

**Judgment 45/2003**

**Seed International Ltd v  
Tracey et al  
Royal Court  
(Civil Action File 702)  
3<sup>rd</sup> November, 2003**

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**Law Reform (Miscellaneous Provisions (Guernsey) Law, 1987 – freezing and disclosure orders – application to set aside – substantive proceedings to be held in the Netherlands – criteria for grant of Mareva relief – whether good arguable case, risk of dissipation and just and convenient to grant the relief sought – courts will take into account the evolution of commerce and finance.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 3rd day of November, 2003 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

In the matter of

- (1) DR RONALD TRACEY
- (2) DR DONALD F. SHELLER
- (3) SANDRA K. SHELLER
- (4) DR GARY LEWIS KAPLOWITZ
- (5) DR ELISEA SINGSON
- (6) DR JOHN A. CARPENTER
- (7) DR KURT A. WEISENFELS
- (8) DR ARTHUR S. LEON
- (9) DR LOUIS SOMMERHALTER
- (10) DR DAVID W. HOPEWELL
- (11) DR EDWIN J. FRINK
- (12) DR KIM C. HENDRICK
- (13) DR ROBERT B. DAVIDSON

Applicants

And

- |  |                    |
|--|--------------------|
| (1) SEED INTERNATIONAL LIMITED   | First Respondent   |
| (2) OCEAN INTERNATIONAL MARKETING B.V.<br>(also known as or trading as HEROS GLOBAL MARKETING) | Second Respondent  |
| (3) CRAIG DOUGLAS GARRETT  | Third Respondent   |
| (4) SEAN RONALD STOCKDALE  | Fourth Respondent  |
| (5) DISNEY LIMITED   | Fifth Respondent   |
| (6) THE KENSINGTON CORPORATION LIMITED   | Sixth Respondent   |
| (7) THE ROYAL BANK OF SCOTLAND INTERNATIONAL LIMITED   | Seventh Respondent |
| (8) THE ROYAL BANK OF SCOTLAND (GUERNSEY) LIMITED  | Eighth Respondent  |

WHEREAS on the 19th - 21st May, 2003, the Court considered the First Respondent's applications dated 6<sup>th</sup> December, 2002 and 13<sup>th</sup> December, 2002 (attached) and having heard Advocates A.D. Laws and J.J.L. Morgan, Counsel for the Applicants and Respondents respectively, reserved judgment;

THE COURT this day handed down judgment, in the terms attached hereto, and ORDERED as follows:

**Order in relation to the freezing of the assets of Seed and disclosure of information and documents by RBS International.**

1. The freezing order will remain in place.
2. RBS International must produce to the Applicants Advocate:
  - (i) Copies of all documents and records in the possession or control of RBS International relating to the Specified Bank Account plus
  - (ii) Copies of all documents and records in the possession or control of RBS International relating to any other account held by Seed.

- (iii) Copies of all statements, details of transfers in and out of the account(s) and a copy or copies of the mandate(s) held by RBS International in so far as not covered by (i) and (ii) above.

Provided always that the information to be provided by RBS International shall be limited to such information as will enable the Applicants to discover the nature and whereabouts of assets directly and indirectly owned by Seed, Ocean, Mr Garrett or Mr Stockdale.

If RBS International is in doubt as to whether information ought to be disclosed for the purposes of discovering the nature and whereabouts of the assets of Seed, Ocean, Mr Garrett and Mr Stockdale or the extent to which documents may need to be edited then it may seek directions from the Court.

3. RBS International must produce the information and the documents by the 17<sup>th</sup> November 2003.
4. Subject always to this order the other orders granted by the Bailiff shall remain stayed until 31<sup>st</sup> December 2003 or until further order.

AND THE COURT deferred judgment on the security for costs application, until hearing any argument on the matter of costs.

Her Majesty's Deputy Greffier.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY  
ORDINARY DIVISION**

**Between**

**TRACEY and OTHERS**

**Applicants**

**V.**

**SEED INTERNATIONAL LIMITED**

**Respondents**

**Judgment of Rowland D.B.**

**Advocate A. D. Laws for the Applicants.**

**Advocate J. J. L. Morgan for the Respondents**

**Hearing dates: 19<sup>th</sup> – 21<sup>st</sup> May 2003 and 24<sup>th</sup> October 2003**

**Judgment handed down: 3<sup>rd</sup> November 2003**

Legislation referred to:

The Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987  
Sec. 37(i) of the Supreme Court Act 1981

Cases and other authorities referred to:

1. O'Mahony v Horgan 1995 21R 411
2. Ninemia Maritime Corporation –v- Trave Schiffahrtsgesellschaft Gm.b.H Und Co.K.G. 1983 1 WLR 1412
3. Dubai Aluminium Co. Ltd –v- Al Alwai and Others [1999] 1 AER 703
4. Bank Mellat –v- Nikpour (1985 FSR [87])
5. Matheson Securities (Channel Islands) Limited –v- Hulme (1997) 24 GLJ 60
6. Brink's Mat –v- Elcombe [1988] 1 WLR 1350
7. Siporex Trade SA v Comdel Commodities Ltd (1986), Lloyds Rep 428
8. Abbasford Ltd v PolyFocus (Europe) Ltd Court of Appeal (Civil Division) Transcript No 1044 of 1989 (2 November 1989)
9. Norwich Pharmacal v Customs and Excise Commissioners [1974] AC 133
10. Bankers Trust Co –v- Shapira [1980] 1 WLR 1274
11. Bekhor –v- Bilton [1981] 2 WLR 601

12. Armco and Others –v- Donohue and Others (Jersey Royal Court 1999, 185)
13. Vardinoyannis –v- Ansol (Royal Court 20.11.01)
14. Morgan Stanley International v Alfio Puglisi Consentino (Royal Court 28 December 1992)
15. News International and Other –v- Clinger and Others (Royal Court 10.05.96)
16. Republic of Haiti and Others –v- Duvalier and Others [1989] 2 WLR 261
17. Astro Exito Navegacion SA v Chase Manhattan Bank N.A. (1983) 2AC 787
18. Gidrxslme Shipping –v- Tantomar Transportes Maritimos Lda (The Naftilos) [1995] 1 WLR 299
19. Vidatech Corporation v Crystal Decisions UK Ltd (2002) EWCA Civ. 356
20. Grupo Torras –v- Sheik Fahad Mohammed Al-Sabar (CA Civil Division Transcript No 159 of 1994)
21. Irish Permanent Building Society –v- Farrell (Royal Court 04.10.93)
22. A and Another –v- C and Others [1981] 1QB 956.
23. Nova Nordisk A/S and others v Banco Santander (Guernsey) Limited (Royal Court 31.01.00)
24. Derby and Co. Ltd and Others –v- Weldon and Others 9Nos 3 and 4) [1990] Ch 65.
25. Gee Mareva Injunctions and Anton Piller Relief, Chapter 17, 4<sup>th</sup> Edition pp Chapter 17, 4<sup>th</sup> Edition pp 346-366

## **THE PARTIES AND THE APPLICATIONS**

1. On 22<sup>nd</sup> November 2001 on behalf of Dr. Ronald Tracey and twelve others (hereinafter called the Applicants) application was made without notice to the Respondents by Advocate Helyar to the Bailiff for an injunction prohibiting disposal of assets and ordering disclosure of information in anticipation of substantive proceedings being instituted in the Netherlands where five of the Applicants had obtained pre action conservatory arrests orders.
2. The Applicants are doctors or dentists residing in the United States of America or in one case the wife of such a dentist.

### **Restraint and freezing order applications**

3. The Applicants sought injunctions against the First Respondent Seed International Ltd. formerly know as Churchill Associates Ltd. (Seed), the Second Respondent Ocean International Marketing BV formerly known as Heros Global Marketing Services BV (Ocean), the Third Respondent Craig Garrett (Mr. Garrett) and the Fourth Respondent Sean Stockdale (Mr. Stockdale), prohibiting each of them until further order from charging, dealing or disposing of assets within the jurisdiction of the Court up to a value of US \$6,125,035. The First to Fourth Respondents are not resident within the jurisdiction of the Court.

4. Seed was incorporated in the Cayman Islands. It had promoted investment inter alia in wine. Ocean was incorporated in the Netherlands and operates from there. It had acted as Seed's sole agent and its only client and dealt with clients of Seed. Mr. Garrett and Mr. Stockdale were directors of Ocean.
5. The Fifth and Sixth Respondents were Disney Ltd. (Disney) and the Kensington Corporation Ltd. (Kensington). They are resident within the jurisdiction of the Court. They are both licensed by the Guernsey Financial Services Commission to carry on fiduciary business in Guernsey. Kensington was incorporated in Alderney. It carries on business in Guernsey and has provided company administration services to Seed. Disney is a subsidiary of Kensington. It was incorporated in Guernsey. It had for some time been a corporate director of Seed. It had executed documents on behalf of Seed. The Applicants sought an injunction against both of them until further order from disposing of assets held for the First to Fourth Respondent within the jurisdiction of the Court.
6. The Seventh Respondent was the Royal Bank of Scotland International Ltd. (RBS International) and the Eighth Respondent was the Royal Bank of Scotland (Guernsey) Ltd. (RBS Guernsey). Both are licensed by the Guernsey Financial Services Commission to carry on banking business in Guernsey. An order was sought requiring both of them to freeze assets held for any of the First to Sixth Respondents up to a value of US \$6,125,035.
7. The prohibition on dealing with assets and the freezing orders were to be the subject of exceptions which would permit the First to Fourth Respondents to deal or dispose with any of their assets in the ordinary course of business subject to a requirement to give notice to the Applicants' Advocates. Furthermore, any order could be varied by agreement with the Respondents' Advocates and any order would cease if a Respondent provided security in a manner acceptable to the Applicants' Advocates. A judgment obtained in the Netherlands is capable of recognition and enforcement by the Royal Court under reciprocal enforcement legislation.

#### **Disclosure order applications**

8. The Applicants sought orders requiring Disney, Kensington and the two Banks to provide information to the Applicants' Advocates. Disney and Kensington were required to provide information within three days of service of the order of all assets and accounts held by them for the First to Fourth Defendants. They were also to provide information within such period relating to Bank Account No. 561 56825 (the Specified Bank Account) including details of the account holder, its full legal title, its place of incorporation or formation, its registered

office and place of business. They were also to provide copies of all documents or records in their possession or control relating to the First to Fourth Respondents.

9. The two Banks (the Seventh and Eighth Respondents) were to provide within ten days of service of the order copies of all documents or records in the possession or control of Disney and Kensington relating to all dealings with or accounts held by the First to Fourth Respondents. Furthermore they were to provide information within three days of service of the order on the balance standing to the credit of any account held for the First to Fourth Respondents including the Specified Bank Account and copies of all documents or records relating to all dealings with or accounts held by the First to Fourth Respondents.
10. The application to the Bailiff was supported by an affidavit sworn by Advocate Helyar dated the 21<sup>st</sup> November 2002 and his 4 page skeleton argument. He had been instructed by Mr. Harmen Hoek (Mr Hoek), a Netherlands' Advocate. Appended to the affidavit of Advocate Helyar was a 12 page statement signed by Mr. Hoek on 12<sup>th</sup> November 2002, appended to which were affidavits of each of the Applicants sworn in September, October and November 2002 relating to their dealings with Seed and Ocean. Those affidavits varied in length, in content and in terms of documents appended to them. There would inevitably be differences in the dealings of Applicants with Seed and Ocean. There was also a second additional statement signed by Mr. Hoek dated 15<sup>th</sup> November. Exhibits included copies of correspondence with the Securities Board of the Netherlands, a statement by a former employee, Mr. Philip Beesley (Mr. Beesley), and copies of conservatory arrest orders obtained in Rotterdam by five Applicants in relation to any assets in the Netherlands of Seed, Ocean, Mr. Garrett and Mr. Stockdale.
11. In his affidavit Advocate Helyar stated that Disney and Kensington were likely to have either control of the First to Fourth Respondents' assets within the jurisdiction of the Royal Court or elsewhere and also information which would assist the Applicants in identification and if necessary, tracing of the assets, officers and directors of Seed and Ocean. It was believed that Seed had a bank account (the Specified Bank Account) with one of the Banks who were the Seventh and Eighth Respondents but it was not known which of those banks within the Royal Bank of Scotland banking group.

#### **THE INFORMATION CONSIDERED BY THE BAILIFF ON 22<sup>ND</sup> NOVEMBER 2002**

12. It is appropriate to review the information contained in the papers submitted to the Bailiff.
13. The detailed information put before the Bailiff may (for the purposes of this matter in the Royal Court) be summarised as follows:-

**The Collectables Programme – Champagne, Bordeaux and Spanish wine.**

14. Seed had, in 1996 or thereabouts, promoted investments in wines, luxury goods and other collectables.
15. Wine investments were promoted through its sole agent Ocean which operated at all material times from the Netherlands. Ocean employed a team of salesman who contacted the Applicants and apparently over 2000 other investors with a view to encouraging them to invest substantial sums in wine. It would appear that from some date in the early days initial contact was made with potential investors from Canada. Once interest had been generated by Ocean salesmen in Canada, investors were contacted by Ocean salesmen in the Netherlands. The Applicants were encouraged to commit monies to investments in Champagne, Bordeaux and Spanish wines under what was named the Collectables Programme.
16. The scheme of things was that investors received a brochure promoting membership of a wine membership programme. The brochure purported to contain summaries of material documents and/or agreements. The brochure contained little indication of such terms. Would-be investors were directed to note the terms which were to be found in other documents.
17. The Applicants apparently agreed to invest substantial sums during telephone calls with Ocean employees during which they had promoted wine investments as interesting and sound investment opportunities.
18. Only then were the Applicants required to complete an Account Opening Form with Seed (then still known as Churchill Associates Ltd.). After the form had been received and accepted by Seed it opened an account subject always to adherence by Applicants to the terms and conditions of the Member's Agreement pursuant to which investors joined the Churchill Collectable Programme. Investors also entered into an Agency Agreement with Seed which set out inter alia the terms on which investors would invest monies in the programme administered by Seed. Investors thereby appointed Seed as their agent for the purpose of purchasing parcels of wine.
19. The Agency Agreement was a document which was type set in small print. Its provisions indicated that payments constituted a down payment on an item to be purchased on a pre-determined date. Seed was empowered to execute the Membership Agreement on behalf of the investor. Purchase of a parcel of wine would be transacted by way of telephone dealing based on offer prices. Seed was an intermediary between the purchasing and selling member. A member waived his rights to be informed by Seed of the identity of the seller of a parcel to the member. If a sale was transacted Seed was entitled to commission at the rate of up to 60% of

any gross profit. Seed as agent gave no warranties as to title, authenticity, quality or condition or otherwise whatsoever. The Agreement provided that a member could not sell or otherwise deal with an investment parcel without Seed's agreement and would within a one year period accept reasonable recommendations from Seed in relation to the sale and purchase of investment parcels. Seed undertook to repay to a member any profits held to the members order given 30 days notice to that effect but not within one year of the most recent purchase of a parcel. Monies standing to the credit of a member would not accrue any interest unless agreed in writing by Seed. Seed had full and complete discretion to trade a parcel at any time and purchase syndicated parcels i.e. more than one client purchasing the same parcel. The agreement was to constitute the entire agreement and all other terms and conditions including (without limitation) any representations or implied terms were excluded.

20. The agreement was governed by the law of the Cayman Islands. Disputes were to be referred to arbitration in the Cayman Islands under Cayman law. Arbitration costs were to be borne as to 75% by the member and 25% by Seed. If the claim was made by the member, then the member had to appoint an arbitrator within 6 months of a dispute arising, or the claim would be deemed to be absolutely barred and Seed discharged of all liability. There was no reciprocal provision in relation to Seed. Any notice was to be served not at Seed's registered office but on Seed's agent Ocean at its address in Rotterdam or other address notified by Seed from time to time.
21. It may be that investors had not seen or completed documentation before their first purchase of a parcel but it would appear they would have done so at some time and this probably occurred for most Applicants before entering into purchases of new parcels in place of original parcels since successive sales and acquisitions seems to be the general pattern.
22. An investor after making an investment would subsequently receive a Certificate of Conditional Ownership. The expectation or hope of investors was that they would be able to sell their investments before follow-up payments fell due. Perhaps because of the pitch made by Ocean employees to them Applicants did not consider what might be the position if the investments proved to be poor and as a consequence no new investors would wish to purchase wine parcels from the Applicants. Salesmen encouraged Applicants to sell some small investment parcels. Perhaps comforted by the fact that sales had proved possible at a profit Applicants were invariably tempted to invest more substantial sums and did so. Solicitation phone calls from Ocean salesmen were frequent. Investment meetings and a cruise were also mounted by Ocean to promote a range of investment opportunities including investment in wine. Applicants were encouraged to roll the sale proceeds (net of commission) together with additional funds into the purchase of a new wine contract. The standard contract in those days

provided that invested funds and resulting profits were to be held for 12 months by Ocean before returns could be made to Applicants and this period was to reckon from the date of the most recent purchase. At no time did sale documentation provided to the Applicants name the purchaser. The Applicants were taking it upon trust that there existed purchasers. In those days they appear to have taken this upon trust. It is likely that the extent to which Applicants were pressurised by sales talk or felt pressurised varied from one Applicant to another, from one salesman to another and varied from time to time. There may have been some investors who investigated the prospective investments in detail and entered into transactions fully cognisant of the risks associated with investing in wine parcels and the sums to which they were committing themselves. Suffice it to say that does not appear to have been the position so far as the Applicants are concerned. Many of them claim to have had little cognisance of the contractual terms.

