Neutral Citation Number: [2014] EWHC 3192 (Ch)

Case No: HC14E03117

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/10/2014

Before:

THE HONOURABLE MR JUSTICE ROTH

Between:

(1) ANGLO FINANCIAL SA
(2) FORTIS BUSINESS HOLDINGS LLC **Claimants**

- and -

STEPHEN JONATHAN GOLDBERG **Defendant**

Mr Jeffrey Littman (instructed by **Waller Pollins Goldstein**) for the **Claimants**
Mr Clive Freedman QC (instructed by **Teacher Stern LLP**) for the **Defendant**

Hearing dates: 18-19 September 2014

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE ROTH

Mr Justice Roth:

Introduction

1. On 11 August 2014, Asplin J made a freezing order against the Defendant, Mr Stephen Goldberg, in the amount of £1.6 million. As is often but not invariably the case, that application was heard without notice. From the note of the hearing, it is clear that the Judge regarded this as a borderline case on risk of dissipation of assets, in the light of the considerable delay, and was only just persuaded to make the order.

2. The Claimants apply to continue the freezing injunction. That application is opposed and there is also a cross-application by Mr Goldberg to discharge the injunction, although it expires in any event at the conclusion of this hearing.

3. The return date of the original injunction was 21 August 2014, when the matter came back before Peter Smith J. Both sides were then represented and it was agreed that a full day's hearing was required, with further time for evidence. The Judge therefore continued the injunction to an adjourned hearing to be held between 18-23 September, and directed that Mr Goldberg file and serve his evidence by 4pm on 3 September and the Claimants file and serve any evidence in reply by 4pm on 11 September.

4. Mr Goldberg asked for an extension from the Claimants of 24 hours and served his evidence at about 5pm on 4 September. The Claimants had adopted in correspondence the position that in return for that extension they required an extension of 72 hours. However, they sought to serve an additional witness statement only on 16 September, followed by the exhibit on 17 September, the day before the hearing. Mr Littman, who appeared for the Claimants on this application as he had at the original without notice hearing, frankly accepted that no good excuse could be put forward for the late service, for which he could only apologise. But if that late evidence were admitted, it would mean that Mr Goldberg would not have an opportunity to file any evidence in response to the quite serious allegations being made. I regard it as wholly unsatisfactory that a claimant who has obtained a freezing order from the Court on a without notice application, which of its nature places a defendant under considerable pressure, should then conduct itself in that way. The timetable set out in Peter Smith J's order was clearly designed to enable both sides to take full account of each other's evidence. With the agreement of Mr Freedman QC, appearing for Mr Goldberg, I admitted that evidence *de bene esse*, on the basis that Mr Freedman could respond on instructions to the new factual material being put forward.

Background

5. The First Claimant ("Anglo") is a Panamanian company and the Second Claimant ("Fortis") is a Delaware corporation. The controlling mind of both companies appears to be Mr Louis Kestenbaum, who lives in New York City. It is Mr Kestenbaum who represented the Claimants in the transactions which give rise to the present claim and who gives evidence on their behalf. Both Claimants appear to be engaged in making financial transactions, i.e. advancing loans, often for short periods at high rates of interests.

6. Mr Goldberg is a solicitor and now works as the in-house solicitor for his family's company that is engaged in property investments in the United Kingdom, Northern & Midland Holdings Ltd ("N&M"). However, at the material time and until about 2010, he was in independent practice. From 1998-October 2007 his firm was called Goldberg Linde. Mr Carl Linde was the other partner until September 2003 and subsequently acted as a consultant to the firm. Over that time, Mr Linde became less engaged in legal work as he concentrated more on assisting his clients with management of their assets. For that purpose, Mr Linde used a company called Fidex Asset Management SA ("Fidex"), incorporated in Luxembourg, and other companies bearing the "Fidex" name. Mr Goldberg also had some involvement with Fidex and signed loan agreements on its behalf. His connection is also indicated by the fact that in October 2007, Mr Goldberg ceased to trade as Goldberg Linde and practised thereafter as Fidex Law.

7. The other key individual to feature in the story is Mr Robert Hirsch, who is resident in Switzerland. He operated what is described by Mr Kestenbaum as a trustee/fiduciare business through a company called Maverick Conseil SA ("Maverick") and also controlled a Swiss firm, Hirsch & Cie. Mr Hirsch became a business associate of Mr Linde, in that they were involved together on a number of transactions.

8. From Mr Kestenbaum's evidence, it appears that from the year 2000 onwards Mr Linde introduced him to a number of financing opportunities and that Mr Kestenbaum's companies made a series of loans to clients of Mr Linde or Fidex, which were all repaid without a problem. Mr Kestenbaum came to trust Mr Linde and a close friendship developed between them. Mr Linde also introduced Mr Kestenbaum to a number of other investment opportunities, including a dot.com business venture.

9. For legal work in England, Mr Kestenbaum's companies used Goldberg Linde/Fidex Law as their principal legal advisors. Mr Kestenbaum came to know Mr Goldberg very well and states that they became friends: he was introduced to Mr Goldberg's father and went to Mr Goldberg's daughter's engagement party. In the Particulars of Claim, their relationship is described as a "close friendship". Mr Kestenbaum says, and I accept, that he came to trust Mr Goldberg as he did Mr Linde.

The Claim

10. The claims against Mr Goldberg by Anglo and Fortis are distinct and need to be described separately.

Anglo

11. The claim by Anglo concerns two loan transactions made, respectively, in January 2007 and February 2008.

12. The January 2007 loan was initially made to Maverick, supposedly a client of Fidex, and subsequently by novation the borrower became Brevard Ltd, a British Virgin Islands ("BVI") company, described in the loan document as a client of Fidex with its office in Geneva. The loan (the "Brevard loan") was for £1 million and was periodically extended. The final extension was by written agreement dated 4 August 2008. The loan matured on 4 February 2009 when it was repayable with fixed interest

of £260,000. The "Borrower" is defined in the loan agreement and related promissory note as comprising not only Brevard Ltd but also its sole corporate director, LZ Nominees Ltd ("LZ Nominees"), and Fidex. The Brevard loan is signed by Mr Goldberg along with Mr Linde on behalf of LZ Nominees.

