Case No: HC10C01784

Neutral Citation Number: [2010] EWHC 1908 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2010

Before :

MR JUSTICE ROTH

- -

Between :

LUXE HOLDING LIMITED	**Claimant**
- and -	
MIDLAND RESOURCES HOLDING LIMITED	**Defendant**

- -
- -

John Higham QC and Zoë O'Sullivan (instructed by **White & Case**) for the **Claimant**
Jonathan Gaisman QC and Charles Holroyd (instructed by **Allen & Overy**) for the **Defendant**

Hearing dates: 14 and 15 July 2010

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Judgment

Mr Justice Roth :

1. There are before the court two applications. The first is an application by the defendant ("Midland") to discharge the injunction granted without notice by Mann J on 26 May 2010 and continued by Norris J on 2 June 2010. The second is an application by the claimant ("Luxe") for a fresh injunction.

2. The original injunction which is presently in force restrained the sale, transfer or other dealing with shares held by Midland in 20 companies, many of them incorporated in Russia or the Ukraine. The injunction was granted in support of Luxe's claim for specific performance of an agreement for the purchase by it from Midland of those shareholdings. Luxe now acknowledges in the light of events that will be described below that the claim for specific performance is unsustainable and it seeks to amend its claim form to claim instead an entitlement to the profits made by Midland by reason of its sale of those shares or alternatively "equitable compensation" or damages.

3. Prior to the hearing, Luxe sought to argue that the existing injunction should be discharged only on condition that Midland pays into court a sum that represents the balance of its proprietary claim to the proceeds or that Midland be restrained from dealing with or disposing of those proceeds. Such a "conditional discharge" was strongly resisted by Midland on the basis that if the underlying claim that supported the original injunction was no longer pursued, that injunction cannot stand. Since on any view there can be no right to any such condition ancillary to a discharge of the injunction if there would be no right to a fresh injunction in such terms, the argument before the court has focussed on whether such a fresh injunction should be granted.

4. At the end of the hearing, because of the urgency of the situation, it was agreed that the existing injunction should be discharged on an undertaking by Midland that the amount claimed out of the proceeds of sale, when received, should be held in a designated account to protect Luxe's position pending the delivery of this judgment. The court made an order in those terms on 15 July.

The Facts

5. The essential facts in this case are simple whereas the legal issues examined in argument were complex, embracing inter alia questions of trusts, conflict of laws and the right to an account of profits. Midland is a company incorporated in Guernsey and, as its name suggests, is a holding company of a range of interests held through a network of subsidiaries. The ultimate beneficiaries of Midland are, as to 50% each, Mr Eduard Shifrin (and his immediate family) and Mr Alexander Schnaider. Luxe is a company incorporated in Cyprus. Prior to the events which give rise to this claim, one of the major interests of Midland was its shareholding in the Zaporiszhstal Group ("the Z Group") which is primarily involved in the mining and metal industries in Ukraine. The other major shareholder of the Z Group was the Industrial Bank Group ("IBG"). It appears that one of the Z Group's main assets is the fifth largest steel producer in Ukraine.

6. By a Sale and Purchase Agreement dated 4 May 2010 ("the SPA"), Midland agreed to sell to Luxe its shares in the companies listed in a schedule to the agreement. The schedule lists 20 companies, of which the first 17 are Russian or Ukrainian companies

and the remainder comprise a Guernsey company and two Irish companies. The first 17 companies include Midland's interests in the Z Group, and Mr Simonov, Luxe's Ukrainian lawyer, states that IBG was privy to all the discussions between Midland and Luxe regarding this sale.

7. The SPA is a short agreement which comprises 13 clauses. It is in parallel Russian and English texts and clause 13 provides that in the event of a conflict, the Russian language version shall prevail. Save briefly in one respect, I was not addressed on the Russian text and there is no suggestion on this application that there is any material difference between the two language versions.

8. By clause 12, the agreement in governed by English law and the parties submit to the exclusive jurisdiction of the English courts.

9. It is necessary to set out some of the terms of the SPA in full. Midland is defined as "the Seller" and Luxe as "the Buyer". Clauses 1 and 2 provide:

> "1. The Seller is a direct or indirect legal and beneficial owner of shares and interests in the companies (the "Companies") set out in Schedule 1 to this Agreement (the "Shares").
>
> 2. The Seller hereby agrees that it shall sell and transfer to the Buyer (or any other company nominated by the Buyer), all of the Shares in the Companies set out in Schedule 1, and the Buyer shall accept the Shares and pay the Purchase Price (as defined below) for them."

Clause 3 certifies the purchase price as US$ 690 million which is to be paid in instalments as follows: $50 million by 8 May 2010; $350 million by 31 May 2010; and the balance of $290 million in 18 equal monthly instalments from the date of transfer of the shares.

10. Clause 4 provides:

> "4. The Seller shall transfer 100% of the Shares in the Companies and the title therein to the Buyer no later than 31 May 2010. The transfer of Shares in the Companies (direct or indirect) shall be performed through an escrow agent against payment by the Buyer of the Second Payment. Simultaneously with the transfer of the Shares in the Companies the Buyer shall pledge the Shares in the Companies for the benefit of the Seller pending receipt by the Seller of the full Purchase Price pursuant to Clause 3 above. The details of the pledge shall be agreed by the Parties in the Restated Agreement (as defined below)."

