Case No: 2014 FOLIO 733

Neutral Citation Number: [2014] EWHC 3250 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 10/10/2014

Before :

MR. JUSTICE TEARE

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Between :

U&M MINING ZAMBIA LTD	**Claimant**
- and -	
KONKOLA COPPER MINES PLC	**Defendant**

- -
- -

Derrick Dale QC and Christopher Langley (instructed by **Clyde & Co LLP**) for the **Claimant**
Graham Dunning QC, Rebecca Stripe and Louis Flannery (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing dates: 18 & 19 September 2014

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Judgment

Mr. Justice Teare :

1. On 17 June 2014 Eder J. granted the Claimant a world wide freezing order ("WFO") *ex parte*. The Claimant has now applied *inter partes* to continue the WFO. The Defendant opposes the continuation of the WFO. The WFO was granted in support of sums awarded by a London arbitration tribunal so there is no dispute either as to the Claimant's cause of action or as to this court's jurisdiction. The Defendant has taken three points. First, the Claimant has not established a risk of dissipation. Second, it is not just and convenient to grant a WFO. Third, the Claimant failed in its duty of full and frank disclosure.

2. Before considering each of these points it is necessary to say something about the parties and the disputes between them.

3. Both the claimant and the defendant are companies incorporated under the laws of Zambia.

4. The claimant, U&M Mining Zambia Limited ("U&M"), is a subsidiary of a substantial Brazilian mining conglomerate and carries on business as a mining equipment contractor.

5. The defendant, Konkola Copper Mines PLC ("KCM"), is owned, as to 79.4%, by Vedanta Resources Holding Limited which in turn is owned, as to 100%, by Vedanta Resources PLC, a resources and mining company listed on the London Stock Exchange (FTSE 250). The remaining interest in KCM is owned by a company which, as to 87.6%, is owned by the Zambian government. In addition the Zambian government has a "special share" which entitles it to certain rights. Three of the 8 directors of KCM are government appointees.

6. KCM is one of the two largest mining and metals companies in Zambia and one of the largest copper producers in Zambia. It is the largest private sector employer in Zambia with 18,000 employees. Its assets are almost exclusively held in Zambia. This at any rate is apparent from the assets disclosed by KCM pursuant to the WFO. It appears from that disclosure and from further information provided after the hearing that apart from three bank accounts with very modest balances its assets are held in Zambia.

7. Pursuant to certain contracts U&M mined one of KCM's mines. These contracts provided for arbitration in London and for the proper law of the contracts to be that of Zambia. The contracts provided for the High Court of Zambia to have exclusive jurisdiction to execute the arbitration award.

8. Disputes arose between the parties. These, or some of them, were settled by a Settlement Agreement dated 26 October 2012. However, KCM did not pay the amounts it had agreed to pay pursuant to the Settlement Agreement. Instead, by letter dated 28 January 2103, it purported to rescind the Settlement Agreement on the ground that it had been induced by misrepresentation. At the same time KMC purported to terminate the remaining contract between the parties and sought and obtained from the High Court of Zambia an order requiring the immediate removal of U&M from the mine. In response U&M applied to the English court seeking relief pending the constitution of an arbitration tribunal. When that tribunal was constituted

(Edwin Glasgow QC, Stuart Isaacs QC and Michael Lee) it granted interim relief to U&M allowing it 90 days to demobilise and vacate the U&M compound.

9. In March, April and May 2013 U&M commenced several arbitrations against KCM. In June 2013 the arbitration tribunal directed a trial of a preliminary issue, namely, whether the Settlement Agreement was valid and binding. If it was binding then the defences sought to be raised by KCM to U&M's claims would fail (because of the terms of a release provision in the Settlement Agreement).

10. The preliminary issue was heard over 5 days starting on 30 September 2013. Oral evidence was adduced by both parties.

11. By an award dated 7 November 2013 ("the first award") the arbitration tribunal found that there had been no misrepresentation and that the Settlement Agreement was valid and binding. KCM was ordered to pay some US$13m. to U&M. Nothing has been paid. Unlike the mining contracts between the parties the Settlement Agreement does not provide for exclusive enforcement in Zambia. However, no doubt because KCM's assets are almost all in Zambia, U&M are seeking to enforce the first award in Zambia. KCM are resisting enforcement in Zambia and a ruling by the High Court of Zambia is expected shortly on the matter. Mr. Dale QC, counsel for U&M, has submitted that the grounds on which KCM are seeking to resist enforcement are "spurious and dishonest". However, in circumstances where the matter has been debated before the Zambian High Court and judgment is awaited it is inappropriate for this court to enter into that debate.

12. In November 2013 U&M made a number of applications to the arbitration tribunal. KCM did not respond to these applications and on the eve of a hearing withdrew instructions from its solicitors and sought a three month adjournment to permit alternative representation. The arbitration tribunal refused the application for an adjournment and considered U&M's applications at the hearing on 9 December 2013. By an award dated 7 January 2014 ("the second award") it made certain orders which would become final in the event that U&M failed to show cause within a 14 day period why they should not be made. KCM failed to show cause and accordingly the orders became final. Pursuant to the second award KCM was ordered to pay some US$40m. to U&M. Nothing has been paid.

13. By an award dated 24 March 2014 ("the third award") the arbitration tribunal ordered that KCM pay the costs of the first award on an indemnity basis. It considered that KCM's conduct in attempting to re-open the Settlement Agreement on the grounds of misrepresentation had been unjustified and that resisting the application for the issue to be determined as a preliminary issue had been obstructive. Furthermore the evidence of its principal witness was not credible. Costs were assessed in the sum of £1,260,385.19. Those costs have not been paid.

14. KCM applied to the English High Court to challenge the second award pursuant to sections 67 and 68 of the Arbitration Act 2014. Eder J. acceded to an application that KCM provide security for the costs of its challenge to the second award. KCM provided that security.

15. On 15 July 2014 Cooke J. held that KCM's challenge to the second award was untenable and dismissed it. He awarded U&M 75% of their costs on an indemnity

basis and Eder J awarded U&M 65% of its costs of the application for security on an indemnity basis. Interim payments were ordered and they have been paid.

Risk of dissipation of assets

16. It was common ground that what had to be shown was correctly stated by Flaux J. in *Congentra v Sixteen Thirteen Marine* [2008] 2 CLC 51 at para.49 as follows:

> "(i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business……; or
>
> (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes……..".

17. Mr. Dale QC, on behalf U&M, submitted that there were, in broad terms, two reasons why the court should infer that there was such a risk. The first was the manner in which KCM had conducted the arbitration hearings and the second was KCM's attitude to its unsecured creditors. Before Eder J. Mr. Dale described those two points as the "twin pillars" upon which his application was based.