13. The February 2008 loan is pleaded by the Claimants as being made to a company called New Sales Ltd. However, from the loan documentation before the Court it seems that New Sales Ltd was borrowing jointly with Mr Hirsch personally. The agreement is entered into between Anglo as lender and Fidex and Hirsch & Cie as agents. New Sales Ltd is stated to have the same corporate address in Lausanne as Hirsch & Cie. This loan (the "New Sales loan") was for £1.375 million. The New Sales loan was also extended, eventually by an agreement dated 4 August 2008 with a related promissory note. The maturity date under those documents was the same as for the Brevard loan, i.e. 4 February 2009. The loan was repayable with fixed interest of £357,500. The "Borrower" is defined in the loan documents as comprising not only New Sales Ltd and Mr Hirsch but also Fidex and Hirsch & Cie. It is signed by Mr Goldberg along with Mr Linde, this time on behalf of Fidex, and by Mr Hirsch on behalf of himself personally and for Hirsch & Cie.

14. The promissory notes relating to both the Brevard loan and the New Sales loan contain an identical term that in the event of default, interest will accrue "at the highest rate permitted by law."

15. Anglo asserts in the Particulars of Claim (at para 16) that neither the Brevard loan nor the New Sales loan, nor the stipulated interest, was paid on maturity on 4 February 2009 or at any time since.

16. Both loan agreements contain a number of warranties made by the "Borrower":

    a) clause 4C of the Brevard loan provides that the amount on deposit at the Borrower's specified bank account at ING Wolvendael in Brussels exceeds £2 million and "will at all times until the Note is paid and discharged in full exceed the Loan Value", which in turn is defined as being £2 million.

    b) clause 4C of the New Sales loan is in similar terms save that the account there specified is with Clariden Leu Bank in Zurich and the minimum amount and Loan Value is stated to be £2.75 million.

17. Central to the claim against Mr Goldberg is clause 4B. Although the Particulars of Claim is framed on the basis that the terms of this clause are identical as regards Mr Goldberg in both agreements, that is not correct, as Mr Littman accepted when that was pointed out in the course of argument.

18. In the New Sales loan, clause 4B provides:

> "The Borrower hereby represents, warrants, attests, declares and covenants and agrees as follows:
>
> ...

> B. ...The Signatories hereto, Carl Linde, Esq., Stephen Goldberg, Esq, and Robert Hirsch are the sole signatories on the Account and will remain so until all amounts due and arising under the Note have been unconditionally and irrevocably paid and discharged in full. The Signatories hereto unconditionally warrant jointly and severally that they will not take any action with respect to the Account in contravention of the terms of this Agreement, and assume full responsibility under the terms of this Agreement for any such action. The Borrower and the undersigned Signatories hereto further undertake that until such time as the Note has been unconditionally and irrevocably paid and discharged in full, they will not authorise the withdrawal, transfer of or assignment of any of the monies in the Account other than to make payment to the Lender under the terms of the Note."

19. In the Brevard loan, clause 4B provides:

> "The Borrower hereby represents, warrants, attests, declares and covenants and agrees as follows:
>
> ...
>
> B. The Signatories hereto, Carl Linde, Esq. and Stephen Goldberg, Esq, plus Arthur Ashton are the sole signatories on the Accounts [sic] and will remain so until all amounts due and arising under the Note have been unconditionally and irrevocably paid and discharged in full. The Signatories hereto unconditionally warrant jointly and severally that neither they nor Arthur Ashton will take any action with respect to the Accounts in contravention of the terms of this Agreement, and assume full responsibility under the terms of this Agreement for any such action. The Borrower further undertakes that until such time as the Note has been unconditionally and irrevocably paid and discharged in full, it will not authorise the withdrawal, transfer of or assignment of any of the monies in the Accounts other than to make payment to the Lender under the terms of the Note in this Loan and Security Agreement."

20. Anglo's case against Mr Goldberg is essentially simple. It alleges that on the maturity date, 4 February 2009, both the specified bank accounts were empty. Accordingly, on the assumption that the respective amounts specified were indeed in those accounts at the time the loan agreements were entered into, as the Borrower warranted, there must have been withdrawals from the accounts. Those withdrawals must have been authorised by at least one of the signatories to the respective account. Even if it was not Mr Goldberg who authorised the withdrawals, by clause 4B he assumed liability for such a breach of warranty by one of the other specified signatories.

Fortis

21. The claim by Fortis is of a wholly different nature. In late August or early September 2008, Mr Kestenbaum was approached by Mr Hirsch with a proposal that one of his companies could invest in a mining concession in Rwanda which he was told Hirsch & Cie was seeking to acquire. That was not the kind of investment of which Mr Kestenbaum had prior experience. However, he agreed with Hirsch & Cie to advance $5.25 million for 90 days, after which it would either be converted at the lender's option to an equity investment in the mining concession or treated as a straight loan attracting 26.7% interest. Mr Linde was also involved in the meetings and discussions concerning this proposal, which he was evidently seeking to advance on behalf of Mr Hirsch.

22. As a result, Mr Kestenbaum agreed on behalf of Fortis to proceed with the transaction. On 8 September 2008, the money was paid on behalf of Fortis to Hirsch & Cie's account at Clariden Leu Bank in Switzerland and a promissory note for that sum was executed by Hirsch & Cie in favour of Fortis. The promissory note was governed by New York law with a New York jurisdiction clause.

23. It is not alleged that Mr Goldberg had any involvement in the negotiations or transaction at that point.

24. The Particulars of Claim contend that on the next day, 9 September 2008, Mr Kestenbaum proposed in an email to Mr Goldberg that he (i.e. Mr Goldberg) should "work in an unspecified capacity with Fortis in connection with the loan and mining concessions conditional on there being no conflict of interest for [Mr Goldberg] in so doing."

25. The Claimants have not exhibited that email or the initial reply which it seems Mr Goldberg made, but have exhibited what is expressly stated to be a further email from Mr Goldberg of 10 September in which he says that he has spoken to Mr Hirsch and is satisfied that he can operate in an independent manner on Mr Kestenbaum's behalf. He then proposes how he would need to go out to Rwanda, meet the appropriate professionals and carry out due diligence there, and he sets out his proposed fees.

