Neutral Citation Number: [2025] EWCA Civ 1060

Case No: CA-2024-002383

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mr Justice Calver
[2024] EWHC 2522 (Comm)

Royal Courts of Justice
Strand, London, WC20 2LL

Date: Thursday 31st July 2025

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE POPPLEWELL
&
LADY JUSTICE ELISABETH LAING

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Between :

(1) ASTOR ASSET MANAGEMENT 3 LIMITED **(2) VLADMIMIR SKLAROV** **(3) CORNELIUS VANDERBUILT CAPITAL MANAGEMENT LTD** **(4) ASTOR CAPITAL FUND LTD**	**Appellants/ Defendants**
- and -	
(1) RICARDO BENJAMIN SALINAS PLIEGO **(2) CORPORACION RBS SA DE CV**	**Respondents/ Claimants**

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Simon Davenport KC and Daniel Khoo (instructed by **DWF Law LLP**) for the **Appellants**
Adam Cloherty KC, Matthew Abraham and Stefanie Wilkins (instructed by **LK Law LLP**) for the **Respondents**

Hearing date: 4 June 2025

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LORD JUSTICE POPPLEWELL:

Introduction

1. The principal issue in this appeal is whether the Claimants ('Mr Salinas' and 'RBS' respectively) were in breach of their duty of full and frank disclosure in respect of what was or was not disclosed about Mr Salinas' wealth and probity when they were granted a worldwide freezing order and proprietary injunction against the First and Fourth Defendant (the First and Second Appellant, 'Astor 3' and 'Mr Sklarov' respectively) by Mr Justice Jacobs on 2 August 2024; and when the same relief was ordered against the Fifth Defendant (the Third Appellant, 'Vanderbilt') by Jacobs J on 7 August 2024; and against the Sixth Defendant (the Fourth Appellant, 'Astor Capital') by His Honour Judge Pelling KC on 13 August 2024. The application before Jacobs J on 2 August was made without notice to Astor 3 and Mr. Sklarov; the application on 7 August before Jacobs J was made on very short notice to Vanderbilt, which did not attend and was not represented; and the application on 13 August before HH Judge Pelling KC was made on informal notice to Astor Capital, which did not attend and was not represented. The argument before us 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 (save in respect of one document which post-dated the first two orders). For that purpose, both sides focussed upon the presentation of the Claimants' case before Jacobs J on 2 August 2024. The three orders ('the Injunctions') were made upon the Claimants giving a cross-undertaking in damages in the usual form.

2. The defendants applied to discharge the injunctions on the basis of six alleged failures to make full and frank disclosure ('the discharge application'). Mr Justice Calver ('the Judge') rejected each of those grounds in a judgment dated 7 October 2024 ('the Judgment'), and dismissed the discharge application by an order of the same date.

3. This appeal is against that order. It does not pursue five of the six allegations of non-disclosure but relies solely on the sixth, relating to the wealth and probity of Mr Salinas. For the purposes of the appeal it is not necessary to distinguish between Mr Salinas and his company, RBS; the focus of the submissions was on the position of Mr Salinas personally.