11. Clause 5 sets out the seller's warranties including, under Clause 5.1:

> "5.1 the Shares in the Companies are legally owned (directly or indirectly) by the Seller or will be so owned at the time of their transfer to the Buyer, and all such Shares shall be

> unencumbered with any pledge, encumbrance, pre-emption rights, claims or actions of any third parties, including business partners of the Seller;"

12. Clause 6 provides in so far as material:

> "6. The Parties shall, on or before 20 May 2010, in good faith agree and sign the now complete version of the sale and purchase agreement in respect of the Shares (the "Restated Agreement"), as well as other documents referenced in this Agreement. Pending signing of the Restated Agreement the current Agreement shall to the fullest extent regulate the obligations of the Seller and Buyer. Subject to Clause [9] below, failure to sign the Restated Agreement shall not affect the validity of this Agreement and obligations of the Parties hereunder. …"

The actual text of Clause 6 cross-refers to Clause 8 but it is accepted on both sides that this is clearly an error for Clause 9.

13. Clauses 9 and 10 are at the heart of this case:

> "9. In the event … (2) the Seller avoids signing of the Restated Agreement within the term set out in Clause 6 of this Agreement, then the Buyer shall become entitled to unilaterally terminate this Agreement without any liability on its part or any penalties due, as well as to claim back and return any and all amounts paid by it to the Seller before termination date.
>
> 10. In the event of unilateral refusal by the Seller to enter into the Restated Agreement with the Buyer or perform the Seller's obligations under this Agreement and/or Restated Agreement, the Seller shall, within ten (10) calendar days of receipt of written demand of the Buyer, return to the Buyer everything received under the terms of this transaction, as well as pay a fine of US$50,000,000 (fifty million) US Dollars."

14. On 6 May 2010, Luxe duly paid the first instalment of $50 million.

15. On 8 May 2010, Allen & Overy, acting for Midland, sent a draft Restated Agreement to Luxe's Ukrainian lawyers. On 14 May, Luxe's Ukrainian lawyers sent a revised draft of the Restated Agreement to Allen & Overy. The Restated Agreement was due to be completed under the "good faith" obligation in clause 6 of the SPA by 20 May. Midland was due under clause 7 of the SPA to provide by 15 May a list of assets owned by the scheduled companies that are not included in the subject matter of the SPA, but it failed to do so. Mr Simonov, Luxe's Ukrainian lawyer, says in his affidavit that on 17 May he spoke to the solicitor at Allen & Overy dealing with the matter who said that they had not received any feedback or instructions from their client regarding the SPA but that this may be because Mr Igor Shifrin (the son of Eduard Shifrin who was handling the matter on behalf of Midland) was busy with various commercial aspects of the SPA, such as implementing a corporate

restructuring which the parties had discussed. Mr Simonov says that between 14 and 18 May he and other Luxe representatives tried to call both Eduard Shifrin and Igor Shifrin to discuss what was happening but were unable to reach them and they did not return calls. His affidavit continues:

> "Finally, at around 11 am on 18 May 2010, Igor Shifrin called me. He assured me that Midland was busy working on the SPA and checking that they would be able to give Luxe the warranties requested by it in the 14 May draft of the Restated Agreement. He also said that A&O were finalising the Restated Agreement and they would send it to me before 2 pm on 19 May 2010."

16. However, on 19 May Mr Rinat Akhmetov, whose family effectively own Luxe, received a telephone call from Mr Eduard Shifrin who told him that Midland was pulling out of the deal because they had found another buyer. On the same day, Luxe received by fax a letter of that date signed by Derek Roe, a director of Midland, which stated:

> "We hereby give you notice that Midland will not be able to agree and sign the Restated Agreement with Luxe on or before 20 May 2010 as was contemplated by Clause 6 of the Agreement.
>
> Accordingly, and as contemplated by Clause 10 of the agreement, we have made the following payments to your account (SWIFT confirmations enclosed):"

There are set out the figures of $50 million, being the return of all amounts received, and a further $50 million, being the payment of the "fine". The letter concluded:

> "We kindly ask you to confirm the receipt of funds and that the return of the Advance Payment and the payment of the Fine shall be in full and final settlement of any and all obligations and/or liabilities of Midland under the agreement."

The next day, 20 May, Mr Akhmetov received a telephone call from one of the principals of IBG. He told Mr Akhmetov that he and his partner had met with Eduard Shifrin the day before to discus a potential sale to a new buyer and that as a result of that meeting IBG had decided to sell its interest in the Z Group to this new buyer "jointly and concurrently with Midland".

17. No part of the account of these telephone conversations given by Mr Simonov is challenged in any of the subsequent evidence served on behalf of Midland.

18. At this point, White & Case, Luxe's English lawyers, became involved. On 20 May 2010, White & Case wrote to Midland rejecting the purported termination of the SPA, stating that Luxe remained willing and able to complete the share purchase as required by the SPA by 31 May, extending time for signature of the Restated Agreement to that date, and stating that the payments made to Luxe returning the $50

million advance payment and $50 million purportedly as a "fine" are of no legal effect. The letter concluded:

> "Our client is concerned that you intend to sell the Companies to another buyer. Kindly confirm (1) that you remain the owner of the Shares in the Companies (as represented and warranted in Clause 5.1 of the SPA) and (2) that you will not take steps to sell to another party or otherwise to deal with the shares in the Companies so as to obstruct or prevent a sale to Luxe. Our client reserves the right to seek injunctive relieve against you in the event that you do not provide satisfactory confirmation. In that regard, please nominate solicitors in London to accept service of such proceedings on your behalf."