26. Mr Kestenbaum gave Mr Goldberg instructions to proceed by a further email on the same day which is very clear and specific in its terms. From that email, it is evident that the due diligence which Mr Goldberg was being instructed to carry out concerned the mining concession; and it was not due diligence regarding Hirsch & Cie and its creditworthiness regarding the loan itself, which had of course already been advanced. However, if the equity investment were to proceed, Mr Kestenbaum was also looking to Mr Goldberg to assist in establishing an appropriate partnership structure that would safeguard Fortis' interest.

27. Although the pleading is somewhat ambiguous in that regard, Mr Littman confirmed that this was his client's position. Although Mr Littman referred to a subsequent draft agreement which Mr Goldberg had prepared, that related not to the initial loan but to potential further loans which were never in fact made.

28. Mr Goldberg duly travelled to Rwanda, along with a geologist, and reported back to Mr Kestenbaum. There is a detailed email from Mr Goldberg dated 13 November 2008. That does not advise Mr Kestenbaum against making the investment, as Mr Goldberg suggests in his evidence, but rather sets out some concerns which he and the

geologist had, and expresses the view that if Mr Hirsch addresses those concerns adequately, then this could be a very worthwhile project.

29. In any event, no criticism is made by Mr Kestenbaum regarding this advice and there is no suggestion that Mr Goldberg was not then acting in good faith. Whether it is because the concerns which Mr Goldberg set out in his email were not adequately addressed or for some other reason, Mr Kestenbaum decided not to proceed to take an equity interest in the mining concession.

30. There were apparently discussions between Mr Kestenbaum and Mr Hirsch regarding an extension of the loan, in which Mr Goldberg was not involved, and on 26 February 2009 Fortis formally demanded repayment of the loan. It was not repaid and on 11 March 2009, the Supreme Court of New York granted Fortis judgment against Mr Hirsch and Hirsch & Cie, along with another defendant, in the sum of a little over $6.8 million.

31. By that time, it had emerged that the entire transaction was a fraud perpetrated by Mr Hirsch on Mr Kestenbaum and Fortis. The intention of Mr Hirsch was to use the money provided by Fortis not for an investment in Rwanda but to satisfy his liabilities to an independent third party in Australia. But although Mr Kestenbaum considers that Mr Linde was involved in that fraud, it is not alleged that Mr Goldberg had any involvement. The case against Mr Goldberg is based entirely on what it is alleged Mr Goldberg should have done after he found out about the fraud.

32. It appears, and is Fortis' case, that on the date of the New York judgment the $5.25 million which Fortis had advanced was still in the account of Hirsch & Cie at Clariden Leu Bank. It was transferred from that account to the account of the third party in Australia on Friday, 13 September 2009.

33. Apparently, that same day Mr Goldberg spoke to Mr Kestenbaum and they discussed the position of this money in the Clariden Leu account. It seems that Mr Goldberg told Mr Kestenbaum that the money was blocked, by what I infer is a *saisie* or the Swiss equivalent of a freezing order, by a Swiss Court in either Zurich or Lausanne. That emerges from the transcript of a further telephone call between Mr Kestenbaum and Mr Goldberg on Sunday, 15 March, which Mr Kestenbaum has exhibited. In summary, Mr Goldberg then told Mr Kestenbaum that although he believed that a block had been put on the money in the account, Mr Hirsch had told him on Thursday that he was hoping to get that block lifted, and if that happened Mr Hirsch could send the money straight away to Australia. Accordingly, he told Mr Kestenbaum that he should take urgent action himself to get the money blocked, by contacting his lawyers in Switzerland first thing on Monday morning. I think it is appropriate to quote from the transcript:

> "LK: … Let me ask you a question: you could find, eh, is there any way you can find out the real details of the block? Or you can't?
>
> SG: I can't
>
> LK: You cannot

> SG: I can't. But your lawyer should be able to; your lawyer gets on the phone tomorrow morning, at 8:15, and speaks to them, and put a block on it. Notify them that this is, as you said, this is fraudulent money, it was taken under false pretenses, and let him put a block on it, but he should do that first thing; I'm telling you, Louis,
>
> LK: OK.
>
> SG: It is very important;
>
> ...
>
> LK: ... But Friday you were comfortable that nothing is going to happen for a month or two or three, you said; now, now you are changing your mind
>
> SG: I am changing my mind, yes
>
> LK: OK, I try to understand the background
>
> SG: Because, because, I, because, I am worried, that I know that it has changed from one area to another, and I don't know of what has happened in the intervening period, because I, I know when I spoke to Robert Hirsch, he told me there was a period when there wasn't a block on it, and he tried to send the money, but then it was blocked – I don't know"

34. Mr Kestenbaum contacted his Swiss lawyers as soon as possible thereafter and they sent an urgent letter to Clariden Leu Bank on the Monday morning seeking to block the funds. But by that stage it was too late: the money had gone the previous Friday.

35. Although I have to say that it is not at all clear from the way the matter is pleaded, it is Fortis' case, as explained by Mr Littman, that as soon as Mr Goldberg spoke to Mr Hirsch on the Thursday and learnt that (as he here relates) Mr Hirsch was seeking to get the block lifted, Mr Goldberg should have got on the telephone to Mr Kestenbaum and told him to get a new block placed on the money. If Mr Goldberg had done that, then Mr Kestenbaum could have got his Swiss lawyer to block the money successfully on the Friday morning, as opposed to seeking to do so unsuccessfully the following Monday.

36. In his affirmation, Mr Kestenbaum goes further and states, at paragraph 90:

> "Mr Goldberg subsequently told me that he was aware of the fact that, when he advised me to freeze the funds in Switzerland, they had already left the jurisdiction."

No details are given as to when and in what circumstances Mr Goldberg is alleged to have made that admission, which is denied by Mr Goldberg in his evidence in reply. Although Mr Kestenbaum, as I mentioned at the outset, served a further witness statement in response, he does not there address this point at all.

37. These facts are alleged to constitute a breach of fiduciary duty on the part of Mr Goldberg as solicitor to Fortis, or breach of contract and negligence at common law. Mr Littman explained that the broader allegations made against Mr Goldberg in the pleading are not abandoned but depend upon further investigation of what exactly Mr Goldberg knew and at what stage. For the purposes of the freezing order, he confined his case to this particular allegation regarding the monies frozen in the Clariden Leu account.