The Claim

4. The Claimants' case, as explained in their evidence when seeking the injunctions and subsequently contained in Particulars of Claim, is that as a result of fraudulent misrepresentations, Mr Salinas was persuaded to transfer his shares in a Mexican company called Grupo Elektra SAB De CV ('Grupo Elektra') to custodians as security for loans which were to be advanced by Astor 3 to RBS under a Stock Loan Agreement dated 28 July 2021('the Loan Agreement'), guaranteed by Mr Salinas, under which RBS drew down in five tranches the equivalent in Mexican pesos ('MXN') of approximately US$113 million. Grupo Elektra is listed on the Mexican stock exchange. The case is that Mr Sklarov is a prolific fraudster who it is now known had a well-established modus operandi involving the use of false names (often resembling those of legitimate financial services firms) to obtain valuable securities which he then misappropriated through a web of companies in offshore jurisdictions. Here, it is alleged, Mr Sklarov (operating under the false name "Gregory Mitchell") and his associate Alexei Skachkov (operating under the false name "Thomas Astor-Mellon") fooled the Claimants into thinking that they were dealing with a legitimate financial institution owned by the wealthy Astor family from the USA. Unaware of the reality of the position, Mr Salinas transferred the shares in Grupo Elektra which were worth in excess of US$415 million as collateral for the proposed loan. Mr Sklarov's companies then sold those shares in secret, using part of the proceeds to make the loan to RBS, and misappropriating the balance worth approximately US$300 million through various companies within Mr Sklarov's control. The claims include (i) proprietary claims to recover the proceeds of the Claimants' shares (which the Claimants say were held on trust for them); (ii) a claim for damages for the tort of conspiracy; (iii) a claim for damages for the tort of deceit; (iv) a claim for damages for breach of trust; (v) a claim for damages for breach of contract; and (vi) claims in constructive trust for knowing receipt and dishonest assistance. Of relevance to the present appeal is that at paragraphs 122 to 123 of the skeleton argument put before Jacobs J on the 2 August 2024 ('the skeleton argument'), it was explained that if rescission were no longer available, the Claimants sought an order for redemption of the collateral shares, which would require their delivery up against payment of sums due under the loan (which have not been repaid). For this relief the skeleton said, at paragraphs 92 and 124, that the Claimants were willing

and able to repay everything owing to Astor 3 under the Loan Agreement (but only against return of the collateral shares in full). This was in part the basis for the proprietary injunction.

The Evidence

5. The without notice application was supported by an affidavit of Mr Salceda, who was a business associate of Mr Salinas and had signed the Loan Agreement for RBS. At the time it was in unsigned form but there was an assurance given that it would be signed and it was subsequently sworn as Mr Salceda's first Affidavit in materially identical terms to the form in which it had been put before Jacobs J. It said the following at paragraphs 6 and 7 on the basis of Mr Salceda's own knowledge:

> "6. By way of background, the First Applicant ("Mr Salinas") is one of the wealthiest individuals in Mexico with a net worth of several billion US dollars. He is the founder and chairman of Grupo Salinas, a conglomerate with interests in many different businesses in Mexico (including financial services, retail, media, telecommunications and the internet). The Second Applicant ("RBS") is a Mexican company beneficially owned and controlled by Mr Salinas.
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> 7. The companies within Grupo Salinas include another Mexican company called Grupo Elektra SAB De CV ("Elektra"), which is listed on the Mexican stock exchange. Elektra operates a large and well-known chain of retail stores (which sell consumer goods and also provide various financial services) in Mexico and Central and South America. Mr Salinas is the direct or indirect beneficial owner or controller of approximately 67,544,413 shares in Elektra, representing 30.47% of Elektra's share capital (disregarding the impact of the fraudulent scheme referred to below)."

6. In support of the discharge application, Mr Sklarov made his first witness statement. Under a heading "Mr Salinas' severe financial difficulties" it suggested at [73] that "Mr Salinas's net worth merited further scrutiny". Three matters were relied on:

(1) a know your client form submitted by Mr Salinas in support of the application for the loan ('the KYC form'), which stated that he owned a 10% shareholding in Elektra, rather than 30.47%;

(2) a BNP Paribas Portfolio Management Report ('the BNP report') referring to 6.9 million Grupo Elektra shares as marked "BLO" indicating, it was said, that they were "blocked" as collateral for a loan;

(3) at [76] that "Mr Salinas's reputation as a wealthy and reputable entrepreneur is further undermined by his involvement in several scandals and open conflicts with various governmental authorities over the years"; there were then set out in 13 short sub-paragraphs what were said to be the supporting instances, with material in the exhibit comprising, for the most part, press articles; I shall return to the detail of these, which were referred to as the paragraph 76 matters.