19. White & Case sent a copy of that letter to Allen & Overy from whom they received a reply the next day which confirmed that they act for Midland and stated:

> "We understand that, despite having given us less than a day to consider and reply to your letter, you have now written directly to Midland, threatening it with a potential injunction.
>
> It appears that your client's belief that it may be entitled to an injunction rests on two assertions made in your letter to Midland, being, in summary:
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> i. That Midland is "*not entitled*" to terminate the SPA between our respective clients of 4 May 2010; and
>
> ii. The two payments of $50 million each which Midland has made to Luxe pursuant to clause 10 of the SPA "*are of no legal effect*"
>
> You do not, however, provide any analysis at all supporting these assertions and we are, as yet, unable to see any legal basis for them. Given the potential consequences for Midland of your client's threatened action (and indeed, for Luxe in terms of its potential liability assuming a cross-undertaking is required as a condition of being granted an injunction), we do not think it satisfactory that you should write in such terms without some further explanation.
>
> We would therefore be grateful if you would provider [sic] a reasoned basis for your assertions in order that we can understand your client's position properly, and advise our client accordingly. As will be apparent, we think any attempt by Luxe to seek an injunction without having provided such an explanation would be premature and we would draw the court's attention to this correspondence in connection with any costs award that the court might make in connection with the threatened application."

White & Case received that letter by e-mail attachment at 7.19 pm on Friday 21 May.

20. On Monday, 24 May White & Case wrote back seeking confirmation of the two matters set out in its letter of the previous Thursday. The response was a two-line letter from Allen & Overy on 24 May stating:

> "We write to inform you that Midland has sold its interest in the Companies to which you refer to third parties."

21. In the light of that letter and after failing to receive a response to a request for details of the identity of the buyer, an urgent application was made for an injunction which was granted, as I stated at the outset, by Mann J on 26 May.

22. That application was made in the belief that it would not have been possible for Midland to have completed the necessary restructuring of its interests in the various companies so as to enable an effective transfer to be completed within such a short time. However, it is explained in the witness statement of Mr Igor Shifrin of 29 June 2010 that already by 12 May his father had been in discussions with the principals of an Ukrainian group that had approached him expressing an interest in buying the companies through the Russian investment bank, Troika Dialog ("Troika"). He states that on the evening of 12 May he telephoned Allen & Overy and instructed them to prepare a first draft sale and purchase agreement to be submitted to Troika. He says that Allen & Overy were able to work quickly as they could use as a basis the draft that had been prepared for the sale to Luxe. He says that on about 14 or 15 May his father told him that he did not think the sale to Luxe was likely to go ahead and that he should concentrate on negotiations with Troika. He states that over the weekend 15-16 May meetings were held with Troika and then on 17-19 May at the Moscow offices of the law firm advising Troika; and he adds:

> "I was present with A&O throughout these meetings which were almost non-stop."

23. Those negotiations culminated in Midland and the Troika buyers signing a final sale and purchase agreement on 19 May. The purchase price paid by the Troika buyers was $850 million.

24. Luxe now accepts that the sale to Troika had been completed by 26 May and that is why it no longer pursues its claim for specific performance or seeks to continue an injunction in the terms granted by Mann J. In fact, Midland's shareholdings in companies 17-20 on the schedule to the SPA, being the Guernsey and Irish companies, did not form part of the sale to Troika. However, it appears that those companies are not trading and the shares are of nominal value so Luxe does not pursue a separate claim in that regard.

The Application

25. Luxe alleges that the failure to complete the sale was a breach of the SPA. Midland disputes that and has served a draft defence which raises various alternative defences, including that the SPA is insufficiently certain to be enforceable or that on its true construction the SPA permitted Midland to withdraw from the transaction upon payment of the $50 million "fine". It also counterclaims for rectification of the SPA.

However, for present purposes, Midland very properly accepts that Luxe can show a good arguable case that Midland is in breach of the SPA.

26. On that basis, Luxe puts its application on three alternative bases:

(a) A proprietary claim to the proceeds of sale so far as those exceed the purchase price under the SPA: ie $160 million;

(b) A claim to an account of the profits made by Midland from its breach of the SPA (ie $110 million after allowing for the $50 million "fine" received);

(c) A claim to damages measured by the difference between the value of the shares and the contract price, for which it says on the available evidence the sale price to Troika is the best estimate (ie $110 million, again after allowing for the $50 million).

It is common ground that to obtain a freezing injunction on the basis of (b) or (c), Luxe has to show a real risk of dissipation of assets by Midland so as to avoid effective enforcement of an eventual judgment.

27. Before examining these various grounds of claim and the responses to them by Midland, I think it is salutary to emphasise that these are interim proceedings seeking an injunction until trial. The fundamental question for the court is whether it is just and convenient to grant relief, in accordance with section 37(1) of the Senior Courts Act 1981. That gives the court a broad discretion, but of course it is a discretion which has to be exercised within established principles. However, the court is not here making a final determination of the various contested matters, some of them raising difficult points of law, that are involved in this case.

(a) Proprietary claim

28. It is well established that an agreement for the sale of the shares in a private company, like an agreement for the sale of land, entitles the purchaser to specific performance. Again, it is accepted by Midland for the purpose of this application that Luxe has a good arguable claim to specific performance.

29. On that premise, Luxe contends that it acquired a beneficial interest in the shares as of the date of the SPA. Once the shares were sold, in breach of the SPA, that interest transfers to the fund obtained by the seller from that sale. Therefore this gives Luxe a proprietary claim to that fund, obviously only so far as it exceeds the balance of the price that Luxe would itself have had to pay under the SPA.

30. In answer, Midland puts up essentially two arguments:

(i) Midland did not directly own the shares in the Group at the time of the SPA but held them through various subsidiaries. Under Ukrainian law, it cannot sell an indirect interest in shares and therefore it could have no proprietary interest in those shares or pass any beneficial interest to Luxe even if Ukrainian or Russian law recognised the concept of a beneficial interest (which is not the case). The ownership of the shares, as distinct from the contractual rights between the parties, is governed by the *lex situs*,

which here for companies 1-17 was Ukraine or Russia. For the latter proposition, Midland relies on *Dicey, Morris & Collins, The Conflict of Laws* (14th ed, 2006), paragraph 24-006 and the authorities cited therein.