Freezing order

38. The requirements for the grant of a freezing order are well known. There are three cumulative conditions:

a) The claimant must show a good arguable case: that is something less than the balance of probabilities but more than a serious question to be tried (i.e. the *American Cyanamid* test): see, in the context of jurisdiction, *Canada Trust v Stolzenberg (No. 2)* [1998] 1 WLR 547 per Waller LJ at 555.

b) There must be a real risk of dissipation of assets such that a judgment in the claimant's favour would be unsatisfied: *The Niedersachsen* [1983] 1 WLR 1412 at 1422.

c) It must be just and convenient to grant relief: sect. 37(1) of the Senior Courts Act 1981.

Good arguable case

Anglo

39. As regards Anglo, I accept for the purposes of this application that, on the basis of the express personal warranties by Mr Goldberg in both the Brevard and New Sales loan agreements, there is a good arguable case of breach.

40. However, I am not at all clear that there remains any loss suffered by Anglo that has not been satisfied. In May 2009, Anglo and Fortis brought a claim in this Court against Mr Linde along with Mr Hirsch, Hirsch & Cie and some others. They obtained a freezing order against Mr Linde and on 4 December 2009 that action as against him was settled by a Tomlin order. The terms of that order are not exhibited but it is disclosed that the Claimants have recovered some $7.285 million from Mr Linde.

41. Further, the Claimants have recovered from Mr Hirsch and Hirsch & Cie some $2.566 million. As explained above, Mr Hirsch and Hirsch & Cie are both comprised within the "Borrower" and therefore liable under the New Sales loan.

42. Accordingly, there has been a total recovery of about $9.85 million which, applying Mr Littman's conversion rate of 1.7:1, amounts to around £5.79 million.

43. The recovery from Mr Linde alone is more than the principal and interest due on the two loans as at 4 February 2009. Although Anglo has claimed "non-UK legal fees" of £1,881,618, paid on 24 June 2012, those are wholly unparticularised and it is unclear

how such high fees might be justified when Anglo had the benefit of a settlement with Mr Linde under an order of this Court.

44. Anglo is also entitled to interest after 4 February 2009, but Mr Littman had to accept that the interest calculation set out in the pleaded Particulars of Loss cannot be correct since it is computed on the full liability as at 4 February 2009 for the period up to 7 August 2014 and therefore fails to take account of the fact that part, if not all, of the principal debt was satisfied during that period by the recovery made against Mr Linde.

45. It is highly unfortunate, to say the least, that interest has been pleaded in an exaggerated amount, in Particulars of Claim substantiated by a statement of truth on behalf of Anglo, which is well accustomed to international financial dealing and would readily appreciate the basis on which interest has to be calculated.

46. Accordingly, although I accept that Anglo has an arguable case, I am not satisfied that it has a *good* arguable case to recover monies from Mr Goldberg, applying the slightly higher test set out in *Canada Trust*. It is wholly unclear when recovery was made from Mr Linde, and Mr Littman had to tell the Court that he did not know. The calculation of loss begs far too many questions.

Fortis

47. As regards Fortis, the first question is whether Mr Goldberg owed any continuing duty to the company as at mid-March 2009. Mr Goldberg had completed his due diligence on the mining concession in late 2008, and Mr Kestenbaum had decided not to take an equity investment. Mr Littman argued that Mr Goldberg's role amounted to more than just due diligence on the mining concession, and that Mr Goldberg acted as agent for Fortis and "owed the duty of agent as regards the prospective transaction." I have major doubts that the "prospective transaction" was anything other than the investment in the Rwanda mining concession, and certain other concessions which Mr Hirsch claimed to be considering and which were also not pursued. I can see that Mr Goldberg may have owed a duty to reveal to Mr Kestenbaum/Fortis when he discovered that the mining transaction was part of a fraud whereby Mr Hirsch had procured the advance of $5.25 million. But it is clear that Mr Kestenbaum was aware of that fraud by 11 March, whether as a result of information supplied by Mr Goldberg or from elsewhere. To succeed under this head, Fortis would have to satisfy the Court that Mr Goldberg owed a duty to warn Fortis as soon as he learnt that the money frozen in Hirsch & Cie's Swiss bank account became unblocked, or even might become unblocked. That would be a considerable extension of any duty or retainer, when it seems that Mr Goldberg did no further work for Fortis or Mr Kestenbaum after the end of 2008.

48. However, in the light of my findings on the risk of dissipation and non-disclosure, it is unnecessary to reach a concluded view as to whether Fortis has shown a good arguable case on this ground. I shall simply say that I have serious doubt that it meets the threshold.

49. Further, under this head also, the claim as advanced in support of a freezing order appears to me manifestly overstated. The loss claimed against Mr Goldberg by Fortis is pleaded at some £6.83 million plus the recovery of costs of $127,000. That may be Fortis' total loss as a result of the Rwanda fraud since the loan carried a significant

rate of interest. But the particular breach now advanced as against Mr Goldberg resulted, on Fortis' case, in the loss of $5.25 million that was transferred out of the Clariden Leu account on Friday, 13 March 2009.

50. However, since the freezing order made by Asplin J was limited to £1.6 million, and there is no attempt on the part of the Claimants to increase that sum, it is unnecessary to say more in that regard.

Risk of dissipation

51. The relevant principles have been conveniently summarised by Eder J in *Elektromotive Group Ltd v Pan* [2012] EWHC 2742 (QB) at [33(i)]:

> "i. ...the Court must conclude on the whole evidence before it that the refusal of a freezing order would involve a real risk that the judgment would remain unsatisfied: *The Niedersachsen* [1983] 1 WLR 1412 (at 1422H). In *Z Ltd v A-Z* [1982] QB 558 (at 585A-G), Kerr LJ held that one particular form of abuse of this basic jurisdictional principle was as follows:
>
> > *"The increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself 'judgment-proof'; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action."*
>
> ii. Bare assertions that a defendant is likely to put assets beyond the claimant's grasp and is unlikely to honour any judgment or award are not enough of themselves. Exiguousness of the claimant's evidence on this aspect must weigh strongly when the Court comes to consider the matter inter partes on an application to discharge: *The Niedersachsen* (above) (at 1419H-1420B).
>
> iii. There must be solid evidence of the risk of dissipation: *Thane v Tomlinson* [2003] EWCA Civ 1272 (at para 21).
>
> iv. The mere reliance on the alleged dishonesty of the defendant is not of itself sufficient to found a risk of dissipation. It is appropriate in each case for the Court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate (*Thane* (above) at para 28)."

