Neutral Citation Number: [2018] EWHC 2149 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 30th July 2018

Before :

Mr Justice Popplewell

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Between :

The Fundo Soberano de Angola and others — **Claimant**

- and –

José Filomeno Dos Santos,
Jean-Claude Bastos De Morais,
Quantum Global Investment Management AG
and others
and The Northern Trust Company — **Defendant**

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Paul McGrath QC, Nik Yeo, Alexander Milner (instructed by **Norton Rose Fulbright**) for the **Claimant**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **1st Defendant**
Stephen Auld QC and Alex Brown (instructed by **Grosvenor Law**) for the **2nd Defendant**
Philip Edey QC, **Andrew Fulton, Sam Goodman** (instructed by **Quinn Emanuel**) for the **3rd – 20th Defendants**

Hearing dates: 30th July 2018

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APPROVED JUDGMENT

MR JUSTICE POPPLEWELL Monday 30th July 2018

(3.00 pm)

Ruling by MR JUSTICE POPPLEWELL

1. I would want to take time to consider my judgment and formulate detailed reasons in writing. However, I am conscious that it has taken some time to list the return date and for the application to discharge the freezing order to come on, and it is said to be causing considerable prejudice to the defendants.
2. I have reached a clear view that, for at least some of the reasons advanced, the freezing order should be discharged in its entirety and no fresh freezing order granted. In particular, there were breaches of the duty of disclosure in failing to draw attention to material matters which were or ought reasonably to have been known to the claimants and their legal advisers so as to make a fair presentation of the issues which the judge had to consider.
3. I therefore propose to discharge the injunction now, to grant a stay under Section 9 of the Arbitration Act 1996 in respect of the claims which it is agreed are subject to arbitration agreements, and otherwise to reserve my decision and my reasons in relation to jurisdiction and case management.
4. I will give brief reasons for my decision in respect of the freezing order. They will be replaced in due course with fuller written reasons and are not to be treated as an approved judgment for reporting purposes, although the result may, of course, be published. I do so because the claimants should have an idea now as to why they have lost on the freezing order issues, and in case they wish to argue for permission to appeal and a continuation of the freezing order pending such appeal or pending an application to the Court of Appeal for permission.
5. I should make clear that the arguments which I do not address in this judgment have neither been accepted nor rejected; they will be dealt with in my written judgment in due course. These

reasons, therefore, do not necessarily constitute the entirety of the reasons for discharging the freezing order.

6. There was, in my judgment, a breach of the duty of disclosure in at least the following seven respects.

7. First, there was non-disclosure and an unfair presentation in respect of the selection process in a number of ways. The claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr Dos Santos being chairman of that organisation, which subsequently became FSDEA, and at a time when Dr Manuel was chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered in an IMA with the Petroleum Fund on 13 July 2012, signed by Dr Manuel, and Quantum entities had been engaged in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, again signed by Dr Manuel. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments, and two in respect of equity investments in infrastructure and hotel projects respectively. None of the presentations were made by Mr Bastos. The presentation in relation to the liquid portfolio was by a Mr Gareth Fielding QGIM's chief investment officer since 2008, with 25 years' experience in asset management, including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, a Mr Ulrich Otto, who had more than 10 years' experience in private equity investments involving assets which reached more than $2 billion in value and who sat on the supervisory board of a company with revenues of $1 billion. The presentation contained detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by a Mr Antoine Castro, Quantum's director of real estate, with extensive prior

experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages. There was no attempt to put those before the judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA, nor to address whether the selection at that stage was made otherwise than on merit. Instead, Mr Morris' first affidavit and the skeleton argument put before Mr Justice Phillips gave the misleading impression that the selection had been entirely that of Mr Dos Santos and that it had been made in 2013 when he was chairman.

8. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of his first affidavit, he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr Dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, or any part of them, and before any selection process, whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and the December 2012 addendum were each signed not by Mr Dos Santos but by Dr Manuel. The subparagraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for six months, amounting in total to $264 million. That would have been indeed breathtaking, to use the epithet applied to the fees in the claimants' skeleton argument, but it was wrong. The fees were $44,000 monthly, giving a total of $264,000 for six months.

9. It was also misleading to characterise the process, as the claimants did in the skeleton argument, as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as apparently "the extent of the selection process". Again, this ignores the selection process in 2012 which involved the detailed presentations from Quantum. The false impression was reinforced by the assertion at paragraph 31 of the Ernst & Young report that no proposals were requested from any of the four potential managers, ie including Quantum, which implied that there had never been any proposal from Quantum.

10. Moreover, Mr Dos Santos gave a fairly lengthy account of the selection process and of the rationale for appointing Quantum in a letter of 27 September 2013, addressed to Jersey trustees, who were then contemplated as potentially being involved in the management of the Fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not in evidence before the judge on the without notice application and its contents were not referred to.

11. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However, it seems likely that the existence of the prior appointment of the 2012 IMA and of the 2012 proposals were known to those at FSDEA with the conduct of the case; and that they were known to Mr Goncalves, who was on the Board throughout the period and remains an adviser to FSDEA and who provided a subsequent witness statement. I say he was on the Board throughout the relevant period because although in his own statement he describes himself as being on the Board from October 2012, Mr Morris in his fifth affidavit says that Mr Goncalves was on the Board from March 2012; and importantly, Mr Goncalves himself refers, at paragraph 26 of his subsequent witness statement, to seeing one of the presentations in May 2012. It also seems to me likely that the circumstances of the 2012 appointment and the 2012 presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013, and on the Board from 2016, from whom Mr Morris did take instructions at the time of the

without notice application. I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Goncalves, and he gives evidence about those topics. At the very least, the circumstances of the 2012 selection presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

12. These were important matters. One of the central elements of the case against the defendants is that it was Mr Dos Santos, as chairman of FSDEA, who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a different complexion on that selection.

13. Secondly, there was non-disclosure and a failure to make a fair presentation of Quantum's track record and suitability. Mr Morris described Quantum as "an unknown and untested entity", and in paragraph 14 of the skeleton argument put before the judge Quantum was described as having a "limited track record" with a capitalisation of only 100,000 Swiss francs, and was contrasted with other candidates of the size and calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the judge not only that Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, but that as part of that process Quantum had identified in its proposals the apparently well-qualified staff with apparently extensive relevant asset management experience who were employed by Quantum, and, further, the independent board members, apart from Mr Bastos, who were of apparent eminence and experience. It should have been explained that Quantum in fact had a capitalisation of 1 million Swiss francs and had had that capitalisation since 2007, as the detail in the Ernst & Young report accurately recorded.

14. Moreover, Quantum had managed assets for the Banco Nacional de Angola, the Angolan Central Bank, of US$2.3 billion dollars in liquid assets and a further US$1 billion in private

equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at paragraph 39 of his first affidavit by saying that:

"It appears from the documentation generated for the purposes of Project Rainbow ... that Quantum Global, at least at one point, managed several hundred US dollars (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA."

15. Again, these were important matters which were known to the claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he says he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or lack of it, was at the heart of the allegations on which the claimant's case is founded.
16. There was, additionally -- although this is a less significant matter -- an unfortunate mischaracterisation in relation to Mr Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence, whereas, as was apparent from the material available to Mr Morris and from which he took his information, the sanction was in fact a suspended sentence of a fine, ie a fine payment of which was suspended, and which in the event Mr Bastos was not required to pay, save in respect of the small sum of 4,500 Swiss francs, which was an immediately payable fine which was not suspended.
17. Third, there was non-disclosure and a failure to make a fair presentation of the extent to which the appointment of Quantum and its activities in carrying out the investment management were transparent and regularly reported on to an audience within FSDEA beyond Mr Dos Santos. The

claimants did not disclose or draw to the judge's attention as they should have done the following.

