In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 246

BETWEEN: **Alpine Partners (BVI) L.P.** **Plaintiff**

-and-

(1) Sumitomo Pharma UK Holdings Ltd.

(2) John Wasty **Defendants**

RULING
(In Chambers)

Hearing Dates: **29 and 30 October 2024**
Ruling Date: **14 November 2024**

Appearances: *Richard Millett KC* and *Delroy Duncan KC* of Trott & Duncan Ltd for the Plaintiff
Sonia Tolaney KC and *Jordan Knight* of Appleby (Bermuda) Limited for the Defendants

RULING of Martin J

Summary and disposition

1. This Ruling deals with (1) an interlocutory application for interim injunctions by the Plaintiff (i) to restrain the First Defendant from pursuing an application pending before the in the United States District Court, Southern District for New York in which the First Defendant seeks to obtain disclosure of documents from a third party in relation to proceedings pending in Bermuda (Causes 2023 No 62 and 63) (ii) to compel the First Defendant to discontinue or withdraw the US disclosure application (iii) to restrain the First and Second Defendants from making further disclosure of certain confidential information disclosed under a non-disclosure agreement made in the Bermuda proceedings and (iv) to render any document disclosed in the US discovery application inadmissible in the Bermuda proceedings (together referred to as the "Injunction Summons") and (2) a cross application made by the First Defendant in Causes 2023 No 62 and 63 for a release from its obligations of confidentiality prospectively in respect of specified items that have been disclosed to the First Defendant by the Plaintiff in the Bermuda proceedings and retrospectively in respect of certain information alleged to have been disclosed in the New York proceedings in breach of the non-disclosure agreement and/or the implied undertaking to keep documents disclosed in legal proceedings confidential (referred to as the "Release Summons").

2. For the reasons given in this Ruling the Court has refused the Plaintiff's applications in the Injunction Summons for interim relief and has granted the First Defendant's application in the Release Summons.

3. In summary the Court's conclusions are:

    (i) The arguments advanced by the Plaintiff in support of granting the interim relief do not meet the required standard of 'high probability' of success at trial to justify the grant of (a) the anti-suit injunction and the mandatory injunction sought or (b) the that would in effect grant the relief sought by the Plaintiff at a trial.

    (ii) The arguments advanced by the Plaintiff in support of an interim injunction to retrain further disclosure of the information that has allegedly been misused do not justify the grant of an injunction on the 'good arguable' case standard.

(iii) Damages are an adequate remedy for the Plaintiff's claims because the only claims that are being pursued in these proceedings are financial claims. This would justify the refusal of all the Plaintiff's applications in any event.

(iv) The balance of justice clearly favours a refusal of the injunctions on the grounds that the relative prejudice and harm to the First Defendant outweighs any prejudice to the Plaintiff occasioned by either (a) the potential disclosure of documents as a result of the New York disclosure application and (b) the potential delay in the trial of Causes No 62 and 63. This would also justify the refusal of all the Plaintiff's applications in any event.

4. The Court considered deciding the matter exclusively on the First Defendant's Release Summons, which will (in all probability) render the rest of these proceedings academic and unnecessary. However, in light of the likelihood of an appeal against the Court's decision, and against the possibility that this matter might still proceed to a trial, the Court felt that it would be desirable to set out the reasons for rejecting the Plaintiff's applications and granting the First Defendant's applications in full.

Introduction

5. By a generally endorsed Writ of Summons dated 29 August 2024 the Plaintiff (to whom I shall refer to as "Alpine" in this Ruling) seeks declarations that (i) the First Defendant (who I shall refer to as "Sumitomo") breached clauses 2 and/or 3 of a Non-Disclosure Agreement dated 19 December 2023 (the "NDA") by misusing certain confidential information in formulating and prosecuting an application in the US Southern District of New York (Case no 1:24-mc-00290) under section 1782 28 USC (the "1782 Application")[1] namely that Alpine obtained shares in Myovant Sciences Ltd ("Myovant"), including after the merger between Myovant and Zeus Sciences Ltd had been approved and announced, by engaging the services of Clear Street LLC ("Clear Street") to act as broker-dealer, as well as information related to where those shares were custodied, and how they may have been traded (ii) the Second Defendant (to whom I shall refer to as "Mr. Wasty") breached the undertaking he gave to Alpine under the NDA and/or his equitable duty of confidentiality by assisting Sumitomo in formulating and prosecuting the 1782 Application by misusing the confidential information in an affidavit he swore in support of Sumitomo's 1782 Application and (iii) Sumitomo's 1782 Application is oppressive, vexatious and/or otherwise unconscionable.

[1] This provision of the US Code allows foreign litigants to apply to the US Court for disclosure of evidence against entities in the US to aid the foreign litigant in their foreign proceedings. In this case Sumitomo seeks disclosure from Clear Street in order to aid Sumitomo in the Appraisal Proceedings pending between Alpine and Sumitomo in Bermuda as defined in paragraph 6.

6. The relief that Alpine seeks are Declarations that Sumitomo and Mr. Wasty are in breach of the NDA and then a series of permanent final injunctions (i) to prevent Sumitomo (its directors, officers, employees or agents) from pursuing the 1782 Application (ii) to compel Sumitomo to discontinue or withdraw the 1782 Application (iii) to restrain Sumitomo and Mr. Wasty from making any further disclosure of the misused information (iv) to render any document obtained by Sumitomo from Clear Street or as a result of any other misuse that Sumitomo or Mr. Wasty has made of any confidential information inadmissible in the appraisal proceedings pending before the Supreme Court of Bermuda in actions 2023 Nos 62 and 63 (the "Appraisal Proceedings")[2].

7. In addition to the permanent injunctions sought, Alpine seeks damages or equitable compensation from Sumitomo and Mr. Wasty for the alleged breaches of the NDA and undertaking respectively including the legal fees incurred in defending the 1782 Application and in taking the present proceedings in Bermuda (and elsewhere) to protect the confidential information.

The information alleged to have been misused

8. The confidential information that is alleged to have been misused is the statement in Mr. Wasty's declaration in support of the 1782 Application dated 21 June 2024 which states in paragraph 12 *"Alpine purchased shares of Myovant after the Transaction was approved and announced. Alpine acquired these shares by engaging the services of Clear Street LLC to act as broker-dealer."*[3]

The NDA is subject to the supervision of the Court

9. The NDA was negotiated and executed between the parties following the Directions Order[4] made by Hargun CJ in the Appraisal Proceedings to provide a mechanism for protecting the disclosed information, and not independently outside the parameters of the Appraisal Proceedings. The NDA gives the Court the jurisdiction to moderate and regulate the disclosures given by the parties under the NDA.

10. The relevant parts of the NDA[5] (so far as material to these applications) are set out below:

    a. Recital D: *"Sumitomo and the Dissenters will produce documents and other information to each other in accordance with the Order made by the Court on 25 August 2023 following a directions hearing on 18 and 19 July 2023 (the*

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[2] I note that there in fact are two appraisal actions, one in the name of Alpine and another in the name of APS Holding Corporation, a related entity which acquired a different tranche of Myovant shares, which have been consolidated for case management purposes, but which are separate proceedings.
[3] Hearing Bundle B at page 757. References to the hearing Bundle will be by letter and page number (e.g. **[B 757]**)
[4] **[D 93-101]**
[5] **[D109-117]**

*"**Directions Order**") for use strictly and exclusively in the Proceedings (the "**Purpose**")."*

b. Clause 1.1: Definition of Confidential Information: *"Confidential Information" means any information of whatever nature relating directly or indirectly to the Purpose, provided...by the Discloser or the Discloser's Affiliate, in whatever form or medium including in oral, written, visual, electronic to or learned by the Recipients or its Representatives under this Agreement...."*

c. Clause 1.2: Exceptions: *"Confidential Information shall not include any information that the Recipient can establish: (i) was publicly available at the time of disclosure to the Recipient by the Discloser; (ii) becomes publicly available after disclosure to the Recipient by the Discloser through no action or inaction of the Recipient...; or (iii) is in the rightful possession of the Recipient without confidentiality obligations or restrictions as to its use or disclosure at the time of the disclosure by the Discloser to the Recipient."*

d. Clause 1.4: Procurement of Compliance: *"Each Party shall procure that...its Representatives, to whom Confidential Information is made available (i) acknowledge and comply with the provisions regarding Confidential Information contained in this Agreement.....A party shall not show, reveal, disclose or otherwise furnish any document or information within such document designated as Confidential...unless and until that person has signed an undertaking in the form set out in Schedule 1..."*

e. Clause 2: Non-use and Non-disclosure: *"Except as may otherwise be agreed in writing by the Discloser or permitted by the Court (by way of relief from the implied undertaking or, where the implied undertaking does not apply, by way of order relieving the Recipient of its obligations under this Agreement) all Confidential Information and its contents received by the Recipient shall : (a) be maintained in accordance with this Agreement....(c) be used solely for the Purpose....The Recipient shall not disclose any Confidential Information or permit any Confidential Information to be disclosed, either directly or indirectly, to any third party without the Discloser's prior written consent."*

f. Clause 8: Remedies: *"The parties agree that damages would not be an adequate remedy for any breach of this Agreement, and any such breach, whether threatened or actual, will entitle the Discloser or any other relevant Person to obtain injunctive relief, specific performance and any other applicable equitable relief and/or legal remedies."*

g. Schedule 1: Undertaking:

"1. I have read a copy of the Agreement and I understand the Agreement and the implications of giving this undertaking...

2. I acknowledge and understand that any document and information disclosed by the Parties and to which I am being given access are subject to an implied undertaking as a matter of Bermuda law, which means that the document and information must not be used for any purpose other than the Purpose.

3. I will not disclose any document or information designated as Confidential Information to any individual or entity except as explicitly permitted by the Agreement.