52. In his argument against continuation of the injunction, Mr Freedman relied strongly on the delay before the Claimants launched these proceedings. He submitted that in

the present case, the issue of delay is relevant to both the risk of dissipation and non-disclosure.

53. The significance of delay will vary greatly from one case to another. In particular, it is important to consider what happened over the period of delay and how the claimant seeks to explain it. As Eder J stated in *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (Comm) at [78]:

> "Delay in bringing the application is at least one factor to be weighed in the balance in considering whether or not to continue the freezing injunction. ... it is not simply the fact of delay that is so important but what it tells the court about the risk of dissipation. Absent some proper explanation, the fact that the claimants here waited for almost 2 and a half years before seeking a freezing injunction raises, at the very least, a large question mark as to whether there is indeed a real risk of dissipation particularly against the background of the many and varied Indian proceedings in which the parties have been engaged since 2007."

54. In the circumstances of the present case, I consider the delay to be very relevant.

55. It is common ground that after obtaining the Tomlin order against Mr Linde in late 2009, Mr Kestenbaum engaged in 2010 in prolonged negotiations with Mr Goldberg in an attempt to achieve settlement of his companies' claims against him. Those negotiations ultimately broke down, although they proceeded for almost a year. Thus, Mr Goldberg was well aware that Mr Kestenbaum was pursuing him for the recovery of the substantial losses made by his companies.

56. Further, the matter resumed in about 2012 when an intermediary approached Mr Goldberg on behalf of Mr Kestenbaum. Mr Kestenbaum and Mr Goldberg are both orthodox Jews, and Mr Goldberg then suggested that the case could be brought before the rabbinical Court of the London Beth Din as opposed to the ordinary courts. Mr Kestenbaum did not follow that course, but Mr Goldberg could have been under no illusion that Mr Kestenbaum was still seeking to recover the monies his companies had lost. However, it was only in August 2014 that the Claimants launched these proceedings.

57. Accordingly, if Mr Goldberg was someone who had the intention or desire to spirit away or conceal his assets to avoid a judgment, he had ample opportunity to do so. And if Mr Kestenbaum really believed that there was a serious risk that Mr Goldberg would act in that way, I would expect him to have commenced these proceedings and sought a freezing order not months but years before now.

58. What explanation does Mr Kestenbaum give for this delay? Hardly anything is said in his affirmation, save that he waited first to try and collect monies from other entities that had responsibility for the losses. But at least as regards the period from 2010, that seems to me inconsistent with the fact that Mr Kestenbaum then engaged in prolonged negotiations to try to get payment from Mr Goldberg.

59. In Mr Littman's skeleton argument, it is said that the Claimants had doubt that Mr Goldberg was worth pursuing but that more recently "it became apparent that he is worth powder and shot." Not only is that explanation not part of the Claimant's evidence, although it is now adopted in Mr Kestenbaum's recent witness statement, but given the nature of Mr Goldberg's assets and what I have been told about what was said in those negotiations, there is no basis on which it can be suggested that the Claimants have made some recent and significant discovery about Mr Goldberg's wealth. This is not a case of an individual who has come into new and substantial funds in the past few years. Moreover, if Mr Kestenbaum had believed that Mr Goldberg was unable to pay significant money, it is difficult to understand why he nonetheless devoted prolonged efforts to seek a substantial payment from Mr Goldberg in the many months of negotiations in 2010. In that regard, it is telling to learn from Mr Kestenbaum's recent witness statement what he said to Mr Goldberg on 27 April 2010, according to the transcript of the conversation from which he quotes:

> "LK: The bottom line is, if I get paid from Robert, I am not going to take, if I get paid from you, I am not going to take. But I don't know what's going to happen. I am not a prophet, I am going to work very hard to get it. I need a proposal, The bottom line is to me ... you have shares, you're worth money, you are going to make money, you made money, and. [sic] If you don't, I am not going to get, I am not going to go, I don't want to go in court. I want to avoid everything to go in court. I don't have to, I don't want to do it. But one thing I need from you, I need, get this money and to see what, you know what I am saying, give me a proposal, a plan, if, I have no problem, If I get from them I write to you, you don't owe me the money, but if I don't get from them I want the money from you."

60. Mr Littman's skeleton argument also referred to the period between the end of June 2014 and the issue of the claim form, when he says the Claimants did not wish to start court proceedings because of the strictures that he says very orthodox Jews are under in the period of commemoration of the destruction of the Temple. I make no finding in that regard and make clear that I do not draw any adverse conclusion from the decision not to start proceedings over that short period. It is the much longer period of years between 2010 and June 2014 which I regard as relevant.

61. I turn to consider what Mr Goldberg's assets are and what has happened to them over this prolonged period.

Shares in Goldpalm Ltd

62. The Claimants rely first on Mr Goldberg's shares in Goldpalm Ltd, which is the holding company of N&M, the family property investment company. Mr Goldberg's evidence is that he holds 4,780 shares in his own name, which represents 6.25% of the total shareholding. The last filed accounts of the company show its total value at £28.8 million. This is therefore a substantial asset, even if the value of such a minority shareholding in a private company cannot be computed pro rata and is subject to significant discount.

63. However, Mr Goldberg's evidence is that those shares have been given as security to the subsidiary company, N&M, in April 2009, in return for a loan from the family of c.£1.2 million which he raised specifically for the purpose of paying Fortis. This arose because of another of the loan agreements arranged largely between Mr Linde and Mr Kestenbaum. On 17 October 2008, Fortis made a loan to Cotto Assets Ltd, a BVI company (the "Cotto loan"). The loan agreement was not dissimilar to those for the Brevard and New Sales loans, and Mr Goldberg signed the agreement along with Mr Linde on behalf of Fidex and LZ Nominees, the corporate director of Cotto Assets Ltd.