18. The Board of FSDEA was, by Presidential Decree, overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President, whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA policy and the investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development and the Governor of the National Bank of Angola. Its role was not specifically addressed in the evidence or argument before Mr Justice Phillips, apart from an inaccurate reference in the Ernst & Young report suggesting that the body never met; inaccurate because Mr Goncalves' later evidence is that it met at least once.
19. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance, and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports, and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example it had detailed reports on the Illiquid Portfolio from Deloittes. Moreover FSDEA's accounts were audited by Deloittes.
20. Quantum also provided regular reports on the investments, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid Portfolio, which contained the sort of information one would expect from investment managers.
21. None of this was addressed in the claimants' evidence or argument, or drawn to the judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable enquiries. Again, it was of importance to the case being advanced.

22. Fourth, there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The judge's attention was not drawn to the fact that the Ernst & Young report described the structures used for the Illiquid Portfolio as based on a standard model and that:

    "Such models are commonly used in PE and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

23. In argument before me, the thrust of the complaint changed to one that the limited partnership structure was only suitable for collective investment schemes, that is to say where there was more than one investor. But this was not the position taken by Deloittes in its audit reports, which made no criticism of the structure as such. Nor was it the subject matter of any criticism by the Mauritian authorities, at least in relation to five of the seven limited partnerships. The judge should have been told that both Ernst & Young and Deloittes had not treated the structures used as inappropriate and that they were a commonly used model. This was obviously important given the criticisms which were being made of this structure.

24. Fifth, there was non-disclosure in relation to the allegation of conflict of interest in the projects within the illiquid portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016, Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy and expressly disclosing a number of transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and in relation to conflicts dealt with in accordance with the policy by counter signing the letter. The disclosure included a hotel

project in Luanda in which some US$157 million had been invested, which had been the subject matter of identified criticism by Mr Morris in his affidavit. The letter and waiver were signed not only by Mr Dos Santos but also by Mr Fortunato, another Board director against whom no allegations of impropriety are made.

25. The 17 August letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris has said that he and the team preparing the application were unaware of it at the time because it was part of a set of over 750 documents which Norton Rose Fulbright had received as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath QC accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Norton Rose Fulbright to have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and the size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the material it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it unless there were constraints of time or expense which made this impossible. Neither existed in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum, and if the material was interrogated for that purpose, it should have been fully interrogated. In any event, Mr Fortunato was obviously aware of the letter and reasonable enquiries would have extended to all the Board members in place at the relevant times, including Mr Fortunato, whom it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application, whether or not that availability was taken advantage of at the time of the without notice application.

26. Sixth, there was non-disclosure and an unfair presentation in respect of the fees charged on the illiquid portfolio. The fees as a whole, then put at some US$515 million, were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio there was further criticism that the fees were charged on the full amount of the portfolio of US$3 billion, when the amount invested in the project was only a much smaller part of that, with a sum in excess of US$2.2 billion remaining uninvested and held in liquid funds at the date of the freezing order. There are several elements to what the judge was not told as he should have been.

27. As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as Ernst & Young noted as paragraph 54 of their report, to which the judge's attention was not specifically drawn. In the course of the hearing before me, Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the claimants thereby lost visibility and control, and when pressed, he conceded that this was the only vice of which complaint was made. But this was not how the matter was presented to Mr Justice Phillips, before whom the criticism was not confined to this aspect. On the contrary, it was suggested that the improper purpose of the drawdown into the partnership accounts, or at least one of the improper purposes, was "to extract management fees by reference to the entirety of the US$3 billion even though most of it has been sitting in cash or cash-like securities"; see the skeleton argument at paragraphs 16.5(b), and see also the skeleton argument at paragraph 16.7, which made this criticism as a matter of "the structure by which the fees were calculated".

