IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2021] EWHC 3014 (Ch)

No. BL-2020-001343

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 19 October 2021

Before:

MR JUSTICE MILES

B E T W E E N :

XX & Others — Claimants/Respondents

- and -

YY & Others — Defendants/Applicants

MR STEPHAN ROBINS and MR ANDREW SHAW (instructed by Mishcon de Reya) appeared on behalf of the Claimants/Respondents.

MR THOMAS GRANT QC and MR CALEY WRIGHT (instructed by Grosvenor Law) appeared on behalf the Defendants/Applicants.

REPORTING RESTRICTIONS / ANONYMISATION APPLIES

J U D G M E N T

(Via Skype Hearing)

MR JUSTICE MILES:

1 Reporting restrictions have been imposed in relation to these proceedings. This version of the judgment of the court has been prepared for publication, in a form to prevent identification of the parties. Any publication of the identity of the parties, or publication of information likely to lead to their identification, remains subject to those restrictions.

Introduction

2 On 24 August 2020 Edwin Johnson QC, sitting as a Deputy High Court Judge of the Chancery Division ("the Deputy Judge"), granted an *ex parte* worldwide freezing order ("WFO") against five respondents. These included the second and tenth defendants in these proceedings. They have been married for many years. The tenth defendant now applies to discharge the WFO and for related relief.

3 I start by saying something briefly about the claimants' allegations. They allege that the first four defendants, assisted by others, not including the tenth defendant, were guilty of fraudulent trading and breach of fiduciary duty. The first claimant is now in administration. It raised monies through the issuance of bonds to members of the public. It represented to bondholders that it would lend their money to small and medium sized businesses at a profit to fund the payment of interest on the bonds.

4 The claimants allege that most of this money was misappropriated and paid to the first to tenth defendants. The claimants say that the true position was concealed through the making of loans by the first claimant to various companies, under purportedly *bona fide* arms' length transactions. But they say those borrowers were connected with and/or controlled by certain of the defendants. They say that the borrowers were incapable of repaying their debts to the first claimant and had to borrow further monies from it in order to pay interest. Interest and redemption payments by the first claimant to existing bondholders were thus, they say, funded with subscription monies received from new bondholders. The claimants say that the first claimant's business was therefore in the nature of a Ponzi scheme.

5 The second defendant was a director of the first claimant until 15 August 2013, when he was replaced by the first defendant. The first claimant's first bond issue was in August or September 2013. The claimants allege that a substantial part of the original bond issue was paid to the second defendant and his companies. They also allege that though he was no longer a *de jure* director of the first claimant, the second defendant continued to be closely involved in its affairs including giving instructions about the payment of money.

6 The claimants allege that the first and second defendants returned in 2015 to using the first claimant to raise money through bond issues. It is the claimant's case that the second defendant was in charge of the decision to recommence the first claimant's operations at this time. They say that he continued to be at the heart of the first claimant's affairs. He was a director and an ultimate beneficial owner of most of the borrowers from the first claimant and signed the loan agreements on behalf of many of them. The claimants allege that many agreements signed by the second defendant

were dishonestly backdated. The claimants allege that the second defendant was one of the main recipients of the funds they say were misappropriated.

7 They claim that he received more than £23 million of misappropriated monies deriving from the claimants which were paid to him and/or to the tenth defendant. The claimants plead that the tenth defendant received misappropriated funds as nominee of the second defendant. They also allege that they are entitled to trace the monies received and still held by the tenth defendant.

8 It is also the claimants' case that the second defendant entered into a series of dishonest transactions which had no genuine commercial rationale, but were instead put in place to disguise the misappropriation of bondholders' monies, including a number of arrangements for the sale of assets to the borrowing companies. These arrangements are known in the proceedings as "SPAs," also the purchase agreements. They include, by way of an example, an SPA concerning the sale and purchase of a plot of land in Cornwall (the "B Site"). The tenth defendant held some of the shares in a company that owned the site, (which I shall call “L Ltd”). The claimants contend that the tenth defendant held these on trust for the second defendant. This is denied by the tenth defendant who says that the shares were allotted to her in return for supporting the funding of the original acquisition of the B Site. This is, in turn, contested by the claimants who say that the relevant property which was apparently put up as security for the funding of the site was not itself owned by the tenth defendant. At any rate there is an unresolved dispute about this.