64. It is not in dispute that Mr Goldberg made a payment of over $1.278 million to Mr Kestenbaum in discharge of the Cotto loan on 27 April 2009. In my judgment, that is significant in two respects:

a) The fact that Mr Goldberg was prepared to raise money to make such a very substantial payment to Mr Kestenbaum, or his company, in respect of losses incurred in a very similar transaction to the Brevard and New Sales transactions claimed on here, is in my judgment a strong indication that Mr Goldberg is not someone who seeks to conceal or dissipate assets to avoid having to make such a payment.

b) There is nothing untoward about Mr Goldberg pledging his shareholding as security for the loan from his family's company. The shares remain in his legal ownership, and as shares in a private English company, they are not assets which can readily be dissipated. In argument, Mr Littman submitted that the Court should draw an adverse inference from the fact that there was no documentation of this loan, and suggested that it was all rather suspicious. However, Mr Goldberg paid over a substantial sum of money which he would have had to raise, and I see no basis to find that his account of these dealings within the family regarding the pledging of his shares in the family company as security for a loan to enable him to make the payment somehow supports a finding that Mr Goldberg is not to be trusted and may seek to spirit away his assets.

65. As regards Mr Goldberg's payment, there is a disputed issue between the parties as to whether it was made, as Mr Goldberg asserts, only in consideration of a promise by Mr Kestenbaum not to pursue him further for any other claims and not in satisfaction of any personal liability in respect of the Cotto loan itself. Mr Kestenbaum disputes that, and asserts that Mr Goldberg paid because he was liable under the Cotto loan agreement which he had signed (and which contained a personal warranty by the signatories similar to the warranties under the Brevard and New Sales loan agreements). I obviously cannot resolve that dispute on this interim application. But assuming in the Claimants' favour that Mr Goldberg paid because he felt liable under the terms of the Cotto loan, that reinforces the point that he is not an individual who seeks to avoid satisfying a liability to a company run by Mr Kestenbaum and who would therefore seek to dissipate his assets to that end.

Pension Plan

66. Next, Mr Goldberg has disclosed in his statement of assets, made pursuant to the freezing order, his pension plan, currently worth £341,400. However, under

legislation currently in force he can withdraw only 25% of that value as a lump sum. Significantly, he has not done so at any time in the past four years despite his knowledge of the claims that Mr Kestenbaum was pressing against him. Mr Littman referred to the fact that the position will change next April when Mr Goldberg will be able to withdraw all his pension. But that cannot begin to constitute evidence of a real risk that Mr Goldberg will do so, still less that he will do so in order to dissipate his assets. Mr Goldberg states that he needs this fund for his pension and there is no reason to disbelieve him.

Properties

67. Before the Judge on the without notice application and again before me, the Claimants sought to place considerable reliance on the position regarding the former matrimonial home at 103 Bridge Lane and the house where Mr Goldberg now lives with his wife at 16 Decoy Avenue, both in London NW11. The Decoy Avenue property was bought in April 2008 and the Bridge Lane property was sold in June 2012. At least part of the long interval between the two transactions was due to the fact that extensive building works were carried out at the Decoy Avenue site so the Goldberg family remained resident at Bridge Lane until the new house at Decoy Avenue was ready.

16 Decoy Avenue

68. In the affirmation placed before the Court at the without notice application, the Claimants exhibited the Land Registry entry showing that the property was registered in Mrs Goldberg's name in August 2010. On the basis that it had been purchased in 2008, Mr Kestenbaum stated that he had been "advised that it can be inferred" that Mr Goldberg "simply transferred it into her name" in August 2010. However, Mr Goldberg explains in his evidence that 16 Decoy Avenue was purchased from the outset in his wife's sole name, and he exhibits the contract of purchase. He explains that the failure to register her title in 2008 was just an oversight that came to light in 2010 when they sought to execute a charge over both the Decoy Avenue and Bridge Lane properties as security for a loan which they took out to cover the building works. That failure was remedied by transfer forms sent to the Land Registry at the time, who corrected the Register. Thus, there never was a transfer by Mr Goldberg of the property to his wife.

69. Instead of accepting this explanation, Mr Littman advanced a new submission that Mr Goldberg was not telling the truth in his affirmation of assets, since there he disclosed no interest in 16 Decoy Avenue. Mr Littman argued that Mr Goldberg would have a beneficial interest, since on his evidence the money for the purchase came from the proceeds of disposal of another property, in Grosvenor Gardens, which Mr and Mrs Goldberg had initially agreed to buy as their new home but then released to the owners of the adjacent property who were prepared to pay a premium of £500,000. That money, together with some £45,000 of family savings, was used to pay the purchase price of 16 Decoy Avenue in 2008.

70. However, Mr Goldberg states that the move from 103 Bridge Lane had always been his wife's project and that she was the driving force in finding the new properties and negotiating the transactions, so he was content for 16 Decoy Avenue to be owned solely by her. Whether that is the full explanation, or whether there were in addition

fiscal considerations, as suggested by the letter from Mr Goldberg's former solicitors of 18 August 2014, the simple fact is that the contract for Mrs Goldberg to purchase 16 Decoy Avenue was entered into on 10 April 2008. That is long before the problems arose with the Brevard and New Sales loans and before any prospect of an investment on the part of Mr Kestenbaum's company in Rwanda had even been put forward. It is, in my judgment, wholly misconceived to suggest that the purchase in his wife's sole name in April 2008 of what was to become the new family home indicates a risk of Mr Goldberg dissipating his assets.

71. As for Mr Goldberg's affirmation of assets, as Mr Freedman pointed out, the law on resulting trusts is not straightforward and the presumption of advancement would normally have applied at that time to a purchase by a husband of property in the name of his wife, rebutting any intention to create a trust. The purchase of 16 Decoy Avenue was completed prior to sect. 199 of the Equality Act 2010 coming into force. I reject the suggestion that the affirmation of assets was dishonest on this basis.

72. The fact that in the "without prejudice" negotiations in 2010, Mr Goldberg may have referred to the property as "his house", even if that were admissible and not covered by privilege, does not, in my judgment, affect this conclusion. In negotiations of that kind, people often talk of assets on which they can raise funds without necessarily being precise, and his wife may have been willing to allow their home to be used to assist in achieving an overall settlement of the claims against her husband.

