[2024] UKPC 30
Privy Council Appeal No 0095 of 2021

JUDGMENT

Attorney General (Appellant) *v* Jonathan Reid and 3 others (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Reed
Lord Lloyd-Jones
Lord Hamblen
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
24 September 2024

Heard on 16 July 2024

Appellant
Aidan Casey KC
Kenrah Newry
Deidre Clark Maycock
(Instructed by Charles Russell Speechlys LLP (London))

Third and Fourth Respondents (Rudolph Kermit King and Celebrating Women International Ltd, respectively)
Tom Poole KC
Emily Moore
(Instructed by Sheridans (London))

LORD LLOYD-JONES:

1. This appeal concerns the discharge on grounds of material non-disclosure of a restraint order made under proceeds of crime legislation as extended to support foreign proceedings by way of mutual legal assistance.

Factual background

2. The Attorney General of The Bahamas ("the appellant") alleges that in December 2015 Boeing, the US aerospace company, was the victim of a bold fraud in the USA. It is alleged that the fraudsters induced Boeing to transfer US$ 2,289,488.80 to an account in the USA under their control by falsely representing that the transfer was the repayment of a deposit paid in respect of the purchase of a jet aircraft under a contract which had been cancelled. In fact, the appellant alleges, the payment which had been made to Boeing had been made by Fuji Industries for unrelated purposes.

3. The appellant alleges that the fraudsters persuaded Boeing to make the transfer to an account at Sun Trust Bank, one of three accounts at that bank ("the Sun Trust accounts") over which the fraudsters had control and which had been opened in the name of "CWI International Investments Ltd", a company incorporated in Georgia, USA ("CWI Investments"). The funds were then quickly moved in nine tranches into one of the accounts at The Royal Bank of Canada Caribbean ("RBC Royal Bank"), in The Bahamas ("the RBC accounts") in the name of the fourth respondent, Celebrating Women International Ltd ("CWI").

4. On 20 June 2017 Grant-Thompson J, sitting in the Supreme Court of The Bahamas, made a restraint order ("the MLAT restraint order") on the application of the appellant. The appellant is the competent authority in The Bahamas. The application was made pursuant to a request for mutual legal assistance ("the MLAT request") made by the US Department of Justice on 1 May 2017 under a mutual legal assistance treaty between The Bahamas and the USA made on 18 August 1987 ("the MLA Treaty"). The MLAT restraint order was granted under the Proceeds of Crime Act 2000 ("POCA") as modified and applied to foreign criminal proceedings in certain designated countries by the Proceeds of Crime (Designated Countries and Territories) Order 2001 ("Modified POCA"). It restrained some US$ 2,079,000 ("the funds") on the ground that there was reason to believe that they were the proceeds of the fraud on Boeing.

5. The MLAT restraint order had been preceded by a restraint order granted on 26 May 2016 on the application of the Commissioner of Police under the domestic provisions of POCA ("the domestic restraint order") in support of contemplated Bahamian criminal proceedings relating to money laundering offences in relation to the funds. On 15 June

2017, five days before the making of the MLAT restraint order, Grant-Thompson J heard an application to discharge the domestic restraint order on the basis of delay in the commencement of any Bahamian prosecution. On 10 April 2018, some months after the MLAT restraint order had been made, Grant-Thompson J gave her ruling on that application and discharged the domestic restraint order.

6. On 19 June 2019, on an application made by CWI and others, Grant-Thompson J discharged the MLAT restraint order on the grounds that (1) the application for that order was an abuse of process as it was based on the same facts and sought to relitigate the same issues as the domestic restraint order and (2) no sufficient nexus had been shown between the fraud and the named respondents to the originating summons ("the first instance judgment").

7. The appellant appealed against the first instance judgment. Thereafter a series of procedural steps resulted in the Court of Appeal dismissing the appeal without reference to the merits. First, the Court of Appeal ruled that CWI needed to be a named respondent to the proceedings, ie that the originating summons needed to be amended to show its name in the title, and on 30 July 2020 it made an unless order that provided that the appeal would be dismissed if CWI were not joined. Secondly, on the appellant's consequential application to join CWI, which was made ex parte so far as CWI was concerned, the Court of Appeal ordered on 10 December 2020 that CWI be joined ("the CWI joinder order"). Thirdly, following the hearing of what was described as a "notice of preliminary objection", filed on behalf of CWI and the third respondent, Mr King, the Court of Appeal ruled on 27 May 2021 that there had been material non-disclosure in the application for the CWI joinder order such that the CWI joinder order fell to be set aside and the appeal dismissed.