4. I will use any document or information designated as Confidential Information only for the Purpose and for the purpose of no other current or future proceedings, dispute, complaint or other use whatsoever in any jurisdiction except as explicitly permitted by the Agreement."

Alpine's application for interim relief

11. By *inter partes* summons also dated 29 August 2024 Alpine sought interim injunctive relief in the same terms as the relief sought in the Writ summarised in (i) to (iv) at paragraph 6 above. That application was supported by an affidavit from Mr Ryan Hawthorne who is an attorney in the Bermuda law firm representing Alpine[6]. Mr. Hawthorne set out the background of how the proceedings arose and described the inter party correspondence and exhibited the relevant documents (which will be considered in detail below). In this affidavit Mr. Hawthorne says that Alpine considers that that both Sumitomo and Mr. Wasty are (i) in breach of the NDA and the undertaking given by Mr. Wasty (ii) in contempt of court for breaching the implied undertaking not to use information disclosed in the Appraisal Proceedings for any other purpose than those proceedings and (iii) reserved Alpine's right to bring committal proceedings against both Sumitomo and Mr. Wasty for breaching those undertakings[7].

12. Mr. Hawthorne's affidavit then sets out (in substance) the legal arguments that Alpine advances in support of its case to justify an urgent interim injunction granting the relief summarised above pending trial. It is noteworthy that the effect of the interim injunctions sought would be (i) to grant the permanent relief that is sought at trial and (ii) require Sumitomo to withdraw or discontinue the 1782 Application immediately pending trial of

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[6] **[B 1]**
[7] **[B 4]** at paragraph 12 and **[B 9]** at paragraph 36.

the Writ in this action. These features are mentioned here because they have an effect on the approach the Court is required to take when considering the standard that Alpine's case has to meet in order to persuade the Court to grant the relief sought on an interim basis.

13. The background to these proceedings arises out of an amalgamation transaction under sections 104 to 104H of the Companies Act 1981 (the "1981 Act") by which the minority interests of shareholders other than those of Sumitomo and its affiliates were compulsorily acquired for a price of US$27.00 on 10 March 2023 which was the effective date of the amalgamation (the "Valuation Date"). Alpine had acquired shares in Myovant (which was the subject company of the amalgamation) and exercised its right under section 106(6) of the 1981 Act to have the Court make an appraisal of the fair value of its shares. This is the subject of the Appraisal Proceedings defined in paragraph 6 above, which are pending.

The 'standing' issue

14. One of the issues in the Appraisal Proceedings is the meaning and effect of the provisions of section 106 (6) of the 1981 Act which provides:

> *"Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may apply within one month of the giving of the notice referred to in subsection (2) [i.e the notice of the shareholder meeting at which the vote on the amalgamation is to take place] apply to the Court to appraise the fair value of his shares."*

15. The meaning of the section has been considered in appraisal proceedings in another case that is pending before the Bermuda Court by both Hargun CJ[8] and the Court of Appeal[9]. In summary, the effect of the section is narrow because the only requirements for a shareholder to exercise a right to seek an appraisal of his shares are that (i) he (or she) is a shareholder at the time application is made to the Court for appraisal and (ii) the shareholder (the individual person or entity who is the registered holder at the date he or she applies for an appraisal) (a) did not vote in favour of the amalgamation and (b) is not satisfied that fair value for the shares has not been offered.

16. This means that under section 106 (6) it is possible for someone to acquire shares in the amalgamation 'target' company after the announcement of the amalgamation or merger has been made (which contains the offer price) and exercise the right to an appraisal within one month of the notice of meeting. This gives rise to the possibility that the shares acquired in this way could have been voted in favour of the amalgamation by a prior holder (which would have disqualified the prior holder from exercising an appraisal right), but that the

[8] **Re Jardine Strategic Holdings Limited** [2022] SC (Bda) 27 Com
[9] **Re Jardine Strategic Holdings Limited** [2023] CA (Bda) 7 Civ

acquirer may still exercise the appraisal right because the acquirer is now (i.e. within one month of the notice of meeting) the holder of the shares and did not himself vote in favour of the amalgamation.

17. It is important to note that the shares in Myovant (in common with many (if not most) companies listed on major stock exchanges in the United States and elsewhere) are "dematerialised". This term is a shorthand expression for the way shares are held and traded on the public exchange for speed and convenience, rather than by way of an actual sale or transfer of certificated shares. These shares are uncertificated and are 'held' in a 'fungible' electronic register in the name of a central depository (such as Cede and Company) which acts as custodian and transfer agent, and which follows the instructions given by the beneficial owners who trade in the shares, and records (for example) how many shares are bought, sold, traded, or hypothecated, or in this case, recording how many shares are voted in favour or against a resolution. This means that there is no physical transfer of particular shares by reference to a share certificate number representing a particular number of particular shares in the name of a specific holder. The chain of ultimate beneficial ownership is also complicated by the fact that brokers often act as agents on behalf of investor clients and "hold" shares for the benefit of their clients, so that the actual "holdings" at any given time may be more than one level deep in terms of legal relationship.

18. Sumitomo wishes to examine the exact circumstances in which Alpine acquired its shares in Myovant because Alpine's rights to exercise those rights may be affected by (i) when the shares were acquired (ii) in whose name the shares were "custodied" (iii) whether the prior custodian or broker gave instructions that the shares were to be voted in favour of the transaction on behalf of a prior beneficial owner or by Alpine (iii) how many shares are the subject of Alpine's right to exercise the right of appraisal[10].

19. Sumitomo has raised a number of factual queries over the numbers of shares that were recorded as having voted in favour of the amalgamation. These are set out in the first affidavit of Ms Khiyara Krige, who is an attorney on Sumitomo's Bermuda legal team[11].

20. The essence of the complaint is that it appears to Sumitomo that there is a discrepancy between the records that show Alpine's holdings and the number of shares in respect of which Alpine has claimed an appraisal when compared with the records of the number of shares that were voted in favour of the amalgamation.

21. It is said that Alpine owned 536,614 shares between 1 October 2022 and 31 December 2022 and did not become a shareholder of record until mid-February 2023, i.e. after the

[10] These points are summarized in Ms. Tolaney KC's skeleton argument on behalf of Sumitomo at paragraphs 24-34.
[11] **[B 240-3]** at paragraphs 7.3 to 7.10.

Record Date for the transaction which was 20 January 2023. At the shareholder meeting which was convened on 1 March 2023 to approve the amalgamation, the official record of votes cast against the amalgamation was 2,259,136 of which 1,000,000 were cast by registered shareholders other than Alpine. This means (says Sumitomo) that the maximum number of shares that Alpine could have voted against the amalgamation was 1,259,136 whereas the total number of shares for which Alpine seeks appraisal is 6,245,084. Alpine issued voting instructions in respect of 4,693,688[12] shares but has refused to confirm whether it issued or sought to issue instructions in respect of the remainder but confirmed that all of its voting instructions were against the merger[13]. Sumitomo says that it is likely that Alpine issued (or sought to issue) voting instructions in respect of all its shares, that leaves a discrepancy of (at least) 5,165,948 shares (82% of the Alpine shares that are subject to the appraisal claim).

22. This (says Sumitomo) raises the real possibility that shares that were voted in favour of the amalgamation are the subject of Alpine's appraisal. This gives rise to potential challenges to Alpine's standing in the Appraisal Proceedings[14], and following a contested hearing and detailed Decision on the Directions application[15], Hargun CJ gave a direction in paragraph 6.2 of the Directions Order[16]that Alpine must give disclosure of *"all documents relating to the ownership of and voting instructions given in relation to the 8,425,084 shares in respect of which [Alpine and APS Holding Corp. claim appraisal rights."*

23. In the detailed judgment that set out Hargun CJ's reasons for the Order he said at paragraph 38:

> *"The Court orders paragraph 6.2 which provides [omitting the text above], but discovery is limited to the documents which are in the possession of [Alpine/APS]. The Court makes this limited order given that Mr. Moore KC [counsel for Sumitomo] contends that this documentation may show whether any instructions were given by [Alpine/APS] in relation to their beneficial ownership of the shares and his contention that this may be relevant to [Alpine/APS] standing in relation to these s 106 proceedings."*

24. The learned Chief Justice then directed a non-disclosure and confidentiality agreement was to be signed concerning the documents to be disclosed by all parties to the Appraisal Proceedings. This was the agreement which became the NDA[17] in these proceedings.

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[12] **[C1-3]**
[13] **[B 828-9]** paragraphs 6-8 of Hawthorne 2
[14] See **[B 528-30]** Martin Moore KC at transcript pages 154-164 of the transcript of the Directions hearing and paragraphs 26-30 of Sumitomo's skeleton.
[15] **[D 70]** at **[D 87-9]**
[16] **[D 96]**
[17] **[D 109]**

25. Following the exchange of information and documents contemplated by the Directions Order, Sumitomo raised queries about the adequacy of the disclosures made by Alpine in relation to its ownership and voting instructions. In brief, they had no documents to disclose except the bare registration documents[18]. Alpine maintained that its disclosure obligation was limited to documents in its possession, in light of the learned Chief Justice's language at paragraph 38 of the Directions Judgment quoted above.

26. Between February 2024 and May 2024 correspondence passed between the Bermuda attorneys about the adequacy of the disclosure and their respective positions which it is not necessary to set out in detail here, save to note that no further disclosure was made. Sumitomo threatened at one point to issue an application to strike out the proceedings based on the standing issue but has not yet done so.

The 1782 Application

27. On 21 June 2024 Sumitomo made its 1782 application in the United States District Court for the Southern District of New York supported by the declaration by Mr. Wasty, which included the statement quoted at paragraph 8 above. The motivation behind the application was in part to obtain information directly from Clear Street about the ownership of Alpine's shares but also included a number of other related matters[19].