23. I do not review in detail each affidavit and appended document but refer briefly to that of the Eighth Applicant (Dr Leon). Dr. Leon, says that in 1999 he tried to take out money rather than roll over the net stated profits into the purchase of a new wine parcel. He encountered considerable difficulty in receiving repayment. The hope that the volume of Champagne sales for the Millennium celebrations would outstrip supply had not materialised. The price of Champagne had not risen as anticipated. Dr. Leon alleges that he has received only part of what he claimed was due and payable to him. The difficulty which he claims he encountered was that account managers ceased to manage his account. Successor account managers claimed not to be aware of promises made by their predecessors. Between 2000 and early 2002 he claims matters did not improve.
24. Affidavits indicate that many Applicants encountered similar responses or otherwise had serious complaints. Some were unable to fund monies to pay the balance of funds which Ocean said they were contractually bound to pay. The Applicants were deeply troubled.

#### **The Wine Programme Agreement (the WPA) - Italian wine**

25. During the course of 2001 Ocean salesmen were encouraging Applicants who were unable or unwilling to make scheduled payments or wished to sell parcels to enter into what they termed a new Italian wine investment programme. It was promoted as an attractive investment. Applicants claim that a specific feature promoted to them was that there would no longer be a 12 month period before sale proceeds could be returned. Instead investment returns would be fully liquid and available shortly after a sale had been effected. Applicants appeared to be reassured by this information and agreed to roll over their existing wine

contracts into the WPA. As was the case previously they were encouraged when so doing to introduce further monies.

26. The WPA was not promoted to all Applicants at the same time. Some investors heard about it in mid 2001 or thereabouts, others not until early in 2002.
27. A new contract document was sent to Applicants for signature some time after they had committed themselves to invest in the WPA. It differed from the Collectables Programme in many respects. It was a contract between Seed and the client. Seed was now constituted as a purchaser and vendor of wine. It was not a membership scheme like the Collectables Programme. The WPA provided that if the client has purchased or sold wine (a Prior Transaction) through or with Seed or its sales agent then all existing rights and unperformed Prior Transaction obligations were irrevocably waived, released and abandoned by both parties. Prior Transactions for the Applicants meant their investments under the Collectables Programme. Deposits and part payments were deemed to be a deposit for the purposes of the WPA. Any current unpaid balance in respect of a Prior Transaction was deemed to be an unpaid balance under the WPA. Any Certificate of Conditional Ownership in respect of a Prior Transaction was deemed a Purchase Certificate under the WPA. Any profit rolled from the Collectables Programme into the WPA remained subject to what remained of the 12 month payment delay provision. New purchases under the WPA would not be subject to the 12 month delay period. The WPA would replace and supersede any prior agreement, arrangement or undertaking, whether written or oral between Seed and its affiliates (so defined so as to include Ocean) and the client.
28. There were to be several different purchase scenarios under the WPA:
  - (i) Seed might sell to a client a parcel of wine which it owned or which was in its possession when an order was placed, or
  - (ii) Seed might sell a parcel which it had contractual right to acquire. If Seed was not able to acquire a parcel by the proposed delivery date then Seed was to refund whatever the client had paid towards the acquisition of the parcel. Seed would have no further obligation to the client, or
  - (iii) Seed would make commercial efforts to acquire a parcel before an agreed delivery date. If unable to acquire it by the agreed delivery date or at a price acceptable to Seed in its sole discretion, then Seed was obliged to refund the client the sum paid by the client. Seed would have no further obligation to the client.

29. Purchase price, deposit, payment and delivery terms for each parcel were to be agreed at the time the order was placed. A Purchase Certificate would be sent after the order was placed and deposit paid. A client could after payment of the deposit offer to sell a parcel to Seed. If, however, a client wished to sell it to a third party Seed had a first option to purchase. Seed was entitled to a transaction fee on any sale. There were provisions in regard to deposits and unpaid balances. Any non payment of unpaid balances would result in forfeiture of all monies paid to date as damages. There was a 45 day cancellation period exercisable by a client but if exercised the deposit would be forfeited.
30. Interest on sales proceeds would not accrue unless specifically agreed with Seed. If a client required wine to be delivered to him then it was for him to arrange this at his expense, it was at his risk and he must deal with any applicable taxes and laws governing transportation of wine. Seed did not represent to clients that it was a wine expert. Seed did not give any warranty of merchantable quality or fitness for purpose of wine nor authorise any other person on its behalf to do so.
31. In the event that Seed failed to exercise reasonable care and skill in exercising its duties its liability was to be restricted to the amount paid to Seed by the client in respect of the parcel. Seed accepted no liability for the accuracy of its promotional material including web site information.
32. The agreement also included a confidentiality clause requiring the client not to divulge to any third party (other than professional advisors or in court proceedings) its dealings with Seed upon pain of forfeiting to Seed any monies paid to Seed in respect of any order without prejudice to other rights or remedies open to Seed.
33. The agreement was governed by the law of the Cayman Islands. Disputes were to be referred to arbitration in the Cayman Islands under Cayman law. Arbitration costs were to be borne equally by the parties. If the claim was made by the client, then the client had to appoint an arbitrator within 6 months of the dispute arising or the claim would be deemed absolutely barred and Seed discharged from liability. There was no reciprocal provision in relation to Seed. Notices to Seed were to be given by registered post to Ocean in the Netherlands or such other address as may be notified to the client by Seed. That contract set the framework and did not disclose the total amount payable by the client nor the duration of the new wine contract.
34. Dr. Leon, in his affidavit, stated that he entered into the WPA orally in August 2001. He did not receive the WPA contract document until November 2001. It was not until March 2002 that he was notified that the contract involved a 10 year payment commitment with an

obligation to pay US \$355,557. If he did not pay US \$10,550 by 31<sup>st</sup> March and make a similar payment in September 2002 he would lose his entire prior investment and profits. Dr. Leon said he was shocked. He authorised two payments each of US \$2,000 (on account of the US \$10,550 claimed) to keep his investment alive. He then immediately sought legal advice. He claims that without his authorisation Ocean subsequently charged an additional US \$6,550 to his credit card in May 2002. On 27<sup>th</sup> July 2002 he received, for the first time, a detailed schedule of payments on the account. Dr. Leon claimed that since 1997 he had invested US \$41,700 less reimbursements totalling US \$2,080 and US \$6,550 (taken by Ocean from his credit card and subsequently reimbursed). The sum represented to him as profits as at 19<sup>th</sup> July 2002 were US \$42,946 producing a total investment of US \$76,016.

35. Other Applicants in their affidavits recalled dealings with Ocean and investments made. Unsurprisingly they did so in different degrees of detail. They emphasised issues and events in their respective investment histories with Seed and Ocean which gave rise to concern. They related dealings which echoed complaints made by fellow Applicants concerning Ocean salesmen, their sales techniques and a failure when entering into a contractual obligation to communicate some fundamental terms of the contract.

**The basis of the proceedings to be instituted by the Applicants in the Netherlands.**

36. Mr. Hoek in his statement of 12<sup>th</sup> November 2002 drew attention to the contractual terms. It was his assertion that they were one sided in favour of Seed. He alleged that Ocean employees had adopted aggressive sales pitches to encourage investment. Nearly all investment monies were transferred by Applicants to an Ocean account with ABN AMRO Bank in Rotterdam.
37. He alleged that Seed had never been regulated by any national authority or agency concerned with the regulation of investments. The arbitration clause in the contract provided for arbitration in the Cayman Islands. Seed appeared to have no assets there or in the Netherlands. The absence of regulation, the non-transparent multi jurisdictional pattern of Seed's affairs and harsh contractual terms which militated against liquidity gave rise to concern on his part and made litigation against Seed and recourse to its assets difficult. He alleged that there was a large scale fraud. He asserted that substantial sums of money had vanished.
38. Mr Hoek placed reliance on Mr Beesley's statement of 16<sup>th</sup> September. Mr Beesley was a former employee of Ocean.

39. Mr. Beesley in his statement of 16<sup>th</sup> September said that it was only after investors had transferred monies to Ocean that salesmen had informed clients of the unpaid balance which would be due and payable by investors. Later Mr. Beesley was to retract his allegations in an affidavit executed on 3<sup>rd</sup> December in Guernsey.
40. Mr. Hoek alleged that a feature of the WPA emphasised by salesmen to the Applicants was that it would create enhanced liquidity in that there would be no twelve month waiting period for the return of funds and profit. However, Applicants were not given detailed terms when agreeing to the new investment. Applicants subsequently learned that they had committed themselves to a contract running for 8-12 years involving six monthly payments of additional monies. Mr Hoek further alleged that Seed and Ocean were carrying on business in the Netherlands without a licence and therefore illegally. The contractual and illegality issues entitled Applicants to claim damages against Seed and Ocean. The illegality issues would apply to dealings with all Applicants. The contractual issues would hinge on the dealings of each client with Seed and Ocean.
41. He stated that pre-trial conservatory arrest orders had been sought and obtained in the Netherlands by 5 named Applicants against the assets of the Second to Fourth Respondents. Appended to his affidavit were copies of the applications made to the District Court in Rotterdam for conservatory arrest orders. They had not been refused. He outlined the straightforward ex parte procedure by which pre-trial conservatory arrests were obtained and acknowledged the low information threshold required in order to secure such orders in Courts in the Netherlands. Only US \$450,000 had been frozen in Ocean's Netherlands' bank account. A conservatory arrest order also attached to Mr. Garrett's home in the Netherlands but that was already heavily mortgaged. The conservatory arrest orders, therefore, applied to a relatively small sum when compared with possibly hundreds of millions of US dollars which Mr. Hoek estimated had been transferred by investors to Ocean's Netherlands' bank account and the US\$6,125,035 claimed by the Applicants.
42. Ocean, Mr. Garrett and Mr. Stockdale had subsequently challenged the pre-trial conservatory arrests in Rotterdam. They had claimed that the arrests had been granted unlawfully and that the arrests were severely hindering Ocean's business. Their summary challenge to the pre-conservatory arrest orders had been rejected by the Acting President of the Court. The pre-trial conservatory arrest orders remained in force. Substantive proceedings would be instituted by the arresting Applicants and this would be within the required time applicable in the Netherlands when conservatory arrest orders are obtained. The Bailiff was informed that this period would soon expire and so early in 2003 substantive proceedings would be instituted by all 13 Applicants in the Netherlands.

43. Mr. Hoek also referred to a pre-conservatory arrest order obtained by another investor (not one of the Applicants) in 2001. This had resulted in Ocean and Seed providing a bank guarantee. That case had provoked Seed and Ocean to respond to the similar allegations made against them. It gave some clue to their likely line of defence in the proceedings soon to be instituted in the Netherlands by the Applicants. Seed and Ocean had claimed in that case that investors had been provided with necessary contractual information but they acknowledged that in some instances investors had been provided with detailed information only after they had committed to heavy investments. Seed and Ocean claimed that the investment programme did not constitute a trade in futures or derivatives and consequently no licence was necessary from regulatory authorities in the Netherlands. Furthermore Seed asserted that claims by investors had to be resolved through the Cayman Islands arbitration procedure as agreed in the contract.
44. Mr. Hoek stated that he had raised the legality of Seed's investment scheme with the regulatory authority in the Netherlands namely the Autoriteit Financiële Markten (the Netherlands Board of Securities) in October 2002. He had spoken and subsequently met with a Board official. On the information supplied by Mr. Hoek the official had expressed a view that the scheme promoted by Seed was similar to securities and futures products. Her view was that a licence was required by Seed and Ocean.
45. In an additional statement of 15<sup>th</sup> November 2002 Mr. Hoek included a letter received by him from the Netherlands Board of Securities dated 14<sup>th</sup> November 2002 which related to activities of Ocean and Seed in a range of investments promoted by them. The letter was signed by the Board's Director of Enforcement and Integrity and also its Director of the Primary Market Sector. With reference to the WPA the view expressed was that it constituted an investment and that when Ocean was acting as the agent of Seed it was acting as an intermediary and consequently required a licence. The Board was at pains to emphasise that the letter was written on the basis of the information which had been provided to it by Mr. Hoek.
46. Mr. Hoek said that "through the use of a detective bureau" it had been disclosed to him that US \$805,000 had been transferred to the Specified Bank Account held by Seed with the Royal Bank of Scotland in Guernsey. Transfers had been made in 2002 to the Royal Bank of Scotland. He did not distinguish between the Seventh and Eighth Respondents banks. It seemed that Mr. Hoek had himself instructed the detective bureau. Seed was to complain about his conduct to his professional body.

47. Mr. Hoek outlined the claim which the Applicants would institute in the Netherlands. They would be claiming that the contracts were a nullity because neither Seed nor Ocean had licences to conduct business in securities. He acknowledged that at the time of Ocean's application for summary judgment the Acting President had not been prepared at that time on a summary basis to conclude, as requested by the five Applicants in those proceedings, that there had been such a violation. Some Applicants had received Seed subordinated loan notes under the law of the Netherlands. This also constituted an illegality entailing nullity because Seed was not licensed to issue such notes.
48. The Applicants would also contend that contracts could be annulled on the ground of non disclosure of material terms before a contract was concluded. If the contracts are declared to be null and void the Applicants would be entitled to the return of their investment monies plus interest. Alternatively the Applicants would claim damages against Seed based on the Applicant's claims that they were not told about material terms of the contract before entering into them and also the fact that Seed and Ocean had not secured a licence to conduct business.
49. These legal issues will be resolved in substantive proceedings in the Netherlands. They were not for the Bailiff to determine.

#### **THE ORDER OF 22<sup>ND</sup> NOVEMBER 2003**

50. The application was granted by the Bailiff. It was to remain in force until further order. The Court would reconsider the application and whether the Order should continue at a further sitting to be held on 19<sup>th</sup> December 2002. The Order contained a provision that the Respondents were at liberty within a reasonable time to apply to the Court to discharge the Order.
51. On 28<sup>th</sup> November, as undertaken to the Court, original copies of the statements of Mr. Hoek were filed with the Court.

#### **APPLICATIONS MADE TO THE ROYAL COURT BY SEED AFTER RECEIVING NOTICE OF THE ORDER AND AFFIDAVITS FILED WITH THE COURT**

52. On 26<sup>th</sup> November Advocate J. Morgan, instructed by Seed only, filed an application to extend the period of three days specified in the Order for disclosure pursuant to paragraph 3 of the Order by Disney, Kensington and the two Banks until 2<sup>nd</sup> December. It was supported by an affidavit (dated 26<sup>th</sup> November) of Mr. C.H.K. Friedlaender a lawyer in Advocate Morgan's firm. The extension of time, it was asserted, was necessary to enable proper

consideration to be given to the merits of and compliance with the Order. The application was not opposed by the Applicants and was granted.

53. On 2<sup>nd</sup> December a further application was made on behalf of Seed that such disclosure under the Order be stayed further until 6<sup>th</sup> December. The application was not opposed by the Applicants and was granted.
54. On 6<sup>th</sup> December Seed filed a further application. Seed sought a further stay of the Order alternatively an order restraining the Fifth, Sixth, Seventh and Eighth Respondents from making disclosure pursuant to paragraph 3 of the Order. In support of the application a second affidavit of Mr. Friedlaender (dated 6<sup>th</sup> December) was filed together with affidavits of Mr. Beesley and Mr. P.D. Whitehouse (Mr Whitehouse) (both dated on 3<sup>rd</sup> December).
55. On 6<sup>th</sup> December on an application by Seed the Bailiff ordered that disclosure by Disney and Kensington be stayed until £10,000 Security for Costs for the costs of Disney and Kensington had been provided by the Applicants, and that Seed's application in respect of disclosure by Seed be stayed until 10<sup>th</sup> December. The Order granted by the Bailiff on 22<sup>nd</sup> November had required the Applicants to pay into Court £3,000 by way of Security for Costs before service of it on any Respondents.
56. On 10<sup>th</sup> December in Chambers the Bailiff fixed the 17<sup>th</sup> December for argument on the disclosure order. The freezing order was to remain in place and the disclosure provisions to be further stayed.
57. On 13<sup>th</sup> December Seed filed an application to set aside the freezing and disclosure provisions of the Order. It also filed in support an affidavit (the First Affidavit) of Mr. Paul Freeman (dated 10<sup>th</sup> December), a director of Seed.
58. On 16<sup>th</sup> December a supplementary affidavit of Mr. Hoek (dated 13<sup>th</sup> December) was filed in support of the Order and in response to Seed's application to set aside the freezing order and stay the disclosure provisions.
59. On the 17<sup>th</sup> December Seed's application of 13<sup>th</sup> December was part heard and it was adjourned generally. The Bailiff also observed that nothing that he had heard that day had persuaded him that the freezing order which he had granted on 22<sup>nd</sup> November should be lifted.
60. On 20<sup>th</sup> and 23<sup>rd</sup> December 2002 the application to set aside the freezing order and stay the disclosure order which had been adjourned by the Bailiff came before me. Counsel were by then in discussion with a view to narrowing issues to be considered by me. The application

was adjourned until specified dates in February subject to a timetable for filing of documents laid down by me. The freezing order would remain in place and the disclosure orders would remain stayed until the scheduled hearing dates in February.