8. The appellant now appeals to the Judicial Committee of the Privy Council against the decision dismissing the appeal on grounds of material non-disclosure.

The MLAT request and the application for the MLAT restraint order

9. The material non-disclosure found by the Court of Appeal arose from a statement in the MLAT request which was sent to the appellant's office by the Department of Justice on 1 May 2017 pursuant to the MLA Treaty. The MLAT request set out what the US Department of Justice said were grounds for believing that (1) the funds were the proceeds of a fraud against Boeing, (2) the funds were rapidly transferred to The Bahamas following the fraud, and (3) there was reason, apart from the movement of the funds to The Bahamas, to believe that the fraud itself was carried out from The Bahamas.

10. The MLAT request stated:

(1) The US authorities were conducting an investigation to determine the true identity of individuals using the names Jonathan Reid and David Valdez-Lopez who executed the scheme to defraud Boeing. The suspects had claimed, in discussions with Boeing in November 2015, that they represented CWI Investments and that it was interested in purchasing a jet aircraft. They agreed to make a down payment of US$ 2 million. By some means the suspects knew of an unrelated payment of US$ 2,289,488.80 made by Fuji Industries to Boeing. The suspects informed Boeing that that payment was CWI Investments' down payment on the purchase price of the aircraft. They then informed it that CWI wished to cancel its order and requested the return of what they claimed was the down payment.

(2) The suspects requested that the funds be transferred to an account at Sun Trust Bank in the USA ("Sun Trust 1") which had been opened online with two further Sun Trust accounts in the name of CWI Investments on or about 10 November 2015. The named holder and signatory on those accounts was a US citizen who appeared to be the victim of identity theft and had no connection to the fraud. That person is also listed in corporate records as the incorporator for CWI International Investments in Georgia. On 4 December 2015 Boeing transferred US$ 2,289,488.80 to Sun Trust 1.

(3) Sun Trust's records indicated that large sums of money were then wire transferred to, from and between the Sun Trust Accounts, and also that between 11 December 2015 and 9 January 2016 nine cheques totalling US$ 2,079,000 were drawn on Sun Trust 1 and deposited into the RBC accounts. The MLAT Request set out details of these cheques. The records also showed that between 4 December 2015 and 16 January 2016 various funds from two of the Sun Trust accounts were debited via ATM cash withdrawals and debit/credit card purchases at various locations in The Bahamas of which the MLAT request gave details.

(4) On 19 January 2016, after learning of the true purpose of the payment by Fuji, Boeing attempted to recall the outgoing wire transfer to Sun Trust 1, but Sun Trust had already disbursed the funds.

(5) During the course of the frauds, the suspects sent a number of emails to Boeing and searches revealed that the IP addresses for the relevant accounts showed that they were provided by The Bahamas Telecommunications Company, located in Nassau.

(6) On 25 April 2017, a judge of the US District Court for the Western District of Washington had issued a temporary restraining order in relation to the RBC accounts and the prosecutor was now seeking the assistance of the appropriate

authorities in The Bahamas to restrain those accounts as an initial step to forfeiture under US law. The MLAT request gave details of the various offences suspected to have been committed under US law.

11. The final sentence of paragraph 13 of the MLAT request stated:

> "All of the Sun Trust accounts were closed on January 23, 2015."

The appellant came to contend later in the proceedings that the reference to 2015 was a typographical error and that the reference should have been to 2016.

12. On 19 June 2017 the appellant issued an ex parte originating summons seeking the MLAT restraint order and orders requiring the provision of certain information also requested in the MLAT request. The principal affidavit in support of the application, sworn by Ashley Sturrup of the Attorney General's Office on 19 June 2017 ("Sturrup 1") largely reproduced the text of the MLAT request, including verbatim at paragraph 13 the sentence quoted above which stated that the Sun Trust accounts were closed on 23 January 2015.

13. The respondents named in the title of the originating summons were Jonathan Reid and David Valdez-Lopez. The restraint order sought by that summons was an order prohibiting them and also Mr Smith (President of CWI), Mr Allens (Vice-President and Director of CWI), CWI and "CWI International" from disposing of or otherwise dealing with any funds in the RBC accounts. Grant-Thompson J granted that order on 20 June 2017.