KCM's conduct of the arbitration hearings

18. In essence Mr. Dale submitted that KCM had acted in a dishonest, unacceptable and extraordinary manner with a view to avoiding its legal obligations to U&M. He submitted that such behaviour is or can be evidence that KCM is the sort of company which will stop at nothing, including dissipation of its assets, to prevent U&M from making any substantial recovery.

19. The conduct of KCM upon which Mr. Dale relied in this regard was:

    i) making threats to U&M in October 2012;

    ii) refusing to pay the sums due under the Settlement Agreement and seeking to justify that refusal by putting forward "a dishonest" basis for suggesting that the Settlement Agreement was not binding upon it;

    iii) obtaining an urgent ex parte mandatory injunction from the Zambian High Court that U&M leave its compound immediately;

    iv) "dishonestly" obtaining an order from the arbitration tribunal in March 2013 that U&M keep its equipment at a particular site to secure a damages claim to be brought by KCM against U&M (at the rate of US$1.5m. per day) based upon the proposition that KCM was to work the mine when in fact KCM had decided in December 2012 not to work the mine;

    v) refusing to return equipment to which U&M was lawfully entitled;

vi) seeking to advance "dishonest and untenable arguments" in the Zambian High Court in an attempt to resist enforcement of the First Award;

vii) advancing arguments before the English High Court which were untenable in an attempt to challenge the Second Award pursuant to sections 67 and 68 of the Arbitration Act 1996.

20. In my judgment the suggested threats made by KCM prior to agreeing the Settlement Agreement (point (i) above) do not materially advance U&M's case. Mr. Dale described them in his Skeleton Argument as "sarcastic". They were certainly not attractive comments to make but in my judgment do not amount to the necessary "solid evidence" (see *The Niedersachsen* [1983] 2 Lloyd's Rep. 600 at p.607 per Kerr J.) of an intention to dissipate assets. They were made about one year before the first award was published. Nor do I consider that it would be appropriate to enter into the debate which has taken place in the Zambian High Court as to whether the arguments advanced by KCM to prevent enforcement of the First Award are "dishonest and untenable" (point (vi) above). The judgment of the Zambian High Court on those arguments is awaited and in those circumstances it would be inappropriate for this court to comment on them.

21. However, the other points made by Mr. Dale must be considered.

22. When dismissing KCM's case that the Settlement Agreement was not binding and awarding U&M costs on an indemnity basis the arbitration tribunal made clear that it could not accept the evidence upon which that case was based. The evidence of the principal witness, Mr. Pratap, KCM's Business Controller, was not credible. It is clear that the arbitration tribunal did not regard Mr. Pratap as an honest witness.

23. Mr. Dale submitted that KCM "formulated a dishonest basis upon which to contend that the Settlement Agreement was not binding upon it" and (in his oral submissions) that KCM suffers from "systemic dishonesty". The suggestion that KCM "formulated a dishonest basis" to resist enforcement was said to be based on paragraphs 57-59 of Mr. Hirst's first affidavit. Mr. Hirst had noted that although it had been reported on 1 November 2012 that KCM had refused to pay the sum due under the Settlement Agreement it was not until 28 January 2013 that KCM's lawyers said that KCM was rescinding the Settlement Agreement on the ground of a fraudulent misrepresentation. However, the only dishonesty to which I was referred was that of Mr. Pratap and I assume that it is this on which Mr. Dale relies when saying that KCM formulated a dishonest basis on which to resist enforcement of the Settlement Agreement. The phrase "systemic dishonesty" suggests that KCM as a corporate body is routinely dishonest. The arbitration tribunal did not make such a finding.

24. Mr. Dale was, however, able to point to further evidence given on behalf of KCM which he submitted was dishonest.

25. Mr. Ndulo, the senior legal counsel employed by KCM, gave evidence that KCM was accumulating losses at the rate of US$1.5 million per day.

26. On the basis of this evidence KCM sought from the arbitration tribunal an order restraining U&M from moving its equipment so that KCM had security for losses it

was said to be incurring. The arbitration tribunal considered that U&M should give an appropriate undertaking which it did.

27. In September 2013 Mr. Ng'andu, the Executive Director of KCM, said that KCM had decided in December 2012 that the mine would shut down. This evidence was confirmed by Mr. Dawar, the chief financial officer of KCM.

28. U&M therefore says that its undertaking was given in response to untrue evidence and claims to have suffered loss as a result; such losses are to be assessed at a further arbitration hearing. When U&M sought to be released from its undertaking KCM did not agree and U&M had to obtain an order from the arbitration tribunal releasing it. The tribunal considered that had it been aware of Mr. Ng'andu's evidence it would have been most unlikely to have ordered U&M to give the undertaking.

29. Mr. Dale submitted that this evidence of Mr. Ng'andu showed that KCM was willing to put forward a "dishonest position to cause maximum damage" to U&M. Again, I assume that the reference to KCM putting forward a dishonest position is a reference to Mr. Ndulo doing so.

30. It is striking that KCM can be shown to have relied upon untrue evidence on two occasions. Further, the failure to release U&M from its undertaking suggests a willingness to cause unnecessary harm to U&M. The same willingness to cause harm is suggested by KCM's conduct in obtaining from the Zambian High Court an *ex parte* order that U&M vacate its compound immediately (in reliance upon its unjustified case that KCM was not bound by the Settlement Agreement). KCM must have appreciated that such injunction was capable of causing damage to U&M. Similarly, although the arbitration tribunal ordered in its second award that U&M was entitled to the transfer of the ownership in certain items of equipment KCM has refused to comply with that order.

31. KCM has sought to challenge the First Award in Zambia. As I have said I do not consider that I can comment upon the objections raised. It is however surprising that KCM has sought to challenge the First Award in Zambia in circumstances where KCM informed the arbitration tribunal that if the Settlement Agreement were found to be valid and binding by the tribunal "then it would have no defence to a claim for payment of the amounts due from it to U&M under the Settlement Agreement."

32. KCM's challenge to the Second Award has been held by Cooke J. to be "untenable". KCM withdrew instructions from its legal representatives on the eve of the hearing and then, having been given an opportunity to show cause why certain orders should not be made, failed to show cause. It then sought to challenge the award on untenable grounds. This conduct suggests a party willing to do all it can to prevent the other party from enforcing its legal rights.