28. Alpine complained that Mr. Wasty's declaration relied upon information that had been disclosed in the Appraisal Proceedings under the protection of the NDA. Sumitomo responded that it had not relied on any confidential information but had relied upon (i) information in the public domain (public statements by Alpine's principal, Uri Cohen that disclosed his business relationship with Clear Street as a broker-dealer) and (ii) information within its own knowledge derived from Equiniti Trust Company LLC ("Equiniti") which acted as Myovant's transfer agent (and upon the conclusion of the merger, Myovant became the same entity as Sumitomo). The details of these sources are examined in greater detail below.

The present proceedings

29. These proceedings were issued on 29 August 2024 and the application for interim relief was issued simultaneously, supported by the First Affidavit of Mr. Hawthorne. Mr. Hawthorne summarises the arguments that were relied upon at the hearing in respect of the interim injunctions. The essential point contained in this affidavit (apart from the legal arguments that Alpine intended to make) was that Mr. Wasty could not have known that Alpine had used Clear Street to *acquire*[20] the Myovant shares except by using the

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[18] **[B429-30]** and **[B578-9]**

[19] See the affidavit of Mr. David Livshiz (one of Sumitomo's attorneys in the 1782 Application) **[D 548]** at paragraph 8.2.

[20] Emphasis is added to draw the distinction that was made by Alpine that acting as a broker-dealer does not necessarily mean that the broker-dealer would be used to acquire the shares, but the broker-dealer might be used simply to hold the shares.

information that had been disclosed in the Appraisal Proceedings and that was in breach of the NDA undertaking Mr. Wasty had signed and the implied undertaking to which he and Sumitomo are subject in the Appraisal Proceedings.

30. In response to Mr Hawthorne's first affidavit in these proceedings Mr. Wasty responded that the source of the information contained in paragraph 12 of his Declaration was not from the materials disclosed under the NDA but from his knowledge that Equiniti had stated that Clear Street was Alpine's broker-dealer. He said that based on that he did not consider that the 1782 application nor his statement in paragraph 12 of his Declaration was in breach of the NDA. He said that had he thought that either of those were in breach of the NDA he would not have executed his Declaration without first obtaining an appropriate release from the NDA.

31. Ms Krige also swore her first affidavit in answer[21] to Mr Hawthorne's affidavit, setting out Sumitomo's position and taking issue with various assertions made by Mr. Hawthorne, mainly by way of argument, but setting out the factual basis for the standing point that was the principal reason that Sumitomo had commenced the 1782 Application (the details of which have been summarised in paragraph 16 above). Ms Krige also exhibited the transcript of the hearing before Hargun CJ in which the standing point had been raised[22].

32. Ms Christine Pino of Equiniti swore a short affidavit[23] which confirmed (i) that Equiniti had served as Myovant's transfer agent since October 2016 (ii) that in February 2023 Equiniti received correspondence from Clear Street requesting that certain shares in Myovant previously registered in the name of Cede & Co be registered in the name of Alpine (iii) on 15 February 2023 Depositors Trust Company ("DTC") delivered 5,571,489 shares to Equiniti and on 23 February DTC delivered 853,595 shares to Equiniti, which Equiniti re-registered in the name of Alpine pursuant to instructions its (i.e. Alpine's) broker Clear Street provided through DTC.

33. In addition, Mr Livshiz (one of Sumitomo's New York attorneys acting in the 1782 Application) filed supporting evidence detailing the background to the commencement of the 1782 Application and the steps taken by his colleagues to verify the information that was used to support the Application from Equiniti. He also produced the Transfer Agency and Registrar Services Agreement that provided at paragraph 15 that the records kept by Equiniti (formerly American Stock Transfer & Trust Company LLC) as to share transfers and all other materials are the property of Myovant, which became Sumitomo, and therefore the information in Equiniti's hands was also in the possession of Sumitomo. This

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[21] I do not need to set out in detail all the various points in dispute that do not bear directly on the issues raised in this application.
[22] **[B 530]**
[23] **[B 824]**

was to support the argument that under the terms of the NDA the information was not confidential because it was independently in the rightful possession of Sumitomo without confidentiality obligations or restrictions[24]. Mr Livshiz also produced the publicity statement issued by Clear Street which disclosed its relationship with Alpine and quoted Mr. Cohen as confirming this relationship existed[25].

34. Mr Hawthorne put in a second responsive affidavit, again summarising Alpine's legal arguments and challenging Sumitomo's characterisation of the 1782 Application, and making various legal points about why Sumitomo's remedy is against Alpine in the Appraisal Proceedings, the alleged prejudice to Alpine in not being able to protect the confidentiality of the contents of Clear Street's documents, and asserting that the 1782 Application was in contravention of the Directions Order made by Hargun CJ. The only factual averment was (on information that he had been given) was that the 1782 Application would likely not be resolved until 2026, and that this represented an unacceptable delay amounting to real prejudice to Alpine.

35. Mr. Duane Loft (one of Alpine's New York attorneys in the 1782 Application) put in an affidavit[26] on behalf of Alpine to challenge Mr. Livshiz' account and disputing the account given by Mr Livshiz as to why it was that Alpine contends that Mr. Wasty could not have been relying on the public information and the Equiniti information in order to make the statement in paragraph 12 of his Declaration. He also accused Mr. Livshiz of making misleading and inaccurate statements which he said were intended to mislead the US Court. Most of the affidavit is argument, not evidence of fact, so I have not set it out in detail.

36. Ms Georgia Bullitt also put in an affidavit on behalf of Alpine explaining[27] why (in her view) the inference (i) that Clear Street was the "acquiring broker" for Alpine in respect of the Myovant shares that Mr. Livshiz had put forward in his affidavit and (ii) that Equiniti would have had any insight into who Alpine's broker was during the acquisition period in February 2023.

37. Finally, Mr Livshiz put in a second affidavit[28] responding to the accusations of unprofessional conduct that had been levelled at him by Mr. Loft.

Alpine's primary submissions in relation to the application for interim relief.

38. Mr Millett KC's submissions[29] rested on three primary points.

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[24] **[D 111]** at para 1.2 (iii)
[25] **[B 663]**
[26] **[B 860]**
[27] **[B 929]** I have not summarized all of Ms. Bullitt's evidence, only the key points for the purposes of the present application.
[28] **[H 3]**
[29] Mr. Millett KC's submissions ran to over 130 paragraphs, so I intend no discourtesy by not itemizing or repeating all of them here. This represents what I consider to be a summary of the fundamental parts of his argument.

39. The first was that the Directions Order was restricted in its ambit by paragraph 38 of the Directions Judgment of Hargun CJ to all documents *in the possession of* Alpine that related to Alpine's share ownership and voting instructions. He said that this meant that the Chief Justice had restricted what was relevant to the issue in the proceedings, so that it was impermissible for Sumitomo to seek to use the 1782 proceedings to widen the search for additional material.

40. The second was that the NDA restricted the disclosure given by Alpine to Sumitomo for use *"in"* the Appraisal Proceedings and no other proceedings. He said that the language permitted no other interpretation so that it could not be interpreted as meaning *"for the purposes of"* the Appraisal Proceedings.

41. The third was that Mr. Wasty could not have made the statement in paragraph 12 of his Declaration without using the information derived from Alpine's disclosure because the sources that he relied on did not disclose that Alpine had used Clear Street as broker-dealer for the *acquisition* of the Myovant shares. The statement he made was therefore a "deliberate" breach of the NDA undertaking he had signed.

42. Once he had established these three things, Mr. Millett said that he had provided the Court with all the elements required to show a clear breach of the NDA on the part of both Sumitomo and Mr. Wasty.

43. Mr Millett KC continued by referring to the good arguable case standard[30] for establishing a claim to injunctive relief to restrain Sumitomo and Mr. Wasty from any further misuse of the confidential information that Alpine had disclosed in the 1782 Application, and an order to require Sumitomo to discontinue or withdraw the 1782 Application. He said the information was confidential and that its protection required the Court to grant an anti-suit injunction to restrain pursuit of the foreign proceedings, i.e. to prevent Sumitomo from enjoying "the fruits" of its wrongful conduct.

44. Mr Millett KC said that Alpine suffered prejudice by the oppression of its confidential documents being disclosed in the 1782 Application when the learned Chief Justice had limited the disclosure obligation to those documents in *Alpine's* possession, not the possession of others.

45. Mr Millett KC submitted that the effect of clauses 2 and 3 of the NDA constituted by necessary implication a promise not to bring the 1782 Application using information from documents disclosed by Alpine in the Appraisal Proceedings because that was outside the

[30] I.e. the well-known test in **American Cyanamid Co v Ethicon Ltd.** [1975] AC 396 ("**American Cyanamid**").

"Purpose" as defined in the NDA which was for use "in" those proceedings only. On the strength of that, it was submitted that the principles that apply to covenants not to sue in a foreign court were engaged, and thus that Alpine was entitled to an anti-suit injunction to restrain Sumitomo from pursuing the 1782 Application.

46. He submitted that the balance of convenience clearly favoured granting injunctive relief because (i) the NDA provided that damages would not be an adequate remedy for any breach and (ii) that specific performance of the agreement was the appropriate remedy. It was said that specific performance in this context meant holding Sumitomo and Mr. Wasty to their respective confidentiality obligations under the NDA. He submitted that there could be no prejudice to Sumitomo by holding it and Mr. Wasty to their covenants not to misuse the confidential information.

47. Alternatively, Mr Millett KC submitted that the Court should enjoin Sumitomo from pursuing the 1782 Application on the grounds that it was vexatious, oppressive or otherwise unconscionable. This was on the basis that the Bermuda Court had already prescribed the ambit of disclosure in the Appraisal Proceedings and the section 1782 Application undermined or frustrated the Court's management of its own proceedings. Mr Millett KC accepted that there was no embargo against any third party disclosure, but said that the Court had forbidden any third party disclosure that was aimed at production of documents that went to Alpine's acquisition of ownership of the Myovant shares. This was because, he said, they were not documents in Alpine's own possession, pursuant to paragraph 38 of the Directions Judgment, which he said meant that any documents in the hands of a third party that touched on Alpine's acquisition of the shares were not relevant. This was the "end run" argument.