7. In Mr Salceda's fourth witness statement in response he explained that the 10% shareholding on the KYC form reflected Mr Salinas' personal direct shareholding as at the date of the form, 9 April 2021; that that direct shareholding had risen to 19.24% by the time of his first affidavit; and that Mr Salinas' further interest of 11.23% was held via three companies, making up the 30.47% shareholding identified in his first witness statement, which at the current share price and exchange rate was worth approximately US$ 3.2 billion. He addressed each of the paragraph 76 matters at paragraph [45] as follows:

"I address below the various allegations. Taking each sub-paragraph in turn:

(1) Subparagraph (a): the SEC filed a civil complaint against Mr Salinas in January 2005. The case ended in a settlement in which Mr Salinas neither admitted nor denied the allegations of the SEC complaint. The bar on serving as a director expired in 2011.

(2) Subparagraphs (b): a fine was imposed in 2015 of MSN 672,9000 (or approximately US$ 34,000).

(3) Subparagraphs (c): a fine was imposed in 2017 of MSN 2,260,000 (or approximately US$ 113,000).

(4) Subparagraph (d): TV Azteca is appealing against the order. The proceedings are ongoing.

(5) Subparagraph (e): Grupo Elektra and companies associated with Mr Salinas are involved in a dispute with the Mexican Tax Administration Service which commenced in February 2023. The dispute is ongoing.

(6) Subparagraph (f): the application of fines given by the Mexican National Banking and Securities Commission was successfully challenged by Banco Azteca, and therefore no fines were ultimately due or payable.

(7) Subparagraph (g): the Bankruptcy Court in the Southern District of NY dismissed the bondholders' petition in November of 2023.

> (8) Subparagraphs (h) and (j): Banco Azteca was not, and is not, on the verge of bankruptcy. Indeed, it is in a healthy financial position as evidenced by its latest results summarised in the Grupo Elektra Q2 Report [EGSS4/11-20 at 14 and 15].
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> (9) Subparagraph (i): Mr Salinas disputes the seizure of a golf course located in Oaxaca which he believes is an arbitrary occupation motivated by political concerns and is unrelated to any tax liability. He is challenging this seizure in the Mexican courts.
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> (10) Subparagraph (k): these proceedings are ongoing.
>
> (11) Subparagraph (l): I do not accept the accuracy of this article regarding Mr Salinas's wealth as explained elsewhere in my evidence. Forbes indicates Mr Salinas and his family's net worth to be US$9.9 billion as of 4 September 2024. [EGSS4/23-24]."

8. In a fourth witness statement, Mr Sklarov deposed amongst other things that Mr Salinas was still the owner of a 105m "superyacht" which he had bought in 2021 at a reported asking price of US$ 125 million.

9. This evidence was served in accordance with a timetable directed by Mr Justice Bryan by an order of 29 August 2024 for the purposes of the discharge application hearing listed for 20 September 2024. It provided for the defendants' reply evidence to be served on 16 September 2024. By an email sent by the defendants' solicitors to the claimants' solicitors and the court after office hours on Friday 19 September 2024, the eve of the hearing, which came to the Judge's attention the following morning, the day of the hearing, the defendants sought to rely on a number of documents from New York proceedings relating to a dispute between Mr Salinas' telecommunication companies and AT & T. On this appeal Mr Davenport KC sought to rely on all that material, to which the Respondents objected. In his Judgment, the Judge did not advert to that material or treat it as being in evidence. At the hearing before him Mr Béar KC, then appearing for the relevant defendants, had made brief submissions about one of the documents, dated 8 August 2024. The Claimants' counsel did not address it but did not interject to register an objection. It is clear that none of the material was in evidence before the Judge, and there is no application to this court to have it admitted as fresh evidence. Mr Davenport KC argued that the 8 August document was treated as being in evidence by it having been referred to by Mr Béar without express objection. I would reject that submission because it was not how the Judge treated it. Moreover it would have been necessary for the defendants to apply for and be granted permission to rely on it because it was outside the timetable laid down in Bryan J's order. No such application was made or granted. I note that in any

event that document post-dated the orders made on 2 and 7 August 2024, although it was before the injunction was extended to Astor Capital on 13 August 2024.