33. It is necessary to consider whether the court can infer from the totality of KCM's conduct (rather than from each piece of conduct separately) a risk that KCM will deal with its assets other than in the ordinary course of business in such a way as to make enforcement of the arbitration awards more difficult. U&M has adduced evidence that personnel employed by KCM are willing to give untrue evidence, are willing to cause unnecessary harm to U&M and are willing to take untenable points with a view to delaying the time when the second award can be enforced. Further, the arbitration

tribunal found that KCM had been obstructive in resisting the application for the determination of the validity of the Settlement Agreement as a preliminary issue. This conduct is consistent with a comment made by Mr. Ng'andu in February 2013 during a telephone conversation with Mr. Mendoca, the International Operations Director of U&M, that he recognised that invoices were due and unpaid but that KCM "would hold onto U&M's money to the end of the dispute, which it would fight bitterly, no matter how long it took, including in Zambia where proceedings would take many years."

34. In my judgment such conduct is solid evidence from which it can be inferred that there is a risk that KCM, unless restrained by an order of this court, will deal with its assets other than in the ordinary course of business with a view to making enforcement of the arbitration awards more difficult. It is true that none of the conduct in question amounts to such a dealing with its assets but an entity which has employees willing to give untrue evidence, to cause unnecessary harm, to be obstructive of the arbitration process and to take untenable points with a view to delaying enforcement of an award might well seek to deal with its assets other than in the ordinary course of business with a view to making enforcement of the arbitration awards more difficult.

35. Mr. Dunning QC on behalf KCM submitted that no such inference could be drawn when account is taken of the nature of KCM as a company and its assets "which are at the opposite end of the spectrum from those of the offshore single asset owning vehicle." A number of points were taken including the following. Many of KCM's assets were of a capital nature or were in daily use in its copper mines. It is a trading company. Is KCM, he asks, going to remove its liquid assets (such a bank accounts) so as to frustrate U&M ?

36. I accept that such matters must be taken into account when deciding whether a risk of dissipation can be inferred from the evidence relied upon by U&M. But although KCM has assets of a capital nature, some mortgaged and therefore unlikely to be dissipated, KCM also has bank accounts in Zambia. The question is whether there is a real risk that such liquid assets as it has will be dealt with other than in the ordinary course of business with a view to making enforcement of the arbitration awards more difficult. I consider that a company which can act in the manner which I have described may well deal with its liquid assets other than in the ordinary course of business with a view to making enforcement of the arbitration awards more difficult. There is therefore the required real risk. In answer to Mr. Dunning's rhetorical question there is a risk that KCM will deal with its liquid assets in such a way as to frustrate the efforts of U&M to enforce the arbitration awards.

37. Mr. Dunning also relied upon the fact that KCM has paid the interim costs orders made by this court and has complied with its disclosure obligations pursuant to the WFO. I accept that they have but I am not dissuaded from drawing the necessary inference by those matters.

<u>KCM's attitude to unsecured creditors</u>

38. Mr. Dale also submitted that a clear picture emerges from certain evidence, in particular the GTAC report (a report of the Zambian Government Technical Audit Committee), that KCM has deliberately structured and conducted itself to make it

difficult for an unsecured creditor such as U&M to receive and/or enforce its debts. The matters relied upon have been summarised by Mr. Dale in this way:

> "In short, as found by the GTAC Report KCM has been structured so that (1) it makes significant new capital projects ….from internally generated revenues including by delaying payments to suppliers; (2) it has very highly geared bank lending and is "effectively mortgaged" to the banks; (3) its current liabilities massively exceed its current assets; and (4) its liquid assets for paying debts as they fall due – such as cash in the bank – are kept deliberately at a minimum level. Furthermore serious concerns have also been raised as to the removal/transfer of funds from KCM to Vedanta by various means."

39. I have found the conclusions which Mr. Dale invites me to draw from these matters difficult to accept. I of course accept that there is evidence (not only in the GTAC report but also in two reports from Grant Thornton) that KCM is short of cash, has considerable debts and delays in paying its creditors. It prefers to spend its resources on capital projects rather than on its current debts. But such matters do not, it seems to me, show that KCM has deliberately structured and conducted itself to make it difficult for an unsecured creditor such as U&M to receive and/or enforce its debts. Spending resources on capital projects rather than on paying current debts may or may not be unwise. Without knowing more of the nature of such capital projects and KCM's obligations in respect of them it is not possible, it seems to me, to say that such expenditure is not in the ordinary course of business. Thus I am not able to accept that the evidence in the GTAC report or in the Grant Thornton reports establishes a risk that assets may be dissipated or dealt with other in the ordinary course of business with a view to making enforcement of the arbitration awards more difficult. The evidence of course gives rise to a risk that U&M may not be paid because KCM appears to lack the resources to pay all its debts. But that, by itself, does not establish a risk that its assets may be dissipated other than in the ordinary course of business. It is no part of the purpose of a freezing order to pressurise a defendant into discharging the claimant's debt in preference to the debts of others; see *Camdex International v Bank of Zambia* [1997] 1 WLR 632 at p.640 per Phillips LJ.

40. There is a very considerable dispute between the parties as to whether or not Vedanta is supporting KCM and whether or not Vedanta is removing assets from KCM to itself. Whilst there was some support in the GTAC report for U&M's case in this regard KCM says that the allegations made by U&M are wrong. KCM's response was not accepted by U&M. Indeed, Mr. Dale said that KCM's case that Vedanta was providing finance to KCM was a "complete lie". Strictly, it is unnecessary for me to enter into this dispute because, for the reasons I have given, U&M can establish the necessary risk of dissipation without having to rely upon its allegations with regard to Vedanta. I shall however make some observations about them. On an interlocutory application it is not possible to make definitive findings with regard to them.

41. The principal allegations are that Vedanta has not injected capital into KCM as it was supposed to have done and that funds are being diverted from KCM to Vedanta, in particular, by selling copper to a subsidiary of Vedanta other than at arm's length in such a way as to result in under-pricing of the copper. Prior to obtaining a copy of the

GTAC report on 12 June 2014 (shortly before U&M applied *ex parte* to Eder J. for a WFO) U&M already had concerns about Vedanta's support for KCM and about funds being diverted to Vedanta. These were based upon concerns expressed by the Zambian government, statements by Mr. Anil Agarwal (the chairman of Vedanta), reports in Bloomberg News, enquiries made in Zambia by Mr. Hirst of Clyde and Co. (who act for U&M), a report by Grant Thornton, the web site of the Lusaka Times, information provided by Foil Vedanta (an organisation dedicated to providing increased visibility of, and information in respect of, Vedanta's business practices) and certain documents obtained in confidence (see paragraphs 230-281 of Mr. Hirst's first affidavit dated 17 June 2014). However, attention was focused at the *inter-partes* hearing on the evidence in the GTAC report.