73. The circumstances of the development loan secured on the properties were not relied on in the original application for a freezing order as the Claimants were then not aware of it. It is disclosed in Mr Goldberg's evidence and he exhibits a copy of the loan agreement dated 20 December 2010. It is a loan facility from a Gibraltar company, Enid Properties Ltd ("Enid"), enabling Mr and Mrs Goldberg together to draw down up to £1.25 million by tranches. The loan is secured by mortgages on both the Bridge Lane and Decoy Avenue properties. The executed version of the agreement was produced by English solicitors, and Mr Littman did not suggest that it was other than genuine, but nonetheless sought to argue that there is "a cloud of suspicion" over this agreement. That was essentially on the basis that the lender was an obscure Gibraltar company, the loan was secured using the services of a solicitor at the well-known Gibraltar firm of Hassans who was engaged in tax planning rather than property transactions, and the interest rate was stated to be 20%. However, Mr Freedman pointed out that the loan was for a total period of 20 months, out of which it was interest-free for the first 14 months. That disposes of the interest rate point. As for the use of a Gibraltar company, it may be that there was an element of tax planning in this borrowing but there is nothing untoward about that. Clause 19 of the loan agreement significantly states:

> "Stephen Jonathan Goldberg has joined in this Loan Agreement at the request of the Lender. Such participation is not to be deemed an express or implied representation or warranty on the part of the Borrower that Stephen Jonathan Goldberg has an equitable or legal interest in the Decoy Avenue Property."

I should add that I see nothing suspicious about the fact that this clause was added in manuscript before the agreement was executed.

103 Bridge Lane

74. On 11 June 2012, Mr Goldberg sold his house to Uri and Rebecca Goldberg for £950,000. In the affirmation placed before the Court at the without notice application, Mr Kestenbaum stated that it was sold to Mr Goldberg's son and daughter-in-law and added:

> "I have no idea whether they paid full market value for it but I have my doubts."

75. Mr Goldberg points out that the purchasers were not his son and daughter-in-law but his nephew, who is in his thirties, and his wife. Mr Goldberg says that the sale was at market value since he got valuations from two estate agents (whom he identifies), who both advised that the property could be marketed at just over £1 million to enable a sale price "slightly below £1 million" to be achieved. He explains that he therefore discounted from £1 million to arrive at a price of £950,000 to account for fees and VAT saved by not selling through an estate agent, and the benefit of avoiding the inconvenience of having to market the property.

76. The Claimants now apologise for the mistake made as between Mr Goldberg's son and his nephew. However, Mr Littman proceeded to submit that it really made no difference as this was not a sale on the open market but within the family, and therefore was likely to be at an undervalue. I have to say that I found that an astonishing submission. As Mr Kestenbaum is well aware, Mr Goldberg has several children. There is no suggestion that Mr Goldberg is an individual of enormous wealth. The benefit which a man may wish to pass on to one of his own children, who in due course may be expected to inherit from him, is, in my view, obviously different from the arrangement he may come to with another member of the family regarding one of his most valuable assets. I would have thought that, as a general proposition, that is self-evident.

77. Mr Kestenbaum's witness statement of 16 September 2014 asserts:

> "We have been advised that the property would be worth significantly greater than the amount it was sold for."

But he further states:

> "We are still awaiting an expert's report in relation to the value of the property at the relevant time."

78. I note that Mr Kestenbaum does not disclose the source of the advice he says he has received on the property's value. The Claimants have had months to prepare their case and obtaining a professional valuation of a property in London as at June 2012 is hardly a difficult exercise. Although Mr Littman sought to complain that Mr Goldberg had not exhibited the valuations to which he referred, the burden is of course on the Claimants to support their assertions that the sale of 103 Bridge Lane indicates a risk of dissipation of assets. There is not a shred of evidence before the Court to support the Claimants' suggestion that it was sold at an under-value.

Other suggestions

79. The Claimants sought to rely on the fact that Mr Goldberg engaged in prolonged negotiations in 2010 and then, as Mr Kestenbaum puts it, "inexplicably walked away" without denying liability, as indicating that he is someone who is devious and not to be trusted. However, it is a commonplace that parties to very many of the commercial cases that come to trial have attempted to negotiate a settlement, and there are all kinds of reasons why such negotiations may be unsuccessful. That the claims were not settled cannot be taken of itself as an indication that one side cannot be trusted. On the contrary, in the present case, as I have already observed, the very length of those negotiations, and the fact that Mr Goldberg did not seek to conceal or dissipate assets at that time, is in my judgment a significant factor in the balance when assessing whether there is a real risk that he would do so now.

80. Mr Littman also suggested in his skeleton argument placed before the Judge at the without notice application that "it is all too easy for someone like [Mr Goldberg] to leave the jurisdiction and go to Israel, from which he could not be made to return." This remarkable submission was repeated in argument before me, on the basis that Mr Goldberg made his affirmation of assets of 21 August 2014 in Israel and first instructed to represent him in the present action a firm of English solicitors that also have an office in Tel Aviv. But Mr Goldberg has not moved to Israel in the four years since Mr Kestenbaum started to seek recovery from him; he is involved with his family's UK property business; and he states in his affirmation that four of his children live in England, the youngest of whom is a teenage girl at school and living at home. He states firmly that he has no plans to leave the United Kingdom. There is no basis whatever to find otherwise. That is quite aside from the fact that there is reciprocal enforcement of civil judgments as between Israel and the jurisdictions in the United Kingdom pursuant to the 1958 Convention between Israel and the United Kingdom on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters.

81. Altogether, I find that the Claimants' case on risk of dissipation, when carefully scrutinised in the light of Mr Goldberg's evidence in reply, rests on bold surmise supported by an attempt to raise suspicion and draw inferences against Mr Goldberg on the flimsiest foundations. The Claimants have repeatedly attacked Mr Goldberg's honesty and both the evidence of Mr Kestenbaum and the arguments of Mr Littman are replete with suggestions of duplicity, deceit and even, in Mr Littman's oral submissions before me, perjury. Those are serious allegations to make against any individual, let alone against a professional solicitor.

82. On this interim application, I am of course not concerned with determining what happened regarding the monies in the bank accounts referred to in the Brevard and New Sales loan agreements, or precisely when Mr Goldberg discovered that the advance by Fortis in relation to the purported concession in Rwanda had been procured by fraud. Mr Goldberg is not an individual with significant liquid assets. I conclude that on the evidence before the Court, there is no basis to find that there is, objectively viewed, a real risk of dissipation of assets by Mr Goldberg in the absence of a freezing order.

83. That is of course sufficient to dispose of the Claimants' application. However, as it was fully argued and may have some further relevance, I address the points raised by Mr Freedman concerning non-disclosure.