9 The claimants allege that the first and second defendants caused the first claimant to lend some £25 million to another company, of which the first and second defendants were directors, which then used the money to buy the shares in L Ltd. The claimants say that there were various versions of the SPA under which the price of the shares in L Ltd went up from about £2.1 million ultimately to about £14.26 million. Under that last version some £5 million odd was allocated to the tenth defendant.

10 The claimants allege that other transactions or SPAs were used to disguise the misappropriation of monies from the first claimant.

11 It is the claimants' case that each of these had the same *modus operandi*, involving the purported sale of assets to purchasers who borrowed monies from the first claimant in order to pay the purchase price but in circumstances where the assets in question were worthless or, at best, worth only a small fraction of the amount which the purchasers paid for them.

12 As already explained, it is the claimants' case that the second defendant received substantial misappropriated monies from the claimants. Some £11.3 million was, they say, paid into accounts in his sole name. Some £6.8 million was paid into accounts in the joint names of him and the tenth defendant, and some £5.1 million was paid into accounts in the name of the tenth defendant.

13 It is the claimants' case that the first to fourth defendants knowingly participated in fraudulent trading by the first claimant and misappropriated very substantial amounts of money. Those claims include personal claims for fraudulent trading, for knowing receipt and dishonest assistance, as well as proprietary claims.

14 The claimants do not assert that the tenth defendant was personally involved in the misappropriation of the money. They do not accuse her of fraudulent trading or dishonest assistance. They make proprietary claims for the assets received by her and remaining in her hands. They also assert that she received misappropriated funds as a nominee for the second defendant. As will be seen in a moment, the claimants also said in their original pleading (a draft of which was placed before the Deputy Judge and which I will call "the POC") that the tenth defendant was liable to account as a constructive trustee on the footing of knowing receipt and was therefore liable to pay equitable compensation. The claimants have now amended the POC to delete any personal claims against her. Much of the argument on this application turned on the significance of this amendment and I shall say more about it below.

15 So far I have set out the allegations made by the claimants. It is right to record at this stage that this case is contested by the defendants. In particular the second and tenth defendants deny the allegations of wrongdoing and misappropriation. They contend that the various transactions that took place under the SPAs were genuine and *bona fide*. This is not the occasion to resolve these disputes.

Procedural history

16 On 24 August 2020 the claimants applied to the Deputy Judge for WFOs and for proprietary orders. The Deputy Judge made the WFOs but declined to make proprietary orders at that stage. He concluded that more time and consideration was necessary before such orders could be made and adjourned the application in that respect. In due course, some months after the order of 24 August 2020, the second and tenth defendants consented to proprietary injunctions relating to specific sums of money received by them and/or property representing or derived from such monies.

17 At the application before the Deputy Judge the claimants sought orders against the parties now listed in the proceedings as the first to fourth and tenth defendants. At that stage those defendants were listed as respondents one to five, the second defendant being the second respondent and the tenth defendant being the fifth respondent.

18 The evidence before the judge consisted of a very long witness statement by one of the administrators (the "Administrator"). It is obvious that it must have taken a long time to produce the statement. In para 8 he summarised the claims: "Insofar as the respondents received misappropriated money, the claimants were making proprietary claims, and that insofar as the respondents no longer held the money, or its traceable proceeds, the claimants were bringing knowing receipt claims for equitable compensation."

19 That summary did not exclude the fifth respondent (tenth defendant). Instead it referred compendiously to the respondents.

20 At para 11 the Administrator said that the claimants were seeking WFOs against the respondents and ancillary orders, including under the jurisdiction in *TSB Private*

Bank International SA v. Chabra [1992] 1 WLR 231 against the fifth respondent (tenth defendant).

21 At para 332 the Administrator said that as a general matter applicable to all the respondents, the claimants were concerned about the dishonest nature of the respondents' wrongdoing, including the way in which they concealed and disguised payments made to themselves. Again no distinction was drawn between the tenth defendant and the other respondents.

22 At paras 381 and following, the Administrator addressed the risk of dissipation by the second and tenth defendants. He addressed them jointly. He said that the claimants believed that the second defendant made financial decisions for both of them and was in control of their joint finances. He said that the concerns about the second defendant therefore applied equally to the tenth defendant. He also said that, given the way part of the allegedly misappropriated assets were put into the tenth defendant's name, the claimants considered that she was likely to be holding assets as the second defendant's nominee.