42. The GTAC report states that an investment of US$2.8 billion in KCM supposedly made by Vedanta was in fact made up of US$2.07 billion from internally generated cash flows (including delaying payments to suppliers) and US$729m. from bank loans.

43. It is not clear to me that KCM denies this allegation. Mr. Dunning referred to Mr. Dawar's first witness statement at paragraph 77.5 which refers to a "cumulative investment in terms of capital expenditure" of more than US$2.8 billion. But the point which U&M makes is not that there was no investment in capital expenditure but that the investment was not provided by Vedanta. Mr. Dawar does not appear to challenge that point.

44. There is, however, evidence of more recent investment provided by Vedanta. A "Business Improvement Plan" required a US$400m. guarantee to be provided by Vedanta. Mr. Dawar has stated (at paragraph 61 of his witness statement) that this was in fact given by Vedanta and enabled KCM to secure US$250m of refinancing resulting in an injection of US$150m. of funds. This was in addition to a cash injection of US$100m. by Vedanta in three tranches in late 2013 and early 2014. Mr. Hirst has said that Vedanta has apparently failed to meet its commitment to provide the US$400m. guarantee (see paragraph 283 of his affidavit), relying upon an article on the website of the Lusaka Times dated 20 May 2014 reporting that Mr. Yaluma, the Minister of Mines, had said that Vedanta had "failed to meet its commitment to inject US$397m into KCM as a foreign direct investment." But it is not clear that this is the US$400m. guarantee. Indeed, in another context (see his written submissions entitled "Alleged Misleading Impressions") Mr. Dale submitted that the commitment to inject US$397m did not originate from the Business Improvement Plan but was something promised at the time that Vedanta originally bought KCM shares. It seems very likely that the commitment to inject US$397m was distinct from the commitment to provide a guarantee of US$400m. It is also to be noted that Grant Thornton assumed in their second report that the guarantee of US$400m. had been given.

45. So the position appears to be as follows. Capital investment of some US$2.8 billion in KCM has been made possible by internally generated cash flows of US$2.07 billion and US$739 million from bank loans. There appears to be no evidence that this investment was made by Vedanta. There is however evidence (which does not appear to be challenged) that Vedanta has provided a cash injection of US$100m. in three tranches in 2013 and 2014. Further, the suggestion that Vedanta did not provide the US$400m. guarantee as contemplated by the Business Improvement Plan appears to be mistaken.

46. I do not regard these matters as materially assisting U&M's case for a WFO. If the position were that Vedanta was not investing in KCM that would increase the risk that creditors such as U&M will not be paid. But a risk of non-payment is not a risk that assets will be dissipated other than in the ordinary course of business. In any event there is evidence that Vedanta has invested in KCM.

47. That leaves the suggestion that KCM's funds are being improperly diverted to Vedanta and, in particular, that copper has been sold at an under value to a subsidiary of Vedanta. The suggestion was made in the GTAC report but has been denied by Mr. Dawar. In addition KCM's auditors have said that the terms of sale were no more favourable than those arranged with third parties and experts instructed on both sides appear to agree that the sales were broadly at market price on market terms. In these circumstances Mr. Dale was only able to describe the matter as one of "concern" which he "could not take much further." I therefore do not consider that this issue materially assists U&M's case for a WFO.

48. Before Eder J. Mr. Dale referred to evidence of a statement by Mr. Agarwal, the chairman of Vedanta, to the effect that Vedanta was receiving US$500m. "profit" per year from KCM plus an extra US$1 billion as "the other high water mark" of his case. My understanding of the significance of this point is that it points to substantial monies being "dissipated" to Vedanta. It has given rise to much debate, largely because of a dispute as to whether Mr. Agarwal referred to US$500m of profit or intended to refer to US$1,500 million of turnover. However, whatever the answer to that debate it does not appear that the payment of such a sum to Vedanta has been identified either in the GTAC report or in the reports of Grant Thornton. I was not referred to any supporting references (though I have noted that Grant Thornton confirmed that the average turnover for the past four years had been US$1,591 million). It is improbable that the payment of such sums to Vedanta by KCM, if made, could be hidden from the authors of the GTAC report or from Grant Thornton. I therefore have my doubts as to the significance of this "high water mark". But it is unnecessary for me to assess its significance any further because, for the reasons already given, the necessary risk of dissipation has been established.

Just and convenient

49. It must be just and convenient to grant the WFO; see *The Niedersachsen* [1983] 2 Lloyd's rep.600 at p.619-620 per Kerr J. Mr. Dunning submitted that even if the necessary risk of dissipation has been established it is neither just nor convenient to continue the injunction. Mr. Dunning relied upon 18 points in support of this submission but those points can, I think, be summarised in this way. KCM has no assets in England and so enforcement of the arbitration awards will not take place here but in Zambia where the bulk of KCM's assets are. Zambia appears to have a legal system based upon English law and U&M can avail itself of the remedies available in Zambia. There is no evidence that the legal remedies available to U&M are inadequate and in the absence of such evidence there is no utility in continuing the WFO. Indeed, the largest award in favour of U&M, the second award, provides that enforcement shall take place exclusively in Zambia. In support of his submission Mr. Dunning relied upon a statement by Millett LJ in *Credit Suisse Trust v Cuoghi* [1998] QB 818 at p.827 that "where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to

make their orders effective." Mr. Dunning submitted that in the present case the courts of Zambia were best suited to making a freezing order.

50. Mr. Dale's response to this argument was that it was appropriate for the English court to make the WFO because the seat of the arbitration was in London. He said that the fact that another court could assist (by granting a freezing order) was no bar to this court doing so where London was the seat of the arbitration.

51. Mr. Dunning replied that it was not the invariable rule that this court should grant a WFO where London was the seat of the arbitration. He submitted that before the English court issued a WFO there must be "utility" in so doing. He said there was none in the present case.

52. As a matter of principle there must be a real purpose, or to use Mr. Dunning's word, utility, in this court granting a WFO. However, where there is a risk that the defendant may dissipate or deal with its assets (in the required sense) and so render it more difficult to enforce an arbitration award there plainly is a real purpose or utility in granting the WFO. That is so even if the defendant's assets are not in England but in another jurisdiction. The more difficult question is whether it is appropriate for this court to grant a WFO if the court in the jurisdiction where the defendant's assets are located can also grant a WFO.