Sumitomo and Mr. Wasty's response

48. Ms Tolaney KC submitted[31] on behalf of Sumitomo and Mr. Wasty that the application for an injunction based on the alleged misuse of confidential information was hopeless on the facts because (i) the information was not confidential because it fell within the exceptions provided in the NDA (a) that the information was already within the public domain and/or (b) that the information was within Sumitomo (and Mr. Wasty's) knowledge obtained independently from the disclosure by Alpine[32].

49. It was submitted that Mr. Wasty gave clear and unchallenged evidence that he had not relied upon the disclosure material from Alpine, and that the evidence of Ms Pinot and Myovant's

[31] Again, I mean no discourtesy to Ms. Tolaney KC's submissions by not repeating them at length in this judgment. I have summarized what I consider to be the most relevant points.
[32] These are exceptions (i) and (iii) in Clause 1.2 at **[D 111]**.

share transfer records were within Sumitomo's own rightful possession so Sumitomo had no need to rely upon Alpine's disclosure materials for this information.

50. In answer to Mr Millett KC's point that these materials did not expressly disclose that Clear Street had been used as the acquiring broker, Ms Tolaney KC submitted (i) that Sumitomo did not need to know that Clear Street was the acquiring broker in order to make the 1782 Application (ii) Clear Street would be likely to have relevant information in its capacity as Alpine's broker-dealer and (iii) it was an inevitable inference from the facts within Sumitomo's knowledge that Alpine had used Clear Street as its acquiring broker given the circumstances and time-line during which Alpine's acquisition of shares in Myovant had taken place.

51. Further, it was submitted that the argument based on the definition of "Purpose" in the NDA was misconceived because the implied undertaking (which Alpine had accepted was co-extensive with the NDA[33]) allowed use of disclosed material for the purposes of seeking further information from third parties for use in the Appraisal Proceedings[34].

52. Ms Tolaney KC submitted that the anti-suit injunction principles applicable to the enforcement of forum selection clauses relied upon by Mr. Millet KC were not engaged in the present circumstances because (i) the NDA is self evidently not a forum selection clause (ii) there is no embargo on the parties seeking assistance from the US Court under section 1782 28 USC (or other third party disclosure mechanisms) contained in the Directions Order and the Directions Judgment cannot be read as imposing one[35] (iii) the principles relating to anti suit injunctions required the Court to act with caution so as not to interfere with the processes of a foreign court unless there were clear grounds to justify doing so, which did not exist in this case.

53. Further, in a case where (i) the interim injunctive relief to restrain further misuse and (ii) the interim mandatory injunctive relief sought had the effect of granting the applicant the final relief sought in the proceedings as a whole, the test for granting the injunction was not the ordinary 'good arguable case' standard derived from **American Cyanamid**, but required the court to be satisfied that the merits of the applicant's case would result in a judgment in the applicant's favour at trial to a high degree of probability[36].

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[33] See Millett KC's skeleton at paragraph 45. Mr Millett KC recanted on this in his reply by restating what he had said in opening, namely that the restriction on use was narrower under the NDA than it was under the implied undertaking, saying that there would have been no point in negotiating the NDA otherwise.
[34] See **Wilden Pump v Fusfeld** and **Omar v Omar** discussed below at paragraph 94.
[35] Ms. Tolaney KC pointed out that Alpine has availed itself of relief under section 1782 in the context of the Appraisal Proceedings so it can hardly complain about Sumitomo doing the same thing.
[36] See paragraphs 62-4 below.

54. As to the arguments regarding balance of convenience and prejudice, Ms Tolaney KC said there is no need to 'hold the ring' pending trial because Alpine had accepted that it had no need or interest in protecting the misused confidential information[37] and that damages were an adequate remedy, particularly since the only real claims that were being pursued were for legal costs in the 1782 Application and in these proceedings[38], which were obviously financial claims.

55. For all these reasons, it was submitted that this was plainly not a case where an interim injunction should be granted.

56. Ms Tolaney KC also made an application on behalf of Sumitomo and Mr. Wasty for a release from the confidentiality obligations insofar as they relate to the section 1782 Application. This is considered separately at paragraphs 121-138 below.

The scope of the court's review at this stage of the proceedings

57. The Court's role at this stage of the proceedings is obviously not to determine disputed issues of fact, or make final determinations of the legal issues, because that will be the function of the trial. On these applications the Court is required to consider the evidence on the affidavits, and to evaluate the competing merits of the legal arguments, and having regard to the balance of justice, to decide whether to exercise the Court's discretionary powers in Alpine's favour.

'Good arguable case' or 'high degree of probability' standard

58. The first issue to be determined is what standard to apply to the four categories of interim injunctive relief sought in this case. This question is relevant to both the grant of an anti-suit injunction and the grant of the interim injunctions that mirror the full relief sought in the proceedings.

The anti-suit injunctions

59. In this case Alpine seeks an interim injunction to restrain Sumitomo from (i) pursuing the 1782 Application and (ii) compelling Sumitomo to desist and/or withdraw that Application.

60. It is well established that in a case where an anti-suit injunction is sought, the Court will exercise caution so as not to interfere with a foreign court's processes. In **South Carolina Insurance Co v Assurantie Maatschappij NV**[39] the House of Lords held that

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[37] See Loft 1 **B 867** paragraph 20 (c) **B 868-9** paragraph 21 (a) and (c)

[38] See **[A 4]** paragraphs (3) and (4) of the prayers for relief.

[39] [1987] AC 24 at 40D per Lord Brandon. **British Airways Board v Laker Airways Ltd** [1985] AC 58 at 95E per Lord Diplock.

"...among the forms of injunction which the High Court has power to grant, is an injunction granted to one party to an action to restrain the other party from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court involved."

61. As a matter of Bermuda law (following English law principles) it is open to any litigant to take whatever steps appear to be best suited to gathering the evidence that is required to present the case at trial. This includes steps taken outside the jurisdiction of this Court[40]. In exercising the anti-suit injunction jurisdiction, the Court needs to be satisfied that there is a solid legal basis upon which to invoke the Court's power to restrict a litigant's right to take proceedings in a foreign court. The Court will not usually exercise that power in the absence of a clear contractual restriction on that litigant's right to take proceedings in a foreign court[41].

62. In this context it is worth referring to the *dictum* of Toulson J in **Deutsche Bank AG v Highland Crusader Offshore Partners LP**[42] that

"...where the court is not enforcing a contractual right under English law, the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and, in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. In other words, there must be a good reason why the decision to stop the foreign proceedings should be made by and English judge rather than a foreign judge, and cases where justice requires the English court to intervene will be exceptional."

63. This was described as a "*threshold*" test in **Ecobank Transnational Inc.v Tanoh**[43] where the English Court of Appeal held that *"an applicant for an anti-suit injunction had to show a high degree of probability"* that there was an arbitration agreement (or forum selection clause) that governed the party's dispute.

64. In addition, it is also well established that a high standard of proof is required to justify making a mandatory injunction[44].

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[40] See **South Carolina** at 41G-43D per Lord Brandon. See also **RBS v Hicks** [2011] EWHC 287 at paragraphs 95-6 per Floyd J even in a case where there was an exclusive jurisdiction clause.
[41] See **Donohue v Armco Inc** [2001] UKHL 64 at para 24 per Lord Bingham.
[42] [2010] 1 WLR 1023 at para 56 page1038 B to D.
[43] [2016] 1 WLR 2249-50 paragraphs 89-91 per Clarke LJ approving Teare J and Colman J in earlier cases.
[44] The *locus classicus* is **Redland Bricks v Morris** [1970] AC 652 at 665 per Lord Upjohn *"A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future...It*

65. The Court must therefore make a careful assessment of the strength of Alpine's claim that this Court should exercise its jurisdiction to grant an injunction which would deprive Sumitomo of its right to seek relief in a foreign court to obtain evidence for use in the Appraisal Proceedings and force Sumitomo to withdraw or abandon its 1782 Application, applying the 'high degree of probability' test, not the 'good arguable case' standard[45].

Does the alleged breach of the NDA qualify for an anti-suit injunction?

66. There is no forum selection clause in this case, so the conventional justification for interfering with a foreign court's process is founded on the existence of a contractual submission to the domestic court's jurisdiction (or arbitration in a particular jurisdiction) does not apply. Mr Millett KC sought to argue that the Court should construe the combination of (i) the Court's Directions Order (read with paragraph 38 of the Directions Judgment) (ii) the definition of the term "Purpose" which contained the limitation of "in the proceedings" and (iii) the restrictions on the use of the information otherwise for the proceedings necessarily implied a restriction on Sumitomo from making the 1782 Application, which had the same effect, and therefore the Court should apply anti-suit principles.

67. It seems to me that this argument suffers from a high degree of artificiality. Mr Millett KC accepted that the learned Chief Justice did not place an embargo on all third-party disclosure applications. Ms Tolaney KC pointed out that Alpine had made several applications of the same kind, so it could not be suggested that there had been either any such intention, nor that the learned Chief Justice intended the embargo to apply only to Sumitomo. Mr Millett KC submitted that the Directions Judgment had the effect of limiting third party disclosure applications in relation the standing issue because the learned Chief Justice had ruled that only the documents in the possession of Alpine were relevant, and Alpine said it had given disclosure of everything it had.