14. On 19 June 2019, Grant-Thompson J handed down the first instance judgment discharging the MLAT restraint order, as referred to above at paragraph 6.

The judgment of the Court of Appeal

15. The appellant appealed to the Court of Appeal against the first instance judgment.

16. The Court of Appeal did not address the merits of the appeal but held that there had been material non-disclosure by the appellant in failing to bring the issue concerning the correctness or otherwise of the 2015 date in the passages reproduced at paras 11 and 12 above to the attention of the Court of Appeal in the course of the joinder application.

17. The only judgment was given by Evans JA with whom Isaacs and Jones JJA agreed. His reasoning may be summarised as follows:

(1) The date of closure of Sun Trust 1 had exercised the Court of Appeal. The appellant had stated that the date given in Sturrup 1 and in the MLAT request was a typographical error. The question whether it was an error was for determination but clearly it had not been raised with the judge by either party. If it was not an error, it went to the root of the appellant's case.

(2) The appellant accepted that there had been non-disclosure. (This is disputed by the appellant.) The most that could realistically be said on behalf of the appellant was that the non-disclosure was innocent. If counsel for the appellant had made a careful review of the documents, he would have been aware of the facts.

(3) The information not disclosed to the court was clearly material to whether to grant the CWI joinder order.

(4) Notwithstanding material non-disclosure, the court had a discretion to continue the order or to make a second order on terms. However, to determine that a typographical error occurred and to correct it would require the input of the person who prepared the documents. Furthermore, this issue was not raised before "the trial judge".

(5) To vacate the CWI joinder order would have the effect of removing a party whose presence was necessary for the determination of the appeal. However, that must be balanced against the duty of the court to ensure that a party guilty of material non-disclosure did not benefit from that breach of duty.

(6) The appellant had a duty to disclose the issue relating to the date of the closure of Sun Trust 1. The court could not ignore the non-disclosure. The failure to recognise the inconsistency in the evidence was inexcusable.

(7) There was no basis for the Court of Appeal to determine "the issue as to which date is correct" as that had not been brought to the attention of the judge for her determination. It would not be appropriate to allow the appellant to introduce further evidence on this point as it was clearly not fresh evidence. It was now too late to cure this non-disclosure.

(8) The CWI joinder order made ex parte would be set aside. The appellant's appeal against the judge's order to discharge the restraint order was also "necessarily affected by this malady".

Grounds of appeal

18. The appellant appeals on the following grounds.

Ground 1: The Court of Appeal erred or its decision was unjust because of a serious procedural or other irregularity in applying conventional civil litigation principles and authorities as to the duty of full and frank disclosure and the consequences of any breach thereof.

Ground 2: The Court of Appeal erred in concluding that there was any material issue as to whether the "2015" reference was a typographical error.

Ground 3: If contrary to Ground 2 there was any material or real issue, the Court of Appeal erred, or its decision was unjust, because of a serious procedural or other irregularity.

Ground 4: If contrary to Grounds 1 and 2 the Court of Appeal adopted the correct approach and there was any material or real issue, the Court of Appeal erred in concluding that there had been a failure in the duty of full and frank disclosure, or a failure that justified the discharge of the CWI joinder order.

Ground 5: The Court of Appeal erred in concluding that, if the CWI joinder order fell to be discharged, the appellant's appeal against the discharge of the MLAT restraint order was doomed to failure or could not be pursued, or that conclusion meant that its decision was unjust because of a serious procedural or other irregularity.

Ground 6: The Court of Appeal erred and/or its decision was unjust because of a serious procedural or other irregularity, because the appellant's appeal against the learned judge's order discharging the MLAT restraint order was meritorious and the judge's order was made in error. In particular:

(1) The judge erred in concluding that the application for the MLAT restraint order was an abuse of process because it could and should have

been made at the same time as the application for the domestic restraint order;

(2) The judge erred in concluding that the appellant had failed to establish that one of the named respondents was complicit in the fraud.

19. It is convenient to address these grounds of appeal in a different order.

Grounds 2 and 4

20. Under these grounds of appeal, the appellant submits that the Court of Appeal erred in concluding that there was any material issue as to whether the statement was a typographical error or that there had been a material non-disclosure.