53. This court has power to make orders in support of arbitral proceedings; see section 44 of the Arbitration Act 1996. That power is not limited to arbitrations whose seat is in England and Wales, but where the seat is outside England and Wales the court may refuse to exercise its powers if it is inappropriate to do so; see section 2(3) of the Act. The DAC report said that the object of this provision is to ensure that the English court's powers are not exercised where a foreign court is seized or is likely to be seized of the matter, or where there is another more appropriate forum in which the application for supportive measures may be made; see *Commercial Arbitration* by Mustill & Boyd 2001 Companion to the Second Edition at p.258. *Mustill & Boyd*'s own comment at p. 324 is that the court would refuse to exercise its powers if a court of the seat of the arbitration had corresponding powers or if the court's powers were likely to be unenforceable in the country of the seat.

54. The inference which I draw from sections 2 and 44 of the Act is that where the seat of the arbitration is in England and Wales it will ordinarily be appropriate for this court to issue orders in support of the arbitration. However, the court obviously has a discretion as to whether or not to issue such an order even where the seat of the arbitration is in England and Wales. There may be reasons why, notwithstanding that the seat of the arbitration is in England and Wales, it is not appropriate to grant the order.

55. A number of authorities reflect this approach. In *Econet Wireless Limited v Vee Networks* [2006] EWHC 1568 (Comm) at paragraph 19 Morison J. accepted a submission that "the natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same county." That was a case where the seat of the arbitration was in Nigeria and the case concerned shares in a Nigerian company whose business was based in Africa; see paragraphs 15-19. The judge held that there

was no reason why the English court should make an order in support of the Nigerian arbitration.

56. In *Cetelem SA v Roust Holdings Limited* [2005] EWHC 300 (QB) a freezing order was granted in support of a London arbitration, notwithstanding that the respondent had no assets within the jurisdiction. Langley J. held that in such a case this court "should take the lead ….unless there is good reason not to do so."

57. In *Belair v Basel* [2009] EWHC 725 (Comm) Blair J. granted a freezing order in respect of the former presidential palace in Tbilisi, the capital of Georgia. The arbitration in support of which the order was granted was in London. Blair J., relying upon *Econet Wireless v VEE Networks*, said that "the English Court may be a natural court for the granting of interim injunctive relief as the court of the country of the seat of the arbitration."

58. There is nothing in *Credit Suisse Trust v Cuoghi* [1998] QB 818 upon which Mr. Dunning relies which detracts from this approach. That case did not concern an arbitration. It concerned proceedings in Switzerland against a defendant who was resident and domiciled in England. A freezing order, which was not available in Switzerland, was sought by the claimant in this court. It was granted. The full text of the passage in the judgment of Millett LJ upon which reliance was placed was as follows:

> "Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, this means the courts of the state where the person enjoined resides."

59. Thus in *Credit Suisse* the English court was best able to make its order effective because the defendant was resident in England.

60. In the present case Mr. Dunning says that KCM has no assets in England and so enforcement of the arbitration awards will not take place here but in Zambia where the bulk of KCM's assets are. There is no evidence that the legal remedies available to U&M in Zambia are inadequate and in the absence of such evidence there is no utility in continuing the WFO. Further, with regard to the largest award in favour of U&M, the second award, the parties have agreed that enforcement shall take place exclusively in Zambia.

61. There is no dispute that enforcement of the arbitration awards will take place in Zambia. Indeed, Mr. Hirst said in his second witness statement that "at no time has it been suggested that U&M are (or were) attempting to enforce the Awards anywhere other than Zambia." (The only assets outside Zambia which have been identified are three bank accounts, one in Bahrain and two in London which contain modest sums.) Does that circumstance make it inappropriate for this court to grant a WFO in support of the arbitration awards made in London ? Mr. Dale submitted that it did not because

a WFO is not a measure of enforcement and that protective measures which operate in personam are distinct from enforcement.

62. It has not been disputed that this court has jurisdiction to issue a WFO against KCM. Thus, although KCM is not resident or domiciled in this jurisdiction, it can be made subject to orders of this court which operate *in personam*. This is because KCM has agreed to London arbitration and accordingly either section 44 of the Arbitration Act 1996 (as contended by U&M) or section 37(1) of the Senior Courts Act 1981 (as contended by KCM) confers personal jurisdiction over KCM. (Mr. Dunning submits that section 44 has no application after an award has been published and the arbitration tribunal is *functus officio* but *The Arbitration Act 1966* by Merkin and Flannery at p.177 suggests it applies in such circumstances. In any event Mr. Dunning accepts that jurisdiction to make a WFO in such circumstances can be found in section 37 of the Senior Courts Act.) The fact that the seat of the arbitration is in London means that, in the absence of some reason or indication to the contrary, it will be appropriate for this court to grant relief in support of the arbitration (whether the source of the court's power is section 44 of the Arbitration Act or section 37 of the Senior Courts Act.)

63. This court has granted freezing orders in support of a London arbitration even though there are no assets in this jurisdiction; see *Cetelem SA v Roust Holdings Limited* [2005] EWHC 300 (QB) and *Belair v Basel* [2009] EWHC 725 (Comm). I consider that that is the right approach. A WFO, being an order which operates *in personam*, is conceptually distinct from enforcement of an arbitration award. Enforcement of an award requires an asset to be attached. A WFO does not attach an asset. It operates *in personam* by requiring the defendant not to dissipate or deal with his assets in such a way that will render enforcement of an award by attachment of an asset impossible or more difficult than it would otherwise be. It seeks to preserve the position so that enforcement may take place in the future; see *Masri v Consolidated Contractors International* (No. 2) [2008] 1 AER (Comm) 305 at paragraph 59 per Gloster J. Thus the mere fact that enforcement of an award will take place in Zambia is, by itself, insufficient to make it inappropriate for this court, being the court of the place where the arbitration has its seat, to grant a WFO. For the same reason the fact that in relation to the second award the parties have agreed that enforcement shall take place in Zambia is, by itself, insufficient to make it inappropriate for this court to grant a WFO.

64. The further factors relied upon are that KCM is resident in Zambia and therefore amenable to the *in personam* jurisdiction of the courts of Zambia and that there is no evidence that the courts of Zambia cannot grant a freezing order. In those circumstances it is to be assumed that they can. So protective relief can be given by either the English or the Zambian court. Does that factor, coupled with the location of KCM's assets in Zambia, mean that it is not appropriate for the English court to issue a WFO ?

65. This is a case where it is appropriate for two courts to grant a freezing order against KCM; this court because of the London arbitration clause, and the court of Zambia because that is where KCM is resident. However, I do not accept that the fact that it may be appropriate for another court to grant a freezing order means that it is inappropriate for this court to do so where this court's *in personam* jurisdiction over KCM derives from the London arbitration clause to which KCM agreed. Nor do I

consider that it is more appropriate for the Zambian court to issue a freezing order given that the seat of the arbitration was London.

66. For these reasons I consider that it is just and convenient (subject to the last point which I must consider) to grant a WFO in the circumstances of this case.