23 The Administrator said that the court was asked to grant a freezing order against the tenth defendant on this basis. There were then some other points concerning the tenth defendant specifically, such as the existence of a Criminal Restraint Order, proceedings taken previously by the second and tenth defendants concerning alleged privilege in relation to documents, and unsuccessful attempts by the administrators to conduct s.236 examinations.

24 The Deputy Judge was also asked to read the draft particulars of claim. Para 68 and following of those particulars set out the claims against the second and tenth defendants. Paragraph 68 set out a number of sums said to have been received by the second defendant from the claimants in his own name. Paragraph 70 set out sums alleged to have been received into the joint names of the second and tenth defendants, and asserted a proprietary claim in respect of them. Those sums added up to about £6.9 million. Paragraph 72 alleged in the alternative that the tenth defendant received those sums as a nominee for the second defendant and received, or held the same, or the traceable proceeds thereof, on constructive trust for the first claimant. Paragraph 72 said,

> "If and to the extent that [D2] and/or [D10] no longer hold the same, or the traceable proceeds thereof, the first claimant seeks equitable compensation against each of them jointly and severally for knowing receipt."

25 Paragraph 73 then set out sums of about £5.97 million, alleged to have been received by the tenth defendant from the assets of the first claimant. £5.1 million related to the payments under the SPA concerning the sale of the shares in L Ltd. A further sum of about £800,000 was alleged to have been received by the tenth defendant. I note parenthetically that by a separate amendment made in April 2021, the claim in respect of that £800,000 odd was deleted and the claimants acknowledged that there had been an error.

26 Paragraph 74 alleged in the alternative that the tenth defendant had received the sums listed in para 73 as a nominee for the second defendant, and that she held them on trust for the claimants. Paragraph 75 said this:

> "If and to the extent that [D10] no longer holds the same, or the traceable proceeds thereof, the first claimant seeks equitable compensation against her for knowing receipt."

27 The two sets of sums listed in paras 70 and 73 of the POC added up to about £12.86 million.

28 There was also a skeleton argument before the Deputy Judge. Paragraphs 55 to 65 explained that the claimants sought WFOs against the first to fourth respondents, on the basis of their dishonest misappropriation of assets. The claimants relied on the allegations of dishonesty as a key plank of their case that there was a risk of dissipation.

29 At para 66 and following, the skeleton argument turned to the position of the tenth defendant. In para 66 it was made clear that the claimants did not allege that the tenth defendant was knowingly party to the fraudulent trading, or that she dishonestly assisted in any breach of duty. Paragraph 67 said,

> "Rather, as explained above, the applicants' claims against [the tenth defendant] consist of: (1) a proprietary claim to recover monies and other assets held by her on constructive trust; and
> (2) a personal claim for equitable compensation for knowing receipt."

30 At para.68 the skeleton stated that the applicants did not rely on any allegations of dishonesty against the tenth defendant in the context of a risk of dissipation.

31 Paragraphs 69 to 71 read as follows:

> "69. Instead the applicants' application for a Worldwide Freezing Order against [the tenth defendant] is advanced on two grounds.
>
> 70. First the applicants submit that their concerns about a risk of dissipation in the case of [the second defendant] apply equally to his wife. The evidence indicates that [the second defendant] and [the tenth defendant] operated as a single financial unit and that [the second defendant] is effectively the decision-maker. The [second defendant] seems to have decided how much should be paid to [the tenth defendant] and by which entities. Further some of the misappropriated bondholder monies were paid into accounts in their joint names. The applicants are concerned that [the second defendant] controls the finances of [the tenth defendant] and that he is able, in practice, to dissipate her assets.
>
> 71. Secondly the applicants asked the court to make a worldwide freezing injunction against [the tenth defendant] on the basis of the *Chabra* jurisdiction, i.e. on the basis that [the tenth defendant] holds assets for the

> second defendant which would be amenable to a process of enforcement to satisfy a judgment against [the second defendant]."

32 Paragraph 72 then set out the relevant principles concerning *Chabra* relief, as stated by Popplewell J in *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov & Ors* [2013] EWHC 422 (Comm) at [7], quoted with approval by the Court of Appeal *in Lakatamia Shipping Company Limited v. Su* [2015] 1 W.L.R. 291; [2014] EWCA Civ. 636 at [32]. I will return to these principles in due course.

33 Returning to the skeleton argument, para.73 said:

> "The applicants invite the court to freeze assets held by [the tenth defendant] on this basis. In summary, although [the tenth defendant] had no role in the claimants, or in any of the connected borrowers, [the second defendant] arranged for her to receive £5,969,400 in her own name and £9,896,916 in their joint names. It is submitted that there is good reason to suppose that [the second defendant] was involving his wife as a nominee for himself in respect of these dealing with money."