(ii) As already mentioned, Ukrainian and Russian law do not recognise the concept of a beneficial interest at all. The questions of ownership and therefore proprietary interests in shares are governed by the *lex situs* of the companies. Thus, whatever might have been the position if these had been shares in English companies, there were no beneficial interests in the shares which could pass to Luxe.

31. In examining these objections, I think it is necessary to ask what sort of trust, and thus beneficial interest, arises on the sale of land or of shares in private companies. In such a case, a trust arises only because the agreement is specifically enforceable. In a sense, therefore, it is the corollary of the remedy of specific performance. Thus it is not a full trust in the classic sense. The nature of the trust which arises on the exchange of contracts for the sale of land was the subject of a thorough and helpful review of the authorities, going back to *Lysaght v Edwards* (1876) 2 Ch D 499, by Lawrence Collins J in *Englewood Properties v Patel* [2005] EWHC 188(Ch), [2005] 1 WLR 1961 at [40]-[42]. As Lawrence Collins J there notes, it has been described as a "qualified trust" and the vendor has been referred to by Lord Greene MR as "a quasi-trustee".

32. It is by reason of this trusteeship that the vendor who breaks his contract of sale by reselling to someone else has been held to be accountable to the first intended purchaser for the proceeds of sale. This was precisely the issue which arose in *Lake v Bayliss* [1974] 1 WLR 1073. There, Walton J set out the submissions of Mr Peter Millett QC (as he then was) appearing for the first intended purchaser (at 1074G-1075B):

> "On his behalf Mr. Millett has urged that although the relief which he is seeking is unusual, one has to go back to first principles, and if one goes back to first principles there is really no difficulty in the matter. He says that it is one of the standing doctrines of the court that upon a contract for the transfer of property being entered into the vendor or intending transferor becomes a trustee for the purchaser or transferee. Admittedly, it is a qualified trusteeship. It does not have all the usual incidence of a bare trusteeship for a cestui que trust, and of course the most glaring and obvious departure from such normal incidence is that the trustee has his own interest, in the shape of the receipt of the purchase money, to protect. Of course he has a lien on the property until he has been paid his purchase money in the normal course of events. But, says Mr. Millett, as to the basic relationship in regard to the land contracted to be sold or transferred, no matter what may be the case in relation to other collateral matters, such as moneys paid under a contract of insurance or receipts under derequisitioning procedures, there is no doubt at all that the property itself is held as by a trustee. That being the case, he says, if in fact before the contract comes to be completed the vendor

wrongfully - as is the allegation here-sells the property then the purchaser is entitled, if he is so minded, to say that what has happened is that the vendor has sold trust property, and he is entitled under those circumstances to follow the trust property and say when it comes to the final performance of the contract that he will take the proceeds of sale instead of the property."

33. After some discussion, Walton J continued (at 1075F-1076C):

> "Authority appears to be silent on this save for one case which the industry of Mr. Millett has unearthed, a decision of Lord Eldon LC in *Daniels v. Davison* (1809) 16 Ves. Jun. 249. I can go straight away to the passage in the judgment of Lord Eldon LC on this point where he says, at p. 254:
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>> "My judgment on that point"- after dealing with other points in the case - "lays out of consideration the question, whether, taking Cole not to be affected with notice, Davison, the vendor, is to be considered in equity as holding the money, derived from the second purchase, viz. the difference between the prices, in trust for the person, to whom he had first agreed to sell the estate. The estate by the first contract becoming the property of the vendee, the effect is, that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate, of which he was so seised in trust; or should not be considered as selling it for the benefit of that person, for whom by the first agreement he became trustee; and therefore liable to account. It is not however necessary to decide that point; . . ."
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> It is perfectly true that Lord Eldon L.C. there puts it in the form of a query, but I think that it is to be understood in the sense that he would have given, if pressed, the answer to that query that that indeed represented the law.
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> Again, the industry of Mr. Millett has found out that Sir George Jessel, when Solicitor-General, arguing the leading case of *Shaw v. Foster* (1872) LR 5 HL 321, 327, stated flatly that
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>> "*Daniels v. Davison* shews that after a contract for the sale of an estate, if the vendor sells to another person for valuable consideration he is accountable for the money as a trust."
>
> In my opinion that is absolutely in line with authority, and entirely represents the law."

Walton J expressed his conclusions as follows:

> "Once one has undertaken the role of trustee then it is a role which, unless discharged by some external circumstance, one must carry out to the bitter end if so required by the other party to the contract. The vendor cannot be heard to say that because of her wrongful act in reselling the property she never was a trustee. She remained a trustee right down to the moment of resale, and accordingly is bound to hold the purchase price as trust property to transfer to the purchaser upon the purchaser completing the obligations on the purchaser's part."

34. The decision in *Lake v Bayliss* was cited with approval by Lord Nicholls, giving the leading judgment with which Lords Goff, Browne-Wilkinson and Steyn agreed, in *A-G v Blake* [2001] 1 AC 268 at 284D.

35. Is the application of these principles precluded by the fact that the property is held through subsidiaries in a country the law of which does not recognise the concept of a lesser proprietary interest or that it does not recognise a beneficial interest at all? The fact that Midland held the shares though subsidiaries does not in itself preclude the SPA from being specifically enforceable, as Midland for present purposes accepts. The obligation to be enforced would be that Midland must procure that the shares are transferred. I do not see that this in itself would prevent the qualified trust relationship from arising.