68. Paragraph 38 of the learned Chief Justice's Directions Judgment makes it clear that Alpine's ownership and the instructions that it gave as to voting in relation to the shares it acquired is a relevant issue as it goes to the standing issue described above. That is not disputed. However, the qualification in paragraph 38 that the documents must be in the possession of Alpine does not restrict Sumitomo from pursuing all other avenues that lie open to it to investigate whether Alpine's agent Clear Street holds documents relevant to the question of what shares Alpine owned, when and whether it gave voting instructions in relation to them.

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is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly." More recent cases to the same effect were cited, e.g. **Zockoll Group Ltd v Mercury Communications Ltd** [1998] FSR 354 at 356 per Phillips LJ.

[45] Contrary to the submissions made by Mr. Millett KC.

69. If those documents were in the hands of a third party within this jurisdiction, for example, Sumitomo would be able to issue a *sub poena duces tecum* and have the documents produced on the basis that these documents are necessary for the fair disposal of the issues at the trial. Those issues include Alpine's standing and the number of shares to which it is entitled to have appraised, which go to the heart of the relief sought by Alpine in the Appraisal Proceedings.

70. It seems to me that if Sumitomo believes that all documents relating to these issues have not been disclosed by Alpine, then it is a legitimate line of enquiry for Sumitomo to pursue. Alpine seeks to shut out this line of enquiry by saying that Sumitomo's only recourse is to apply to the Bermuda Court on the basis that Alpine's disclosure is deficient (i.e. because it has not produced the documents of its agent, which are in law treated as if they are in Alpine's possession[46]). There is no authority cited in support of this argument, which is directly contrary to the principles in the **South Carolina** case referred to above.

71. In my view, Sumitomo is entitled to seek to impeach Alpine's disclosure by making the section 1782 Application, and nothing in the Directions Order (or the Directions Judgment) prevents it from doing so. Therefore, Alpine's argument is not sufficient to persuade the Court that the combination of the Directions Judgment and the NDA amounts to the equivalent of a forum selection or exclusive jurisdiction clause which is capable of being "enforced" by an anti-suit injunction.

72. Moreover, even if the NDA had been subject to an exclusive jurisdiction clause, that would not have been a bar to Sumitomo seeking disclosure outside the jurisdiction[47].

73. Therefore, the fundamental premise on which the applications for an anti-suit injunction and mandatory order to desist in pursuing the 1782 Application rests does not meet the standard of 'high degree of probability'. These applications therefore fall at the first hurdle (i.e. the 'threshold test' referred to above). This means that Alpine's applications for the interim relief sought in categories (i) and (ii) described in paragraph 1 above must be refused.

74. However, if I were held to be wrong on that, I would also have refused the relief in categories (i) and (ii) on the grounds set out in paragraphs 110-120 below because (a) damages would be an adequate remedy and (b) the balance of justice clearly requires to Court to refuse these injunctions.

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[46] See the cases cited at footnote 56 below.
[47] See e.g. **RBS v Hicks** cited above.

The restraint of misuse injunctions

75. The second pair of orders sought by Alpine relate to the restraint of any further misuse of the information that is alleged to have been wrongly disclosed (category (iii)) and to render any document disclosed as a result of the 1782 Application inadmissible in the Appraisal Proceedings (category (iv)).

76. The application in respect of category (iii) attracts the ordinary standard of 'good arguable case' under conventional **American Cyanamid** principles. The application under category (iv) is within the 'high probability' standard because it seeks to permanently exclude the documents from use and equates to the permanent relief sought in the proceedings.

77. The argument put forward by Mr Millett KC under category (iii) was to the effect that the fact that Clear Street was the acquiring broker was unknown to Sumitomo and Mr. Wasty but for the disclosure given in the Appraisal Proceedings, and therefore this information fell within the category of protected information. As a result, Sumitomo must (a) be restrained from any further misuse and (b) must be deprived of all of the fruits of the misuse of the information, namely use of any documents that Clear Street produces in the 1782 proceedings.

78. The argument turns on the words *"in"* the proceedings as opposed to *"for the purposes of"* the proceedings. Although this is obviously an *arguable* interpretation of the language, this point also suffers from a high degree of artificiality because the documents produced as a result of the 1782 proceedings (if relevant) will be used "in" the Appraisal Proceedings.

79. Mr Millett KC submitted that there would be no utility to the NDA if it amounted to the same as the implied undertaking. This submission leaves out of account that the NDA was drafted and executed following a direction of the Court to regulate the disclosure process in the Appraisal Proceedings. It would be strange if the Court had intended the parties to conduct their disclosure under a restriction that the information disclosed would not be capable of being used to seek additional information for the purposes of the proceedings. The normal implied undertaking allows the parties to use information disclosed in this way, and I see no provision in the Directions Order which supports the argument that the Court intended the parties to limit their ordinary rights in the way Mr. Millett KC suggests[48]. I note in particular that the form of the undertaking annexed to the NDA provides in paragraph 2 that the person signing it acknowledges that the information to which the recipient is being given access **is subject to the implied undertaking** (my emphasis),

[48] I have noted above that in his reply (Transcript Day 2 page 71) Mr. Millett KC retreated somewhat from his skeleton at paragraph 45 and in oral submissions Day 1 pages 76 and 87 that the obligations under the NDA and the implied undertaking were "co-extensive".

which strongly suggests that the restriction in the NDA is intended to be co-extensive with and goes no further than the implied undertaking.

80. There is an oddity in the relief claimed in category (iii) because this relief seeks an injunction to restrain any *further* disclosure of the misused information. This I take to mean further use of the information in the 1782 Application, but it is not clear. On a narrow reading, it simply means a further disclosure that Clear Street was the acquiring broker. Even on the wider interpretation, it is not clear what this is aimed at because Alpine has indicated that it no longer seeks to protect the confidentiality of that information[49]. I will address this point in more detail below.

81. The argument in relation to the relief sought in category (iv) was that the information obtained as a result of the (alleged) misuse must be rendered inadmissible. In my view, this result does not follow automatically from establishing that there is a good arguable case in relation to misuse of the confidential information.

82. First, the claim to this injunction does not meet the 'high probability' standard because its predicate (namely that there should be an injunction against further use) has not been satisfied. Second, the admissibility of evidence is clearly a matter for the trial judge in the Appraisal Proceedings, and it would be inappropriate and wrong for this Court on this application to tie the hands of the trial judge by granting an interim (or a permanent) injunction excluding any admissible material obtained in the section 1782 Application. Third, there are good reasons not to exclude documents that go to the standing issue. I will deal further with this aspect of the application under the 'balance of justice' heading considered below.

The factual allegations of misuse of confidential information

83. On the facts alleged in Mr. Hawthorne's first affidavit, it is said that Mr. Wasty swore his declaration quite deliberately, knowing that he was acting in breach of the undertaking he gave in relation to the NDA[50].

84. Mr Millett KC went through the Affidavit that Mr. Wasty swore in these proceedings that deals with the allegation that he swore the Declaration in support of the 1782 Application in breach of his undertaking[51].

85. In that affidavit, Mr. Wasty says (i) he was aware of his obligations to the court under the implied undertaking and under the NDA (ii) he takes those obligations very seriously (iii)

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[49] Loft 1 **B 867** paragraph 20 (c) **B 868-9** paragraph 21 (a) and (c)
[50] **B 4** and **B 9** Hawthorne 1 at paragraphs 12 and 36.
[51] **B 538**

at the time he made the Declaration he was aware that (a) Equiniti had stated that Clear Street was Alpine's broker-dealer and (b) he was aware from Alpine's discovery that Clear Street was Alpine's broker dealer and (iv) on the basis of the information he had from Equiniti he did not consider either the 1782 Application or his Declaration was in breach of the NDA. He said that had he considered otherwise he would have made the appropriate application for a release from the NDA.

86. Mr Millett KC said that Mr Wasty could not have known from Equiniti that Clear Street was Alpine's acquiring broker-dealer in respect of the Myovant shares when he swore the Declaration otherwise than from Alpine's disclosure because:

    (i) Equiniti did not know that Clear Street had acted in that capacity and so any knowledge that Equiniti had that is attributed to Sumitomo as Sumitomo's agent did not include this information;

    (ii) Ms Pino's affidavit[52] from Equiniti only goes as far as saying that (a) Myovant engaged Equiniti as transfer agent on 12 October 2016 until 10 March 2023 (b) in February 2023 Equiniti received correspondence from Clear Street requesting certain shares to be registered in the name of Alpine (c) on 15 February 2023 another depository (DTC) delivered 5,571.489 Myovant shares to Equiniti and on 21 February DTC delivered another Myovant 853,595 shares which Equiniti re-registered in the name of Alpine pursuant to instructions from Clear Street via DTC (d) Equiniti provided Sumitomo the share register on 13 March 223 identifying Alpine as the registered holder of 6,425,084 Myovant shares.

87. Mr Millett KC said that the only inference that can be drawn from these facts is that Mr. Wasty used Alpine disclosure as the basis for his statement in paragraph 12 of his Declaration. Although reference to Clear Street's broker-dealer relationship with Alpine's principal Mr. Uri Cohen had been made in publicity statements, Mr Millett KC pointed out these were not relied upon by Mr. Wasty in his affidavit in these proceedings to explain the source of his knowledge. In any event, Clear Street's publicity piece did not reveal that Clear Street had acted as the acquiring broker-dealer for the Myovant shares. He suggested that it was highly unlikely Mr. Wasty could have guessed from the fact that Clear Street publicised that it did act in a small percentage of Alpine's trades as broker-dealer that Clear Street had done so in relation to the Myovant shares.

88. Therefore, said Mr Millett KC, there was evidence of a clear breach. Mr Millett KC went on to examine what Mr Livshiz (one of Sumitomo's US attorneys in the 1782 proceedings)

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[52] **B 824-5**

says about the basis of the 1782 application and makes various criticisms about his evidence. They amount to an attack on Mr. Livshiz's statements about the source of the information and the way his firm which had sought verification or confirmation of Clear Street's status as broker-dealer.