Full and frank disclosure

67. The scope of the duty of disclosure of a party applying ex parte for injunctive relief has been described by Bingham J. in *Siporex Trade v Comdel* [1986] 2 Lloyd's Rep. 428 at p. 437 as follows:

> "Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure."

68. I was also referred to authority which states that where there has been a breach of the duty to make full and frank disclosure the applicant "cannot obtain any advantage from the proceedings"; see *Bank Mellat v Nikpour* FSR [1985] 87 at p.90 per Donaldson LJ. But the passage quoted above from the judgment of Bingham J. shows that the court retains a discretion. It was said in *Brink's Mat v Elcombe* [1988] 1 WLR 1350 at p.1358 by Balcombe LJ that the discretion is to be used "sparingly" but he accepted that "the rule" that an injunction will be discharged if it was obtained without full disclosure cannot be allowed to become "an instrument of injustice". Thus in *Congentra v Sixteen Thirteen Marine* [2008] 2 CLC 51 and [2008] EWHC 1615 (Comm) Flaux J said at paragraph 63 that the overriding question for the court is what is in the interests of justice.

69. Mr. Dunning submitted that U&M did not make a fair presentation to Eder J. of the nature of KCM. In particular he said that U&M made no proper attempt to describe the size and nature of KCM's business and its fixed assets. However, Mr. Hirst in his affidavit described KCM as the owner of a number of mines in Zambia and a subsidiary of a very large company Vedanta. He referred to the vast amounts of money KCM earns from mining in Zambia and described it as a very large mining organisation. He said that KCM was the largest copper mining company in Africa and was once one of the largest employers in Zambia. He described the nature of the

business as open pit mining which requires excavation of the pit by removing waste to reveal the copper ore and then mining the ore. I consider that this was sufficient to make clear to the court, for example, (and as Mr. Dunning submitted) that KCM was very different from "an offshore single asset owning corporate vehicle".

70. Mr. Dunning also said that U&M failed to mention the delay and lack of urgency and failed to justify why an application needed to be made *ex parte* just before two major hearings. As to delay, I was not persuaded that there was any delay. It may be that the application could have been made before U&M obtained a copy of the GTAC report but it is often a difficult matter for a claimant to decide that he has sufficient evidence to justify the application. Certainly it is KCM's case that the information and material available to U&M before it received a copy of the report did not justify the grant of a WFO. In the event U&M made its application shortly after receiving a copy of the GTAC report from a confidential source. As to urgency Mr. Hirst said that if notice were given to KCM of the application KCM would be in a position to take steps to put its assets beyond the reach of U&M. That is the usual explanation for seeking a freezing order *ex parte* and is an acceptable explanation if there is solid evidence that unless restrained the defendant will dissipate or deal with its assets other than in the ordinary course of business with a view to making enforcement of any judgment or arbitration award more difficult. Mr. Dunning submitted that this is not a case where any particular asset "may go in the next few days". But liquid assets such as bank accounts may be dealt with quickly and in such a way that enforcement of the arbitration awards is made more difficult. Finally, Mr. Dale in paragraph 20 of his Skeleton Argument before Eder J. expressly informed Eder J. that there were two hearings shortly to take place in the Commercial Court. The subject matter of those hearings did not render it inappropriate to proceed *ex parte*.

71. Mr. Dunning submitted that U&M failed to draw certain facts and matters to the attention of the court. It is necessary to consider each complaint in turn.

a. "For several years, dividends were declared to KCM's shareholders, Vedanta and ZCCM, but not paid."

72. The relevance of this point is that if dividends were declared but not paid that indicates that Vedanta, far from extracting cash from KCM, was doing the opposite. It is accepted by Mr. Dale that whilst dividends of US$100m. between 2011 and 2104 were declared only US$49.9m. were paid. However, Mr. Hirst did not state that in his affidavit. The only reference to dividends was a comment at paragraph 240 of his first affidavit that since the list of creditors as at January 2014 did not include dividends payable, the dividends were paid and a substantial proportion of the dividends must have been paid to Vedanta. By contrast the first report of Grant Thornton, which was available to U&M before the *ex parte* hearing, stated that KCM appeared not to have paid the full amount of dividends that were declared for 2013 and noted that such unpaid dividends could amount to fresh funding of KCM by Vedanta. However, there is no indication that this information was brought to the attention of Eder J. In circumstances where (i) Mr. Hirst made a point about dividends, suggesting they had been paid, (ii) he had available to him the first report of Grant Thornton and (iii) had summarised Grant Thornton's analysis (see paragraph 251 of Mr. Hirst's affidavit) Mr. Hirst ought to have brought Grant Thornton's comment about dividends to the attention of the court and corrected or at any rate clarified the passage in his affidavit about dividends. His failure to do so was a failure to give full and frank disclosure.

b. "KCM repaid a US$500 million loan to Vedanta in 2012, but in the same period it secured a replacement credit facility in the same amount at far more beneficial interest rates, so its net position was not worsened but improved."

73. It is true that in his Skeleton Argument before Eder J. Mr. Dale said that Vedanta had prematurely called in a loan of US$500 million. That was in support of the argument that there was a lack of direct investment by Vedanta in KCM. Mr. Dale has submitted that the fact that the loan was replaced by a loan from Standard Chartered Bank was not relevant to that point but that in any event Mr. Hirst at paragraph 260 of his affidavit informed the court that the loan from Vedanta had been replaced by a loan from Standard Chartered Bank. No reference was made to the fact that the replacement loan was at better rates for KCM. This had been stated in the GTAC report. In making the point that there was a lack of direct investment by Vedanta in KCM Mr. Hirst was, it seems to me, suggesting that KCM's position was less advantageous than it would otherwise have been. That being so, the failure to inform the court that Vedanta's loan had been replaced by another loan at more advantageous rates ought to have been mentioned because that tended to suggest that KCM's overall position had improved, not worsened.

c. "The Government of Zambia holds a "Special Share" in KCM, which confers upon it the right to veto any material change in the nature of the KCM Group's business."

74. Mr. Hirst drew the attention of the court to the fact that KCM was part owned by the Government of Zambia. However, there is no dispute that the "special share" is something else. It was material because its existence tends to weaken the possibility that monies of KCM would be improperly diverted to Vedanta. The fact of the special share was mentioned in KCM's accounts and so its existence ought to have been brought to the attention of the court.

d. "Clause 9.7 of the Contract for Mining Output Enhancement from Open Pits dated 25 April 2007 provided that the High Court of Zambia shall have exclusive jurisdiction to execute any arbitration award, and similar provisions were contained in the other contracts that are the subject matter of this dispute."