21. The respondents' case on material non-disclosure rests entirely on the statement first made by the Department of Justice in paragraph 13 of the MLAT request, and repeated in Sturrup 1, as to the date on which the Sun Trust accounts were closed. Paragraph 13 states:

> "Records for Sun Trust-1 show that the Sun Trust-1 account was opened on or about November 10, 2015, along with two additional Sun Trust accounts in the name of 'CWI International Investments Limited,' account number ****4041 ('Sun Trust-2') and ****4009 ('Sun Trust-3'). All of the relevant Sun Trust accounts were opened online, the signatory was the person who is the apparent victim of identity theft, and the registered address was 1230 Peachtree St NE, 19th Floor, Atlanta GA 30309. The person shown as the signatory is also listed in corporate records as the incorporator for CWI International Investment in Georgia. All of the Sun Trust accounts were closed on January 23, 2015."

22. The appellant has subsequently maintained that the statement that the three Sun Trust accounts were closed on 23 January 2015 was incorrect because they were, in fact, closed in 2016. The appellant maintains that the reference in the MLAT request, which was repeated in Sturrup 1, to the accounts being closed on 23 January 2015 was merely a typographical error.

23. If the Sun Trust accounts were, in truth, closed on 23 January 2015 that would be a contradiction of the appellant's case that Sun Trust 1 was used to perpetrate the fraud

on Boeing in December 2015. If the Department of Justice really had intended to maintain that the Sun Trust accounts were closed on 23 January 2015, a statement to that effect was apparent on the face of the MLAT request and Sturrup 1. The inconsistency of that proposition with the other allegations made by the Department of Justice would also have been apparent. There can, therefore, be no suggestion that there was a failure to disclose that a date for closure of the accounts which was inconsistent with the remainder of its case had been advanced by the Department of Justice.

24. However, Mr Poole KC on behalf of the respondents submits that the duty of fair presentation was engaged here because the date given by the Department of Justice gave rise to an argument in favour of the respondents. He submits that had the lawyers acting for the appellant examined the evidence with care, as they were required to, they would have identified and appreciated the significance of the conflict of dates. Sun Trust 1 could not have been used to perpetrate the alleged fraud because it had already been closed. He submits that in these circumstances there was a duty on the appellant to draw that to the attention of the court on an application which was ex parte against CWI.

25. The most that can be said on behalf of the respondents in this regard is, therefore, that the existence of a possible argument premised upon the date was not drawn to the attention of the court. The difficulty with this argument is that the statement was so obviously an unintentional error. This is readily apparent from paragraph 13 of the MLAT request itself. Sun Trust 1 cannot have been opened on or about 10 November 2015 and closed on 23 January 2015. Furthermore, the proposition that the accounts were closed on 23 January 2015 is clearly contradicted by the following further information in the MLAT request and Sturrup 1.

(1) On 2 December 2015 the person describing himself as Reid cancelled the order for a jet with Boeing and asked that Boeing refund the deposit to CWI Investments, instructing that the money be remitted to Sun Trust 1. On 4 December 2015 Boeing transferred the sum of US$ 2,289,488.80 to that account.

(2) On 19 January 2016, after learning of the fraud, Boeing attempted to recall that wire transfer but Sun Trust had already disbursed the funds.

(3) Records for the Sun Trust accounts show that they were opened online on or about 10 November 2015 with the apparent signatory being an apparent victim of identity theft.

(4) Records for Sun Trust 1 show that after Boeing had made the transfer nine cheques totalling US$ 2,079,000 were written on that account between 11 December 2015 and 9 January 2016 and those cheques were paid into the RBC accounts.

(5) Transaction records for Sun Trust 1 and one of the other Sun Trust accounts show that between 4 December 2015 and 16 January 2016 funds from those accounts were debited through ATM cash withdrawals and debit/credit card purchases at various locations in The Bahamas.

26. The matter is placed beyond doubt by the further evidence that was before the Court of Appeal by the time of its ruling which is now under appeal to the Board. The statement that the Sun Trust accounts were closed on 23 January 2015 is shown to be untenable by the overwhelming weight of this further evidence.

27. The further evidence in the third affidavit of Ashley Sturrup ("Sturrup 3") included the following:

(1) Sun Trust 1 was opened on 10 November 2015 in the name of CWI Investments. This company was incorporated in Georgia, USA and records provided by the Georgia Corporations Division gave its date of registration as 30 January 2015.

(2) All nine cheques drawn on Sun Trust 1 between 14 December 2015 and 11 January 2016 were deposited into one of the RBC accounts. Ms Sturrup explained that it was initially believed that some of the nine cheques had been deposited into different RBC accounts in the name of CWI, but having received the RBC records this was corrected.