89. Mr Loft accused Mr. Livshiz of deliberately mischaracterising the nature of the 1782 proceedings in his first affidavit filed in the Bermuda Court and suggested that Mr Livshiz used artful language to avoid saying unequivocally that Sumitomo did not use the information disclosed in the Appraisal Proceedings. This prompted Mr. Livshiz to put in a further affidavit in rebuttal of what Mr. Livshiz considered to be accusations of unprofessional conduct.

90. The tenor of Mr. Millett KC's submissions on these affidavits was to imply that the verification and confirmation exercise with Equiniti was in substance an exercise to disguise the real source of the information[53].

91. Mr Millett KC also relied on the affidavit of Ms Georgia Bullitt to support the argument that a transfer agent would not ordinarily know the identity of the beneficial owner until the shares were reregistered in the owner's name and that it was not unusual for an institutional investor like Alpine to use a broker-dealer other than its prime broker to execute transactions and then move the shares between prime brokerage accounts, so that it could not be inferred that because Clear Street had been used as the prime broker when the shares were registered in Alpine's name in February 2023 that Clear Street had also acted as Alpine's prime broker when the Myovant shares were acquired between October 2022 and February 2023[54].

92. Ms Tolaney KC made it clear that Alpine's case amounted to making serious allegations of dishonesty on the part of Mr. Wasty which are impermissible without a proper foundation and invited Mr Millett KC to withdraw them. She submitted that in circumstances where there was a short time window in which the acquisitions were made, it was an obvious and inevitable inference that Clear Street was the acquiring broker and that the suggestion that it could have been any other broker was unrealistic. In any event, Ms Tolaney KC submitted that Sumitomo did not need to know for certain that Clear Street was the acquiring broker-dealer in order to make the 1782 Application, and even if that was wrong, Clear Street would still be likely to have relevant information as to the transfer of shares prior to them being transferred to Equiniti.

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[53] Day 1 Transcript pages 127-9.
[54] **B 931-3** at paragraphs 6-9.

93. Ms Tolaney KC submitted that because the information was (i) within the public domain (Mr Uri Cohen's publicly quoted comments) and (ii) within Sumitomo's rightful possession which were the excepted categories in the NDA[55]. Equiniti's documents are the property of Sumitomo under the Stock Transfer Agency and Registrar Service Agreement, and Equiniti's knowledge would be imputed to Sumitomo on ordinary principles of agency[56].

94. Ms Tolaney KC further submitted that even if (which is denied) any information had been used from Alpine's disclosure as the basis of making the 1782 Application, this was not an impermissible use because disclosed documents are not "misused" when they are used in a third-party disclosure action (i.e the 1782 Application) brought for the sole purpose of furthering the party's case in the original action (i.e. the Appraisal Proceedings). She relied on **Wilden Pump & Engineering Company v Fusfeld**[57] (a case on not dissimilar facts) where Falconer J stated that where the disclosure action that was brought was "ancillary" to the primary action and the claimant's sole purpose of bringing it was for the purpose of the conduct of the primary action, the use of information in the primary action to do so was a permissible use of the disclosed information.

95. In reply, Mr Millett KC confirmed that there was no allegation that Mr. Wasty had deliberately lied (as I think he was professionally bound to do) and made the submission that Mr. Wasty had not "come up to proof" because he had not explained or expanded or modified his statements in his affidavit[58].

Assessment of the evidence

96. It is obviously not the Court's function to make a final determination of the evidence at this stage. I have not heard the witnesses, and there has been no cross-examination. However, I can comment on the evidence for the purposes of assessing the merits of the applications for the interim relief sought.

97. First, I agree with Ms Tolaney KC that it is not permissible to infer serious wrongdoing or dishonesty without supporting evidence. Serious allegations of this kind must be properly pleaded and set out, and the lawyers making the allegations must have written instructions and must be satisfied that there is credible evidence to support those allegations[59].

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[55] Clause 1.2 in the NDA set out above.
[56] **B 599** at clause 15 and **UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH** [2014] EWHC 3615 at para 762 per Males J and **Murray v Walter** (1839) Cr. & Ph 114 at 125 per Lord Cottenham LC.
[57] [1985] FSR 581 at 605 cited with approval in **Omar v Omar** [1995] 1 WLR 1428 per Jacobs J.
[58] Transcript Day 2 page 34 "Now, let me be very clear. This is not a question of Mr Wasty lying on oath or misleading the court. We make no such allegations. We are very allied [alive] to the fact that Mr Wasty is a highly respected member of the legal community, of the Bermuda legal community, of course. This is a question of failure on his part, at least at this interim stage, to come up to proof, to come up with a complete or a convincing explanation."
[59] Bermuda Barristers Code of Professional Conduct 1981 Rules 41, 46

98. Second, Mr. Wasty is a highly respected and experienced senior practitioner and an officer of this Court. He has given sworn evidence that he did not rely upon Alpine's disclosure when making the statement he did in paragraph 12 of the Declaration. He says if he had thought that his statement was in breach of the NDA undertaking he would not have sworn the declaration without first having sought the appropriate release.

99. This evidence is unchallenged. Mr Hawthorne's evidence is that *it is his client's case* that Mr. Wasty breached the NDA undertaking and the implied undertaking, which is a very different thing. Mr. Wasty's evidence was not rebutted or challenged by direct evidence.

100. Mr. Millett KC's confirmation that Alpine are not alleging that Mr. Wasty was lying under oath was rightly given. It seems to me that once Mr. Wasty has given unchallenged testimony that he did not rely on Alpine's disclosure, Mr. Wasty does not need to "come up with a convincing explanation" at this stage of the proceedings: it is for Alpine to meet its own evidential burden at the trial.

101. In addition, there does not appear to be any factual basis to support the application for interim relief to restrain any further disclosure of the misused information. It is not said how this will arise. The complaint was that the statement in paragraph 12 of Mr. Wasty's Declaration was used as the foundation of the 1782 Application. For the reasons given above, the Court has refused the relief aimed at stopping Sumitomo from pursuing that application.

102. Even if the wider interpretation of 'further' disclosure is applied (i.e. further use or misuse), it is difficult to see how any further use of that information is going to be made in those proceedings. This is compounded by the acknowledgement by Alpine that it does not seek to protect the confidentiality in that information any longer[60].

103. Once it is accepted that Mr. Wasty's evidence is unchallenged and that he is not being dishonest, it is difficult to see what positive evidence remains to underpin Alpine's case. What remains in the affidavits is legal argument.

Ancillary use

104. Mr. Millett KC's argument that the documents disclosed in the Appraisal Proceedings can only be used "in" the Appraisal Proceedings has been summarised at paragraph 78 above. The Court has already observed that this argument appears artificial in that it ignores the fact that the information obtained in the 1782 proceedings will be used "in" the Appraisal Proceedings. It is also obvious that the 1782 proceedings fall within the meaning of

[60] Loft 1 **B 867** paragraph 20 (c) **B 868-9** paragraph 21 (a) and (c)

"ancillary" proceedings within the meaning of the tests in and **Wilden Pump** and **Omar** referred to above. Therefore, it is difficult to see any principled basis for the objection to the 1782 Application.

The alternative argument that the 1782 Application is vexatious or oppressive

105. The alternative argument for seeking relief included a rehearsal of the same arguments that have been made under the other limbs described above and I will not repeat them. The only additional points under this heading were (i) the argument that the 1782 Application is an attempt at an "end run" around the directions given by Hargun CJ and (ii) that the probable additional delay in the hearing of the Appraisal Proceedings would be prejudicial to Alpine.

106. For the reasons I have already given at paragraphs 66 to 70 above, I am not persuaded that the learned Chief Justice intended to restrict the ambit of disclosure in the manner contended for by Mr. Millett KC.

107. Moreover, the fact that the ambit of disclosure may be broader under section 1782 than it is under the Bermuda Rules of the Supreme Court 1985 is not persuasive. In **Soriano v Forensic News LLC**[61] the English Court of Appeal refused to grant an anti-suit injunction based upon the premise that the 1782 application in that case was an inherently abusive fishing expedition or that its terms went beyond those that would be applicable in England.

108. Once it is conceded (as it was[62]) that the Directions Order did not restrict third party disclosure, the 'vexation and oppression' argument on the basis of an "end run" struggles to meet the 'good arguable case' standard required for the grant of injunctive relief, let alone the 'high probability standard' that is required for an anti-suit injunction.

109. It was also said that not granting an interim injunction would mean that the Appraisal Proceedings would be delayed until after the 1782 proceedings have concluded, probably not before the end of 2025 or early 2026. This is not a persuasive argument in my view because:

    a. This litigation is being hard fought at every stage by both sides, as they are each entitled to do. Delays are therefore inevitable.

    b. The documents and/or information that go to the standing point are required for the fair disposal of the issues in dispute, which include whether Alpine is entitled and

[61] [2023] EWCA Civ 223 at paras 7, 10, and 25-8 per Sir Geoffrey Vos MR
[62] Transcript Day 1 Mr. Millett KC page 29-30 and Day 2 page 72.

if so to what extent to an appraisal of its shares. A fair trial cannot realistically be held without disclosure of all documents that go to this issue.

c. The question of what effect this may on the Appraisal Proceedings is a matter for the judge in those proceedings, not for this Court in the context of this application.

d. The remedy to reduce any undue delay caused by the 1782 Application lies in Alpine's own hands by directing its broker-dealer Clear Street to release the documents sought.

Are damages an adequate remedy?

110. Mr. Millett KC relies upon the contractual statement in clause 8 of the NDA which provides that the parties have agreed that damages would not be an adequate remedy for any breach of the agreement, and any breach will entitle Alpine to obtain injunctive relief, specific performance and any other applicable equitable relief and/or legal remedies.