36. Does the applicability of the *lex situs* to questions of ownership alter the position *as between the contracting parties*? It is trite but nonetheless important to recall that equity acts *in personam*. The parties here have chosen to govern the relationship as between themselves according to English law. Unless precluded by authority, it seems to me that as a matter of principle where the parties have expressly chosen English law and the exclusive jurisdiction of the English court, they have voluntarily subjected themselves to the English system of remedies. In my judgment, it is at the very least well arguable, and if necessary I would hold, that this includes the "qualified trusteeship" that applies as the corollary in such a case to the availability of specific performance, unless that gave rise to a situation that was directly contrary to the *lex situs* in the sense of interfering with the operation of the local law.

37. Far from being contrary to authority, there is clear authority in support of this position. Considering the matter first more generally, in *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, the Court of Appeal held that the equitable rule against clogging the equity of redemption of a mortgage applies to a contract governed by English law and will be enforced against a contracting party as regards land abroad in a state where the equity of redemption may not be recognised. In his judgment, Cozens-Hardy MR stated (at 513-514):

> "For centuries the Court of Chancery has, by virtue of its jurisdiction in personam, applied against parties to a contract or trust relating to foreign land the principles of English law, although the lex situs did not recognize such principles. The judgment of Lord Alvanley in *Lord Cranstown* v. *Johnston* asserts this in very strong language: "With regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British

> Dominions, this Court will hold the same jurisdiction, as if they were situated in England." The language of Lord Cottenham in *Ex parte Pollard* is equally strong: "It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate in rem; but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings in personam, which Courts of Equity here are constantly in the habit of doing: not thereby in any respect interfering with the lex loci rei sitæ. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities.
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> To take a simple case, if A by an English contract agreed to give a mortgage to secure an English debt upon land in a foreign country, the law of which country does not recognize the existence of what we call an equity of redemption, which was the case of our common law, and if a mortgage was given and duly perfected according to the lex situs, I feel no doubt that our Courts would restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage in the sense in which that word is used by us. In doing this our Courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. *Similar observations would apply to a trustee, if the lex situs does not recognize trusts*." [my emphasis]

38. Secondly, and directly on point, in *Lightning v Lightning Electrical Contractors Ltd* (1998), [2009] 23(1) Tru LI 35, it was alleged that a resulting trust arose to land in Scotland, although Scots law as the *lex situs* does not recognise an equitable interest. Mr Lightning provided the purchase price for the defendant company to buy a property in Scotland which was registered in the company's name. The company was an English company and Mr Lightning lived in England. The company went into receivership and when the receivers commenced proceedings seeking possession of the property Mr Lightning alleged that he was entitled to it beneficially under English law under the principle of a resulting trust. Mr Lightning accordingly sought a declaration against the company and the receivers that the property or its proceeds of sale were held on trust for him.

39. Giving the leading judgment in the Court of Appeal, Peter Gibson LJ held that the relationship between Mr Lightning and the company was governed by English law and that the English court therefore had jurisdiction to grant the relief sought. He stated:

> "The fact that a dispute relates to foreign land or involves interests in foreign land, which a court of equity in this country recognises, but the courts of the foreign land would not, has never been a bar to the English court exercising jurisdiction over a person amenable to the jurisdiction, for example by being present in England. As was stated by the Earl of Selborne LC in *Ewing v Orr Ewing* (1883) LR 9 HL 34 at page 40:
>
> > 'The Courts of Equity in England are, and have always been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicili within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries: *Penn v Baltimore* 1 Ves Sen 444.'
>
> In *Deschamps v Miller* [1908] 1 Ch 856 at page 863, Parker J described the obligation which the Court will enforce as depending:
>
> > '… on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in a view of the Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property.'"

40. Both Henry and Millett LJJ agreed, and in a brief judgment Millett LJ added:

> "If A provides money to B, both being resident in England, to purchase landed property in his own name but for and on A's behalf, and B does so, the consequences of that transaction are governed by English law. It would be absurd if they were governed by the law of the place where the property in question happened to be located.
>
> Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired, since that

> would give B the unilateral power to decide on the legal consequences of the transaction which he had entered into with A."

41. I do not consider that the reasoning in *Lightning* is confined to the particular case of a resulting trust. On the contrary, it seems to me of general application. And the observation made by Millett LJ resonates in the present case, since three of the 20 companies of which Midland sold its shareholding were Guernsey or Irish companies, for which as I apprehend the *lex situs* recognises a beneficial interest. As it happens, those companies are of negligible value, but that obviously cannot affect the principle. If Midland's analysis were correct, the English court would find that Luxe had acquired as against Midland a beneficial interest in those shares but not in the shares of the other companies incorporated under a different system of law, and that it would thus have a very limited proprietary claim.

42. Moreover, it is accepted by Luxe that any beneficial interest in the shares sold to Troika was destroyed or terminated by that sale. Its claim is to the proceeds in Midland's hands. Thus no interference with property transfers under Ukrainian (or Russian) law is involved. There is no reason why equity, acting on the conscience of Midland as a proper defendant to English proceedings, cannot require that Midland holds those monies for the benefit of Luxe.

43. In the light of this analysis, I did not find the various authorities cited on behalf of Midland, which hold that the transfer of legal property or title to foreign land or shares in a foreign company are governed by the *lex situs*, to be of assistance in considering the issue presented by the present case: see the dicta of Diplock LJ in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287 at 330E-H; *Macmillan Inc v Bishopsgate Trust (No 3)* [1966] 1 WLR 387. As for the very full judgments of Tomlinson J in the marine insurance case of *The 'WD Fairway'*, from his first judgment on a series of preliminary issues it appears that it was there conceded that the incidence of proprietary interests in the vessel should be determined by the *lex situs*: [2009] EWHC 889 (Admlty), [2009] LIRR 573, at [15]-[17]. In his further judgment on Phase 2, the issue to be resolved was whether the *lex situs* in this context embraced its system of conflict of laws (ie whether there could be a *renvoi* to English law): [2009] EWHC 1782 (Admlty), [2010] LIRR 1, at [4]-[5]. The judge accordingly did not embark on an analysis of issues of the kind that arise in the present case.