28. Further, the judge was not told what appears now from paragraph 23 of Mr Goncalves' subsequent witness statement, namely that he was aware of reasons given at the time for the funds going into the partnership accounts, having been told by Mr Dos Santos in 2013 that: "The fund was going to face increasing pressure in the economy and pressure to access its funds,

so he wanted to use the funds now and put them into the private equity fund so as not to give appetite to the State to come and use the funds". Mr Goncalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

29. Moreover, on the Illiquid Portfolio, the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio, which accounted for over US$100 million of the fees on the figures then presented, and 2.5% plus 20% in relation to the hotel and other illiquid portfolios, which accounted for the balance in relation to the Illiquid Portfolio. The judge did not have specifically drawn to his attention paragraph 53 of the Ernst & Young report, which describes 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to the Petroleum Fund in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again, a matter not drawn to the judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on, US$263.4 million out of US$515.84 million.

30. The level of fees charged was another of the central elements of the case against the defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

31. Seventh, there was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February and 4 March 2018, Northern Trust had made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instruction from both FSDEA and Quantum, and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, Sidley Austin, which was largely addressed to requests which were made for disclosure, Northern Trust reiterated that there would be no change of position without prior

notification. The first two letters were referred to in a narrative section of Mr Morris' affidavit but were not identified in the section on risk of dissipation and were not referred to at all in the skeleton argument and were not drawn to the judge's attention. The third letter, that of 16 March, was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but it was referred to at paragraph 190 of Mr Morris' first affidavit and in the claimants' skeleton argument in sections which addressed risk of dissipation. It was there addressed in support of a case that Northern Trust's statement that it would give prior notice was no more than a current intention, which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. That was to mischaracterise the correspondence as a whole which, read as a whole and fairly, suggested that Northern Trust were caught between conflicting claims and would not take any steps without the agreement of both parties.

32. Had the judge been shown the correspondence or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the claimants being given sufficient advance notification to afford an opportunity to come before the court in those changed circumstances, if necessary. That is my view of the correspondence, with the result that, irrespective of this aspect of non-disclosure, the claimants have not made out a case of risk of dissipation in respect of over two-thirds of the amount covered by the freezing order.

33. Those seven breaches of the duty of disclosure, or perhaps more accurately groups of breaches, taken cumulatively are serious. They are substantial and they are culpable, although I make clear that I do not find that there was any deliberate breach on the part of the claimants' legal team. They do not relate to a few merely peripheral matters but to numerous matters at the heart of the claimants' case. The court was being asked to infer a dishonest conspiracy by which Mr Dos Santos sought improperly to benefit his friend and associate Mr Bastos and to infer a

consequent risk of dissipation from four central allegations, namely (1) that Mr Dos Santos was solely responsible for appointing Quantum without any proper selection process, (2) that Quantum was not properly qualified for the task, (3) the extraordinarily high and unjustified level of fees charged, and (4) the funds being used to benefit entities owned by or associated with Mr Bastos, involving an undisclosed and inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the claimants to say that the subsequent evidence put before the court to deal with these matters raises disputes which are sufficient to surmount the merits hurdle of a good arguable case.

34. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood, but the unfair presentation in this case, in the respects I have identified, goes far beyond the odd accidental slip and goes to the central elements of a case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no very urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds or some information which suddenly suggested urgency. The matter had obviously been under consideration for many months, at least since receipt of the Ernst & Young report in December 2017. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use as large a team as was necessary to make the necessary enquiries and to consider all the documents which needed to be considered. Given the size of the freezing order sought and the allegations of dishonesty being made, it was incumbent on the claimants and their legal advisers to make the fullest enquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris did emphasise in his first affidavit the limits on the enquiries which had been made, that does not itself excuse a failure to make the necessary enquiries, nor the presentation of incomplete material in an unfairly one-sided way.

35. I have therefore concluded that the breaches the duty are sufficiently serious and culpable to warrant discharging the freezing order and not granting fresh relief, irrespective of the other grounds of challenge. When, in this judgment, I have referred to "the freezing order", I intend to include the proprietary order within that description. I will therefore make those orders now.