The Judgment

10. The Judge dealt with this sixth allegation of non-disclosure towards the end of the Judgment commencing at [117] where he said "The same point can be made in response to Mr Béar's submission concerning Mr Salinas' wealth". The "same point" was the point he had made in relation to the fifth allegation of non-disclosure which was in respect of the Claimants' motive in applying for injunctive relief. At [111] he had said that Mr. Béar's submission concerning the financial health of Grupo Elektra and the Claimants' motivation for bringing its injunction applications was highly contentious, and therefore came within the principle that 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. He cited in support *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 per Elias LJ at [70], 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"

11. Having said that this reasoning applied also to the sixth allegation, headed "Mr Salinas's wealth", the Judge essentially repeated it at [121] after observing at [120] and [121] that the allegation was 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; and that that was all highly contentious. He made some further observation under this head as follows:

> 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).
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> 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."

12. In his conclusory paragraph [128], in relation to the application before him as a whole, not specifically in relation to this sixth ground of non-disclosure, the Judge cited the following remarks of Toulson J in *Crown Resources AG v Vinogradsky* (unreported, 15 June 2001) in a passage approved in *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 at [36], as apposite:

> "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".

The law

13. The duty on a without notice application to make full and frank disclosure of material facts, and a fair presentation to the court, is well established. In *Mex Group Worldwide Ltd v Ford* [2024] EWCA Civ 959 [2025 1 WLR 975, Coulson LJ, with whom Sir Julian Flaux C and Males LJ agreed said at [119]:

> "It is unnecessary to set out the law in relation to full and frank disclosure in any great detail. The relevant principles were summarised by Carr J (as she then was) in *Tugushev v Orlov & Ors* [2019] EWHC 2031 (Comm) at [7]. She said:
>
> > "The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
> >
> > i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
> >
> > ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to

evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms 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;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

> x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
>
> xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
>
> xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
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> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.
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> (See in particular *Memory Corporation plc and another v Sidhu and another (No 2)* [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)"

14. Although the duty is expressed as a duty to disclose material *facts*, it can extend to disputed allegations. The fact that such allegations have been made may be material, and if so, the allegation is a fact which must be disclosed. This is why it is usually necessary

to identify for the court the main defences which it is anticipated the defendant would wish to advance notwithstanding that their veracity or validity is challenged.

15. In *Block v Nicholson t/a Limascue Ltd* (1986) WL407113, the claimant had obtained an interlocutory injunction without notice. He failed to disclose that shortly beforehand he had been arrested and charged with obtaining money by deception. This court upheld the decision of the Tudor Price J that the injunction should be discharged because the fact of the fraud charge was relevant to the discretion of the judge when granting the injunction as to whether the claimant's cross-undertaking in damages could safely be accepted.

16. The passages cited by the Judge from *Crown Resources AG v Vinogradsky* and *Kazakhstan Kagazy* are not in conflict with these principles. They are to the effect that where the non-disclosure can only be established by resolution of disputed facts, the court will not normally embark on a trial to resolve them, especially where they are issues in the action (and see this Court's recent decision in *Mold Investments Ltd v Holloway* [2025] EWCA Civ 986). Where, however, the *allegation* of disputed facts is itself something which is material and ought to be disclosed, irrespective of how it is to be resolved, it does not cease to be disclosable merely because the court cannot at the interlocutory stage determine the disputed allegation. If the Judge was basing his decision solely on the fact that Mr Salceda disputed the paragraph 76 allegations, then that would have been an error if they were allegations which fell properly to be disclosed as allegations.

17. I should also draw attention to what Coulson LJ said in *Mex Group* at [127]:

> 127. That [i.e the appellant's conduct whereby the allegations in respect of full and frank disclosure on the appeal took as much, if not more, time as the substantive issues] is not a sensible or proportionate way in which to address this sort of allegation. It is almost always the position that, no matter how big the case or how complex the underlying issues, a defendant's case that the claimant failed to make full and frank disclosure at the ex parte hearing will stand or fall on no more than a handful of alleged failures. That is because, if the 'big ticket' allegations of failure are not established, or are established but found to be immaterial, then the less significant failures will not bridge the gap. It is the law of diminishing returns."

This was endorsed by Males LJ at [112]:

> "I agree in particular with what Lord Justice Coulson has said at [126] to [128] below about the way the failure to disclose issue was presented by the respondents, both in the court below and in this court. I sought in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [14] and [15] to encourage a degree of restraint

> and a sense of proportion on the part of those seeking to set aside without notice orders on this ground, but it appears that the message has not got through."