61. On 6<sup>th</sup> February 2003 a Third Affidavit of Mr Hoek (dated 6<sup>th</sup> February) was filed.
62. On 12<sup>th</sup> February 2003 Second Affidavits of Mr Hendrick (dated 31<sup>st</sup> January) and Mr Kaplowitz (dated 5<sup>th</sup> February) were filed.
63. On 12<sup>th</sup> February 2003 Mr. Laws set out in a letter to Mr. Morgan details of the disclosure which the Applicants were seeking from RBS International.
64. On 13<sup>th</sup> February 2003 Seed filed five further affidavits sworn by Charles Barry Owens (20<sup>th</sup> January), Mr. Stockdale (20<sup>th</sup> January), Mr. Garrett (21<sup>st</sup> January), Chris Els (21<sup>st</sup> January) and Jan Willem Bruidegom (21<sup>st</sup> January).
65. On 14<sup>th</sup> February 2003 the hearing of the applications to set aside the freezing order and disclosure orders was adjourned by agreement of the parties until 11<sup>th</sup> April 2003. The freezing orders would remain in place and the disclosure orders would remain stayed until then.
66. Following discussion between Counsel Seed and the Applicants subsequently agreed with my consent that argument on the application by Seed to set aside the freezing order and that argument on disclosure be limited for the time being to disclosure by RBS International because the Specified Bank Account is at that bank. Seed had asserted to the Applicants that no monies had been held on 22<sup>nd</sup> November 2002 or since by the Eighth Respondent the Royal Bank of Scotland Guernsey and hence that bank would not figure in the Guernsey proceedings. The Court would not be concerned for the time being with disclosure by Disney or Kensington. Disclosure by Disney and Kensington was by consent of the parties and with my concurrence stayed for the time being.
67. On the 5<sup>th</sup> March 2003 a Second Affidavit of Mr Freeman (dated 14<sup>th</sup> February) was filed.
68. On the 6<sup>th</sup> March 2003 in anticipation of the hearing scheduled for 11<sup>th</sup> April 2003 Seed had made application for Security for Costs in the sum of £50,000.
69. On 3<sup>rd</sup> April 2003 a Fourth Affidavit of Mr Hoek (dated 3<sup>rd</sup> April) was filed.
70. On the 11<sup>th</sup> April 2003 Seed's applications were, by consent of the parties adjourned until 19<sup>th</sup> May 2003 so that consolidated bundles could be prepared by Counsel. Skeleton arguments would be filed by Seed and the Applicants by 2<sup>nd</sup> May and 12<sup>th</sup> May respectively.

The application to set aside the freezing order was adjourned until the hearing and the disclosure provisions were to remain stayed until further Order of the Court.

71. On 19<sup>th</sup> May 2003 the day when the hearing before me was commenced a Fifth Affidavit of Mr Hoek (dated 14<sup>th</sup> May) which had been filed was admitted after discussion with Consel.
72. On 19<sup>th</sup> May 2003 a Third Affidavit of Mr Freeman (dated 16<sup>th</sup> May) which had been filed was admitted after discussion with Counsel.

### **REVIEW OF THE AFFIDAVITS**

73. It is evident that since the Bailiff had granted the Order of 22<sup>nd</sup> November 2002 a number of affidavits had been filed. Appended to some of them were a substantial number of exhibits. I review those documents in order to give some broad indication of their content. Many points were made in order to refute, correct, interpret or emphasise points made in other affidavits. Much of what was contained in them was not of central relevance. My review is therefore not exhaustive. I review them in chronological order according to the date on which they were sworn. They were not necessarily filed with the Court in that order. I remind myself that in dealing with freezing order and disclosure issues in Guernsey it is not for me to take upon myself a detailed review of evidence which will be heard and determined in the substantive proceedings in the Netherlands.

#### First Affidavit of Mr Beesley – 3<sup>rd</sup> December 2002

74. Mr. Beesley in his Affidavit sworn on 3<sup>rd</sup> December said that he had been an employee of Ocean until 1<sup>st</sup> June 2002 and Mr. Whitehouse until January 2002. They had worked for Seed in Rotterdam. They were both resident in South Africa but had been flown from there to Guernsey to make and swear their affidavits. Mr. Whitehouse was now employed by Mr. Beesley. Apparently Mr. Beesley had left Ocean with a book containing details of some 400-500 of Seed's clients and he had approached some of Seed's clients as prospective clients when developing his own business. Dr. Tracey, the First Applicant, had been persuaded by Mr. Beesley's company to make an investment in one of the investment opportunities being promoted by Mr. Beesley. Indeed he had asked Mr. Beesley to speak to his Dutch lawyer concerning Ocean with which he was in dispute. Mr. Whitehouse had also had dealings on behalf of Mr. Beesley's business with Mr. Carpenter, the Sixth Applicant.
75. Evidently in a letter dated 23<sup>rd</sup> July 2002 Ocean had written to their clients referring to the activities of a former employee Mr. Beesley. He considered that the letter related to him. He considered it to be untruthful in its content. Ocean had suggested that the ex-employee was contacting Seed's clients and making serious allegations of impropriety and wrong doing

against Ocean and Seed and that the ex-employee was acting unethically. It was contended that Ocean was considering legal action against this ex-employee.

76. A week later Mr. Beesley had been contacted by Mr. Hoek, who was clearly investigating Seed's activities on behalf of a number of clients. Mr. Beesley recollected that he had not spoken positively about Ocean to Mr. Hoek. Mr. Beesley had promised to write a letter about Ocean and send it to Mr. Hoek but had not found time to do so. Mr. Hoek made follow-up telephone calls. He had also received calls from a lady working for another firm of Dutch lawyers who were working with Mr. Hoek "on the case" about Seed and Ocean. It was Mr Beesley's recollection that Mr. Hoek had suggested that Mr Hoek would prepare a draft letter. It would be sent to Mr. Beesley for comment. [In fact the letter came from a different firm of Dutch lawyers instructed by an investor (apparently Dr Humphrey) who was not one of the Applicants]. However, after follow-up calls from that firm and from Mr. Hoek Mr. Beesley considered the draft, changed it in part and signed on 16<sup>th</sup> September 2002. Mr. Beesley claimed that he signed the letter because he was angry with Ocean. He believed his business could benefit from the dissatisfaction of Seed's clients and the Court action they intended to launch against Seed and Ocean. In his affidavit of 3<sup>rd</sup> December, Mr Beesley claimed that many of the statements contained in the letter of 16<sup>th</sup> September which he signed were either misleading or simply false.
77. (It is to be recollected that the Order was granted on the 22<sup>nd</sup> November).
78. On 26<sup>th</sup> November he had received a telephone call from Mr. Stockdale who informed him that his letter to the Dutch lawyers was being used in Court proceedings. Mr Beesley was invited to retract his statement and indicated that he was prepared to do so if he received an undertaking that he would not be sued by Ocean or Seed or any of its Directors. He was given such an undertaking by Seed, Ocean, Mr Garrett and Mr Stockdale and also Mr. Freeman. Mr Beesley signed a statement on 28<sup>th</sup> November retracting his letter of 16<sup>th</sup> September 2002.
79. On 29<sup>th</sup> November he had been contacted by Mr. Freeman who inquired about the letter and also the business Mr. Beesley was conducting in Cape Town. Mr. Freeman pointed out that it was desirable for Mr. Beesley to make a more comprehensive statement given the nature of the allegations Mr. Beesley had made in the September letter. Mr. Beesley was asked whether he was prepared to travel urgently to Guernsey to provide a further statement. He had agreed to do so and arrived in Guernsey on 1<sup>st</sup> December. There he acknowledged that the letter of 16<sup>th</sup> September contained distortions and untruths. He was prepared to retract the allegations he had made and, he claimed, put them in their proper context. He stressed that

he had made the Guernsey affidavit of his own free will, was not placed under any duress or offered any inducement but had received undertakings from Seed and Ocean and the Directors that he would not be held responsible for the consequences of the letter of 16<sup>th</sup> September.

80. In his 29 page affidavit (including appendices) sworn in Guernsey on 3<sup>rd</sup> December he made comprehensive retractions of the allegations which he had made. He emphasised the efforts made by Ocean's portfolio managers with a view to ensuring that clients knew the terms and conditions of the contracts and the obligations which clients would assume.

Affidavit of Mr Whitehouse – 3<sup>rd</sup> December 2002

81. Mr. Whitehouse, in a two and half page affidavit confirmed the details of the working practices and businesses of both Ocean and Seed described in Mr. Beesley's affidavit. Apparently Mr. Whitehouse had been asked to travel to Guernsey "to provide company" for Mr. Beesley. He had made the affidavit without inducement and of his own free will.

82. He said he had spoken to Mr. Hoek and the other Dutch lawyers at the time that the letter which was eventually to be signed by Mr. Beesley on 16<sup>th</sup> September was being formulated and had seen a draft of it. He did not say what his reaction was at the time to the allegations about Ocean contained in the letter nor what if any discussions he had had with Mr Beesley at the time given the allegations contained in the draft.

Affidavit of Mr Freeman – 10<sup>th</sup> December 2002

83. Mr. Freeman in his affidavit executed on 10<sup>th</sup> December 2002 stated that he was authorised by Seed to make the affidavit. He is a director of Seed. He had been a director since July 2001 prior to which Disney had been its sole director. Prior to July 2001 he had been involved in the management of Seed.
84. He stated that initially he had helped with the financing and establishment of Ocean but presently had no involvement with it. Seed and Ocean have different beneficial owners. The business relationship between the two is governed by a written exclusive marketing agreement.
85. He referred to proceedings instituted in the Netherlands against Seed and Ocean by a client of Seed named Mr. der Waal who was represented by Mr. Hoek. Ocean's bank account in the Netherlands had been frozen. A guarantee had been provided by Seed to secure the release of €110,000 held by Ocean for Seed.

86. He referred to a freezing order granted by the Royal Court on 13<sup>th</sup> September 2002 on the application of Dr. Humphrey (who was represented in the Netherlands by another firm of Dutch lawyers) against Seed, Ocean and The Royal Bank of Scotland. This resulted in Seed's bank account with the Royal Bank of Scotland in Guernsey being frozen. At the time Seed was in the final stages of concluding an important commercial transaction with its principal wine supplier. For purely commercial reasons a decision was taken to settle the Humphrey proceedings. Mr Freeman did not state that the account was with RBS International in Guernsey but this is to be assumed.
87. He confirmed that Seed at that time had 2,014 clients and the vast majority of them had been and are satisfied with their contractual arrangements with Seed.
88. He complained generally that Mr. Hoek had set out to attract clients who are dissatisfied with Seed. Mr. Freeman refuted Mr Hoek's claim that Seed and Ocean are one and the same and have perpetrated a massive fraud on hapless medical practitioners in the United States and that no wine exists to fulfil the purchases.
89. He said that on 19<sup>th</sup> September 2001 Seed had concluded Heads of Agreement with a company named Paradigm for the supply of Italian wine to a maximum deposit amount \$124m. and that Mr. Hoek has a copy of the Heads of Agreement. He claimed that the Fourth Applicant (Dr. Kaplowitz) had, at the end of September or October 2002, visited Italian wine estates in the company of the producers in Italy and was shown and had sampled wine included in his contract. Mr. Freeman expressed concern at the lack of disclosure by Mr. Hoek of certain facts known to him and questioned whether the Netherlands Board of Securities had had the benefit of all relevant information but in any event he stressed that no final ruling had been made by the Board of Securities. Seed denied being in breach of any Dutch law and regulation. He said that Mr. Hoek had presented the Royal Court with an incomplete, selective, distorted and damaging picture of Seed's business.
90. He referred to Mr Beesley's letter of 16<sup>th</sup> September. He described Mr Beesley as a disgruntled former Ocean employee. Mr Beesley's letter had been used (by Dutch lawyers) in the proceedings in the Humphrey case and as those proceedings were settled for commercial reasons Mr. Beesley's allegations had not been challenged (by Seed or Ocean) at the time. Mr Beesley's letter had been faxed to Ocean's lawyers in Rotterdam on 24<sup>th</sup> September 2002.
91. He referred to Mr. Beesley's South African business and the letter signed by Mr Garrett and sent by the Ocean to clients on 23<sup>rd</sup> July 2002. At that time Ocean had not been aware that Mr. Beesley had in his possession a book containing a list of a number of Seed's clients.

92. Mr. Freeman went on to outline how he had asked Mr Stockdale (who was in South Africa) to contact Mr. Beesley about the letter of 16<sup>th</sup> September 2002 and how Ocean and Seed subsequently gave Mr Beesley an undertaking that he would not be sued in respect of what was said in that letter. Mr. Beesley then signed a letter in essence retracting allegations made in his letter of 16<sup>th</sup> September. Mr. Beesley agreed to travel to Guernsey if accompanied by Mr. Whitehouse and there they swore affidavits.
93. Mr. Freeman then outlined the background to the businesses conducted by Seed and Ocean. He outlined how Seed had promoted investments in wine, initially Champagne and how a Belgian company named Churchill Contracts S.A. (later renamed Albion Contracts S.A.) had been incorporated for tax efficient reasons to procure contractual entitlements to supply Champagne. That Belgian company would then make up batches (parcels) of Champagne with a specified price payable on a specified date. The company also carried out administration of the sales contracts and issued Certificates of Conditional Ownership and the allocation of contract numbers.
94. To the best of Mr. Freeman’s knowledge the Champagne contracts had run their course. The documentation prepared by Seed’s lawyers included an account opening form incorporating the limited agency agreement, the members’ agreement and the terms of purchase (jointly referred to by Mr. Freeman as “the Account Opening Form”).
95. In the early days initial contact was made with a client from the Netherlands but late in 1996 it was found more effective and cost efficient to contact clients residing in the United States, from Canada. Once a client had made a payment of his first deposit and signed the Account Opening Form all paperwork would be referred to Ocean’s Rotterdam office. Ocean’s Canadian office had a procedure, through a confirmation office, to ensure that prospective and existing clients fully understood and accepted the terms of business. Mr. Freeman stated that if a client did not fully understand or was not entirely satisfied with the transaction it would not be confirmed. This confirmation procedure, he said, had only applied in the Rotterdam office since approximately September 2001. He explained how tele-sales staff would contact a prospective client after the client had received a brochure and how investment in Champagne would be promoted by Ocean’s staff to clients. It would be explained that the client could acquire a right to a parcel of Champagne by paying a deposit to Seed with an unpaid balance to be paid at a later specified date. Typically the first payment made by a client would be a deposit of \$1,000 towards the purchase of a right to a parcel of Champagne. Once a client had expressed real interest the Account Opening Form documentation would be sent to him. Tele-sales staff were instructed to inform potential clients as to the essentials of the contractual commitment. So that clients could access a short

summary guide of the most important conditions of their agreement they were given the option when calling Ocean offices to select a channel on which they could listen to a summary. If a sale profit was made the profit was shared as to 60% to Seed and 40% to the client. On a sale of a parcel of wine/champagne the investment plus profit would be repaid after a period of 12 months from the date of the sale.

96. Should a client's parcel not sell he had three choices:-
1. Pay the unpaid balance and take delivery of the wine.
  2. At the discretion of Seed extend the contract for a further 12 months.
  3. Forfeit the right to the wine and the deposit.
97. Mr. Freeman asserted that Seed has always been in a position to meet its contractual obligations to its clients, as Seed was either in possession of the wine or in a position to procure the wine for delivery. Seed also sourced other wines. Mr. Freeman listed companies which supplied wine to Seed. A copy of one of Seed's Purchase Contracts was appended.
98. During 2001 Seed resolved, following discussions with Mr. Middlemis of Paradigm, to concentrate its efforts on Italian wine and this would be through Mr. Middlemis. Mr. Middlemis was prepared to offer a discount which Seed could pass on to its clients should they wish to exchange their Bordeaux contracts for contracts to acquire the rights to Italian wine. Seed therefore decided to offer its clients that option. The contracts offered to clients differed from previous contracts. What was offered was no longer a club arrangement with membership. The Italian Wine contract (the WPA) provided for the sale by Seed, as principal, to the client. Seed would no longer share in the profit. It was not an agent for the client. Seed would benefit from the profit margin between the purchase and sale cost. The contracts were multi-vintage contracts. The contract did not provide for a single unpaid balance as was the case in the past but for the payment of the balance by instalments at intervals of six months. The contract was freely assignable to any third party subject to Seed having a first refusal right and subject to the acquiring third party entering into a WPA.
99. Every year some of the wine would be released and could be sold by the client hopefully for a profit. The idea was that once vintages were released and sold the proceeds could be utilised to pay instalments still due. Seed entered into a supply agreement with Paradigm in or about October 2001. Mr. Freeman contended that all Applicants had signed the WPA.
100. On 10<sup>th</sup> October 2002 Seed entered into an Agreement with Architects of Wine Ltd. ("Architects") an affiliate of Paradigm. Clients would be entitled to conclude a new contract directly with Architects for the supply of wine and to cancel their existing contract with Seed. It was anticipated by Mr. Freeman that most clients of Seed would take up the offer.

Consequently Seed had given notice of termination of its marketing agreement with Ocean. He acknowledged that none of the Applicants had cancelled their agreement with Seed. Seed would continue to honour its obligations to clients. Mr. Freeman did not speculate on what might be the future of Ocean which it would seem had been reliant on Seed's business.