111. It has already been seen[63] that Alpine no longer wishes to protect the confidentiality of the information contained in paragraph 12 of Mr. Wasty's Declaration. The remaining claims for relief in the Writ are for the legal expenses which are incurred in the 1782 Application and in these proceedings, which are self-evidently financial claims.

112. It seems to me that as a matter of principle clauses of this type (although common) cannot be effective to require the court to grant relief if the court is not otherwise inclined to grant it, nor to declare that damages are not an adequate remedy when they plainly are, as they are in this case.

113. In **Quadrant Visual Communications v Hutchison Telephone**[64] the English Court of Appeal considered the question whether the court was bound by an agreement which provided that the sums due under a contract were to be paid "*free from any equity*". The question arose whether these words excluded the court's ability to refuse relief on the 'clean hands' principle, and whether clauses of this type bound the court to refuse an order for specific performance. It is the reverse of the facts of this case, but the decision shows that clauses like this are not effective to oust the court's power to grant or refuse equitable relief. Stocker LJ said that such a clause

> *"...could not have the effect of fettering the discretion of the court. Once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered. Once the assistance of the court is involved by one of the parties in a*

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[63] See references at footnote 60
[64] [1993] BCLC 442 at 451-2

discretionary matter, that party is bound by the general discretion of the court to grant or refuse the remedy sought..."

In the same case Butler-Sloss LJ said that such a clause:

"...might in certain circumstances bind the parties, but in my judgment it could not bind the court. The plaintiffs chose to apply for a discretionary remedy...and the discretion of the court cannot be fettered by the agreement of the parties so as to exclude absence of clean hands form the consideration of the judge in circumstances where an equitable remedy is sought by one party."

114. Similarly, Underhill LJ held in **AB v CD**[65] that a clause which declared that damages would not be an adequate remedy

"only opens the door to the exercise of the court's discretion; and in the exercise of that discretion the fact that the restriction in question was agreed may, depending on the circumstances of the case, be a relevant consideration..."

115. It must follow that where, as in this case, the parties to an agreement stipulate that damages will not be an adequate remedy for a breach and that a breach will "entitle" the aggrieved party to a decree of specific performance, this stipulation does not bind the court. The most that can be said is that it is a consideration the court may take into account when exercising its discretion.

116. In this case, (i) Alpine does not seek any relief to protect the confidentiality of the disclosed information, so the question of specific performance does not arise and (ii) the only claims that remain are financial, and so it is obvious that damages are an adequate remedy.

117. Alpine's reliance on clause 8 is therefore misplaced. It follows from this that Alpine's applications for relief are refused on this ground, in addition to or in in the alternative to the reasons already expressed.

The balance of justice

118. I have used the term 'balance of justice' in preference to 'balance of convenience' following the guidance of Lord Donaldson MR[66], even though 'balance of convenience' is often used as a term of art. It is used to describe the process of weighing the competing factors that the Court will take into account in deciding whether and if so on what terms to grant discretionary interim injunctive relief. It usually involves an evaluation of the

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[65] [2015] 1 WLR 771, 784 paragraph 30.
[66] **Francome v Mirror Group Newspapers Ltd** [1984] 1 WLR 892; [1984] EWCA Civ J 0316-3 at 50D.

prejudice to one party that will result from the restraint against the harm to the applicant in not granting the relief, and the need to do justice as between the parties in the overall circumstances of the case.

119. On the facts of this case, the Court has no hesitation in coming to the conclusion that the balance of justice is overwhelmingly on the side of refusing the relief sought for the following reasons:

(i) It is a fundamental requirement of fairness in the presentation of a case at trial that the parties must be at liberty to obtain the materials necessary to prove their case or to rebut the case of the other side. This principle is reflected in the *dicta* cited in the **South Carolina** case and is a theme that runs through the Bermuda rules of civil procedure and the Overriding Objective.

(ii) The documents sought go to a fundamental issue as to Alpine's standing and the number of shares for which they are entitled to seek appraisal. This is at the core of the appraisal exercise the Court is required to undertake. The Court's job under section 106 (6) of the Companies Act 1981 is quasi-inquisitorial. The Court itself will need to consider all aspects of both the value and the number of shares which are the subject of the appraisal, in addition to understanding the nature of the objections.

(iii) The arguments in support of the contractual interpretation of the NDA and the limitations on Alpine's disclosure obligations are derived from a strained construction of the meaning of the learned Chief Justice's Directions Judgment. The consequential limitations sought to be placed on the ambit of 'relevance' are highly artificial and seek to shut out documents which appear to be legitimate lines of enquiry. For the reasons I have given above, these arguments do not meet the test of 'high probability' of success at trial.

(iv) The potential delay in the ultimate trial of the Appraisal Proceedings was relied upon by Alpine as being prejudicial to it, and that it was being kept out of its money. As noted above, the Appraisal Proceedings are being hard fought by both sides. The investment that was made by Alpine was with a view to contesting the Offer Price for the shares on the basis that it intended to seek an appraisal and had calculated that the share value was higher than the Offer Price. This is a commercial decision and was based on an evaluation of risk. Litigation risk must have been assessed as well as the

delay that such litigation inevitably entails. It was (without implying any disapproval) an entirely opportunistic move on Alpine's part, and so Alpine cannot justifiably complain about the delays that occur in this type of litigation. In any event, in my view, the potential consequence of delay is not a more important factor than ensuring a fair trial of the issues in the Appraisal Proceedings.

(v) The prejudice to Sumitomo in not being able to challenge Alpine's standing or advance its defences to Alpine's claims would be substantial, both in terms of a fair hearing and the potential financial consequences that would flow from granting the injunctions. If it is the case that Alpine did not own the shares or some part thereof or gave (or failed to give) voting instructions which resulted in a vote in favour of the transaction in respect of some of the shares, then this prejudice would work a serious injustice.

(vi) In this case, damages for a breach of the NDA are plainly an adequate remedy because Alpine no longer seeks to protect the confidentiality of the fact that Clear Street was the acquiring broker-dealer and the only live claims are financial ones.

120. It follows from what I have said above that all of Alpine's applications for interim relief are therefore refused on this this ground, separately and independently from the others.

Sumitomo's Release Summons

121. By a cross application in the Appraisal Proceedings (2023 No 63 between Alpine and Sumitomo only) Sumitomo sought to be released from its confidentiality undertakings in those proceedings and the confidentiality restrictions imposed under the NDA in respect of a schedule of documents identified by reference number in the Alpine discovery material and annexed to the Release Summons. The release sought would apply to Sumitomo and its legal representatives, including Mr. Wasty.

122. The application was made expressly on the basis that there has been no breach of the NDA or the implied undertaking, but that it would be convenient and sensible to extend the release both prospectively and retrospectively to cover Mr. Wasty's Declaration.

123. Ms Tolaney KC advanced the summons on two main grounds. First, she said that it would bring to an end to the present proceedings and avoid the costs and unnecessary complication of dealing with the dispute over whether there had or had not been a breach of the NDA and/or the implied undertaking. Second, it would make the section 1782

Application proceed more efficiently without the diversion of disputes over what information could or could not be relied on in those proceedings.

124. The legal basis for the grant of such a release is to be found in **Crest Homes Plc v Marks**[67] and **Tchenguiz v Director of the Serious Fraud Office**[68]. The two elements that are engaged are (i) there are special circumstances and (ii) the release will not occasion injustice to the person giving discovery.

125. In assessing the exercise of the Court's discretion, the connection between the proceedings in which the disclosure was given and the proceedings in which the information will be used is an important and persuasive factor. Where the purpose of the use of the disclose material is ancillary to the proceedings in which the disclosure was given, permission will normally be granted[69].

126. Retrospective permission can be given in appropriate cases, and regard will be given to whether the breach was inadvertent or deliberate and the proportionality of barring the applicant from using the documents[70]. If the Court would have given permission if it had been sought, then it will normally grant retrospective permission, unless there are good reasons not to. Even where the breach was deliberate, the court may still grant permission if it would be disproportionate not to grant it.

127. In this case Ms Tolaney KC drew attention to four features that she said justified the Court in granting the permission and granting it retrospectively.

128. First, she said that it is clear that the purpose of the use of the documents is ancillary to the Appraisal Proceedings in that the documents that may be disclosed in the 1782 proceedings will be used in the Appraisal Proceedings.

129. Second, she submitted that the 1782 Application goes to the root of Alpine's right to bring the Appraisal Proceedings. It is therefore a central issue.

130. Third, although it is denied that there was any breach, any breach that could be alleged was entirely inadvertent.

131. Fourth, no prejudice has been or could be suffered by Alpine if the documents relied on are no longer regarded as being confidential by Alpine.

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[67] [1987] AC 829 at 860 per Lord Oliver
[68] [2014 EWCA Civ 1409 at paragraph 66 per Jackson LJ.
[69] **Wilden Pump** (cited above) and **Omar** (cited above).
[70] **Schlaimoun v Mining Technologies International LLC** [2012] 1 WLR 1276 at paragraph 46 per Coulson J and **ECU Group plc v HSBC Bank plc** [2018] EWHC 3045 at paragraph 12 per Andrew Baker J.

132. In those circumstances, Ms Tolaney KC submitted that it is in the interests of efficient and cost-effective case management not to allow these proceedings to become a "sideshow" which will incur ongoing expense and distraction from the main proceedings where the real issues are going to be decided.

133. Mr. Millett KC naturally opposed this application. He accepted that the principles summarised above are correct and that the court can grant retrospective permission for the use of the materials.