18. I cite these last two passages, which reflect what Carr J (as she then was) said in *Tugushev v Orlov & Ors* at [7(vii)] deprecating a scattergun approach, because the appellants were guilty of it in this case. A substantial number of the paragraph 76 matters relied on, and a number of Mr Davenport's points, were so far removed from being big ticket items that they could not assist, even on some cumulative basis, in establishing material non-disclosure. For example paragraph 76(b) complains of a failure to disclose that in May 2015 the Mexican financial services regulatory body imposed a fine (it is not clear on whom but presumably some company within Grupo Salinas) in an amount equivalent to about US$34,000 for failing to lodge a notice of an offer abroad. I will not overburden this judgment by dealing with such trivial individual points.

Materiality

19. The undisclosed facts in this case were said to be material to (a) whether the Claimants were willing and able to repay the loan in the sum of approximately US$114 million in return for the redemption of the collateral; and (b) whether the Claimants were willing and able to comply with an order made against them on the cross-undertaking, because if there were any doubt about it the court should consider ordering fortification.

20. Three points need clarification in order to provide the framework for approaching the evidence. First, there may be a different approach to evidence of assets depending upon whether what is under consideration is on the one hand an *ability* to make a payment to the defendant if ordered, and on the other a *willingness* to do so. If the claimant is to be treated as willing to meet such a payment, then what matters is access to funds so as to be able to do so, not whether they have assets in their own name. Many wealthy people and organisations have an interest in, or access to, funds which are held in the names of other entities through arrangements made for good commercial or tax reasons. If there is no reason to doubt their willingness to meet an adverse payment order, the focus of the inquiry when addressing ability to pay is on assets to which they would have access, however indirectly, not merely those in their own name. If on the other hand there is reason to believe that the claimant would not willingly pay, but rather seek to evade payment, and the defendant would have to resort to enforcement proceedings, the focus

when determining ability to pay is on assets which would be readily amenable to enforcement proceedings following an order, which will usually be to a much more confined class of asset. In the latter case the court may require fortification unless there are likely to be assets in this jurisdiction which are not readily transferable, or at least in a jurisdiction where enforcement is available swiftly and simply. Accordingly in addressing the evidence of Mr Salinas' wealth and assets in this case I will start with whether there is reason to doubt that he would be willing to make the relevant payment.

21. The second aspect which needs clarification is the value of the assets with which the court is concerned at the without notice stage. Asking and answering the question "Is the claimant able and willing to pay what may be called on under the cross-undertaking?" usually makes it necessary to ask and answer the question "How much may the claimant be called on to pay under the cross-undertaking?" As the Judge identified at [124] quoted above, a respondent who seeks fortification of the cross-undertaking must generally show that there is a sufficient risk that the injunction will cause loss and the likely amount of any such loss. This is because whether and to what extent the freezing order causes loss will usually be something peculiarly within the knowledge of the defendant. That does not mean, however, that questions of fortification of the cross-undertaking do not arise at the without notice stage, because at that stage the defendant is not before the court and the order may cause loss before the defendant has had an opportunity to seek fortification. At the without notice stage the court is concerned to decide whether and to what extent the cross-undertaking should be fortified to protect against loss caused by the order in the period before the defendant will have had a reasonable opportunity to put before the court evidence of the circumstances of potential loss which justify fortification. That will usually be the return date, or a short time thereafter which a defendant may need to prepare and present evidence. That that will typically be a matter of weeks and rarely more than a month or two (so long as the freezing order has not imposed unfairly restrictive spending restraints, which is always an important consideration when granting it). The task of the judge at the without notice stage, therefore, when granting the injunction and considering whether and to what extent to require fortification of the cross-undertaking, is to assess what loss might realistically be caused to the defendant over this relatively brief period. Although that often involves an element of speculation, it is an evaluative assessment which judges are used to making based on the individual circumstances of each case, and

in which doubts are to be resolved in favour of the defendant for whose protection the cross-undertaking in damages is required.