101. He briefly reviewed other businesses conducted by associated companies of Seed. Mr. Freeman then proceeded to make general comments on the Applicants' affidavits emphasising that the relationship between Seed and each of the Applicants is governed by a separate contract and that the circumstances that give rise to each contract are distinct and separate.
102. He emphasised that none of the Applicants had made any allegations that Seed had dissipated or is threatening to dissipate any funds or other assets. None of the Applicants had fully disclosed the contractual arrangements between themselves and Seed under the WPA or earlier contracts which preceded it. The Applicants, in their affidavits he claimed, had largely ignored the fact that they had received Certificates of Conditional Ownership and Certificates of Sale and none of them had attempted to cancel their contracts. None of the payments made by the Applicants had been forfeited. Seed remained willing to deliver all the wine referred to in contracts entered into by its clients. Seed also remained willing to discuss the possible revision in appropriate cases, of all relevant unpaid balances and their schedule of payment. Seed had made substantial payments to its suppliers to secure the supply of wine referred to in the clients' respective contracts. All client payments in respect of contracts are reflected in statements issued by Seed (through Ocean) to its clients from time to time.
103. Mr. Freeman then put forward detailed comments in relation to each of the affidavits of the First, Fourth and Twelfth Applicants. He confined his review to these Applicants as he claimed he was under time pressure to file an affidavit.
104. The First Applicant - he contended that the contractual relationship with Dr. Tracey was in his capacity as Trustee of the Tracey Trust and not in a personal capacity. Furthermore Dr. Tracey was no longer the Trustee of the Trust. He pointed out that many purchases had been made and there had been profitable sales. Dr. Tracey had executed contractual documents and would have noted the terms. He was not able to comment on representations which Dr. Tracey had claimed had been made by Mr. Alves an employee of Ocean other than to have grave doubts about the accuracy of Dr. Tracey's recollections. Mr. Alves could not at that time be traced.

105. The Fourth Applicant - his review was more brief. Dr. Kaplowitz had become a client of Seed in 1997. He had made both purchases and sales. It was claimed that he had visited the wine estates in Italy as a guest of Paradigm, an assertion which Dr. Kaplowitz was later to substantially contradict although Dr Kaplowitz was to admit that he had met Mr. Middlemis of Paradigm in Italy but not visited the estates.
106. The Twelfth Applicant – Dr Hendrick had claimed not to have signed an Account Opening Form. Mr. Freeman attached copies of forms which he alleged had been signed by Dr Kendrick including the WPA signed on 26<sup>th</sup> February 2002.
107. He stated that Seed conducts all its banking business from Guernsey with the Royal Bank of Scotland International where Seed has its only bank account. The account was opened in February 2002. He therefore detailed in an exhibit payments made by each of the Applicants since February 2002. They totalled \$709,896 only. During this same period Seed has paid over \$6m. to Deva P.S.C. an associate of Paradigm and \$500,000 to Paradigm Holdings Ltd.

Second Affidavit of Mr Hoek – 13<sup>th</sup> December 2002

- 108 Mr. Hoek further explained the nature and basis of the substantive proceedings to be commenced in the Netherlands.
109. He reaffirmed that proceedings would soon be instituted in the Netherlands against the First to Fourth Defendants and also Mr. Freeman who had been identified as a director of Seed. Mr. Hoek went on to explain the basis of the proceedings to be instituted in the Netherlands referring to provisions of the law of that country which he considered to be applicable.
110. He also appended what he termed to be Ocean’s telephone sales Training Manual (“the Training Manual”) highlighting hard sell pitches and procedures to be employed by tele-salesmen. He also referred to a group structure which he construed as showing Seed at the head of and controlling a multi-jurisdiction operation. He also appended another document which he claimed indicated that Seed controlled Ocean companies in Canada, Rotterdam and South Africa.

Affidavit of Mr Stockdale – 1<sup>st</sup> January 2003

111. Mr Stockdale referred to his employment by Ocean. He confirmed that he had promoted the idea of marketing Ocean’s services out of South Africa. Seed had agreed to provide loan funds to enable the business to be set up and an agency remuneration formula had been agreed. The company was set up in South Africa in August 2000 and he was solely responsible for its management. It traded until August 2002 when Seed was on the verge of

concluding a significantly different commercial arrangement with its wine supplier. He said that he had produced the proposed Training Manual in the first part of 2000 and had planned to use it for his South African business. He had sent a few copies to Ocean in the Netherlands.

Affidavit of Mr Owens – 20<sup>th</sup> January 2003

112. Mr. Owens said that he was employed by Seed on a consultancy basis for one year commencing 25<sup>th</sup> April 2000. He was contracted to deal with marketing and communications. He was to pay particular attention to client complaints and propose ways that Ocean could better its service to Seed's clients. He proposed that a multi-channel telephone recording system to monitor calls be implemented. He does not state whether this was implemented. He had also proposed an independent client services/complaints department in the offices of Ocean in Canada which he says was introduced immediately. He advocated standardised training and marketing materials for Ocean companies.
113. In mid 2000 or thereabouts he had seen the Training Manual produced by Mr Stockdale. He had voiced concern to Mr. Freeman. It was subsequently arranged for copies to be withdrawn. It is not clear from his affidavit for how long the unacceptable manual had been in the possession of Ocean staff in the Netherlands and when the copies were collected up and destroyed.

Affidavit of Mr Garrett – 21<sup>st</sup> January 2003

114. Mr Garrett stated that he was a director of Ocean and also the manager of its business conducted in Rotterdam. He stated that Ocean was not defending the Guernsey proceedings as it had no bank accounts nor any presence of any nature in Guernsey. The relationship between Seed and Ocean was a commercial one. He focused largely on the Training Manual appended to Mr. Hoek's affidavit of 16<sup>th</sup> December 2002.
115. Mr Garrett said that the Training Manual had been produced by Mr. Stockdale when Mr Stockdale had promoted the idea of setting up a telesales operation based in South Africa. The Training Manual had not been produced on the instruction of Seed or Ocean and they had not been involved with its production. Copies had been sent by Mr Stockdale to Ocean's Rotterdam office where it had come into the hands of some of Ocean's staff. It was seen by Mr. Owens, who had been appointed to review marketing material used by Ocean, as being not appropriate or acceptable. It had subsequently been withdrawn.

Affidavit of Mr Els – 21<sup>st</sup> January 2003

116. Mr. Els stated that he was a tele-salesman. He referred to the training which he received after joining Ocean in August 1999. He emphasised that salesmen were instructed that what was said to clients must be absolutely true and accurate and not go beyond what was stipulated in the written agreements. He stated that he had adhered to this instruction.
117. He therefore refuted allegations made by six of the Applicants regarding his conduct. He did not recall seeing the Training Manual. He had had dealings with Dr Tracey, Dr and Mrs Sheller, Dr Kaplowitz and Dr Singson and more recently Dr Carpenter and Dr Weisenfels. He detailed his recollections of his involvement with them.
118. He said that Dr Tracey was aware of the financial implications of the WPA. He considered Dr. Tracey to be one of the most knowledgeable customers and that he clearly understood how the contracts were structured and what his rights and obligations were. In particular he denied that Dr. Tracey was under any illusion as to how the WPA worked or that he was not fully aware unpaid balances would be due. Furthermore, Dr. Tracey knew that the contracts under which he had paid deposits did not sell before any bi-annual instalment became payable he would have to pay that instalment when due. He denied that he had applied “high pressure” sales techniques. He would have said to Dr Tracey that if a sale of physical wine was made it could be anticipated that the purchase contract would at some stage become self-financing. Following the sale of physical wine or of his entitlement to wine Dr. Tracey could withdraw the proceeds of that transaction.
119. He contradicted the recollections of Dr. and Mrs. Sheller concerning a substitute contract and denied any duress on his part. He categorically denied that the Shellers did not understand that they were paying a deposit towards an entitlement to secure wine which would only be delivered in the future. He was astonished by their allegations. He denied having manipulated them having confused them or having dealt in a “devious” manner with them.
120. He denied that he had “demanded” any payments from Dr. Kaplowitz. He asserted that Dr. Kaplowitz in November 2001 signed the WPA. Dr. Kaplowitz’s version of events was, he claimed, totally confused and wholly incorrect. In particular he denied telling Dr. Kaplowitz that he would receive “all” of his money back by Easter 2002. Mr. Els said that he did not misinform, mislead or contradict himself in the way alleged.
121. With regard to Mrs. Singson he claimed to have spoken with her as recently as December 2002 and alleged she had confirmed that she was fully aware of the procedure of liquidating funds but simply stated that she had “been advised” to commence legal proceedings. He denied that he had told her that she could “pull out her funds at any time” without a prior

sale. She was at all times fully aware that a sale was required. She was also aware that she had only paid a deposit, had to pay all instalments and that a failure to do so could result in forfeiture. He denied that she could have been or was under the impression that she could cease making further payments under the WPA without forfeiting payments that had been made. He said that he had told Mrs. Singson that she could get her money back if a buyer could be found for her wine portfolio. Until that time she would have to continue meeting her contractual obligations.

122. With regard to Dr. Carpenter his involvement with him was limited. Mr. Els denied that he had said “one more deposit and you can get your money out”. He said that he may have told him to pay an instalment and then try to sell his contract if he wished to liquidate it. He took exception to the allegation that he had “knowingly lied, cheated and extorted” either him or anyone else.

Affidavit of Mr Bruidegom – 21<sup>st</sup> January 2003

123. Mr. Bruidegom is a Netherlands attorney practising in the international law firm of Simmons & Simmons Trenité in Rotterdam of which he is a partner specialising in matters of international trade including litigation and private international law. At the request of Advocate Morgan he had given advice on Dutch law and commented on Dutch law as stated by Mr. Hoek in his statements November and December 2002.
124. His firm will act for Seed and Mr. Freeman in the substantive proceedings which have been commenced in Rotterdam. That work is dealt with by a colleague of Mr Bruidegom and his involvement in this dispute would be limited and confined to what was contained in his affidavit.
125. In his affidavit he contested Mr. Hoek’s legal opinion on relevant provisions of Dutch law advanced in support of the substantive proceedings issued in the Netherlands on behalf of the thirteen Applicants and also Mr. der Waal who is not a party to the Guernsey proceedings. He contended that Mr. Hoek’s representations about Dutch law in some areas were not correct or complete and in most cases were not supported by references to relevant provisions of Dutch statutes, applicable international conventions, case law or learned works. He concluded that Dutch laws on contract are of limited relevance. He contended that the Dutch rules of private international law are likely to lead the Rotterdam Court to declare that it has no jurisdiction and that the dispute should be resolved by arbitration under the law of the Cayman Islands as provided in the WPA. As to nullity and voidability he was of the opinion that the Dutch law requirements for nullity or voidability had not been met. He further contended that Mr. Hoek’s assertions on applicable Dutch securities legislation are in large

part incorrect and incomplete, and certainly unlikely to lead to a Sunday of nullity of the contract by the Dutch Courts.

Second Affidavit of Mr Hendrick (the Twelfth Applicant) – 31<sup>st</sup> January 2003

126. Mr Hendrick confirmed that he had told Ocean on 11<sup>th</sup> October 2001 that he wished to get out of his wine investments. His invested funds were transferred into the WPA on or about 27<sup>th</sup> February 2002.

127. However, notwithstanding the assertion made by Mr Freeman in his First Affidavit of 10<sup>th</sup> December 2002 that Mr Hendrick had signed the WPA on 26<sup>th</sup> February 2002 Mr Hendrick claimed that he had never signed the original Agreement and that the unsigned document was in the possession of Mr Hoek. He alleged that the copy which had been faxed to him by Mr Hoek (who had received it from Ocean) was a forged copy.

Second Affidavit of Mr Kaplowitz - 5<sup>th</sup> February 2003

128. Mr Kaplowitz accepted that he had signed the WPA. He eventually received the contract and schedule of payments which was sent to him by letter of 19<sup>th</sup> July 2002 some considerable time after he had signed the WPA.

129. He denied categorically that he had been informed about the long term nature of the agreement and had immediately complained to Mr Els and Mr Williams. He alleged that he had been told when he signed the WPA that all his money would be reimbursed by Easter, 2002, which never occurred.

130. He alleged that the contract note and schedule of payments were dated almost one month prior to him signing the WPA. He had not been advised that he was buying wine which had not yet been produced. He denied the accuracy of the profits which Seed claimed he had made.

131. He acknowledged that whilst in Europe on vacation he had dined with Mr Middlemis of Paradigm in Florence at Mr Middlemis' request. He never visited any wine estates. Mr Middlemis had encouraged him to invest in Italian wine and to deal with his company rather than with Seed. He had been gifted five bottles of wine by Mr Middlemis but none of those bottles represented wines in the WPA.

132. He questioned the truthfulness of Mr Freeman's Affidavit.

Third Affidavit of Mr Hoek - 6<sup>th</sup> February 2003

133. Mr Hoek commented on Mr Bruidegom's Affidavit of 21<sup>st</sup> January 2003. He reaffirmed the legal opinion contained in his second Affidavit and contradicted Mr Bruidegom's opinion.

134. Substantive proceedings against the First to Fourth Respondents and Mr Freeman had been commenced in the Netherlands on 10<sup>th</sup> January 2003.
135. The Netherlands Board of Securities on 24<sup>th</sup> January 2003 had issued a public warning on its website aimed at Seed, Ocean and others associated with Seed referring inter alia to “the wine programme”.
136. He stated that Ocean’s offices in Rotterdam had been raided by the Dutch Police on or about 17<sup>th</sup> January 2003. The Netherlands Board of Securities he claimed had reported their findings regarding Ocean and Seed to the Public Prosecutor.

Second Affidavit of Mr Freeman – 14<sup>th</sup> February 2003

137. The Affidavit was prepared in response to Mr. Hoek’s Second Affidavit of 30<sup>th</sup> December. He stated that Seed was willing to resolve its dispute with the Applicants expeditiously by arbitration in accordance with the terms of the contract. The venue for a hearing need not be the Cayman Islands.
138. Mr. Freeman pointed out that only two of the Applicants in their affidavits had revealed that they had signed the WPA. They had all signed it. He stated that each of the Applicants had had ample time to read the WPA before signing it and that its terms were clear. The Applicants are professional people well able to comprehend the terms of an agreement. The contractual provisions contradict complaints of lack of knowledge which many of them professed in their affidavits.
139. Referring to the Training Manual (which Mr. Owens says he first saw in mid 2000) it was Mr. Freeman’s recollection that he was informed about it by Mr. Owens towards the end of 2000.
140. He stressed that Ocean had its own independent board of directors and management structure. It acted independently from Seed in the conduct of its day to day affairs.

Fourth Affidavit of Mr Hoek – 3<sup>rd</sup> April 2003

141. Mr Hoek dealt with the Affidavits of Mr Beesley and Mr Whitehouse dated 3<sup>rd</sup> December 2002 and two Affidavits of Mr Freeman dated 10<sup>th</sup> December 2002 and 21<sup>st</sup> January 2003.
142. Mr Hoek refuted the statement that he had sent a draft letter to Mr Beesley. It had been prepared by another Dutch firm representing Dr Humphrey. Mr Hoek had however spoken to Mr Beesley and the letter which Mr Beesley had signed (on 16<sup>th</sup> September) covered only

a small part of the issues that had been discussed by Mr Hoek with him. Mr Hoek asserted that Mr Beesley had stated during those conversations that Ocean's staff knew that the activities were illegal and those who started asking questions were fired. Mr Beesley knew that at a certain time no more certificates were issued to investors because there was insufficient wine to cover the trades. Mr Hoek said that the fact that information provided by Mr Beesley to him would be used in Court proceedings was known to Mr Beesley.

143. He categorised Mr Freeman's contention in his First Affidavit of 10<sup>th</sup> December 2002 that there had been inadequate disclosure as being of minor importance. Seed he pointed out had not offered any proof that sufficient wine had been delivered to Seed to cover for the trades, which he said amounted to hundreds of millions of US\$.

144. With regard to Mr Freeman's Second Affidavit of 21<sup>st</sup> January 2003 he stated that Mr Hendrick had not signed the contract (in February 2002) as claimed by Mr Freeman. Indeed he exhibited a print of an e-mail on 27<sup>th</sup> August 2002 in which Ocean had stated that Mr Hendrick had not yet signed the WPA.

#### Second Affidavit of Mr Beesley - 30<sup>th</sup> April 2003

145. Mr Beesley in a second Affidavit of 30<sup>th</sup> April 2003 confirmed that he had agreed to travel to Guernsey without inducement and entirely of his own free will.

#### Second Affidavit of Mr Bruidegom - 5<sup>th</sup> May 2003

146. This was an Affidavit given jointly by Mr Bruidegom and a colleague in his law firm. They expressed joint opinions on points made by Mr Hoek in his Third Affidavit of 6<sup>th</sup> February 2003. They refuted Mr Hoek's legal opinion asserting that there were no grounds to claim that the WPA would be held to be a nullity. They reasserted Mr Bruidegom's previous opinion that the dispute should be referred to arbitration under the law of the Cayman Islands in accordance with the express terms of the WPA.

#### Fifth Affidavit of Mr Hoek – 14<sup>th</sup> May 2003

147. Mr Hoek acknowledged that the Treaty of New York (relating to enforceability of arbitration awards) had been extended to the Cayman Islands. He stated that he had relied upon information which he had sought from the Dutch Ministry of Foreign Affairs but unfortunately their advice had proved erroneous because they had not been aware that the extension to the Cayman Islands was listed under the United Kingdom by virtue of its Dependant Territory status.

148. He acknowledged that under Dutch law the Applicants at this stage in the proceedings (prior to judgement) could not secure disclosure against the Respondents but that was academic in respect of Seed as it had no presence in the Netherlands.

Third Affidavit of Mr Freeman – 16<sup>th</sup> May 2003

149. Mr Freeman detailed a number of instances which he claimed were evidence of inadequate disclosure by Mr Hoek in relation to the wine supply agreements and dismissed Mr Hoek's claim that disclosure omissions were of minor importance.

150. He referred to the disclosure of certain documents in the application which Ocean, Mr Garrett and Mr Stockdale had made to the President of the District Court in Rotterdam who dealt with summary application proceedings in October 2002. He stressed that the Court in its judgement was not prepared to lift the Conservatory Arrest Orders nor was it prepared to grant the Applicants who benefited from the Conservatory Arrest Orders summary judgement for the damages claimed by them.