75. It is accepted that these clauses were not drawn to the court's attention. In his second witness statement Mr. Hirst said that the relevance of these clauses is "entirely unclear". He does not say that he was unaware of the clauses; it is improbable that he was unaware of them given that he referred expressly to the clause in the contracts which referred disputes to arbitration in London.

76. The relevance of the clauses is that they suggest that the appropriate court for a WFO in relation to the second award might be the High Court in Zambia. I accept that a WFO is strictly not part of the enforcement process but it is an injunction designed to ensure that a defendant cannot frustrate enforcement. Of course, the circumstance that the seat of the arbitration is London suggests that the High Court in England is the appropriate court to issue a WFO but U&M was obliged to inform the court of any factors which suggest, or might reasonably suggest, that it might not be the appropriate court. In my judgment the exclusive jurisdiction clause is a fact which could reasonably be taken into account by the court when deciding whether it was appropriate for this court to issue the WFO. The exclusive enforcement clause is therefore a material factor, notwithstanding that on consideration of the rival factors

this court would still have been determined to be an appropriate court. The test of materiality is objective and the fact that Mr. Hirst did not appreciate the materiality of the clause cannot avail U&M. There was therefore a failure to give full and frank disclosure with regard to the clause. The clause did not apply to the first and third awards but it did apply to the largest award against KCM, namely, the second award.

e. "Mining reserves do not appear as an asset on the balance sheet except to the extent that they were purchased, but a thorough analysis of KCM's reserves is necessary to inform any understanding of the company's financial position."

77. It is common ground that mining reserves (unless purchased) do not appear as an asset on the balance sheet of a mining company. Grant Thornton have said that it is in accordance with generally accepted accounting practice and standard market practice for a mining company. Grant Thornton accept that this does not mean that reserves and resources are without value but say that the "key point is what and how much KCM can produce and at what level of profitability." I do not understand how U&M could have made a thorough analysis of KCM's mining reserves by assessing what it could produce at a profitable level. It was not explained how such an analysis could have been done. I therefore do not accept this criticism.

78. Mr. Dunning submitted that in several respects U&M gave a misleading impression of events.

a. "U&M relied upon the letter from the Chief Financial Officer of Vedanta dated 24 February 2014 in order to cast doubt on the commitment of Vedanta to KCM, but did not mention that this letter contains a clear and unequivocal statement of support from Vedanta."

79. This criticism is difficult to follow for Mr. Hirst in fact referred in paragraph 283 of his first affidavit to the support which Vedanta promised to make in the letter dated 24 February 2014. (He went on to say that that support had not been given but that is the subject of the next complaint.)

b. "U&M relied upon a statement of Mr. Yaluma MP that Vedanta had not complied with its "commitment" in the BIP to inject US$397 million into KCM as foreign direct investment, but failed to point out that no such commitment is contained in the BIP."

80. I have already said that Mr. Hirst appears to have thought that the promise to inject US$397m into KCM was the promise in the BIP to provide a guarantee of US$400m. In saying that he appears to have been mistaken; see paragraph 69 above. To that extent Mr. Hirst's evidence gives a misleading impression.

c. "U&M relied upon an action group's inaccurate account of the YouTube video of Mr. Agarwal and in so doing attributed words to him that he did not say. U&M also failed to explain the context of this video, namely, that it was made at an event designed to encourage budding entrepreneurs and not a forum for discussion of KCM's financial performance."

81. Although the press comments referred to "profit" of US$500m. per year being received by Vedanta that word was apparently not used by Mr. Agarwal. Mr. Hirst referred both to the press comment and to the translation of the original Hindi, which translation did not include the word profit. The complaint is that this inconsistency was not drawn to the attention of the court. KCM says that the figure mentioned was

not profit but turnover. However, when KCM issued a press release in response to the press reports of the speech KCM did not make the point that the reference to "profit" had been wrong. Rather, the press release made the point that what had not been mentioned by Mr. Agarwal was that "nearly all the returns from KCM have been reinvested back into KCM." The word "returns" is more suggestive of profit than turnover. But in any event I find it difficult to criticise Mr. Hirst for failing to draw to the attention of the court the difference between the press comment and the translation when (a) "profit" was clearly used in the press comment, (b) he also set out the translation of the speech, which did not refer to profit and (c) KCM in its press release did not consider that the disparity between the press comment and the actual text required clarification. The further complaint is that no mention was made that the speech was made at an event designed to encourage entrepreneurs and not at a forum for serious discussion of KCM's financial performance. That is true but any comment made by someone in Mr. Agarwal's position (he was the executive chairman of Vedanta) with regard to the relationship between his company and a subsidiary must surely be treated as serious (notwithstanding that one columnist said that the speech "should be taken with a pinch of salt" and that the "report is coming from him with a clear motive to try and motivate his audience to begin taking business chances.")

d. "U&M declined to bring to the Court's attention the publicly available corrective matters that followed the said YouTube video, which included a follow up article, a press release from Vedanta, a debate between KCM and the Zambian tax authorities and other relevant media reports."

82. The most important corrective matter was the press release issued by Vedanta and published on its web site. This press release made the point that Vedanta was investing in KCM and in particular that its "returns from KCM" had been reinvested in KCM. This was relevant to U&M's allegation that Vedanta was not supporting KCM and reference to it ought to have been made.

e. "U&M gave the impression that the corporate restructuring undertaken by Vedanta in 2012 was a recent event, which contributed to the urgency of its application and the risk of dissipation."

83. Mr. Hirst, at paragraph 253 of his first affidavit, referred to the announcement of the restructuring in February 2012 and to the restructuring having been concluded in August 2013. Mr. Zografakis, at paragraph 21 of his first witness statement, acknowledged that Mr. Hirst referred to the restructuring as having taken place in 2012. In the circumstances I do not consider that the criticism that U&M referred to the reconstruction as "recent" is justified.

f. "U&M stated that the said corporate restructure was unexplained, notwithstanding that an explanation has been publicly available on Vedanta's website since February 2012."

84. Mr. Hirst complained in paragraph 262 of his first affidavit that no explanation had been given for the fact that KCM was not mentioned in the new proposed group structure. Mr. Zografakis states that the rationale behind the restructuring was apparent from a press release issued in February 2012, yet no mention of this was made by Mr. Hirst. I am not at all persuaded that the absence of a reference to KCM in the proposed restructuring is or may be sinister. But even if it is or may be sinister reference ought, in fairness, to have been made to the press release which, it is

accepted, outlines the commercial rationale behind the restructuring. The press release may not explain the absence of a reference to KCM but the existence of a commercial rationale for the restructuring makes it less likely that there was anything sinister in the omission of a reference to KMC.

g. "U&M placed huge reliance upon the GTAC Report, but failed to draw the court's attention to the exhibited letter from Mr. Yaluma MP, which expressed his appreciation for KCM's investment and confirmed the Zambian Government's continued commitment to KCM."