22. Accordingly if Jacobs J is correctly recorded by the Judge at [123] as saying that fortification, if it arose, would be an issue for the Defendants to raise on the return date, that was true, but did not obviate the need to consider whether fortification was necessary for the protection of the defendant against loss caused by the freezing order in the meantime.

23. In the particular circumstances of the present case, the ability and willingness of the Claimants to pay a sum arose not merely under the cross-undertaking in relation to loss potentially caused during that period, but also to the case being advanced that they were willing and able to redeem the shares in the amount of the loan if they were returned. It was argued on their behalf that this issue did not arise, because (a) it subsequently appeared that the shares had been sold so that the defendants could not return them and/or (b) that the loan was a non-recourse loan which meant that the claimants did not need to show an ability to repay it. The short answer to these points is that materiality has to be assessed by reference to the way case was put at the without notice hearing and the basis then advanced for the relief sought, including in this case a proprietary freezing order. As I have explained reliance was placed for these purposes on a claim for redemption of the shares in return for repayment of the loan. It was in support of these contentions that the Court was told in terms that the Claimants were willing and able to repay the loan amount.

24. The sum in question for that purpose was the amount of the outstanding loan obligation of about US$114 million. That substantially exceeds the amount which at the time of the grant of the freezing order could properly have been envisaged as loss suffered by the defendants by reason of the order in the period before they had had a reasonable opportunity to seek fortification of the cross-undertaking.

25. Accordingly the question in this case is whether the Claimants failed to make adequate disclosure of matters which were material to the Claimants' willingness or ability to pay US$114 million.

26. The third aspect which requires clarification is the nature and extent of the evidence which a claimant can reasonably be expected to provide at the without notice stage about their assets. Because the financial position of a claimant is material to the cross-undertaking

and whether it should be fortified, it is good practice to include sufficient details of the claimant's assets and solvency for the court to be able to form a view on that question. The level of detail required and the need for supporting evidence will depend on the circumstances of each case. At 9-009 of Gee on Commercial Injunctions 7th edn., the author says:

> " If nothing is said and an order is made, then the court will be proceeding on the basis that there is no reason to doubt that the person giving the cross-undertaking will be good for the damages."

27. I would agree that if that is what happens, it will have been the basis on which the court was proceeding and any material facts casting doubt on the ability or willingness to pay may well constitute a failure to make full and frank disclosure. However a failure to provide any or sufficient evidence at the without notice stage should normally result in the court requiring fortification.

28. Mr Davenport advanced an argument that what was said about Mr Salinas' wealth at paragraphs 6 and 7 of Mr Salceda's first affidavit was insufficient to fulfil a duty to provide sufficient details of assets, irrespective of whether there were material matters relating to his wealth which ought additionally to have been disclosed. This was a new point which is not open to the appellants because it was not raised below and was not within the grounds of appeal. In any event I would unhesitatingly reject the submission. At the share price of MXN 1,050 per share which was identified elsewhere in Mr Salceda's first affidavit when addressing the loan transaction, the 67,544,413 shares in Grupo Elektra owned or controlled by Mr Salinas were worth MXN 70,921,633,650, equivalent to US$3,903,226,948. Mr Sklarov in his subsequent evidence contended that the price of MXN 1,050 was inaccurate and that the most recent share price at the time of the without notice hearings was actually MXN 945 per share. On that basis, the 67,544,413 shares in Grupo Elektra owned or controlled by Mr Salinas were worth MXN 63,829,470,285, equivalent to US$3,512,904,253. The difference between a $3.5 bn and $3.9 bn value is not material to the arguments on the appeal. Both supported the evidence in paragraph 6 that Mr Salinas had a personal net worth of several billion dollars. Unless there were material facts which ought to have been disclosed in relation to his wealth, that was a sufficient level of detail in which to address the issue at the without notice stage.

The non- disclosure allegations

29. The alleged failures in disclosure may be put into two categories. The first involves allegations of want of probity. These are relevant to whether there is reason to doubt the Claimants' stated willingness to pay for redemption of the shares or to pay any amount they might be ordered to pay if the cross-undertaking were called on. The second involves allegations as to the extent of Mr Salinas' wealth, which are material to the Claimants' ability to pay such a sum by way of redemption of the shares or an order under the cross-undertaking.