151. I do not recite Mr Freeman's contentions in regard to non-disclosure in any detail because during the course of the hearing this line of argument was not pursued further by Mr Morgan.

152. Mr Freeman cast doubt on the legal interpretation of the Netherlands Board of Securities as communicated in its letter to Mr Hoek of 14<sup>th</sup> November 2002 in regard to the need for Seed and Ocean to have statutory licences. He pointed out that on 26<sup>th</sup> February 2003 Ocean's lawyers had met with the Board and expressed concern at the legal interpretation applied by the Board. Ocean had requested the Board to take a formal decision against which Ocean could appeal or alternatively reconsider its legal interpretation. The Board had not commenced any proceedings against Ocean or Seed nor made a formal decision whether or not the WPA constituted a security as defined in the applicable legislation.

153. He expressed dismay that Mr Hoek had employed a private negotiator to make enquiries to establish the money flow from Ocean's bank account in the Netherlands. He claimed that Mr Hoek must have known that such information could only be obtained by unlawful means and hence it was unprofessional.

154. Mr Freeman also emphasised the procedures laid down by Seed which Ocean employees should follow to ensure that potential clients were not misled.

Proceedings in the Netherlands

155. Reference has been made to proceedings in the Netherlands and it is appropriate briefly to review the steps which have been taken.

156. Conservatory Arrest Orders had been granted by the District Court of Rotterdam on application by the First Applicant (including also the Profit Sharing Trust) of the First Applicant) on 12<sup>th</sup> August, the Second and Third Applicants on the 16<sup>th</sup> August 2002, the Fourth Applicant on the 21<sup>st</sup> August and the Fifth Applicant on 15<sup>th</sup> October 2002.
157. The procedure to secure an ex-parte arrest in the Netherlands is generally straightforward. Documents are filed with the Court. Only exceptionally would an Applicants lawyers be required to see a judge. If the documentation seems in order and contains some substance an order is secured that day.
158. The arrest orders were obtained against Seed, Ocean, Mr Stockdale and Mr Garrett. In the event no assets of Seed were found in the Netherlands and indeed Seed says it has no assets in that country. Ocean's has a bank account with the Dutch bank ABN Amro and there is now a restraint on that account in which there was a sum of US\$450,000.
159. Mr Garrett has a home in the Netherlands. It is heavily mortgaged. A restraint order has been placed on it.
160. Ocean on a summary basis had applied to the Court for the Conservatory Arrest Orders to be lifted. The six Applicants who had secured Conservatory Arrest Orders had, also on a summary basis, counter-claimed that damages should be paid to them. On the 10<sup>th</sup> October 2002 the Court dismissed both Ocean's application and the counter-claim made by the five Applicants. The Court had declined in the exercise of its summary jurisdiction to make any ruling on relevant issues relating to Dutch Securities legislation.
161. On 10<sup>th</sup> January 2003 the thirteen Applicants filed substantive proceedings against Ocean, Seed, Mr Stockdale, Mr Garrett and Mr Freeman.
162. On 24<sup>th</sup> April 2003 a formal appearance was entered. Seed did not appear at that time. It is not known whether it will appear to contest jurisdiction. It is not possible to obtain a discerning or disclosure order before judgement.
163. It was common ground between the parties that under Dutch law it is not possible to obtain a worldwide disclosure order prior to judgement. The Court in the Netherlands has power to order the production of documents relevant to the issues in dispute. There is also power for the Court to order a company to open its books and to disclose documents and records that a company is legally bound to keep. The power to order disclosure is therefore very limited.

### The Netherlands Board of Securities

164. Reference has been made to the dealings of the parties with the Netherlands Board of Securities and it is appropriate briefly to review the chronology of documents emanating from the Board.
165. In October 2002 Mr Hoek had raised the legality of Seeds investment scheme with the Board. That month an official on the basis of information provided by Mr Hoek had expressed a view that the scheme promoted by Seed was similar to securities and future's products and Seed and Ocean required licences.
166. On 14<sup>th</sup> November two senior officers had written to Mr Hoek on the basis of information provided to them. With reference to the WPA they had expressed the view that it constituted an investment and that when Ocean was acting as the agent of Seed it was acting as an intermediary and consequently required a licence.
167. On 24<sup>th</sup> January 2003 the Board had issued a public warning published on its internet site warning investors against dealing with Seed, Ocean and two other companies with which they were associated. The "wine programme" of Seed was expressly mentioned in the context of Ocean acting as an intermediary for sales without a licence. It warned that the firms named were acting in breach of the 1995 Act. The Board referred to the fact that it supervised the activities of licensed institutions.
168. At the date of the hearing before me in May Counsel confirmed that the Board's warning was still in place. Counsel accepted that a warning notice would only be issued with the authority of a senior official of the Board.

### **Contracts by Seed for the supply of wine**

169. Mr Laws in his argument had made much of the allegation made by Mr Hoek that there was no evidence that Seed had bought wine or options to acquire wine. I refer now to the documents to which Mr Morgan referred me. The Heads of Agreement and Coudert Brothers letter were referred to in affidavits filed by Mr Morgan before the hearing. The Supply Agreement was supplied on the final day of the hearing but it is appropriate to refer to it now.

### Heads of Agreement – 19<sup>th</sup> September 2001

170. A document headed Heads of Agreement between Seed and Paradigm Wine Services Ltd and dated 19<sup>th</sup> September 2001 had been produced by Seed and it had claimed that Mr Hoek had sight of it before the Order was sought and granted on 22<sup>nd</sup> November 2002. The Agreement

expresses an intent to enter into a comprehensive wine option/supply agreement with the principal objective of protecting the interests of the clients of Seed.

171. The Agreement provided that Paradigm undertook to provide contractual cover for up to US\$ 124m of deposits taken by Seed from time to time in respect of various wines (Italian and non-Italian) which deposits were currently represented by open or unexpired client positions in the records of Seed. Paradigm would also provide contractual cover for US\$6 m of wine sales to be sold by Seed with effect from 19<sup>th</sup> September 2001. Such cover would be secured with wine producers or distributors as may be appropriate to cover the client's positions. The contracts would be structured in such manner as would allow Seed to enforce delivery of the wine by the producers in terms of those wine contracts in the event of a default by Paradigm for any reason. The wines would be acquired at 85% of the projected US\$ recommended retail price. [There was no requirement on Paradigm to deliver the wine to the United States or to pay any import duties thereon]. The contractual cover would cover all open or unexpired client positions. Paradigm's fee would be 2.5% of the deposit amount payable by monthly instalments over 3 years provided that Seed paid US\$ 50,000 per month. Such payments after the first payments were to be made to a solicitor to be appointed by Seed.
172. Seed was required to lodge a list of clients, addresses and details of their open positions with an Escrow Agent. Seed's solicitors would be authorised to release the list to Paradigm in the event of the liquidation of Seed or the termination of Seed's business or for non payment. The purpose being to enable Seed's clients to complete on their contracts and acquire the relevant wine.
173. The parties committed themselves to use their best endeavours to negotiate and execute the comprehensive wine agreement wine option/supply agreement within 14 days of 19<sup>th</sup> September 2001.
174. The Heads of Agreement would terminate upon the parties executing the comprehensive option/supply agreement. The parties committed themselves to keeping the details confidential.

Letter from Coudert Brothers (solicitors to Paradigm) – 19<sup>th</sup> September 2002

175. In a letter dated 19<sup>th</sup> September 2002 from Coudert Brothers, the solicitors to the Paradigm group of companies addressed to Mr Margetson of the law firm in the Netherlands retained by Ocean mention is made of 4 Seed contracts and in respect of each contract reference is made to estates in Italy where the current vintage of wines mentioned in these contracts is produced. It is however expressly pointed out in bold print (no doubt for emphasis) that such wines will only be delivered to Seed or its clients in accordance with the terms and

conditions agreed between Paradigm and Seed. In particular no title in respect of such wines would pass until Paradigm had received payment in full in respect of such wines. Further it was pointed out that Paradigm was not in a position to comment on any dispute between Seed and its clients.

Supply Agreement – 10<sup>th</sup> October 2002

176. As I have stated before the hearing Seed had not produced copies of any further agreement between Seed and Paradigm. Shortly before the conclusion of the hearing before me on 21<sup>st</sup> May, Mr Morgan, having consulted with his client, produced a copy of a 30 page document headed Supply Agreement dated 10<sup>th</sup> October 2002. In the body of the Agreement reference is made to a Letter of Agreement dated 22<sup>nd</sup> March 2002 between Paradigm, Ocean and World Wide Wine Ltd as amended on 21<sup>st</sup> June 2002, further amended by Agreements on 26<sup>th</sup> July, 2<sup>nd</sup> August and 22<sup>nd</sup> August 2002.
- Copies of these documents were not produced.
177. Paradigm is a company registered in Nevis, but which in the Agreement of 10<sup>th</sup> October 1992 provided an address for service of notices in the Cayman Islands. Seed is a Cayman Island Company and the Agreement was executed in Monaco by Mr Freeman on behalf of Seed. The Agreement is governed by English Law with an arbitration clause providing for arbitration in London.
178. The recitals record that Paradigm had made available to Seed wines under multi-vintage wine purchase programme specifying the description and volumes of wine available under such programmes as well as payment terms by way of deposit and instalments. The programmes had an aggregate deposit value of EUR167m. (“the Paradigm Programmes”).
179. It further recorded that Seed had through its marketing agent Ocean, sold wines of a description and volume and on payment terms, as set forth in the Paradigm Programmes to its customers or clients pursuant to the terms of Seed’s contracts with its customers or clients. It also recorded that Seed had agreed to cease the marketing and sale of Paradigm wines from 10<sup>th</sup> October 2002. The Agreement was expressed to supersede all previous agreements, arrangements and understandings between the parties.
180. Paradigm agreed to supply, sell and deliver to Seed Paradigm wines of the type and in the volume described in the Paradigm Programmes on the terms and conditions set out in the Agreement. The Agreement provided for the parties to cooperate in good faith under an identification process to agree a description of the particulars of all Paradigm Programmes pursuant to which Seed has sold Paradigm wines under “the Seed Wine Programme Agreements”. Seed was required to provide a provisional draft within 10 days and Paradigm

would confirm the accuracy of it within 20 days thereafter. After finalisation of this descriptions list (“the Paradigm Programmes Description”) the parties would cooperate in good faith to agree a consolidated schedule of all Paradigm wines to be supplied in accordance with the Agreement of 10<sup>th</sup> October 2002. (the Consolidated Wine Schedule”)

181. Paradigm was to send to Seed a provisional draft of the Schedule as soon as practicable after the Description list had been finalised and Seed should comment within 20 days the Schedule would set out the description of the relevant Paradigm wine, including the name of customers and where available the cuvee and brand name. There were provisions for calculating the price taking account of Seed’s share of instalments payments. The Agreements set out detailed provisions with regard to payments, term, final orders, delivery terms, substitute wines, shipment by Seed, warranties, etc. Seed acknowledged that no Paradigm wines would be sold, supplied or delivered to Seed by Paradigm thereunder unless an Order had been placed by Seed and Paradigm had received payment from Seed in full of the two instalments payable under the relevant Paradigm Programme in the calendar year in which such Paradigm wines were due to be commercially released. The Agreement included provisions for the placing of Preliminary Orders in April in any year in which Seed would estimate its requirement and Final Orders in which Seed would in October notify Paradigm of the volumes of Paradigm wines due for commercial release that calendar year which it would require.
182. There then followed some arrangements described as Interim Arrangements. With regard to Paradigm wines which were due to be commercially released in 2002 (“the Relevant 2002 Release Wines”) being wines in respect of which Seed customers had paid the applicable September 2002 instalment. Paradigm acknowledged receipt from Seed of an aggregate amount of US\$8,486, 797 (Euro 9,039,56) in respect of such wines. Seed was also required to pay on the date of signing the Agreement US\$ 500,000 as a further payment in respect of the wines which were to be released.
183. Prior to 14<sup>th</sup> February 2003 but after finalisation of the Paradigm Programmes Description) and the Consolidated Wine Schedule Seed could by notice require Paradigm to deliver some or all of the Relevant 2002 Release Wines. Paradigm would then sell and deliver such wines to Seed within 45 days of receipt by Paradigm of such notice and without requiring any further payment.
184. There followed provisions precluding Seed from marketing Paradigm’s wine. Seed undertook to indemnify Paradigm against any proceedings by any Seed customer, former Seed customer of Seed or Ocean relating to the business, operations, acts or omissions of Seed and/or Ocean. The Agreement also contained a number of undertakings by Paradigm to

Seed concerning its obligations. It contained a confidentiality clause which subject to a number of exceptions precluded disclosure of the terms of the Agreement to third parties. There were a number of other clauses often found in commercial contracts which I do not need to mention.

185. On 21<sup>st</sup> May I indicated that I would be prepared to resume the hearing if either party wished to address me further on the Agreement, mindful in particular, that Mr Laws scarcely had time to scan the Agreement in Court and because he would be sending a copy to Mr Hoek who is dealing with the substantive proceedings in the Netherlands. I have not received any request to hear any further arguments on the relevance or impact of the Agreement on Counsel's submissions to me in their skeleton arguments or orally before me.

**The hearing on 19<sup>th</sup> – 21<sup>st</sup> May and 24<sup>th</sup> October 2003**

186. Seed was in its application of 13<sup>th</sup> December seeking

- (i) an order that the Order, in its entirety, be discharged or alternatively
- (ii) that disclosure by RBS International be discharged.

187. Seed was also seeking further security for costs.

188. As a result of discussion between Counsel, the Applicants were for the time being and for the purpose of the hearing before me limiting argument on disclosure to the Applicants of:

1(i) Copies of all documents and records in the possession or control of RBS International relating to the Specified Bank Account plus.

(ii) Copies of all documents and records in the possession or control of RBS International relating to any other account held by Seed.

2. Copies of all statements, details of transfers in and out of the account(s) and a copy or copies of the mandate(s) held by RBS International in so far as not covered by 1 above.

189. The arguments advanced on behalf of Seed on disclosure were expressly without prejudice to any arguments that Seed may wish to advance in due course, whether in relation to any further disclosure sought by the Applicants or otherwise.

190. The Order not being limited by date would remain in force until further Order of the Court. The onus was upon him to satisfy the Court that it was right to set aside the Order or discharge the disclosure provision.

191. RBS International have throughout taken a neutral stance and were not represented at any stage in the proceedings.

### **Submission of Mr Morgan on behalf of Seed**

192. Mr. Morgan had set out his submissions on behalf of Seed in a skeleton argument dated 2<sup>nd</sup> May. He submitted that the Order should be set aside because the Applicants had failed to establish that there was a real risk of dissipation of assets by Seed nor did they disclose to the Court all material matters to be taken into account in deciding whether or not to grant the ex parte application. He accepted that if I held that the Order should be set aside that was not the end of the matter because I could entertain an application by Mr Laws on the basis of the information now before the Court.

### **Dissipation of assets**

193. Mr Morgan submitted that the main factor to be taken into account by the Bailiff in the exercise of his discretion when adjudicating on the application of 22<sup>nd</sup> November for an injunction (a Mareva injunction) is whether the Applicants had shown that there existed a real risk of dissipation of assets by Seed and that Seed's intention in disposing of assets was to evade its obligations to the Applicants. *O'Mahony v Horgan* [1995] 2 IR at p 411).
194. The Applicants had to adduce evidence to support the assertion that there existed a "real risk" that a judgment in the substantive action in the Netherlands would go unsatisfied. Unsupported statements to the effect that the Applicants feared that Seeds assets may be dissipated had no evidential weight and were not sufficient to demonstrate a risk of dissipation. (*Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gm.b.H. Und Co.K.G.* 1983 1 WLR 1412 at p. 1419H) (*The Niedersachsen*).
195. No attempt had been made by the Applicants to substantiate that there existed a risk of dissipation. The Applicants had failed to produce evidence to support a contention that there is a "real risk" that a judgment in the substantive action will go unsatisfied or that Seed has demonstrated an intention to dispose of its assets with a view to evading its obligation to the Applicants or to frustrate any order made by the Netherlands Court in the substantive proceedings.
196. The Applicants had failed to adduce any evidence of a risk of dissipation other than the bold and unsubstantiated allegation of Mr Hoek that there had been a large scale fraud whereby

large amounts of money had vanished. None of the Applicants had asked Seed for any information about its bank account prior to the commencement of proceedings in Guernsey.