Material non-disclosure

84. The importance of an applicant for a freezing order on a without notice application making full and frank disclosure has been repeatedly emphasised by the courts. In an oft-cited passage in *Siporex Trade v Comdel* [1986] 2 Lloyd's Rep 428 at 437, Bingham J stated:

> "Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state."

85. In *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, Ralph Gibson LJ, in a judgment with which Slade and Balcombe LJJ agreed, set out at 1356-1357 the following principles that should apply in deciding whether there had been relevant non-disclosure:

> "(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486,514, *per* Scrutton L.J.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners, per* Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. V. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.
>
> (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the

> order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92-93."

86. Here, Mr Freedman relies strongly on the failure properly to disclose the repayment by Mr Goldberg of the Cotto loan. That fact was buried away in Mr Kestenbaum's lengthy affirmation made in the 2009 action against Mr Linde that was also placed before the Judge here on the without notice application, and it was not drawn to the Judge's attention at all. Mr Littman sought to persuade me that it was simply not material. He submitted that a claimant seeking a freezing injunction is not obliged to show that the defendant is not trustworthy in all aspects of his dealings. As a general statement, that is no doubt correct. But this was an instance of a defendant dealing with the same claimant, regarding a transaction that was very similar to the transactions sued upon, at almost the same time as the alleged liability that is the subject of the present action, and paying a substantial sum of money. As I have stated above, I regard it as highly material to the question of a risk of dissipation and I would have thought it self-evident that Mr Goldberg would seek to rely on it in resisting a freezing order. I have no doubt that it should have been brought to the attention of the Judge.

87. Secondly, the Court was given a false picture regarding the sale of 103 Bridge Lane to Mr Goldberg's son when it is now acknowledged that it was sold to his nephew. I have made clear my reasons for regarding that distinction as material. I accept that this was not a deliberate error. But Mr Kestenbaum has sought to emphasise how good friends he was with Mr Goldberg and his attendance at family occasions. That such a mistake was made is, in my view, an example of the somewhat cavalier way in which the Claimants put together their evidence.

88. Next, the Claimants wholly failed to point out to the Judge that Mr Goldberg was likely to rely on the years of delay and the fact that if Mr Kestenbaum believed that Mr Goldberg was dishonest and the sort of defendant who is likely to dissipate his assets to avoid his liability, it might be said that the Claimants would have sought a freezing order some years before when Mr Kestenbaum began to press their claims. I recognise that the skeleton argument placed before the Judge does refer to the delay but it fails to indicate the argument which it could be expected Mr Goldberg would wish to put forward as a result.

89. Further, the Claimants did not point out to the Judge the possible defence to the Anglo claim that there remained no recoverable loss, for reasons I have set out, and put forward a calculation of interest that over-stated the claim. Again, I do not suggest that the mis-calculation of interest was deliberate. But as I have observed, it is an elementary error made by a company well experienced in financial transactions and doubtless familiar with the way interest is to be calculated.

90. The Claimants also failed to point out a possible defence to Fortis' claim, namely that Mr Goldberg would say that he was no longer under any legal obligation to assist the company in making a recovery from Mr Hirsch or Hirsch & Cie in respect of a fraud

in which Mr Goldberg himself had played no part. Indeed, the way the matter was put to the Judge in counsel's skeleton argument regarding this claim is, in my view, disturbing. That written argument states, at paragraph 17:

> "[Mr Goldberg] was in possession of knowledge to the effect that the loan to Hirsch & Cie was fraudulent and owed Fortis a fiduciary duty to disclose it. He did not disclose it until too late."

And then it proceeds, at paragraph 18:

> "Quite clearly, had Fortis known that the money was to be used to pay a liability to Mr Blank the loan would not have been made."

The clear impression created by those assertions is that Mr Goldberg was aware of the original fraud at the time it was being practised upon Fortis. However, that is not the case at all, and, indeed, Mr Kestenbaum's evidence does not make that suggestion.

91. Having regard to all of the above factors, I have no doubt that there was material non-disclosure in this case, for much of which there is no good explanation.

92. Material non-disclosure will not necessarily lead to the discharge of a freezing order, and in this case the order will in any event elapse on determination of the present hearing. However, when it does justify discharge, it may, but will not necessarily, be the basis on which the Court refuses to grant a further injunction. In *Millhouse UK Ltd v Sibir Energy PLC* [2008] EWHC 2614 (Ch), Christopher Clarke J made the following observations, which I respectfully adopt:

> "104. The Court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the Court itself, exists in order to secure the integrity of the Court's process and to protect the interests of those potentially affected by whatever order the Court is invited to make. The Court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.
>
> 105. As to the future, the Court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non-disclosure, the Court will not be blind to the fact that a refusal to continue

> or renew an order may work a real injustice, which it may wish to avoid.
>
> 106. As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

93. Here, I regard the non-disclosure as both serious and significant, in a case where the grounds for granting a freezing order were never strong. The issue of non-disclosure, as Mr Freedman submitted, is here bound up with the risk of dissipation, since the assessment of that risk is very different once the material facts are correctly before the Court. Thus, the material non-disclosure is a reinforcing ground for refusing the Claimants' application for a further injunction.

Just and convenient to grant leave

94. In the light of the above, it is unnecessary to prolong this judgment by further consideration of this as a distinct condition. I will simply observe that I regard as fundamentally misconceived the Claimants' submission that this is a question of balancing the prejudice to Mr Goldberg of granting a freezing order as against the potential prejudice to the Claimants of refusing one if a subsequent judgment in their favour should be unsatisfied. This is not a question of a balance of convenience, as applies under the *American Cyanamid* test for an interim injunction. In many cases, where a sufficient allowance is provided for living expenses and legal fees, an individual defendant may not suffer hardship as a result of a freezing order. That does not, in itself, make it just and convenient for such an order to be made.

95. The Claimants' application to renew the freezing order is accordingly dismissed. Since the existing order lapses under its terms, it is unnecessary to make any order on Mr Goldberg's cross-application.

Postscript

96. From the note of the hearing of the without notice application, it is clear that Asplin J had reservations as to whether this application qualified as vacation business. On the basis of the much fuller material now before the Court, it is clear that her reservations were justified. Unlike many freezing orders, there was nothing particularly urgent about this application and no reason why it could not have been heard in October.