The non-disclosure allegations: probity

30. The material in this category relied on by Mr Davenport primarily comprised the documents sent to the court on the eve of the discharge application hearing, which were not admitted in evidence before the Judge and are not in evidence before us.

31. Of the paragraph 76 allegations, some of the exhibited press material suggests that some of Mr Salinas' companies have been in dispute with the Mexican tax authorities who have claimed that they owe unpaid tax, a claim which has been contested. None has resulted in any judicial determination which is not subject to appeal. They provide no evidence of a refusal to honour an undisputed final judgment. There is nothing in that material to suggest a want of probity by any of Mr Salinas' companies, let alone any want of probity on his own part.

32. Paragraph 76(aa) refers to a civil complaint filed by the SEC against Mr Salinas in January 2005. As Mr Salceda explains, that was settled without admission of liability in a settlement in which Mr Salinas accepted a bar on acting as a director for a period which expired in 2011. That long past history was not a matter which required to be disclosed in relation to his probity.

The non- disclosure allegations: wealth

33. It is not necessary to address in detail all the exhibited material on both sides. Having considered it all I am quite satisfied that it does not suggest that there is any real reason to doubt that Mr Salinas is an exceedingly wealthy man who would be able to pay US$114 million; or that there that there was any failure to make adequate disclosure of matters which were material to the Claimants' ability to pay US$114 million.

34. In addition to the statements in Mr Salceda's first affidavit, the further material supports that conclusion.

(1) Forbes gave Mr Salinas and his family's net worth as US$9.9 billion as of 4 September 2024.

(2) A Bloomberg report on which the defendants relied put his wealth at US $14.9 billion.

(3) The defendant's evidence is that he has a yacht purchased for US$125m.

(4) Mr Salinas' shareholding in the Elektra Group was worth over US$3 billion. There is no reason to doubt that his direct and indirect shareholding was 30.47%, as per Mr Salceda's first affidavit, and that as Mr Salceda explains in his fourth witness statement that is entirely consistent with the 10% figure given in the KYC document which was merely his direct shareholding at that time. The publicly listed share price illustrates that that shareholding was worth in excess of US$3 billion. Mr Davenport criticised this as a historic frozen share price but the second quarter group accounts do indeed show that it was in a healthy financial condition which would justify a share price of this order.

(5) Moreover that was only part of Mr Salinas' business empire. It does not take account of his television interests, nor Banco Azteca and other financial services subsidiaries, because the accounts ignore their loan portfolio value of c. MXN 180 bn (about US$10 billion).

(6) Mr Davenport's reliance on the BNP report was misplaced. It gave a portfolio valuation at that date of approximately US$485 million, of which US$474 million comprised the value of Grupo Elektra shares. The letters BLO appeared against this. It was asserted that this meant "blocked" and that these were therefore not a free asset because they must have been blocked as collateral for a loan. There is no evidence to support such an assertion and the document itself discloses loan liabilities of only US$30 million. In any event (a) this is only a small proportion of Mr Salinas' shareholding in Grupo Elektra (6.9 million out of 67 million shares) and (b) the evidence is that the loan agreement in this case was to refinance the BNP loan, so that if the shares were indeed blocked collateral for that loan they would have ceased to be blocked.

(7) The press articles relied on suggest that the Government had claimed that Salinas companies owe $3.8 billion and that the tax authority had made a claim to MXN 38bn (about US$1.9bn). Another article suggested the tax claim was MXN 63 billion. These are headline allegations without any detail. They are disputed claims, and do not identify against which companies they are made. But even assuming that they relate to the Elektra Group they do nothing to undermine the evidence of the value of Mr Salinas' direct and indirect shareholding, because they were public claims which must already have been taken account of by the market in the publicly listed share price.

Conclusion

35. For these reasons I would dismiss the appeal.

LADY JUSTICE ELISABETH LAING

36. I agree.

LORD JUSTICE ARNOLD

37. I also agree.