(3) Sun Trust 1 was closed on 26 January 2016 at which date the account had existed for less than three months.

(4) There was exhibited to Sturrup 3 the instruction dated 2 December 2015 from CWI Investments to Boeing requesting that that the deposit be wired to Sun Trust 1.

(5) Correspondence between Fuji and Boeing was exhibited which included a screenshot showing the transfer being made by Boeing to CWI Investments at Sun Trust 1 on 4 December 2015.

28. The further evidence in the fifth affidavit of Ashley Sturrup ("Sturrup 5") included the statements for December 2015 and January 2016 for the RBC account which had received the funds. These showed the payments in the amounts shown for the nine cheques drawn on Sun Trust 1 listed in the table at paragraph 15 of the MLAT request (following adjustment for bank charges).

29. This is not a case where there is a conflict between two competing dates and it is unclear which is correct. On the contrary, it is apparent on the face of the material before the court that the date given by the Department of Justice as the date of the closure of the account could not be correct. Furthermore, any argument that might have been advanced by the respondents on the basis of the inconsistency would have had no prospect of success. There was no prospect of fashioning an argument on the basis of the inconsistency which might undermine the appellant's case. In such circumstances, where it is clear beyond argument that the statement was an obvious error, there was no obligation for counsel to draw it to the attention of the court.

30. The Board concludes, therefore, that there was no reasonable basis on which the Court of Appeal could have concluded that what occurred here was a material non-disclosure or a breach of the duty of fair presentation.

31. The Board's conclusion that there was no material non-disclosure or breach of the duty of fair presentation is sufficient to dispose of this appeal. However, it is necessary to say something about the other grounds of appeal.

Ground 3

32. Under this ground of appeal, the appellant submits that if there was a real issue as to material non-disclosure the Court of Appeal erred in failing to make necessary findings of fact.

33. The Board agrees. In particular, if the Court of Appeal was minded to take the draconian action of refusing to hear the appeal on its merits and discharging the CWI joinder order and the MLAT restraint order on grounds of material non-disclosure, it should first have given further consideration to the issue. It should have decided the correct date of closure of Sun Trust 1 on the basis of the evidence before it or should have made provision for it to be decided. It should have decided whether Sturrup 1 and the MLAT request did indeed contain a mere typographical error or should have made provision for it to be decided. It should have decided whether the statement was unintentional and whether it was material. Before the Court of Appeal, the failure to draw attention to the inconsistency was explained by the appellant on the ground that it was a typographical error and that the appellant's team only became aware of the issue relating to the date of closure of Sun Trust 1 during the hearing of the preliminary objection. The Court of Appeal neither accepted nor rejected this explanation. As the Board has demonstrated in its response to Grounds 2 and 4 above, there was ample evidence before the Court of Appeal which enabled it to decide these matters for itself. The answers were, in any event, obvious.

34. Evans JA observed, at para 41, that there was no basis for the Court of Appeal to determine the issue as to which date was correct as that was an issue which should have been brought to the attention of "the trial judge" for her determination. This reveals a misunderstanding of the history of the proceedings. This was an appeal against the order of Grant-Thompson J discharging the MLAT restraint order on grounds of abuse of process (*Henderson v Henderson*) and lack of a sufficient nexus between the fraud and the named respondents to the originating summons. There was no basis for saying that the issue as to the date should have been brought to the judge's attention by the appellant as the respondents did not, in the application to discharge or vary the MLAT restraint order or at any time prior to the notice of preliminary objections, advance any argument on material non-disclosure. This was simply not a live issue in the hearing before Grant-Thompson J which resulted in the order under appeal to the Court of Appeal. For the same reason the Court of Appeal erred in concluding that any further evidence required, in order to address the issue of whether there was a mere typographical error, would be fresh evidence which ought not to be admitted on *Ladd v Marshall* principles. Any such evidence would not be fresh evidence because it would not relate to any allegation or issue which had arisen in the court below. In any event, there was no need for further evidence. As a result, had it been necessary, the Board would also have allowed the appeal on this ground.

Ground 1

35. Under this ground of appeal, the appellant submits that the Court of Appeal erred in applying principles derived from conventional, adversarial civil litigation to the consequences of material non-disclosure in an application for a restraint order.