197. Mr Hoek had however instructed a private investigator to investigate bank transfers made by Ocean. The investigator reported that various transfers amounting to US\$805,000 have been made from Ocean's ABN AMRO account in the Netherlands and credited to an account numbered 56.15.68.25 in the name of Seed at 'the Royal Bank of Scotland' in Guernsey. He submitted that it is to be inferred that the investigator obtained banking information illegally and presumably in breach of Netherlands data protection regulations. The Court should be reluctant to admit information obtained illegally (*Dubai Aluminium Co Ltd v Al Alawi and Others* [1999] 1 AER 703).
198. Notwithstanding that Ocean and Seed's banking details were obtained illegally, the details provided by the investigator fail to substantiate the allegation that there is a real risk of dissipation of the Respondents' assets and that it is Seed's intention to dispose of its assets to evade its obligations to the Applicants.
199. All payments made by Seed's clients were paid into an account numbered 41.85.15.484 in the name of Ocean at the ABN AMRO Bank in Rotterdam. Those funds were transferred in accordance with the agency agreement between Ocean and Seed into an account numbered 56.15.68.25 in the name of Seed at the RBS International in Guernsey (the Specified Bank Account). The transactions identified by the investigator were transactions effected in the ordinary course of Seed's business. The funds transferred to Seed's account were used to make payments to Seed's suppliers in accordance with its contractual obligations and to pay everyday expenses associated with Seed's business. No evidence had been adduced on behalf of the Applicants to suggest that such transfers were improper or untoward. Guernsey is a well regulated jurisdiction and banks are licensed. Guernsey's banking confidentiality laws are the same as those in the United Kingdom. Guernsey is a cooperative jurisdiction and it would be wrong to contend that the use of a Guernsey bank account by Seed somehow taints its business.
200. Seed had been in operation since 1996. There was no evidence that Seed was not a company of real financial standing. Seed had over 2,000 clients. Barely more than the 13 Applicants are involved in litigation against Seed.
201. The Applicants had failed on 22<sup>nd</sup> November to meet the evidential burden of establishing that there is a real risk of dissipation of Seed's assets and that it was Seed's intention to dispose of its assets to evade its alleged obligations to the Applicants. No evidence filed with the Court since the 22<sup>nd</sup> November had altered the position in that regard.

202. Duty to make full disclosure
203. As a general principle, the Applicants on seeking ex parte relief had to act in utmost good faith. They had to disclose to the Bailiff all matters which were material to be taken into account by the Bailiff in deciding whether or not to grant relief ex parte and, if relief was to be granted, on what terms.
204. This general principle applied strictly to an injunction of the sort obtained by the Applicants given the nature of the relief sought and the potential prejudicial effect to Seed or other parties affected by such relief. (*Bank Mellat v Nikpour* [1985] FSR 87 at p 92). This principle had been endorsed by the Guernsey Court of Appeal. (*Matheson Securities (Channel Islands) Limited v Hulme* (1997) 24 GLJ 60).
205. The duty to make full and frank disclosure had required the Applicants to place before the Bailiff all matters which were relevant to the Bailiff's assessment of the application. The test as to materiality is an objective one, and it was not for the Applicants or their advisers to decide what was or was not relevant to the Bailiff's discretion to grant or refuse the application. The duty to make proper disclosure extended not only to information within the knowledge of the Applicants or their advisers but placed an obligation on the Applicants to make a proper enquiry. (*Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350).
206. In essence the Applicants had a duty to ensure, as far as they were able to do so, that the Court was apprised of all the facts giving rise to the Applicants' claim, substantiated insofar as it was reasonably possible with all relevant documents. (*Abbasford Limited v Poly Focus (Europe) Limited* Court of Appeal (Civil Division) Transcript Number 1044 1989 2 November 1989.)
207. It would not be a sufficient answer to an allegation of non-disclosure for the Applicants to state that the relevant information was contained in an exhibit, though not referred to in the body of the Applicants affidavits. The Applicant should have identified the crucial points for and against their application. Any contractual provision (e.g. an arbitration and/or jurisdiction clause) should be referred to and set out in the body of the affidavit. (*Siporex Trade SA v Comdel Commodities Ltd* [1986] 1 Lloyd's Rep 428 at p. 437.)
208. The Applicants had failed abjectly to provide even a semblance of proper disclosure regarding the material facts relating to their case.
209. Mr. Morgan acknowledged that the principle of full and frank disclosure should not be taken to extreme lengths.

210. Having heard Mr Morgan’s argument I put it to him that there were 13 Applicants residing in many States in the USA. Mr. Hoek resides in the Netherlands. It was not reasonable for Seed to dissect each and every Affidavit and in relation to the application made to the Bailiff on 22<sup>nd</sup> November contend that a particular Applicant had not comprehensively reviewed his or her dealings with Seed and Ocean nor appended all possible exhibits. Put another way it was not reasonable for Seed to search ingeniously for facts not disclosed by one Applicant when such facts emerged in the affidavits of other Applicants. It was appropriate for the Bailiff to have regard to the entire picture placed before him. The issue was whether the information presented to the Bailiff struck the right balance between full and fair disclosure and a repetitive overlong description of the facts perhaps overgenerous to his client.
211. If decided not to maintain the Order on the ground of material non-disclosure to the Bailiff I could allow a new application for relief in the same terms. In the event Mr. Morgan after briefly and cogently developing his argument on non disclosure conceded that there had been adequate material disclosure to the Bailiff when viewed in the round and he discontinued this line of argument.

Seed’s argument on disclosure by RBS International.

212. Mr Morgan argued that on the facts placed before the Bailiff he was wrong to grant a disclosure Order. A disclosure Order should not have been made against Seed.
213. The primary purpose of a Mareva injunction is to preserve assets and protect against their dissipation as an aid to the enforcement of a judgment, whether already obtained, or anticipated in due course. The purpose is not to obtain pre-trial discovery or to assist a claimant in undertaking a “fishing expedition” in order to discover facts or documents to bolster its case.
214. Whilst the Royal Court in the exercise of its jurisdiction to grant Mareva relief may grant orders for the disclosure of information, such orders must in their nature be ancillary to the main Mareva relief. They have no independent justification, save in certain specific and exceptional instances, such as for example in the case of *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 and *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 orders. Neither of these exceptions to the general rule he submitted had any application in this case.
215. In ordinary circumstances the Royal Court should only have made ancillary orders for disclosure of information if necessary for the effective working of the injunction. (*Bekhor (AJ) & Co Ltd v Bilton* [1981] 2 W.L.R. 601 at p62.)

216. The purpose of a Mareva injunction is the preservation of assets. It follows that disclosure to make the injunction effective must be limited to identifying the extent and whereabouts of those assets, thereby policing the injunction. Any ancillary disclosure order made by the Royal Court must necessarily be limited to identifying the extent and whereabouts of assets within its jurisdiction.
217. The standard form of disclosure order in England requires disclosure of the value, location and details of assets within the jurisdiction of the English Courts (Volume 2, The Supreme Court Practice 1999 at Section 2C, para 2-86). In the case of bank accounts, the scope of an order for disclosure granted by the Royal Court should be confined to establishing the identity of bank accounts, the name or names in which those accounts are held, the branch of the bank at which the accounts are held and the balance on the accounts. Such disclosure should moreover be limited to identifying the state of the account(s) at the date of the Court's order.
218. The Royal Court should be cautious in exercising its discretion to make disclosure orders in support of Mareva injunctions. (*Bekhor v Bilton* per Lord Griffiths at pages 947 – 949. This view was endorsed by the Royal Court of Jersey in *Armco Inc and Others v Donohue and Others* (1999/85) and by the Royal Court in *Vardinoyannis v Ansol Limited et al* (Royal Court 20<sup>th</sup> November 2001). In *Vardinoyannis*, Lieutenant Bailiff Catherine Newman QC stated (at p68).
- “112. Disclosure before the time has come for trial is always an intrusion into the affairs of the party who has to give it.”
219. Lieutenant Bailiff Newman in *Vardinoyannis* cited *Bekhor v Bilton* with approval in accepting that the order for disclosure sought in that case “was too wide in its scope”:-
- “114. The discretion to grant such disclosure should be sparingly exercised; it does not automatically follow from the grant of a freezing order, see *Bekhor v Bilton* [1981] 2 All ER 565. It is said that the current form of the order goes beyond the standard form order and amounts to a fishing expedition. That is not permitted.”
220. Mr Morgan then reviewed the nature of the Applicants' claims. The Applicants' claims are stated to be founded on two separate legal grounds, namely:
- (i) A claim in damages based on an alleged “unlawful deed”. The “unlawful deed” is said by Mr Hoek to be “the fact that Ocean and Seed are acting in breach of contract and in violation of Dutch law: trading and mediating in transactions regarding futures, securities and similar products without being licensed thereto”

(ii) A claim that the contracts with Seed should be annulled on two legal grounds:-

- (a) the allegation that the contracts and “Ocean’s actions” are in breach of Netherlands security laws and
- (b) the allegation that the contracts were entered into as a result of fraud or abuse of circumstances.

221. Mr Morgan stressed that the Applicants’ claims are in personam claims for damages. Consequently the Bankers Trust Co v Shapira principles, as considered by the Royal Court in Morgan Stanley International v Alfio Puglisi Consentino (Royal Court 28<sup>th</sup> December 1992) and News International Plc & Others v Michael Clinger & Others (Royal Court 10<sup>th</sup> May 1996) lend no support to the Applicants’ claim for a wide order for disclosure of “all documents or records” held by Bank RBS International in respect of Seed’s account(s).

222. In Bankers Trust Co v Shapira Lord Denning had stated (at p.1282):

“This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of the customer’s account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff’s money”.

223. He argued that the decision of the Royal Court in News International v Clinger is particularly instructive for the review by the then Deputy Bailiff of all previous reported Guernsey cases in which the Bankers Trust Co v Shapira principles had been applied. The Deputy Bailiff concluding (at p 3D et seq).

“In each case the plaintiff was asserting a tracing claim and the judgements clearly show that there must be good grounds for believing that the plaintiff’s money had been paid into the defendant’s account.

224. There is however no English decision giving support to the proposition that this kind of order shall be made other than in cases where the money in the bank account is exclusively the property of the plaintiff. Guernsey Courts should not in my judgement be going any further than English Courts in developing this third party jurisdiction to make orders against banks and other fiduciaries, particularly in view of the reservations I have already indicated as to the extent of our equitable jurisdiction.”

225. The Deputy Bailiff refused to grant the wide disclosure order sought against the bank notwithstanding that the applicants in that case were able to produce to the Court “considerable details of funds which have allegedly landed up in the hands of the individual

conspirators named. The Applicants do not allege that any of their funds can be traced into the account against which they seek disclosure.

226. They exhibit a letter from a private investigator which identifies various payments being made to account number 56156825 with RBS International between August 2002 and October 2002 but no more than that. The Applicants do not allege that any of their funds identified by the investigator represent any of the funds which they invested with Seed. The Applicants had adduced no evidence no evidence to support a proprietary claim.
227. The nature of the Applicants' claims is fundamental. The Court should be wary of the Applicants seeking to dress their claim up as a proprietary one. The then Deputy Bailiff in *News International v Clinger* had identified the need for a Court to identify claims being wrongly dressed up with an element of claim of breach of trust or monies being held on constructive trust and to identify those cases which are properly to be afforded the Bankers Trust relief and those which should not because they are non-proprietary. The Applicants have not adduced evidence to establish that any payments were made to Ocean and/or Seed between these dates.
228. The Applicants do not contend that the RBS International holds any information that the Applicants need in order to identify a person or entity against whom the Applicants may have a possible cause of action. The Applicants have never been in any doubt as to the identity of the party they contracted with consequently they cannot avail themselves of Norwich Pharmacal relief to support their claim for wide disclosure by the Bank.
229. The Royal Court in *News International v Clinger* considered that applications for disclosure were best made in the jurisdiction seized of the substantive proceedings.
230. The disclosure sought by the Applicants goes beyond what is required to "police" the freezing order. The Applicants' claims are not proprietary. They are claims for damages. Disclosure, if any, should be limited to the nature and location of the First Respondent's assets within the jurisdiction of the Royal Court as at the 22<sup>nd</sup> November 2002 when the order was granted.
231. Deputy Bailiff Carey in *News International v Clinger* had said that applications for disclosure are best made in the jurisdiction seized of the substantive proceedings, particularly when they are of the complexity of the kind in that case.
232. No application for disclosure had been made in the Dutch proceedings and the Applicants could not under Dutch law prior to judgement make an application in the way that relief is being sought in Guernsey.

233. In the absence of any such application having been made in the Netherlands the order sought from the Royal Court could only be ancillary to the freezing order granted by the Royal Court. To that extent it should not go beyond what is necessary to “police” that freezing order.

#### **Submission of Mr Laws on behalf of the Applicants**

234. Mr Laws had set out his submissions in a skeleton argument dated 12<sup>th</sup> May 2003.

235. The argument advanced by Mr Laws on behalf of the Applicants may be summarised as follows: The Order of 22<sup>nd</sup> November 2002 should not be set aside. The freezing order should be maintained. Disclosure to the extent sought by the Applicants for the purpose of the hearing before me should be allowed.

#### **Good Arguable Case**

236. Proceedings have been issued in the Netherlands. The Dutch Court has permitted Conservatory Arrests. Ocean’s application to have the Arrests discharged was dismissed by the President of the District Court in Rotterdam. That Court considered claims of those Applicants who had sought and obtained Arrests under Dutch law to have sufficient merit to justify continuation of the Arrests. The Applicants have a good arguable case under Dutch law. The Netherlands Board of Securities in its warning to investors also concluded that Seed is acting in breach of section 3 of the Securities Transactions Supervision Act.

237. There is a good arguable case that the Dutch Court would characterise the Applicants’ investments in the wine programme as “securities” and, consequently, hold that the brokering/portfolio management activities of Ocean required it to hold a licence under Section 7 of the 1995 Act. Mr Bruidegom conceded that it is arguable. The

238. Netherlands Board of Securities in its warning to investors posted on its website in January 2003 warns that Ocean is breaching the 1995 Act by trading without a licence. Mr Bruidegom and Mr Siemens contest Mr Hoek’s view that breach of the 1995 Act would render the contracts null and void but the Applicants have a good arguable case.

239. If the contracts are null and void, neither the Cayman Islands choice of law clause nor the Cayman Islands arbitration provision can have any effect.

#### **Dissipation of Assets.**

240. In reply to Mr Morgan’s submission on the risk of dissipation of assets Mr Laws’ submissions were as follows:

241. There is a clear risk of dissipation by Seed. The Applicants claim to have been misled by Ocean’s employees into making and continuing with their investments.

242. Mr Beesley, a former employee of Ocean in his statement, dated 16<sup>th</sup> September 2002 asserted that investors had been deceived in the manner complained of by the Applicants. Mr Beesley had expressed doubts whether there was any wine or sufficient wine to cover the contracts entered into by investors. Ocean's staff knew its activities were illegal. There was never sufficient wine to cover the investors trades. Although Mr Beesley had now chosen to retract and disavow that statement, he has done so in return for an agreement by Ocean and Seed not to sue him. Either he was lying in his original statement and in what he told Mr Hoek, or he is lying now in return for an immunity from suit.
243. The Training Manual which had come into the possession of Ocean employees demonstrated an utterly cynical approach to soliciting investments. Whilst it was claimed by Seed that it was never used by Ocean employees and was prepared by Mr Stockdale without authority for use in an "Ocean" company which he intended to set up in South Africa. Mr Stockdale was a former employee and director of Ocean and had been a tele-salesman with Ocean for almost three years. He knew how the tele-sales operation was conducted. The manual reflected sales technique similar to that which the Applicants say he and his colleagues had practised at Ocean when dealing with them.
244. Seed had given little evidence as to the legitimacy and substance of its business. Whilst affidavits served on Seed's behalf claimed that Seed's business was bona fide no company accounts of Seed have been produced. There is a remarkably paucity of contracts with wine growers of suppliers. Documentary evidence produced by Seed of acquisition of wine to fulfil its obligations is equivocal.
245. The only known asset in Guernsey is Seed's bank account. Seed is incorporated in the Cayman Islands. It carries on no business in or from the Cayman Islands. In the absence of a freezing order, it could easily remove its money from Guernsey and render it untraceable. The Court can have regard not only to fraud or dishonesty but also to unconscionable conduct. There is a real risk that the money would be removed from the jurisdiction of the Royal Court. In consequence a judgement in the Netherlands in favour of the Applicants and registered in Guernsey would go unsatisfied.

#### The Duty to make full and frank disclosure

246. Mr Laws refuted Mr Morgan's contentions that in seeking ex parte relief on 22<sup>nd</sup> November 2002 the Applicants' had failed to make full and frank disclosure. In the event this line of argument was discontinued by Mr Morgan during the course of the hearing before me.

The Applicants' argument on disclosure by RBS International

247. Mr Laws submitted that it is now standard practice to order disclosure of information about assets as an ancillary order in aid of a Mareva injunction (Gee Mareva Injunction and Anton Piller Relief 4<sup>th</sup> ed., p348).
248. A Mareva order made without an order for disclosure could not be “policed” and would be “toothless”. The question in this case is not whether there should be disclosure but whether the disclosure by RBS International being required to make disclosure of the information and the documents which the Applicants are claiming in the hearing before me. Paragraph 3.6 of the Order which requires Seed to disclose the balance standing to the credit of the account must be unobjectionable.
249. The real issue is whether RBS International should provide copies of all documents or records in its possession or control relating to all dealings with or accounts held by Seed, Ocean, Mr Garrett and Mr Stockdale.
250. In the English Courts, nearly all reported cases of disclosure orders being made against banks or other third parties have been made in the context of proprietary claims where the Plaintiff’s case is that the third party is holding (or has held) the Plaintiff’s assets which he has the right to trace. (Bankers Trust Co v Shapira).
251. Mr Laws asserted that such relief is not confined to proprietary claims. In Republic of Haiti v Duvalier [1989] 2 WLR 261 the court proceeded on the assumption that it was a monetary claim only and maintained a freezing order and discovery.
252. In England, there is often no need to join the bank or other third party to the proceedings or obtain a disclosure order against it since there is the alternative procedure of requiring the defendant to sign a direction to the bank requiring it to disclose the relevant information to the plaintiff. In the event of default by the defendant, the English Court will itself sign the direction, pursuant to Section 39 Supreme Court Act 1981, and the bank will accordingly be bound to treat the direction for all purposes as if it had been signed by the defendant (Astro Exitto Navegacion SA v Chase Manhattan Bank N.A. [1983] 2AC 787 at p802.) This practice is frequently adopted. It causes no difficulty or delay. Its availability explains why the English Court is readier to make disclosure orders against banks in proprietary claims, where the plaintiff has a cause of action against the bank, than in purely monetary claims, where the plaintiff has no claim against the bank. Section 39 has no equivalent in Guernsey.
253. Disclosure by RBS International may reveal that money has been transferred out of Guernsey. It is permissible to have a Mareva injunction confined to assets within the jurisdiction yet, require disclosure which extends, or may extend, to revealing assets located outside the jurisdiction (Mareva Injunctions and Anton Piller Relief, Gee 4<sup>th</sup> ed. p349).