44. Accordingly, I find that Luxe has at the very least a good arguable case in the form of a proprietary claim to the proceeds of sale, subject to allowing for the balance of the purchase price it had to pay under the SPA. However, that in itself is not sufficient to justify an interim injunction. As I stated earlier, it is necessary to consider whether it is just and convenient for such an interim injunction to be granted.

45. Midland, by the fifth witness statement of Mr Shifrin, has given a full account of its financial position, including exhibiting its audited accounts for the year ended 31 December 2009 and its management accounts as of 31 March 2010. It clearly has very substantial assets. The balance sheet in the management accounts shows total non-current assets of over US$ 939 million and total current assets of over US$ 850 million, and Mr Shifrin states that the only significant change since 31 March 2010 results from the sales of an iron ore project and of the Z Group shareholding to the

Troika buyers, with the result that its cash holdings have increased by the amount so far received ($425 million less debts paid down). There is no suggestion anywhere in Mr Shifrin's evidence that an injunction freezing the $110 million sought by Luxe will cause Midland financial hardship or trading difficulties.

46. As against that, if Luxe establishes at trial a good claim to the $110 million, it will manifestly suffer significant prejudice if that sum has been dissipated by Midland in the meantime or if Midland should organise its subsidiary holdings in Russia so as to create difficulty in enforcing an English judgment. Considering the balance of justice, or rather asking where lies the lower risk of injustice in terms of the test set out by Hoffmann J in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680, I am firmly of the view in the circumstances of this case that it lies in granting the injunction.

(b) Account of Profits

47. On the basis of my holding above, this alternative way in which Luxe put its case is academic. But in case I am wrong, I proceed to consider whether it can establish a claim to an account of profits. The analysis therefore proceeds on the assumption, contrary to my judgment, that Luxe has no proprietary claim to the proceeds of sale. On that assumption, its claim for an account of profits arises purely as a remedy for breach of contract.

48. As both sides agreed, the foundation of analysis of such a claim is now the decision of the House of Lords in *A-G v Blake*. In his leading judgment, Lord Nicholls conducted a comprehensive review of the circumstances in which the law awards damages measured not by the loss suffered by the claimant but by the benefit gained by the defendant. It is appropriate to quote a lengthy passage from his judgment (at 284-285):

> "There is a light sprinkling of cases where courts have made orders having the same effect as an order for an account of profits, but the courts seem always to have attached a different label. A person who, in breach of contract, sells land twice over must surrender his profits on the second sale to the original buyer. Since courts regularly make orders for the specific performance of contracts for the sale of land, a seller of land is, to an extent, regarded as holding the land on trust for the buyer: *Lake v Bayliss* [1974] 1 WLR 1073. In *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] AC 555 a railway company agreed not to transmit any commercial messages over a particular telegraph wire except for the benefit and account of the telegraph company. The Privy Council held that the railway company was liable to account as a trustee for the profits it wrongfully made from its use of the wire for commercial purposes. In *British Motor Trade Association v Gilbert* [1951] 2 All ER 641 the plaintiff suffered no financial loss but the award of damages for breach of contract effectively stripped the wrongdoer of the profit he had made from his wrongful venture into the black market for new cars.

These cases illustrate that circumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach. In these cases the courts have reached the desired result by straining existing concepts. Professor Peter Birks has deplored the "failure of jurisprudence when the law is forced into this kind of abusive instrumentalism"; see "Profits of Breach of Contract" (1993) 109 LQR 518, 520. Some years ago Professor Dawson suggested there is no inherent reason why the technique of equity courts in land contracts should not be more widely employed, not by granting remedies as the by-product of a phantom "trust" created by the contract, but as an alternative form of money judgment remedy. That well known ailment of lawyers, a hardening of the categories, ought not to be an obstacle: see "Restitution or Damages" (1959) 20 Ohio SLJ 175.

My conclusion is that there seems to be no reason, *in principle*, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression "restitutionary damages". Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it

> would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible.
>
> The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, *in practice*, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.
>
> It would be difficult, and unwise, to attempt to be more specific."

49. The facts of *Blake* were truly exceptional, being a claim to the payment to be made to an infamous spy by his publisher for his memoirs which were found to have been written in breach of a contractual undertaking of confidentiality which he had entered into when joining the British security service. This was a case where the Crown suffered no financial loss from the publication, and if the normal measure of damages applied it would therefore have recovered only nominal damages. The House of Lords, Lord Hobhouse dissenting, held that this was an exceptional case where an account of profits could be recovered.

50. The majority judgment in *Blake* has generated much comment and controversy. See the discussion in *McGregor on Damages* (18th ed, 2009), paras 12-023-12.044 and the

trenchant extra-judicial criticism by Buxton LJ in his ICLR lecture, "How the Common Law Gets Made: *Hedley Byrne* and Other Cautionary Tales" (2009) 125 LQR 60 at 73-78. It would not be appropriate in an urgent judgment on an interim application to subject the remedy of an account of profits to extensive analysis. Although Lord Nicholls refers in *Blake* to the position in contracts for the sale of land (citing *Lake v Bayliss*) that is explained on the basis of the finding of a kind of trust. I have indeed followed that in the earlier part of this judgment in upholding the proprietary claim. The current analysis is posited on the premise that, contrary to my earlier holding, there is no such valid claim, so in my view this does not assist.