85. The GTAC report was dated 21 January 2014. The letter from Mr. Yaluma to which reference is made is dated 3 March 2014. It is accepted that this letter refers to the Government's continuing support for KCM. Mr. Dale submitted that the letter does not change the conclusions of the GTAC report. That may be so but in circumstances where Mr. Hirst makes the point that the Government became increasingly concerned with KCM and as a result considered it necessary to procure the GTAC report expressions of continuing support for KCM after the Government had received the report ought to have been mentioned. Mr. Dale submitted that the expressions of support were "on the back of the Business Improvement Plan which was intended to improve the situation with KCM." That may be so but a full presentation of the evidence probably ought to have made reference to Mr. Yalumba's letter.

h. "Mr. Justice Eder should also have been taken to the letter from the Minister of Mines dated 3 March 2014, which again affirms the Zambian Government's continuing commitment to KCM."

86. It is common ground that this is the same letter as was referred to in the previous complaint and is not a separate complaint.

i. "U&M relied extensively on Foil Vedanta's allegation of transfer mispricing, but did not inform the Court of who it was making the allegation or that such an irregularity would be a matter of concern for KCM's auditors, or that Messrs. Deloitte had in fact approved KCM's 2013 accounts and considered that the transactions with related companies were at arm's length."

87. The first part of this criticism is unjustified. Mr. Hirst described Foil Vedanta as "an organisation which is dedicated to trying to provide increased visibility and information in respect of Vedanta's business practices and to hold it and its backers to account for the way it conducts itself." The second half of the criticism is justified. Deloitte's statement that the transactions in question were at arm's length was obviously material to the allegation of transfer mis-pricing and ought to have been mentioned.

j. "U&M did not correctly explain the basis on which KCM retained possession of the equipment and in fact misrepresented the position in a prejudicial way."

88. I am unable to accept this criticism. Mr. Hirst summarised the letter dated 18 February 2014 at paragraph 202 of his first affidavit which set out KCM's case. I was not persuaded that this summary misrepresented their case.

k. "U&M gave a misleading impression of the nature of KCM's disputes with certain utilities, telephone and electricity companies, which concerned contractual disagreements over tariffs rather than KCM's inability to pay the invoices raised."

89. I was not referred to any evidence that U&M was or ought to have been aware that the dispute was over tariffs rather the result of an inability to pay. U&M relied upon the information available to it. I do not accept this criticism.

90. Such is the importance of the duty to give full and frank disclosure of all matters material to the court's decision that a failure to comply with that duty can lead to a freezing order not being granted even if the circumstances are otherwise such that it is just and convenient to grant a freezing order. I have therefore considered whether the failures in the present case require the court to refuse to continue the WFO.

91. The duty was not complied with in a number of respects. The fact that some dividends had not been paid to Vedanta, that a loan to Vedanta had been replaced at more beneficial interest rates and that the Government held a special share in KCM were material to the court's consideration of, respectively, the question whether monies were inappropriately being paid to Vedanta, the question whether KCM's financial position had been worsened or improved and the risk that monies might be inappropriately paid to Vedanta.

92. The fact that the clause in the contract between the parties which provided that enforcement of any award would take place in Zambia was relevant to the question whether this court, rather than the court in Zambia, was the appropriate court to grant a freezing order in support of the large sum due under the second award.

93. The suggestion that Vedanta had not provided the US$400m guarantee as contemplated by the Business Improvement was wrong and gave a misleading impression of the support being given by Vedanta to KCM. The failure to mention Vedanta's press release commenting upon the report of Mr. Agarwal's comments was a breach of the duty to give full and frank disclosure especially in circumstances where Mr. Hirst stressed that no attempt had been made by KCM or Vedanta to explain or justify what was said by Mr. Agarwal (see paragraphs 28 and 264 of Mr. Hirst's affidavit). It is true that the press release does not extend to an explanation of the US$500m said to have passed from KCM to Vedanta each year but given the reliance placed on Mr. Agarwal's comments Vedanta's press release ought to have been mentioned. Similarly, the press release explaining the commercial rationale for the restructuring of Vedanta in 2012 ought to have been mentioned in circumstances where reliance was placed on that restructuring. Mr. Yaluma's expression of support for KCM in his letter dated 3 March 2014 was material to the question of the attitude of government to KCM. Finally, Deloitte's comment on the sales of copper being at arm's length was material to the question whether there had been sales at undervalues to a subsidiary of Vedanta.

94. These breaches are serious and numerous and therefore suggest that the appropriate course is to refuse to continue the WFO in order to reflect the importance of the duty to give full and frank disclosure. The fact that the WFO would otherwise be continued is not by itself a reason why the court should refuse to discontinue the WFO. But it is a factor which requires the court to consider carefully whether discontinuance of the WFO is in the interests of justice.

95. In that regard I have considered the following matters:

i) Apart from the failure to mention the exclusive enforcement clause in favour of Zambia, the respects in which U&M failed in its duty of full and frank disclosure related to the finances of KCM. They did not relate to the conduct of KCM in the arbitration or in its challenge to the second arbitration award before this court. That is the conduct from which can be inferred the risk that KCM, unless restrained, will seek to deal with its assets other than in the ordinary course of business with a view to making enforcement of the arbitration awards more difficult.

ii) The failures to comply with the duty of full and frank disclosure were innocent in the sense that they were not deliberate. The very length of Mr. Hirst's first affidavit evinces an intention to put all matters thought to be relevant before the court. It may be that Mr. Hirst was aware of the exclusive enforcement clause and chose not to refer to it. But his failure to refer to it was not "deliberate" because he appears not to have appreciated its relevance.

iii) The court's order must mark the importance of complying with the duty of full and frank disclosure and serve as a deterrent to ensure that persons who make *ex parte* applications realise that they must discharge that duty. That purpose can be satisfactorily achieved, in an appropriate case, by an appropriate order as to costs.

96. Having considered these matters I have concluded that, notwithstanding the seriousness and number of the respects in which U&M failed in its duty of full and frank disclosure, it is in the interests of justice to continue the WFO but on terms that U&M bears its own costs of the *ex parte* and *inter partes* application and pays one-third of KCM's costs of resisting continuance of the WFO on the indemnity basis. Such an order, whilst giving legitimate protective relief to U&M, will also reflect U&M's failure to comply with its duty of full and frank disclosure.