254. Given that the Court has jurisdiction to grant a worldwide Mareva injunction with worldwide disclosure, and given that it is entirely proper to seek worldwide disclosure in order to locate and attach foreign assets or commence foreign proceedings, it must follow that a worldwide disclosure order can be made by the Royal Court regardless of whether the Mareva injunction is of narrower ambit.
255. The decision in *Gidrxslme Shipping v Tantomar Transportes Maritimos Lda (The Naftilos)* [1995] 1 WLR 299 establishes that this view is correct in the case of post judgment Mareva injunctions. There is no reason in principle why it should not apply to pre-judgment Mareva injunctions. The question is simply whether it is right to make the Order in all the circumstances.
256. This is a proper case to order disclosure by RBS International in the terms sought by the Applicants for the purpose of the hearing.

### **Security of Costs**

257. I now turn to Seed's application filed on 6<sup>th</sup> March 2003 for security for costs.
- Seed's claim for security for costs was further to the £3,000 deposited by the Applicants with the Court as required by the Order in respect of security for costs of all Respondents. Appended to Seed's application was a draft bill of recoverable costs for the period 25<sup>th</sup> November 2002 to 27<sup>th</sup> February 2003 totalling £53,668.40. Seed was now seeking security for its costs in the sum of £50,000. Mr Morgan stressed that since 27<sup>th</sup> February 2003 further costs had been incurred.
258. It was common ground that the Court has power to order security costs against the Applicants and that the Court would be guided by the English White Book and in particular Order 23 of the Supreme Court Rules. It was also common ground that there is no longer any inflexible rule or practice that a plaintiff resident abroad will be ordered to give security for costs. The Court has a discretion to be exercised judicially and it is the usual ordinary or general practice of the Court to require a foreign plaintiff to give security for costs. The fact that the Applicants are resident in the United States is a valid ground upon which the Court could, if so minded, exercise its discretion under Rule 48 of the Royal Court Civil Rules 1989. A consideration which the Court may take into consideration is the likelihood of the Applicants succeeding. The Court should not undertake a detailed examination of the merits of the case. The parties and the Court should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

### **Submissions of Mr Morgan on behalf of Seed**

259. Mr Morgan contended that in commercial cases the Court will order security for costs unless the plaintiffs can establish that there are special circumstances which the Court should consider when determining whether to exercise its discretion. This case is a commercial one and the Applicants have no assets within the jurisdiction. The Applicants are not impecunious. There is no high degree of probability of the Applicants succeeding in the substantive proceedings in the Netherlands so as to warrant refusal to grant security for costs. The schedule of costs appended to the application had been prepared conservatively. The Applicants are resident in the United States and Seed was unaware of any property owned by the Applicants in Guernsey. It was just that the Applicants should be ordered to provide further security for costs.

### **Submission of Mr Laws on behalf of the Applicants**

260. Delay in making an application is a factor that should be taken into account when the Court exercised its wide discretion under Rule 48. Seed's application was filed on 6<sup>th</sup> March 2003. Although Seed lodged a skeleton bill of costs on that date, no further explanation was given until it filed its skeleton argument dated 2<sup>nd</sup> May 2003.

261. Seed's argument is concentrated on the residence of the Applicants. It makes no reference to any practical difficulties which Seed would face in enforcing an order for costs against the Applicants. It also makes no mention of the assets of the Applicants and in particular that the Applicants have assets in the form of Wine Contracts held by Seed which Seed contends exist and have value. A matter for consideration in granting security for costs is the likelihood of the Applicants succeeding. The Applicants' have a high prospect of success on one or more of the grounds on which their action in the Netherlands is based and also the proceedings in the Royal Court.

262. When the application was filed the hearing date in the Royal Court was close. If the application had any merit it was brought too late. Security for costs should not generally be ordered if an application is close to a hearing. *Vedatech Corporation v Crystal Decisions UK Ltd* (2002) EWCA Civ. 356 It would be oppressive to make an order for security for costs now.

## **DECISION**

### **General Principles**

263. The Mareva injunction relief granted by the Royal Court in this case is an Interlocutory Order of the Court granted before judgement restraining the Respondents from dealing with their assets. It appears that the only Respondent with assets in the jurisdiction may be Seed. The

Court has an inherent jurisdiction to grant appropriate orders. Developments of interlocutory relief in this field has been limited not by principle but sensibly by the evolution of settled practice.

264. In view of the arguments employed by Counsel it is appropriate to note the history of enactment of The Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. In November 1986 the States of Deliberation considered some of the law reform set out in a report of the Advisory and Finance Committee. The report included in extenso a letter sent to the Committee by H M Procureur. He referred to consultation with the Royal Court and the Bar. H M Procureur said:

“Under our customary law the Court already has adequate power to grant arrests of property “ex parte” that is to say in the absence of the proposed defendant. This jurisdiction has been developed in recent years to mirror changes that have taken place in other jurisdictions particularly to prevent a defendant moving assets from one jurisdiction to another to defeat the interest of those who have claims against him. The Court also has power to grant injunctions, that is to say orders that a party should do some act or be restrained from doing some act.

Whilst the Court has jurisdiction to grant ex parte injunctions I consider that the procedure for such applications should be laid down by statute.”

265. Section 1 of the 1987 law provides that the Court may on an ex-parte application grant an Order to an applicant intending to institute proceedings. Seed did not contest that the Royal Court had jurisdiction to grant Mareva relief.

266. Section 4 provides that the Court shall not exercise any such power “unless satisfied that it just and convenient to do so.” This mirrors section 37(i) of the Supreme Court Act 1981.

267. The Royal Court has since 1987 continued to track and mirror the way in which ancillary and other orders have developed in England. Unsurprisingly the Royal Court has not been at the cutting edge of developments but it has not been slow to mirror evolution in England. In so doing it has followed English law principles and settled practice.

268. It was common ground in light of developed jurisprudence in relation to Mareva relief that the Bailiff had to be satisfied that:

1. the Applicants had a good arguable case against the Respondents

2. there was a real risk that any judgement the Applicants might obtain in proposed Netherlands proceedings would go unsatisfied by reason of the disposal by Seed of its assets, unless it was restrained by a Royal Court order.
3. it would be just and convenient in all the circumstances of the case to grant the relief sought.

269. At the end of the day the Court must consider the evidence as a whole in deciding whether to exercise this jurisdiction.

**(1) Good Arguable Case**

270. The good arguable case test is higher than the test ordinarily applicable to injunction cases that there is a serious question to be tried.

271. Mustil J in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gm. B H Und Co.K.G.* (the *Niedersachsen*) described a good arguable case as

“one which is more than barely capable of serious argument, but not one which the judge considers will have a better than 50 per cent chance of success”.

272. On appeal in the same case Kerr LJ said with reference to the test

“It follows that the evidence ..... must be looked at as a whole. A “good arguable case” is no doubt the minimum which the plaintiff must show on order to cross what the judge rightly described as the “threshold” for the exercise of the jurisdiction but at the end of the day the Court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction.”

273. The Rotterdam Court in October 2002 dismissed Ocean’s summary application to set aside the Conservatory Arrest Orders. The Court must have considered that the Applicants had at the very least an arguable case in the Netherlands. That decision is of much assistance to the Applicants but is not conclusive.

**Facts before the Bailiff**

274. The Bailiff did not have to form a view upon the merits of the case the Applicants would be instituting in the Netherlands. He had to take account of the strengths and weaknesses of the respective cases as indicated in Mr Hoek’s affidavits in order to decide whether one or more of the Applicants cases, on their merits, reached the good arguable case threshold. The test is not an unduly onerous one.

275. The Bailiff did not have to decide difficult questions of Dutch law which in the Netherlands will call for detailed argument. The Rotterdam Court when hearing Ocean's summary judgement application in October 2002 was invited to rule on issues concerning the alleged breach of the 1995 Act. It was not prepared to do so at that stage. The Court in the Netherlands proceeding will have to consider jurisdiction issues in view of the arbitration clause in the contracts. It may have to consider a number of other legal points under Dutch law including securities law issues and to consider what constitutes a breach and the legal consequences of a breach. Some issues of law may relate to some Applicants but only other issues will be common to all of them.
276. There will also be many issues of fact to be resolved. The Applicants' cases may turn on their individual pattern of dealings with Seed and Ocean much of it being intermittent telephone dealings with a number of different Ocean employees over a period of years. It is of some significance that the Applicants who are from a broadly common professional sector but not otherwise linked make substantially similar allegations about the conduct of Ocean employees and the representations made by them. Ocean's administrative procedures left much to be desired. Instructions which Seed contends it stipulated for Ocean employees to follow may not have been adhered to. If true the allegations made against Ocean employees are indicative of unconscionable conduct by such employees at the very least.
277. The fact that there are 14 Applicants is a complicating factor and there can be no certainty that all or any of them will succeed in their claims.
278. It may be that most of the 2,000 clients of Seed, as Seed claims, have made no complaint about the conduct of the Ocean employees who dealt with them and the information on which they based their investment decisions. But it does not follow that as a consequence the Applicants do not have a legitimate actionable grievance against Seed arising from their dealings.

#### **Facts before the Deputy Bailiff**

279. Since the Bailiff granted the Order a considerable number of affidavits have been filed. They include detailed opinions on matters of Dutch law and in particular the 1995 Act. Included in the affidavits are voluminous detailed allegations and counter allegations. Much of this will be of relevance in the Netherlands proceedings. Much was not of crucial significance on the issues I have had to consider.
280. Since the Order was granted the Netherlands Board of Securities far from going back on advice given in letters has gone further and has posted a warning notice on its web site cautioning investors about dealing with Seed and Ocean.

281. Seed has provided some detail about wine contracts in relation to the WPA but has not provided copies of all documentation. There are a number of unresolved issues which will no doubt need to be considered in the Netherlands proceedings. The line of defence which Mr Hoek indicated would in all likelihood be mounted by the Respondents has been confirmed on behalf of Seed in some detail but there appears to be nothing conclusive in Seed's favour.
282. Mr Beesley's statement had been relied upon by Mr Helyar when seeking the Order. That has since been retracted by Mr Beesley in circumstances and terms which again leave open a number of questions. It was unsafe for me to rely upon anything he has said.
283. I have concluded that there was ample evidence on which the Bailiff could conclude that the Applicants had a good arguable case over and beyond Mr Beesley's original statement. I am also satisfied on the evidence now available to me that the Applicants have a good arguable case. The Applicants have crossed that threshold.

**(2) Risk of Dissipation**

284. In the Niedersachsen Kerr LJ at p 1416 formulated the applicable test as follows –

“ In our view the test is whether on the assumption that the plaintiffs have shown “a good arguable case”, the Court concludes, on the whole evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgement or award in favour of the plaintiffs would remain unsatisfied.”

285. The test is an objective one. There was no requirement on the Applicants to convince the Bailiff that Seed intended to deal with its assets with the objective of ensuring that any judgement subsequently enforced in Guernsey would not be met. The Bailiff did not have to concern himself with the motive or purpose of Seed. It was not necessary to show that Seed's motives were improper or untoward. However the Applicants had to adduce solid evidence to the Bailiff to support their assertion that there existed a real risk that any judgement would go unsatisfied.

**Facts before the Bailiff**

286. The Applicants had contended that Seed had in August 2002 transferred into an account with Royal Bank of Scotland at either RBS International or The Royal Bank of Scotland (Guernsey) Limited sums totalling US\$805,000.
287. The fact that Seed has a bank account in Guernsey, a jurisdiction recognised as a cooperative well regulated jurisdiction is not a factor which would of itself satisfy the real risk of

dissipation test. However there was other evidence drawn to the attention of the Bailiff which he was entitled to take into consideration.

288. It was alleged that Seed had no place of business in the Netherlands, the Cayman Islands (where it was registered) nor in Guernsey. It appeared to have no fixed place of business or staff of its own. It was not regulated in any jurisdiction. It was alleged that both Seed and Ocean required a licence in the Netherlands to transact there the business which they had conducted with the Applicants. They had not sought licences. The Netherlands Board of Securities had given this allegation some credence. The structure within which Seed had operated in the past and at the time was multi-jurisdictional and somewhat complex. It appeared to be heavily reliant on Ocean which had no place of business or staff in Guernsey. There appeared to be no particular reason why Seed should continue to retain monies in its Guernsey bank account. There was ample evidence on which the Bailiff could conclude that there was a real risk of dissipation.

#### **Facts before the Deputy Bailiff**

289. I have had the benefit of more detailed affidavit evidence. Seed had been in business since 1996. The Specified Account had been opened in February 2002 with RBS International. Seed had had a connection with Guernsey through Disney and Kensington. Prior to July 2001 Seed's sole director was Disney in Guernsey. Company secretarial services are provided in Guernsey by Kensington.

290. There has not been a lengthy connection with Guernsey. Seed did not disclose in which jurisdiction it had had an established place of business. What is evident is that Mr Freeman, the sole director of Seed since July 2001, resides in Monaco. It is there that some of the documentation is signed by him on behalf of Seed. It employs Ocean, which carries on business from the Netherlands as its sole agent. Some time in the past initial telephone calls to clients in the United States had been made from an office in Canada but subsequently by Ocean employees in the Netherlands. An associated company in Belgium had procured entitlements to supply champagne but this stopped. At some time employees of Ocean were paid through Cyprus and subsequently Guernsey. The relationship between Seed and Ocean appears not always to have been absolutely at arms length. Seed for sometime was a substantial loan creditor. Paradigm, which is the other party to the wine supply agreement, was incorporated in Nevis. Seed has over the years changed its contractual relationship with the Applicants. It has recently given to the Applicants the opportunity to cease their contractual relationship with Seed and replace it with a contractual relationship with a third party wine supplier. Seed has recently taken a decision to cease its relationship with Ocean.

Seeds affairs are somewhat complicated. Permanency is not a hallmark of its business relationships or its financial affairs.

291. Seed could have behaved in a more timely and open way in responding to the Applicants allegations and to appease their concerns. Seed has provided some documentation as evidence that it has entered into wine supply contracts but has not given the full picture. It has not been willing to provide a more detailed response to the Applicants' claims that no wine or contractual arrangements exist to acquire wine in order to satisfy Seed's contractual obligations to them. Near the end of the hearing a copy of a wine supply agreement with Paradigm was produced. Its terms raised almost as many questions as it purported to answer.
292. Despite some prompting on my part Seed did not produce any accounts or balance sheets to give an indication of its financial strength and accounts are not filed on any public register.
293. Mr Morgan reiterated Mr Freeman's assertion that when the Order was made Seed's only asset in Guernsey was the balance in the Specified Account at RBS International. Furthermore that the balance as a proportion of the claim for US\$6,125,035 being pursued in the Netherlands is minimal. It may be no more than a four figure sum. Given the turnover of its business it is reasonable to assume that it has assets elsewhere.
294. Unsurprisingly Mr Morgan acknowledged that the freezing order had not impacted adversely on Seed in dealing with its finances. Even if the sum concerned had been greater there is an exception to the Order (para 2.1). Seed is not prohibited from dealing with or disposing of its assets in the ordinary course of its business subject always to a 5 day advance notification procedure.
295. I am also satisfied having considered the additional evidence available to me that a real risk of dissipation would exist if the freezing order was lifted. The Applicants have crossed that threshold.

**(3) Just and Convenient**

296. I remind myself of the requirement of section 4 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. Having satisfied himself that the Applicants had a good arguable case and that there existed on any objective analysis, a risk that without the Guernsey injunction a judgement obtained in the Netherlands may go unsatisfied the Bailiff still had to satisfy himself that it was just and convenient in all of the circumstances of the case that a freezing order should be granted.

### **The Facts before the Bailiff**

297. Whilst it must have been a matter of some concern to the Bailiff that Mr Hoek employed an inquiry agent to acquire information concerning banking transactions between Ocean and Seed I do not consider that that fact should cause me to conclude that it would have been unjust for the Bailiff to grant the freezing order.
298. In light of the evidence before him including the existence of Conservatory Arrest Orders and the advice of officers of the Netherlands Board of Securities I am satisfied that there was ample evidence on which the Bailiff could have concluded that it was right in principle and it was just and convenient to grant the Order. It is also important to note that the conditions attached to the Order enabled the Respondents to apply to the Court to discharge the Order on reasonable notice to the Applicants' Advocates. In the event application was made by Seed to the Court to stay disclosure on 6<sup>th</sup> December and to set aside the Order on 13<sup>th</sup> December.

### **The Facts before the Deputy Bailiff**

299. Mr Morgan did not urge upon me any circumstances which would indicate that Seed had been embarrassed or would be embarrassed in the on-going conduct of its business if the freezing order is maintained. No evidence has been presented to me that that will be the case. It would be unlikely that an order freezing the small sum which Seed says is its only asset in Guernsey would embarrass Seed or that it would suffer any hardship.
300. I have therefore concluded on all the evidence laid before me and after carefully balancing the interests of the parties that it is just and convenient in the exercise of my discretion to maintain the freezing order subject always to the exceptions to the Order imposed by the Bailiff.