51. Although the House of Lords held that the remedy of an account of profits for breach of contract should be available only exceptionally, and could readily find that *Blake* on its facts was an exceptional case, the parameters of what will be sufficiently exceptional are stated in very general terms. Lord Steyn in his concurring judgment sought to provide a principled basis for the development of the law, and noted that although Blake had been held not to be a fiduciary, he was "in a very similar position to a fiduciary. The reason of the rule applying to fiduciaries applies to him" (at 292B).

52. I was initially attracted by the submission that since the only reason why (on the current assumption) Luxe did not have a proprietary claim to the fund was that the shares were in Ukrainian or Russian companies, the position here was sufficiently akin to breach of a contract for the sale of shares in English companies for the remedy to be available, at least where there had been a deliberate and calculated breach of contract carried out in a manner designed to preclude an effective application for an injunction (a point to which I return below). I bear in mind also that in an area of the law that is uncertain and developing, a claimant should not be precluded on the basis of more abbreviated argument at the interim stage from seeking to test the legal boundaries. However, the present decision is not the same as a summary judgment or strike out of the plea.

53. The SPA is an ordinary commercial contract and this is a case of breach of a nature not unfamiliar in business affairs: the seller of goods breaks his contract to deliver because he takes advantage of a more attractive offer available elsewhere. There is no reason in principle why as a matter of contract the ordinary, compensatory measure of damages should not apply. If the contract price was less than the value of the goods, or the claimant can show that the goods would have had particular commercial benefit for him which cannot now be obtained, then (subject of course to questions of remoteness), that can be determined as the measure of his loss.

54. In his judgment in *Blake*, Lord Hobhouse stated (at 299D-E):

> "I must also sound a further note of warning that if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive. I do not believe that such is the intention of your Lordships but if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitutionary rights beyond those presently recognised by the

> law of restitution, such a step will require very careful consideration before it is acceded to."

55. I agree with Mr Gaisman QC, appearing for Midland, that although this was a dissenting speech, Lord Hobhouse's cautionary observations are not at odds with the reasoning of the majority but designed to complement the majority's decision. They are also consistent with the recent judgment of Sales J in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), where he conducted a detailed analysis of the current state of the law, including the judgment of the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, on which I did not have the benefit of full submissions from Counsel. In the end, and not without some hesitation, I consider that since the present case is a claim for breach of a commercial sale agreement, Luxe has not shown a good arguable case that it falls into the exceptional category where the remedy of an account of profits can be sought, in the sense of having the better of the argument as it stands at this stage of the proceedings: *Canada Trust Co. v Stolzenberg (No. 2)* [1998] 1 WLR 547, per Waller LJ at 555.

56. I should add that although Mr Higham QC on behalf of Luxe sought also to rely on Lord Cairns' Act (the Chancery Amendment Act 1858), in my view that does not take the matter further. That Act enabled the court of Chancery to award damages in lieu of an injunction, but it did not alter the measure of damages to be applied: see per Lord Nicholls in *Blake* at 281E.

(c) Damages

57. If an account of profits is not available, Luxe can clearly claim compensatory damages. It submits that it can therefore claim the difference between the value of the shares and the contract price, and as a matter of principle I did not understand that to be disputed. And it submits further that on the facts as presently before the court, the best evidence currently available of the value is the price at which Midland was able to sell the shares at the same time to the Troika buyers. That produces a prima facie measure of damages of $160 million, of which it holds $50 million on account paid by way of the "fine", producing a claim estimated at $110 million.

58. Mr Gaisman argued strenuously that this contention should be dismissed as facile, since there was no open market for these shares and the question should be "what is their value to Luxe?" There was no evidence that Luxe intended to resell them and it may be that the Troika buyers wanted the shares more than Luxe. That is of course a possibility. But I note the evidence of Mr Simonov as to why those behind the purchase of the shares (comprising in particular the shareholders in the Metinvest Group which had substantial international steel and mining interests) used Luxe as a special purpose vehicle for this transaction:

> "This was because the shareholders were undecided whether the asset should become part of the Metinvest Group, on-sold to a third party at some point, or, possibly, contributed into joint venture with other potential buyers interested in the [Z] Group."

59. It seems to me that at this early stage of the proceedings, when Luxe has understandably not yet obtained expert evidence as to the value of the shares, the price paid by another investment group for the same shares at the same time is entirely acceptable as evidence showing a good arguable case of their value. I am reinforced in that view by the facts that Mr Simonov states that Midland had been looking for a quick sale, a feature which may well have strengthened Luxe's bargaining hand in obtaining a favourable price; and further that Mr Igor Shifrin in his evidence says that Midland had "approached the market" in relation to the sale of these shareholdings and that the Troika buyers had initially contacted Midland with a view to purchasing the shares "as part of the bidding process" which Midland had initiated. Obviously Troika did not secure the shares in that "bidding process", and it appears to have gone back to Midland with a substantially higher offer afterwards.

60. Mr Gaisman submitted that this approach cannot be applied in any event since under clause 4 of the SPA, Luxe would have had to pledge the shares for the benefit of Midland until the full purchase price had been paid, and so even if it had obtained the shares in accordance with the SPA on 31 May 2010, it could not have sold them on to a third party for another 18 months. I do not accept that argument. First, the issue is not whether Luxe would have re-sold the shares but determination of the value of those shares at the time stipulated for delivery. Secondly, I consider that the pledge could have been redeemed by payment of the balance of the purchase price at any time. For example, if Midland had honoured the agreement and delivered the shares to Luxe, and if the Troika buyers had then approached Luxe seeking to purchase the shares, Luxe could have structured a re-sale on the basis of securing an initial payment sufficient to discharge the outstanding balance to Midland. Clause 4 of the SPA, on any sensible construction, did not entitle Midland to reject payment of the balance of the full price any earlier than by 18 monthly instalments so as to retain its pledge and prevent Luxe from dealing in the shares.

