for almost 3 years."

107. In any event, there was (before Jacobs J) and is (before me) plainly a risk of dissipation in the present case and the injunction granted by Jacobs J has managed to preserve a substantial portion of the assets and/or their proceeds. In these circumstances, I consider that any delay in bringing the application (which I do not accept occurred) would not have led to the injunction being refused. In *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm) at [156], Flaux J (as he then was) stated (approved in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 906 per Bean LJ at [34]):

> "*The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it*."

108. Furthermore, in the context of an application for a proprietary injunction (which the Claimants sought and obtained here), the potential relevance of delay is even more limited because it is not necessary to show that there is any risk of dissipation: see *Madoff* at [128].

(5) The Claimant's failure to inform the court of its true motive for applying for injunctive relief

109. Mr. Béar KC further submitted that the Claimants came to court on 2 August 2024 under the pretext that they had only discovered the alleged fraud at consultation with their legal advisers on 25 July 2024. He suggested that, in fact, what motivated Elektra to make the market announcement on 26 July 2024, which led (at Elektra's request) to the suspension of trading in the shares by the Mexican Stock Exchange on the same day, was the decline in Elektra's share price. He pointed to the fact that on 26 July 2024 *Simply Wall Street* (a market-leading financial app with c. 6m users) reported that Elektra's earnings had been in decline over a 5-year period, and declared Elektra to be an investment risk. This came on the back of reports of Elektra's poor results for Q2 (announced on 24 July 2024) recording a net loss of MXN 643 million (about US$34 million) versus a profit of MXN 4.94 billion (about US$250 million) for the same period in 2023.

110. Mr. Béar KC said that none of this commercial background was drawn to the court's attention and that it is beyond dispute that the duty of full and frank disclosure requires a 'fair presentation' of the facts. He submitted that in this case, a 'fair presentation' required the Claimants to explain what else had been happening in the critical period prior to the alleged discovery of the fraud on 26 July 2024 and that this provided the motive for the application for injunctive relief.

111. I reject Mr. Béar KC's speculative submission. The Claimants could not reasonably have anticipated at the hearing before Jacobs J that the Sklarov Defendants would subsequently advance such an argument concerning their motive. Moreover, Mr. Béar KC's submission concerning the financial health of Elektra and the Claimants' motivation for bringing its injunction applications is highly contentious: see paragraphs 126-129 of the Claimants' skeleton argument. This is also a case, therefore, where the

court cannot and will not embark upon a trial within a trial to establish whether or not facts existed which are alleged to be material.

112. As to that, the duty of full and frank disclosure "*cannot mean that a party must rehearse before the judge at the without notice application a detailed analysis of the range of possible inferences which the defendant may seek to draw … That is particularly so when both the existence and the relevance of the underlying facts are in dispute*" (*Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 per Elias LJ at [70]).

113. As Slade LJ held in *The Electric Furnace Co v Selas Corporation of America* [1987] RPC 23 at 29, "*it would be unreasonable to expect a plaintiff … to anticipate all the arguments, or all the points, which might be raised against his case*". Similarly, Cockerill J held in *Arcadia Energy Petroleum Ltd v Bosworth* [2017] EWHC 3160 (Comm) at [135] that "*it is wrong for the court to expect that every iteration of a defence should be anticipated or that the detail which emerges in the longer phases of preparing the case should be drawn to the attention of the judge*".

114. It is also important to bear in mind in a case such as the present the sensible observations of Slade LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1359:

"*By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths*".

115. To the same effect, Christopher Clarke J (as he then was) observed in *OJSC ANK Yugraneft v Sibir Energy plc* [2008] EWHC 2614 (Ch) at [106], "*In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose*".

116. In the circumstances of this case, I do not consider that the Claimants can sensibly be criticised as to their presentation of the facts.

(6) Mr. Salinas's wealth

117. The same point can be made in response to Mr. Béar KC's submission concerning Mr. Salinas's wealth.

118. Mr. Béar KC referred to the fact that in support of the Claimants' application, it was said that Mr. Salinas is "*one of the wealthiest individuals in Mexico with a net worth of several billion US dollars*": see paragraph 6 of Mr. Salceda's first affidavit 1 and paragraph 11 of the Claimants' skeleton argument before Jacobs J. He observes that both Jacobs J and HHJ Pelling KC took this at face value and "*did not even require the normal precaution for a foreign party obtaining injunctive relief of fortification of the cross-undertaking*".

119. Mr. Béar KC submits that the Mr Salinas's wealth was relevant not only to the adequacy of the cross-undertaking in damages and fortification, but also to whether the Claimants are entitled to the *substantive relief* to which they claim to be entitled, namely rescission of the SLA and the consequent need to make counter-restitution – it being the Claimants'

assertion that they are "*ready, willing and able to repay all sums owing to Astor 3* [i.e. approx. US$113.9m] *immediately*": see paragraph 135 of Mr. Salceda's first affidavit.