34 It is common ground that the amount of £9,896,916 in the skeleton was erroneously overstated by £3 million and should have been £6,896,916 million. Those two sums are taken from the paragraphs of the POC that I have already referred to.

35 In the course of his submissions before the Deputy Judge, counsel for the claimants said this (I have inserted references to the numbered defendants rather than using their names):

> "My Lord, in terms of miscellaneous matters, the first, I think, is the position of the tenth defendant, which I think I do need to address your Lordship on separately because the applicants do not allege that she was knowingly a party to any fraudulent trading or that she dishonestly assisted in any breach of fiduciary duty. So it is not possible in her case to say that the nature of the claims entitled the court to infer that there's a real risk of dissipation. Similarly, in the case of her alone, there are no further factors that can be relied on, like backdating documents or entering into transactions with no commercial rationale to disguise reality. Instead, we make the application against her for a freezing injunction on two different grounds and separately for the proprietary injunction to catch the monies that she received. In terms of the freezing injunction, the first point is that the concerns about the risk of dissipation applicable to the second defendant we say apply equally to his wife. As your Lordship will have seen from the evidence, the second defendant seems to be the one who decides whether money goes to him or to his wife. She receives money from these entities when she had no business dealings with them, so it can only be the case that he was directing her receipt of those monies and, in fact, some went into accounts in joint names. So we submit, first of all, in light of the way in which their finances are arranged, the risk of dissipation applicable to him applies equally to her. Secondly, really in the alternative, we ask the court to make the freezing injunction against her on the basis of the *Chabra* jurisdiction; in other words, if the freezing injunction is not made against her as a cause of action defendant, as

> defined in the authorities, it would be as a non-cause of action defendant on the basis that she holds assets which are amenable to execution as against the second defendant because, as your Lordship will have seen, although she had no role in any of those companies, the second defendant arranged for her to receive almost £6 million in her own name and also £10 million in their joint names and there is good reason to suppose that the second defendant was involving her as a nominee for himself in respect of those dealings with the monies."

Again, the reference to the second sum of £10 million was, as is common ground, a mistake. It should have been c.£7 million.

36 Later in the hearing, when the Deputy Judge had asked about the amounts of the injunctions being sought, counsel said,

> "Of course the proprietary injunction is different because that just catches the sums that each of them received individually. For the tenth defendant, she is not a defendant for a fraudulent trading claim so the maximum sum for her freezing injunction would be the amount of the knowing receipt claim, which is of course in her case going to be the same as the amount that she received because the knowing receipt claim is, if and to the extent, she does not hold the traceable proceeds then we would seek equitable compensation against her for knowing receipt."

37 There was then further discussion about the maximum sum of the freezing order and the amount proposed for the tenth defendant was £12.86 million odd. Counsel explained to the Deputy Judge that this represented the sums she had received individually and in joint names with her husband. He went on to say,

> "We do not accuse her of being knowingly party to a fraud. The claim against her is brought on a proprietary basis to recover assets held on constructive trust or for (inaudible) known receipt and so it is a smaller amount in her case."

38 In the event, the learned judge made an order limited to that amount.

39 The Deputy Judge gave a judgment. At para 18 he addressed the WFO against the first to fourth defendants. He said that the allegations about the case, which he had decided represented a good arguable case, were relevant to the question of a real risk of dissipation against those respondents. At paras 20 to 23 he said this (again I have inserted the numbering of the defendants):

> "20. The analysis I have set out above does not necessarily apply to one of the respondents, the tenth defendant, who is the wife of the second defendant, one of the four respondents mentioned above. It is not alleged against the tenth defendant that she was knowingly party to the fraudulent trading or that she dishonestly assisted in any breach of duty. The claim against her comprises of a proprietary claim to recover monies and other assets alleged to be held by her on constructive trust, and a personal claim for equitable compensation for knowing receipt.

> 21. It is argued and I accept that there are two grounds upon which a Freezing Order can be made against the tenth defendant, notwithstanding the distinction in her position from that of the other four respondents.
>
> 22. The first ground is that the evidence does demonstrate a good arguable case for saying that the second defendant has had and has some element of control over the finances of the tenth defendant, including the payment of funds alleged to have been misappropriated from the first claimant to the tenth defendant.
>
> 23. The second ground is that I accept that this is a case where there is good reason to suppose that assets held in the name of the tenth defendant would be amenable to enforcement in order to satisfy a judgment against the second defendant; see the so-called *Chabra* jurisdiction summarised by Popplewell J in *PJSC Vseukrainskyi Aksionernyi Bank v. Maksimov* [2013] EWHC 422 (Comm), at [7]."