61. To justify the grant of a freezing order, Luxe must show a real risk of dissipation by Midland so as to make enforcement of an eventual judgment more difficult. Luxe first sought to submit that Midland had few assets other than its interest in the Z Group which had now been turned to cash. However, as I have already recorded, by his fifth witness statement Mr Shifrin has shown that Midland has substantial assets. It has no assets in the United Kingdom, and its only assets in the EU appear to be cash deposits in bank accounts in the Netherland and Austria, which monies could of course be moved very rapidly. However, it has through its subsidiaries substantial investments in real estate and real estate developments, predominantly in Russia (one of its subsidiaries is engaged in a development in Toronto, but that is shown in the balance sheet as worth US$ 20 million and thus worth only a small proportion of the claim).

62. Mr Higham submitted that enforcement of an English judgment against real estate assets in Russia is notoriously difficult, and that this accordingly supported the grant of a freezing order. However, Luxe chose to contract with Midland and agreed that exclusive jurisdiction under the contract should rest in the English court. Any difficulties that may exist regarding enforcement on Russian assets (as to which I make no findings) are therefore inherent in doing business with Midland and cannot, in my judgment, constitute a risk of dissipation that can justify a freezing order.

63. However, there is a very different aspect to be considered. Midland is a holding company and all the real estate assets are held through a network of subsidiaries. The same was the case as regards its shareholdings in the Z Group at the time of the SPA. The evidence of Mr Shifrin, intended to show that the transfer of Midland's interests to the Troika buyers had been completed by the time of the injunction granted on 26 May 2010, demonstrates how a restructuring of Midland's shareholdings was achieved in a matter of days to enable that transaction to be carried out. Midland is a private company of which the "ultimate beneficiaries" are stated to be (as to 50%) Mr Eduard Shifrin (and his immediate family) and (as to 50%) Mr Alexander Schnaider. On the basis of what happened regarding the sale of the shares in the Z Group, it appears that Midland would probably be able rapidly to re-organise the ownership of its Russian real estate interests to transfer them to other entities for the benefit of Messrs Shifrin and Schnaider. It is not necessary for present purposes to consider whether that might be more expeditiously achieved by transfers of the assets by Midland's subsidiary Russian companies or by transfer of its shares in those subsidiaries.

64. Accordingly, I find that Midland would have the ability to move its assets so as to render more difficult the enforcement of an English judgment if it were inclined to do so. But is there a real risk of Midland adopting such a strategy? Gee, *Commercial Injunctions* (5th edn, 2004), at para 12.040 states as follows:

> "… if there is a good arguable case that the defendant has acted fraudulently or dishonestly (eg being implicated in an ingenious scheme for misappropriation of funds belonging to the claimant), *or with an unacceptably low standard of commercial morality giving rise to a feeling of uneasiness about the defendant*, then it is often unnecessary for there to be any further specific evidence of risk of dissipation for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief."

65. The fact that the seller breaks a contract of sale in order to sell the goods at a substantially higher price to another buyer, while unattractive, does not in my view constitute an unacceptably low standard of commercial morality for this purpose. However, here the conduct to be attributed to Midland went considerably further. When Luxe's representatives became concerned about Midland's lack of response between 14 and 18 May, as the contractual deadline for signing of the Restated Agreement approached, Mr Simonov received a telephone call from Igor Shifrin in which, Mr Simonov says, Mr Shifrin assured him (a) that Midland was busy working on the SPA and checking on the requested warranties, and (b) that Allen & Overy were finalising the Restated Agreement which would be sent before 2 pm the next day: see para 15 above. Mr Shifrin has not challenged that account in any of his subsequent witness statements. Both those statements were blatantly untrue and clearly intended to give Luxe false reassurance, thereby causing it not to initiate legal action.

66. Moreover, Mr Simonov states (again in an account that has not been challenged) that on 17 May the solicitor from Allen & Overy to whom he spoke suggested that the reason why they had not received instructions from Midland on the SPA may be because Igor Shifrin was busy with commercial aspects of the SPA. In fact, on that

very day Allen & Overy were heavily involved with Mr Shifrin in concluding the negotiations on the sale to the Troika buyers at the Moscow offices of Troika's lawyers. Furthermore, once Luxe's solicitors became involved and wrote on their client's behalf on 20 May, they received the letter from Allen & Overy on the evening of 21 May that I have quoted at paragraph 19 above. Allen & Overy stated that any attempt by Luxe to seek an injunction "would be premature". That letter was clearly misleading. Far from it being premature for Luxe to seek an injunction, in reality, as Midland and its advisors well knew, such an application would have to be made as a matter of great urgency if it was to be heard before the sale to the Troika buyers went through.

67. I recognise that the fact that Midland and those acting on its behalf engaged in such conduct to preclude an effective application for an injunction in the English court, in a case where they consider that Midland may have a good defence, does not necessarily mean that Midland would seek to take steps regarding its assets to preclude effective enforcement of a judgment of the English court after it had lost at trial. However, the fact that Midland has engaged in such dissimulation so as to frustrate effective recourse to the English court, in my judgment provides real grounds for serious apprehension that it would act so as to place its assets out of the reach of Luxe as a judgment creditor. Accordingly, having regard to the nature of Midland's assets and the ease with which they could be placed out of reach of Luxe, I consider that all the circumstances here substantiate a real risk of dissipation so as to justify a freezing order.

68. I have already considered in the context of a proprietary injunction the final question of whether the grant of an injunction is "just and convenient." Therefore, if I were wrong as regards the grant of a proprietary freezing injunction, I would have in any event granted a freezing order in the sum of $110 million in support of the contractual damages claim. I note that there is no suggestion in this case that Midland needs part of that money to fund its legal or everyday business expenses.