120. In fact, Mr. Béar KC suggests that Mr. Salinas is not a wealthy individual and that he has had massive financial woes, been beset by scandal, and is guilty of tax evasion.

121. Once again, this is all highly contentious (see Mr. Salceda's 4th witness statement at [45]) and the court cannot and will not embark upon a trial within a trial to establish whether or not facts existed which are alleged to be material.

122. Indeed, it is notable that in his first witness statement of 1 September 2024 Mr. Sklarov sought to rely upon three letters dated 21 July 2022, 23 March 2023 and 3 June 2023 in which he said that Astor 3 had raised these issues with the Claimants concerning Mr. Salinas's financial probity and issues with the Mexican tax authorities and regulators. However, Mr. Salceda's evidence (in his 4th witness statement of 8 September 2024) is that the Claimants never received those letters. Despite this, (as the Claimants point out in paragraph 133 of their skeleton argument) Mr. Sklarov has refused to explain how those letters are said to have been sent to the Claimants; and the Claimants allege that the metadata appears to be inconsistent with Mr. Sklarov's evidence. Mr. Sklarov's solicitors have recently confirmed that the Sklarov Defendants no longer rely on the letters.

123. So far as fortification of the cross-undertaking is concerned, Jacobs J observed at the *ex parte* hearing that fortification, if it arose, would be an issue for the Sklarov Defendants to raise on the return date (transcript, p. 19F-G).

124. A respondent who seeks fortification must show that there is a sufficient risk that the injunction will cause loss and the likely amount of any such loss: see *Sectrack NV v Satamatics Ltd* [2007] EWHC 3003 (Comm) per Flaux J at [99], applying and approving Harley Street Capital ltd v Tchigirinski [2005] EWHC 2471 (Ch) at [17]-[18] (Mr. Michael Briggs QC, sitting as a Deputy Judge of the High Court).

125. As Mr. Robins KC submits, the Sklarov Defendants have not applied for fortification nor have they demonstrated, by evidence, that there is any satisfactory basis for requiring the undertaking to be fortified, particularly in the light of (i) Mr. Sklarov's asset disclosure in his affidavit of 2 September 2024 (which suggests very limited assets aside from the Collateral and the sale proceeds thereof); and (ii) the fact that the Collateral transferred under the SLA was worth as much as US$415m, being worth much more than the amount of the Loans: see paragraph 27 above.

Conclusion

126. As Mr. Robins KC pointed out, the Sklarov Defendants do not seek to discharge the freezing injunction on the ground that there is no good arguable case in conspiracy or deceit; nor on the ground that there is no risk of dissipation of assets. They do not seek to discharge the proprietary injunction on the ground that there is no serious issue to be tried. They seek to set the injunctions aside solely on the ground that the Claimants were in breach of their duty of full and frank disclosure.

127. I do not consider that the Claimants were in breach of that duty in any of the respects alleged by Mr. Béar KC, despite his skilful submissions. Indeed, stepping back and looking at the matter in the round, it is plain that the Claimants had to act swiftly once (i) they discovered the alleged fraud in mid to late July 2024; (ii) they received the significant information provided to them by Forward Risk on 31 July 2024; and (iii) they

were informed by Tavira on 1 August 2024 that on 29 July 2024 all 6,268,383 shares of which Tavira was custodian were subject to "FOP Delivery Out" "*to Astor's account as per Astor's instructions*". They did indeed move swiftly and made their application on 2 August 2024. The full and frank disclosure section of their skeleton argument before Jacobs J, contained in paragraphs 181-221, supplemented as it was by Mr. Robins KC's oral submissions, was a sufficiently fair and accurate summary, under pressure of time, of the arguments which they anticipated the Sklarov Defendants might put forward in answer to the application.

128. The Sklarov Defendants contest the conclusions which the Claimants invited Jacobs J to draw from the evidence, but there is clearly a good arguable case that the representations alleged by the Claimants were made to them, were relied upon by them, and were false and I am not satisfied that the Claimants were guilty of any of the non-disclosures which it is alleged occurred at the hearings before Jacobs J and HHJ Pelling KC. I consider that the remarks of Toulson J (as he then was) in *Crown Resources AG v Vinogradsky* (unreported, 15 June 2001) are apposite in a case such as this[6]:

> "*it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself*".

129. In all the circumstances the Sklarov Defendants' Discharge Application is dismissed.

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[6] in a passage approved in *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 at [36] and followed in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) per Males J at [20] and *Petroceltic Resources Limited* [2018] EWHC 671 (Comm) per Cockerill J.