134. Mr. Millett KC's written submissions said that the first reason to refuse was that the breach was quite deliberate and not inadvertent. He repeated his analysis of the facts which he says showed that the information relied on by Mr. Wasty could not have given him the information he needed to make the statement in paragraph 12 of his Declaration. However, as I have noted above, Mr. Millett KC has accepted that Mr. Wasty is not lying in his affidavit in which he says he did not rely on the disclosures by Alpine[71]. (Curiously, Mr. Millett KC later said in response to the Court's questions at the end of the hearing, to which I will refer below, that he stood by the allegations that had been made[72].)

135. Mr. Millett KC also said that Sumitomo ought to have applied prospectively. This is a difficult submission to square with the acceptance of Mr. Wasty's honesty, because in that case the disclosure must have been (at most) inadvertent.

136. Finally, he said that the case management prejudice that would flow from granting permission would be a knock-on effect on the trial of the Appraisal Proceedings. This is a point that I have considered and rejected at paragraph 109 above.

137. Weighing the competing arguments and considerations that they raise, this Court considers that it is in the interests of justice to grant Sumitomo's Release application both prospectively and retrospectively for the following reasons:

    a. It is clear that the question of Alpine's standing has been raised on legitimate grounds and that Sumitomo should have the ability to explore the background leading up to Alpine's acquisition of the shares. The fact that Alpine has claimed that it has no other documents than the two that it produced does not preclude Sumitomo from seeking to challenge that by whatever means that lie open to it. This includes making applications to the Court in Bermuda and overseas if they

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[71] Transcript Day 2 page 68 "*So far as Mr Wasty's state of mind is concerned, as I say, we don't say he deliberately breached the NDA or whether he did it innocently or negligently. It's irrelevant. This is not a contempt application. The legal outcome is breach, and my Lord, that gets me home, and that is all I need to show.*"

[72] Transcript Day 2 page 97. "*I made my submissions, which I hope have been clear about what exactly the allegations are, and we hold to those-- we hold to the allegations and the submission that there is a proper basis for making them.*"

regard that as being the most effective way of doing so. In my view, based on the principles summarised above, had the Court been asked to grant prospective permission in my view it would have done so.

b. The alleged misuse (if there was one) can only have been inadvertent given the unchallenged evidence of Mr. Wasty.

c. It would be disproportionate to penalise Sumitomo in refusing their application to use the information that Alpine has disclosed in furtherance of the 1782 Application which is obviously ancillary to the Appraisal Proceedings.

d. The special circumstances (if the Court is required to hold that they exist in order to exercise the discretion) are to be found in the unusual facts of the case. There have only been a few cases under section 106 (6), and none has raised this point of standing before (or the entitlement of a shareholder who acquires shares after the announcement but before the meeting). It is important for all the parameters of the Court's jurisdiction to be considered fully. This is not a routine case where the law has been well-established over years of litigation.

e. The considerations the Court is required to have regard to in exercising its powers are set out in the Overriding Objective[73]. These include saving expense, proportionality, expedition and appropriate allocation of court resources. It is obvious that these considerations militate strongly in favour of removing this issue to avoid it becoming an expensive "sideshow" and to allow the parties to focus on the main issues in dispute in the Appraisal Proceedings.

138. Therefore, in the exercise of its discretion, the Court grants the Release Summons in terms and releases Sumitomo and Mr. Wasty from their respective obligations of confidentiality in relation to the schedule of documents annexed to the Release Summons both prospectively and retrospectively for the exclusive purposes of making the 1782 Application and using any materials so disclosed in the Appraisal Proceedings. These materials are obviously still subject to the ordinary implied undertaking that they will only be used in connection with or for the purposes of the Appraisal Proceedings.

Allegations of dishonest or unprofessional conduct

139. The Court feels that it is necessary to express some views about the way in which the allegations of breach of the NDA have been made in this case.

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[73] Rules of the Supreme Court 1985 Order 1A /1 in particular (2) (b) (c) (d) and (e).

140. It is a basic rule of legal professional practice, as well as the express rules of procedure in this Court, that an allegation of dishonesty, lack of good faith or unprofessional conduct may only be made if there are proper grounds based on facts that show a *prima facie* case. Dishonesty or bad faith or unprofessional conduct cannot be inferred without a sufficient factual basis on which to do so.

141. In this case, the allegation was made against Mr. Wasty that he had made a "*deliberate*"[74] statement in his Declaration in support of the 1782 Application in which he disclosed that Alpine used Clear Street as its acquiring broker in breach of the NDA undertaking. Mr. Hawthorne's first affidavit says[75] that Alpine considers that Sumitomo and Mr. Wasty are in breach of the NDA and the undertaking given by Mr. Wasty, and also in contempt of court and that Alpine reserves its rights to issue committal proceedings against Mr. Wasty in respect of the breach of the implied undertaking to the court. Criticism of Mr. Wasty's affidavit of 8 October 2024 was to the effect that his explanation was *"wafer thin"* and *"deficient"*[76] and that he ought to have given *"a more convincing explanation"*[77]. It was said[78] that it was *"obvious"* that the 1782 Application was formulated by misusing confidential information. In Reply Mr Millett KC said that he was not accusing Mr. Wasty of lying under oath[79], but appears to have re-asserted his criticisms of him at the end of his address to the Court[80].

142. In short, the whole tenor of Mr. Millett KC's submissions was that because Alpine contends that the information that Mr. Wasty referred to was insufficient to support his statement in paragraph 12 of his Declaration that the Court should disbelieve Mr. Wasty's evidence given in his affidavit in these proceedings.

143. These are serious allegations amounting to at least a serious breach of professional duty. There is clearly the implication that Mr. Wasty was not being truthful in his evidence.

144. Mr. Wasty's evidence in paragraphs 9.3 and 9.4 of his affidavit of 8 October 2024 is that he did not rely upon Alpine's disclosure in making the statement in paragraph 12 of his Declaration. This was not challenged by any direct evidence filed by Alpine. The allegations made in Mr Hawthorne's first affidavit were not withdrawn or modified in response to Mr. Wasty's evidence.

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[74] Paragraph 128 of Alpine's skeleton.
[75] B4 and B9 paragraphs 12 and 36
[76] Transcript Day 1 page 98
[77] Transcript Day 2 page 34
[78] Paragraph 65 of Alpine's skeleton.
[79] Transcript Day 2 page 34
[80] Transcript Day 2 page 97

145. This is not the trial. There has been no cross-examination of any of the witnesses. The Court cannot come to any final conclusions as to the evidence given by either side. However, it is unsatisfactory to leave serious allegations of this kind out in the open and unaddressed.

146. For the sake of clarity, any implication or suggestion that the Court should *infer* that Mr. Wasty was not being truthful in his affidavit is expressly rejected.

147. If this matter were to proceed to a trial, then the evidence of all the witnesses will be fully tested and the witnesses cross-examined and the Court will come to a conclusion. Until then, and for the purposes of the present applications, in the absence of any direct evidence that challenges the honesty of Mr. Wasty's affidavit[81], the Court treats Mr. Wasty's evidence as having been truthfully given.

Affidavits filed by attorneys

148. It is a striking feature that almost all of the evidence that has been adduced in this case has been sworn by the attorneys, except for the evidence from Ms Pino and Ms Bullitt. This is regrettable and has led to the unseemly situation that serious allegations have been made by one Bermuda barrister about the professional conduct of another Bermuda barrister in the Appraisal Proceedings.

149. It is common practice for attorneys to swear affidavits in proceedings in order to set out the background facts, describe uncontroversial matters, exhibit materials to assist the Court in understanding the issues that are to be determined, and often to give a summary of the arguments that are to be raised. This is conventional and unobjectionable.

150. However, where allegations of disputed fact are made, and in particular where serious allegations of dishonest, unprofessional or improper conduct are made by one party against another, it is not appropriate for an attorney to swear the affidavit making those allegations on behalf of the client as a proxy[82]. There are many good reasons for this of which I shall name three that seem relevant to this case.

151. First, attorneys openly accusing one another of improper or unprofessional conduct serves to bring the administration of justice into disrepute. There is an established procedure for the discipline of attorneys, and it does not include making serious allegations in affidavits which will be made public at the end of the trial, if not before.

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[81] The Court here emphasises Mr Millett KC's acknowledgement that he (and therefore his client) does not accuse Mr. Wasty of lying to the Court.

[82] The Court recognizes that there will be rare cases where the primary facts are within the exclusive knowledge of the attorney, but the considerations mentioned still apply.

152. Second, attorneys generally rely upon their client's instructions and are rarely in a position to make the central allegations in the proceedings from facts within their own knowledge. This will usually give rise to challenges as to its admissibility as direct evidence. The attorney who gives evidence in this way may also run the risk that the relationship of legal professional privilege with the client may be compromised.

153. Third, if the attorney is cross-examined, which is likely where the attorney makes serious allegations, the firm that represents the client may have to withdraw from representing the client in the proceedings, either by reason of the rules of professional conduct[83] or by direction of the Court.

154. It is unfortunate that the Court has felt it necessary to make these observations and does so with some reluctance[84]. In doing so, the Court directs no personal criticism at Mr. Hawthorne or his firm. It is apparent from reading his affidavits that they were settled by the legal team in London and/or New York and, as part of his role as local attorney, Mr. Hawthorne was called upon to sign them.

155. The Court well understands the pressure that can be brought to bear on local counsel in high stakes and time-sensitive litigation to follow the directions of those leading the strategic management of the case. However, local counsel, and the interests of the administration of justice, would be better served by resisting that pressure, and requiring that the central allegations of fact (and especially any serious allegations of dishonest or improper conduct) be made by the ultimate client. This will avoid the difficulties I have referred to and put the evidential burden in the appropriate place.

156. I will hear the parties on costs.

14 November 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA

THE HON. ANDREW MARTIN

PUISNE JUDGE

[83] Bermuda Barristers Code of Professional Conduct 1981 Rule 29.

[84] Similar serious allegations have been made in this case between the US attorneys. This Court does not feel qualified to express any view about those matters.