36. The appellant accepts, correctly, that public authorities applying ex parte for restraint orders come under a duty of full and frank disclosure that applies generally to applicants for ex parte orders in civil cases. It was common ground before us that this is equally the position in The Bahamas. It is nevertheless worth reaffirming this vital principle. Thus, in *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927; [2008] Lloyd's Rep FC 30 Hughes LJ observed (at para 6):

> "Because the initial application is commonly made without notice, the court will not at that stage hear argument on both sides. For this reason, as with other without notice applications, the court insists on full and complete disclosure by the applicant of everything which might affect the decision whether or not to grant the order. There is a high obligation upon such an applicant to put everything relevant before the judge, whether it may help or hinder his cause."

37. Similarly in *In re Stanford International Bank Ltd* [2010] EWCA Civ 137; [2011] Ch 33 Hughes LJ stated (at para 191):

> "An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge."
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> (See also *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746; [2006] 1 WLR 182 per Longmore LJ at para 63.)

38. Nevertheless, the appellant submits that in restraint order cases the applicant is acting in the public interest, not in pursuit of private commercial or financial interests, and that as a result in such cases the touchstone of the consequences of a failure to give full and frank disclosure must be the public interest. The appellant submits that in the present case the Court of Appeal failed to have regard to the public interest.

39. It is undoubtedly the case that, in the context of an application for a restraint order in connection with proceeds of crime, it is necessary to take account of the public interest when determining what consequences should follow a material non-disclosure. In *Jennings v CPS* Longmore LJ observed (at para 64):

> "The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say that there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified."

40. Similarly, in *Director of the Serious Fraud Office v A* Hughes LJ stated (at para 18):

> "The law upon the consequences of non-disclosure has not been in contention before us. Plainly, in order to provide any ground

> for discharging the initial order which has been obtained without notice to the suspect, any non-disclosure must be material, that is to say it must be of something which would have affected the judge's decision on the application. If there has been a material failure of disclosure, that may justify discharging the order, but it need not do so. The proper approach is to consider whether the public interest does or does not call for the order to stand, now that the true position is known, and taking into account the previous failure of disclosure. Whether the non-disclosure was deliberate or accidental will be a material factor, although not necessarily determinative. These propositions emerge from a number of cases: see in particular *Brink's Mat Ltd v Elcombe* [1988] 1WLR 1350, and *Jennings v CPS* [2006] 1 WLR 182, paras 52–57 and 62–64. A similar approach to a different kind of without notice application in aid of a criminal investigation, namely one for the production of special procedure material, was taken in *R v Lewes Crown Court, Ex p Hill* (1991) 93 Cr App R 60, 69. Whilst it is appropriate to insist on strict compliance with the rule of disclosure, discharge of the order does not necessarily follow as a means of disciplining the applicant, at least absent what Longmore LJ in Jennings referred to as 'so appalling a failure' that that ultimate sanction should be applied."
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> (See also *A & A v The Director of Public Prosecutions* [2016] EWCA Crim 96 per Sharp LJ at para 115.)

41. Consideration of the public interest will be no less essential where, as in the present case, the application for a restraint order is made pursuant to a request for mutual legal assistance. Here the public interest of The Bahamas is clearly engaged because it appears that the fraud was carried out from The Bahamas and the proceeds of the fraud were transferred to that jurisdiction. In addition, there are present here additional considerations of public interest relating to the treaty commitments of The Bahamas under the MLA Treaty with the USA and to international co-operation to combat crime.

42. In the present case the alleged non-disclosure arose in the context of the CWI joinder application, which the Court of Appeal thought necessary for the proceedings to be correctly constituted. If the Court of Appeal was correct in its view that that alleged non-disclosure was dispositive of the MLAT restraint order (as to which see Ground 5, below), the public interest was nevertheless engaged to the same extent.

43. The Court of Appeal, however, directed itself by reference to the principles applicable in a case of material non-disclosure in commercial disputes between private

parties. In particular, it cited *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 as applied in *Blue Planet Group Ltd v Downie*, SC Civ App No. 80 of 2018. The judgment of Evans JA in the present case makes no reference to the public interest and it appears to have been left out of account.

44. The Board considers, therefore, that the Court of Appeal misdirected itself as to the correct approach in law to the consequences of material non-disclosure in a restraint order case. As a result, were it necessary, it would be open to the Board to come to its own conclusion as to the consequences which should follow. In the Board's view, when considerations of the public interest are taken into account, there could be no justification for discharging the joinder order or the MLAT restraint order. However, the point does not arise because there was here no material non-disclosure.