I now turn to the disclosure order.

### **The Disclosure Order**

301. The Royal Court has since 1987 continued to have regard to the way in which ancillary and other orders have developed in the English courts with regard to the disclosure of information and documents.
302. In England the jurisdiction is derived from Section 37(1) of the 1981 Act. It includes power to require defendants to give discovery of documents or provide information about assets wherever situated. It also includes power to require a defendant to direct his bank to disclose information to the plaintiff. If the defendant fails to comply with the order, the Court can

nominate a person to sign the necessary document in the name of the defendant pursuant to Section 39 of the 1981 Act. These orders can be made “free standing” in the sense there need be no injunction in place to which an order is ancillary.

303. It was not contested before me that the Royal Court has power when granting a Mareva order to assist the efficiency of the Mareva injunction by making ancillary orders for the disclosure of assets. Paragraph 3 of the Order incorporated a number of disclosure orders to be acted upon by Disney, Kensington, RBS International and the Royal Bank of Scotland. Some of the disclosure orders were very wide ranging. They may be the subject of further argument in this Court.
304. It is to be remembered that in the hearing before me the Applicants were seeking from RBS International disclosure of copies of all documents and records relating to the Specified Bank Account and any other account held by Seed plus copies of all statements, details of transfers in and out of the accounts and copies of mandates of other accounts.
305. Mr Morgan had argued that there was no justification to grant a Norwich Pharmacal order. Although the Applicants in their action in the Netherlands allege fraud the evidence before the Bailiff and before me was not strong enough to support Norwich Pharmacal relief.
306. Mr Morgan also argued that there was no evidence which the Bailiff or I could rely upon to grant Bankers Trust Co v Shapira disclosure relief. The Applicants were not asserting on the evidence presently available to them, a proprietary claim. The evidence before the Bailiff and before me alleging fraud was not strong enough. It was insufficient to make a Bankers Trust Co v Shapira order. Mr Laws with measured reluctance and realism acknowledged that this was the case.
307. The question which then followed was whether the Bailiff should have made an order when there was no certainty that there would be a proprietary claim to any of the monies. More likely than not there will be no proprietary claim. Monies in the account may have come from many sources. Any judgement would in all likelihood be a money judgement only.
308. In oral argument before me Mr Laws stressed that the Applicants were not embarking on a fishing expedition in order to discover new defendants or to provide further evidence to support or bolster their substantive action. That is important. The purpose of the order which was being sought was to obtain information and documents about Seed’s affairs which would enable the Applicants to police the Mareva injunction in the strict sense but also to track down assets of Seed, Ocean, Mr Garrett and Mr Stockdale as distinguished from assets of the Applicants.

309. It has long been established that a disclosure order may be granted to police a Mareva order. If this were not the case then as Steyn LJ said in *Grupo Torras SA v Sheik Fahad Mohammed Al-Sabah CA (Civil Division) Transcript No 159 of 1994 (Grupo Torras)* the Mareva injunction would be a “relatively toothless procedure.” This power was readily accepted by Mr Morgan. His argument was that there were no good grounds to make any disclosure order whatsoever against RBS International in this case.

310. In relation to the policing of a Mareva order Deputy Bailiff Carey (as he then was) in the case of *Irish Permanent Building Society v Edmund Farrell (Royal Court 04.10.93)*, which was a case where applicants were seeking to trace their own assets, said this:

“..... It is increasingly frequent to find in cases before this Court that money is being moved around offshore jurisdictions with considerable rapidity. There may of course be perfectly legitimate reasons for doing this but it has to be said that there must be an attraction for persons in possession of funds in questionable circumstances to move those funds around the world in order to obstruct the persons claiming lawfully to be entitled to the funds to lay their hands on them. I am not suggesting that in this case there are not good reasons why this money has not travelled from Ireland to the Isle of Man to Guernsey and then on somewhere else. However I am anxious that this Court should not be seen by taking an over sensitive appreciation of the rules of confidentiality to be blocking plaintiffs in circumstances such as these and tracing what they allege are their assets”.

311. In *News International and Others v Clinger and Others* Deputy Bailiff Carey dealt with an application for discovery in a case where the applicant had secured a world wide Mareva order in the High Court in England. One of the respondents had deposited money with a Guernsey bank. News International claimed that the respondent in question had been a conduit for monies arising from a fraud perpetrated on News International. The Deputy Bailiff in his judgement recalled that in *Bankers Trust Co v Shapira and A and Another v C and Others (1981 1QB 956)* the English courts were dealing with proprietary tracing claims. He expressed the view that:

“Guernsey Courts should not in my judgement be going any further than English Courts in developing this third party jurisdiction to make orders against banks and other fiduciaries, particularly in view of the reservations I have already indicated as to the extent of our equitable jurisdiction.”

312. He had indicated that although Guernsey never developed a separate equitable jurisdiction in the way that the Courts of Equity had developed in England he found nothing incompatible

with adopting English principles of equity and affording relief to plaintiffs who claimed that their money had got into a bank account in another person's name as a result of "fraud or wrongdoing", to use the words of Lord Denning in *Bankers Trust Co. v Shapira*. He concluded that News International had not brought itself within the *Bankers Trust Co v Shapira* principles. He also concluded that justice, a matter which he had taken into consideration, would not necessarily be defeated by declining to give an order. Relief sought by News International he adjudged was best considered in the jurisdiction seized of the proceedings, particularly where the proceedings would be complex. It would appear that the Deputy Bailiff considered that there was no restriction on his power to grant an order. However he felt it appropriate to follow settled English practice.

313. In this case it is noteworthy that Seed is not resident in the Netherlands and has not yet submitted to the jurisdiction of the Courts in the Netherlands in the proceedings instituted by the Applicants. Furthermore the powers of Netherlands Courts to order disclosure is very limited. Those limitations should not be an encumbrance on the Applicants' legitimate aspirations to track down and freeze assets of Seed and the other Respondents in anticipation of a judgement in the Netherlands.
314. It does not appear that the Deputy Bailiff Carey was referred to the judgement of Staughton LJ in *Republic of Haiti and Others v Duvalier and Others*. In that case the plaintiff had instituted proceedings in France against Jean Claude Duvalier, recently deposed President of Haiti and various members of the Duvalier family. Embezzlement was alleged. It was further alleged that the family had attempted blatantly to conceal their assets and place them beyond the reach of courts of law. There appeared to be strong evidence of this. An ex-parte freezing order had been granted in the Commercial Court. Solicitors in England acting for a number of defendants were ordered to disclose the nature, location and value of assets they held for the defendants. When the solicitors applied to the judge for the lifting of the gagging order he had imposed he declined to do so. They appealed. The appeal (the first Duvalier Appeal) was heard in camera and not at that time reported. It appears that Lord Donaldson of Lymington MR had said in terms that he was not happy to accept the suggested limitation on the disclosure of information about assets abroad, viz. that it should only be ordered in connection with a tracing claim. However he found on the evidence before the court that the French action was in the nature of a tracing claim.
315. Subsequently another judge in the Commercial Court had made three Orders permitting the Republic to use certain information provided by the solicitors for the purpose of legal proceedings in other jurisdictions. Thereafter the gagging order was lifted. The defendants were then served with a summons seeking the disclosure of further information and

documents relating to their assets. The defendants sought to set aside the order. Their application was dismissed. They appealed to the Court of Appeal.

316. The Court of Appeal (in the second Duvalier Appeal) had to consider a number of issues. The Republic was not seeking any substantive relief in England. In support of the French action it was seeking disclosure of information as to where the assets of the Duvalier family were, and a temporary restraint on the defendants dealing with those assets.

317. Staughton LJ reviewed the jurisdiction of the Court (at p270) and in so doing reviewed the distinction between a proprietary claim and a monetary claim for debt or damages. At p 271 he referred to the proceedings in France in these terms (emphasis supplied):

“In that state of affairs I would not go so far as to say that the action in France, ..... is itself a proprietary or tracing claim. It does not presently assert ownership of any of the assets expected to be revealed by orders in the English proceedings. But I am confident that ownership will be asserted when and where the assets are found. This is then something of a hybrid situation; and one should perhaps consider it on the basis that interim relief is sought in aid of a monetary claim only, without any claim to ownership of the Duvaliers’ assets. The law on this topic has developed in recent years; and in particular a distinction has emerged between pre-judgement and post-judgement restraint. Our courts are more willing to restrain a defendant from dealing with his assets after, than before, judgement has been given against him..... The decision of this court in *Ashtiani v Kashi* (1987) Q.B. 888 was concerned with a Mareva injunction, pre-judgement, over assets within the jurisdiction, coupled with an order for disclosure of assets worldwide. The injunction was discharged. Both Dillon L.J. and Neill L.J. considered that a Mareva injunction should be limited to assets within the jurisdiction, if there is no proprietary or tracing claim. But I think that they regarded this limitation as arising from settled practice rather than from any restriction on the powers of the court. There are indications in both judgements to that effect. Nicholls L.J. agreed with both judgements.”

318. Staughton L J made it plain that the order in the Commercial Court which the Court of Appeal would uphold was a most unusual measure:

“It is beyond question that the injunction granted by Knox J. and upheld by Leggatt J. was a most unusual measure, such as should very rarely be granted. But this case is most unusual. It is not the nature or strength of the Republic’s cause of action which puts it in that category. What to my mind is determinative is the plain and

admitted intention of the defendants to move their assets out of the reach of the courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that, and the vast amount of money involved. This case demands international co-operation between all nations. As the judge said, if ever there was a case for the exercise of the court's powers, this must be it. Or to quote Kerr L J in the Babanaft case, ante, p. 247G-H:

“some situations .....cry out – as a matter of justice to the plaintiffs – for disclosure orders and Mareva injunctions covering foreign assets of defendants even before judgment.”

And I think that this is such a case. If the Duvalier family have a defence to the substantive claim, and feel that they are being persecuted, then their remedy, as I have said, is to co-operate in securing an early trial of the dispute. It is not to secrete their assets where even the most just decision in the world cannot reach them.”

319. It would appear clear from the judgement of Staughton LJ that in the first unreported appeal Lord Donaldson did not consider that disclosure should be limited to a tracing claim (p 266) and in the second appeal Lord Staughton, who gave the leading judgement, held a similar view. It is also to be noted that disclosure should only be ordered very exceptionally in a monetary claim case. It has to be acknowledged that the Duvalier case was very exceptional. Nevertheless the distinction between the powers of the Court and settled practice is of some importance.
320. In *Nova Nordisk A/S and others v Banco Santander (Guernsey) Limited* (Royal Court 31<sup>st</sup> January 2000) Lt. Bailiff Hancox reviewed the *Bankers Trust Co v Shapira* and *Norwich Pharmacal* jurisdictions. He was reviewing an order which required a bank to disclose documents. The bank had records relating to an account which might or might not indicate to the plaintiffs persons involved in a counterfeiting action. He concluded that the applicants in that case fell within neither the *Bankers Trust Co v Shapira* and *Norwich Pharmacal* jurisdictions, he did not consider it appropriate to extend them and he declined to make the order.
321. The order which the Applicants are seeking in this case is for an entirely different and more limited purpose. It is restricted to tracing assets of the four Respondents who are defendants in the substantive proceedings. It is against these assets that a judgement, if obtained in the Netherlands, may in due course be enforced.

322. Counsel referred me to *Derby and Co. Ltd. and Others v Weldon and Others* (Nos 3 and 4) (1990) Ch 65. In that case Lord Donaldson of Lymington M R said this:

“In *Beddow v Beddow* (1878) 9 Ch.D. 89, Sir George Jessel M R said, at p. 93:

“... I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles.”

That remains the position to this day, the only issue being whether in particular circumstances the grant is “right or just.” What changes is not the power or the principles but the circumstances, both special and general, in which courts are asked to exercise this jurisdiction. This can and does call for changes in the practice of the courts. We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts’ orders as to resisting the making of such orders on the merits of their case. Hence it comes about that, as was pointed out by Neill L J in *Babanaft International Co. SA v Bassatne* (1990) Ch. Cas. No 6,214 and by May LJ in *Derby v Weldon* (No 1) [1990] Ch. Cas. No37 6X, this is a developing branch of the law. To that I would add that a failure or refusal to grant an injunction in any particular case is an exercise of discretion which cannot, as such, provide a precedent binding upon another court concerned with another case, save in so far as that refusal is based upon basic principle applicable in both such cases.”

323. I cite this passage because it illustrates the importance of taking account not only of both the power to grant orders but also basic principles which must be applied. It also highlights that courts will take into account the evolution of commerce and finance and that decisions of courts will develop on a principled basis as may be appropriate. It is also important when citing the dicta of learned judges in freezing order and disclosure cases to remember that the courts have progressively developed relief in order to ensure justice in a fast developing and ever more complex financial world.

324. The financial services sector in Guernsey is both diverse and mature. The absence of exchange controls, technological advances including the growth of business conducted over the internet and global investment opportunities means that money can and does flow from one jurisdiction to another for both lawful and unlawful purposes with great speed. There may be circumstances when funds which were at some time within the jurisdiction of the Royal Court are no longer here or where funds within the jurisdiction of the Royal Court may be eroded quickly. There may be documents and information held by institutions which may

be vital in order to trace the movement of funds in and out of the accounts of defendants. To limit disclosure to the value, location and details of assets may be an unjust limitation in some cases. Disclosure in some cases will be far more important than a freezing order and disclosure will in effect be the main order. This was recognised by Lord Steyn in Grupo Torras. It is important that the Royal Court should in appropriate cases, which in all likelihood will be very exceptional, exercise its power to grant appropriate disclosure orders in non-proprietary cases and this will include cases in aid of proceedings in another jurisdiction.

325. It is often said that the Court should have such power in order to protect the reputation of the Bailiwick. I consider the Royal Court should exercise its power to grant disclosure orders when it is just and convenient in all of the circumstances of the case to grant the relief sought. The Court will need to establish that the evidence justifies it and it is correct in principle, fair, equitable and appropriate. That will always entail an application of appropriate principles and thresholds entailing a scrupulous balancing of the interests of the parties. The Court will always be mindful that disclosure is a serious intrusion into the affairs of a respondent. No two cases will be identical.
326. The Court will be cautious as was recognised by Deputy Bailiff Carey in both *Irish Permanent Building Society v Edmond Farrell* and in *News International v Clinger*. There can be no good reason in principle to limit the power to cases where a plaintiff is tracing his own assets if it is just and convenient to grant an order pre-judgement in a monetary case.
327. The absence of a power enabling a court in the jurisdiction where substantive proceedings are to be initiated or are underway to grant a world wide discovery order will be a fact to be taken into account by the Royal Court but should not be decisive. If a decision is granted to disclose information it may also be appropriate that relevant documentary evidence is also disclosed.
328. I am also satisfied that the Court has power to grant an order requiring a third party to produce documents even if that documentation will result in the disclosure of assets held by other respondents against whom proceedings have been instituted or will be instituted. There may be a need for documents to be edited before disclosure.
329. It is important to note that in this case the disclosure application was made to discover the whereabouts of the assets of the four Respondents who were to be the defendants in the substantive proceedings. The Applicants were not seeking information in order to develop a new cause of action or to discover new defendants. It is not a fishing expedition. I am satisfied that the English Courts have not shirked from making orders in non-proprietary

cases although from the cases cited to me they appear to be rare and hence I am not going beyond settled practice in England. I acknowledge therefore that such orders will seldom be made by the Royal Court.

330. **Order in relation to the freezing of the assets of Seed and disclosure of information and documents by RBS International.**

1. The freezing order will remain in place.
2. RBS International must produce to the Applicants Advocate:
  - (iv) Copies of all documents and records in the possession or control of RBS International relating to the Specified Bank Account plus
  - (v) Copies of all documents and records in the possession or control of RBS International relating to any other account held by Seed.
  - (vi) Copies of all statements, details of transfers in and out of the account(s) and a copy or copies of the mandate(s) held by RBS International in so far as not covered by (i) and (ii) above.

Provided always that the information to be provided by RBS International shall be limited to such information as will enable the Applicants to discover the nature and whereabouts of assets directly and indirectly owned by Seed, Ocean, Mr Garrett or Mr Stockdale.

If RBS International is in doubt as to whether information ought to be disclosed for the purposes of discovering the nature and whereabouts of the assets of Seed, Ocean, Mr Garrett and Mr Stockdale or the extent to which documents may need to be edited then it may seek directions from the Court.

3. RBS International must produce the information and the documents by the 17<sup>th</sup> November 2003.
4. Subject always to this order the other orders granted by the Bailiff shall remain stayed until 31<sup>st</sup> December 2003 or until further order.

**Security for Costs**

331. If after hearing argument I were to award costs to the Applicants then that would in part dispose of Seed's late application for security for costs but not do so in its entirety.

332. There were other disclosure orders made by the Bailiff on 22<sup>nd</sup> November. Those orders have to date remained stayed and will remain stayed until the 31<sup>st</sup> December 2003 on further order.

333. If I had found in favour of Seed I would have inclined to the view that Seed has the power to execute any order which I might have made for costs against assets of the Applicants under Seed's direct or indirect control in the form of the Applicants wine contracts. I heard very limited argument on this point when I raised it with Counsel. This is a feature which Seed will need to consider should it reformulate its claim for security for costs. I therefore defer judgement on the security for costs application until I have dealt with any application which may be made to me for costs.

### **Costs**

334. I will hear argument on costs in this matter but it may be helpful to Counsel to know that in light of my decision I presently incline to the view that the Applicants are entitled to their costs.