45. Before leaving this ground, it should be recorded that the respondents objected to the Board hearing this ground of appeal on the basis that the authorities referred to above on the relevance of the public interest were not cited by the appellant before the Court of Appeal. In this regard the respondents rely on *Baker v The Queen* [1975] AC 774 per Lord Diplock at p 788 A-C. It is indeed the normal practice of the Judicial Committee not to allow the parties to raise for the first time in an appeal to the Judicial Committee a point of law which has not been argued in the courts below. Exceptionally, however, it does allow departure from this practice. In the present case, the submission is one which does not turn on an appreciation of matters of evidence or fact. Furthermore, the point relates to a fundamental misdirection by the Court of Appeal as to the applicable test. Finally, an exception to the practice must be admitted in this case where the error on the part of the Court of Appeal was a failure to take account of the public interest. In these circumstances, there is no unfairness in allowing the point to be argued and it is both appropriate and necessary that the Board should consider the matter. Had it been necessary, the Board would also have allowed the appeal on this ground.

Ground 5: a requirement to join CWI?

46. The Court of Appeal considered that if the CWI joinder order was set aside the appellant's appeal against the discharge of the MLAT restraint order was either doomed to failure or could not be pursued. It considered that if CWI was not joined as a named respondent, the proceedings would be defective on grounds of non-joinder.

47. In the Board's view this conclusion was incorrect. As the appellant makes clear in his written case, the relevant appeal to the Court of Appeal was from the judge's decision on the discharge and variation application. That application had been made by CWI itself as a person affected by the MLAT restraint order. CWI was entitled to make that application pursuant to paragraph 5 of the MLAT restraint order and also under section 26(5) of Modified POCA. CWI was a respondent to the appellant's appeal against the

judge's decision on that application. The proceedings were properly constituted. Had it been necessary, the Board would also have allowed the appeal on this ground.

Moot point?

48. Following the discharge of the MLAT restraint order on 19 June 2019, the funds held in the RBC accounts were transferred to the client account of the respondents' attorneys, Monique VA Gomez & Co. The appellant obtained an injunction restraining those funds pending determination of its appeal to the Court of Appeal against the discharge of the MLAT restraint order. Following the dismissal by the Court of Appeal of the appellant's appeal, on 1 July 2021 the Court of Appeal ruled that the funds ought not to remain restrained pending the appellant's application for permission to appeal to the Judicial Committee. The unrestrained funds were released following this ruling.

49. In these circumstances, the respondents submit that the present appeal is moot, as any relief that the Board could grant the appellant would serve no practical or useful purpose.

50. At the oral hearing, in response to a request from the Board for further information, Mr Poole on behalf of the respondents took instructions and informed the Board that, following the lifting of the restraint order, Monique VA Gomez & Co had transferred the funds (less banking charges) on the instructions of the respondents to another law firm in The Bahamas.

51. The Board is unable to accept that the present appeal is moot. The funds having been transferred to another law firm in The Bahamas, there is no evidence of further dissipation. In these circumstances, there is no reason why a restraint order cannot be made which applies to the funds, if they are still in that other account, or to any assets purchased with the funds. In either case the funds in the new account or any assets purchased with the funds remain "realisable property" within the meaning of section 4(3) of Modified POCA given that they are directly or indirectly a tainted gift in the hands of CWI. Pursuant to section 26(1) of Modified POCA a restraint order can be made in respect of any "realisable property" to prohibit dealing with them.

52. Even if this appeal had become moot, the Board considers that it would have been necessary in any event to hear and decide these grounds of appeal in order to clarify the law.

Ground 6: Abuse of process and lack of nexus

53. Finally, the appellant appeals on the ground that the judge erred in concluding that (1) the application for the MLAT restraint order was an abuse of process as it was based on the same facts and sought to relitigate the same issues as the domestic restraint order and (2) no sufficient nexus had been shown between the fraud and the named respondents to the originating summons. This ground was not considered by the Court of Appeal because of its conclusion on material non-disclosure.

54. At the oral hearing before the Board, the parties were agreed that, if the appeal was allowed on any of the other grounds of appeal, this ground should be remitted to the Court of Appeal for it to adjudicate on the merits of the appeal. The Board agrees that that is the most appropriate course.

Conclusion

55. For these reasons, the Board will humbly advise His Majesty that the appeal should be allowed and the matter remitted to the Court of Appeal for its adjudication on the merits of the appeal.