40 There was a return date two weeks later. The *inter partes* hearing on 7 September 2020 was before Meade J. The claimants' skeleton argument for that hearing explained the grounds on which the WFO had been made against the second defendant and tenth defendant. It repeated the same points as were made in the *ex parte* skeleton.

41 The second and tenth defendants indicated that they opposed the continuation of the WFOs, but that they had not had enough time to prepare evidence or submissions in opposition to the orders and that, in any event, there was not sufficient time at the return date hearing to deal with any points they might wish to make in opposition to the orders.

42 Meade J was satisfied on the basis of the evidence before him that the WFOs should continue. He was also concerned to ensure that so far as possible any discharge application should be made at an early stage in the proceedings so that it could be considered at the first CMC. Paragraph 4 of his order provided that:

> "The first, second and fifth respondents do file and serve, if so advised, any application and supporting evidence to discharge the Worldwide Freezing Order by no later than 4.30 p.m. on 2 November 2020, with such application to be listed and heard at the CMC. For the avoidance of doubt, they will not be required to show a material change of circumstances."

43 Pursuant to para 1 of the same order the CMC was listed for the first available date after 27 November 2020 with a time estimate of four and a half days. In the event the CMC was listed for 4 February 2021.

44 The second and tenth defendants indicated through their solicitors that they required an extension of the deadline for filing and serving their applications to discharge the WFOs and the claimants agreed to extend it to 30 November 2020. Subsequently some of the defendants asked the claimants to agree a further seven day extension,

which the claimants agreed, therefore taking the deadline in the order to 7 December 2020.

45 The tenth defendant did not apply before that deadline to discharge the WFO or seek any extension of time in which to do so. There is a dispute between the parties as to the consequences of this, which I shall address below.

46 The first CMC took place before Mann J on 8 February 2021. He set out a timetable for the parties to comply with the steps required by the disclosure pilot scheme in Practice Direction 51U. In accordance with his order the claimant prepared a draft list of issues for disclosure on 28 May 2021. This included an issue as to whether the tenth defendant held any assets on constructive trust for the first claimant or was liable in knowing receipt.

47 On 11 June 2021 the tenth defendant's solicitors provided a revised version of the draft list of issues, which included a mark-up of that issue which deleted the words "and/or is liable in knowing receipt." In a comment in the margin the solicitors observed that given that no knowledge was pleaded against the tenth defendant this issue was untenable. The claimants responded on 16 June 2021, agreeing with that observation and saying that they had removed the words, "and/or is liable in knowing receipt." The claimants subsequently recirculated draft re-amended POC in which they confirmed that no claim of a personal nature for knowing receipt was being pursued against the tenth defendant.

The parties' positions concerning the application

48 I turn now to the tenth defendant's application. The principal relief sought by the tenth defendant is for the discharge of the WFO. The tenth defendant contends in summary that the removal of the personal claims has changed the forensic landscape. The only remaining claims against her are proprietary claims. Those would not justify a freezing order in the sense of a *Mareva* injunction. They would only justify a proprietary order over specified assets and the parties agreed a proprietary injunction earlier this year. The WFO should therefore be discharged.

49 The claimants oppose this. They submit in summary, first, that the application is misconceived because the WFO was sought and obtained under the *Chabra* jurisdiction and did not depend on the personal claim. Second, in any event, the application was not made within the time required by the order of Meade J and the tenth defendant therefore requires relief from sanctions. There is no basis for such relief. Third, in any event, the WFO is separately justified on *Chabra* grounds.

50 These positions give rise to three principal issues. (a) What was the basis of the original WFO? (b) Does the order of Meade J prevent the tenth defendant from making this application to discharge the WFO? (c) Is the WFO independently justifiable on *Chabra* grounds (in whole or part)?

(a) What was the basis of the original WFO?

51 The claimants submit that paras 72 and 75 of the POC were the botched result of cutting and pasting of knowing receipt claims against the other defendants. They say

that those claims were included against the tenth defendant in error but that the error did no harm because the Deputy Judge understood that the WFO was being sought only on *Chabra* grounds.

52 The starting point is that a reasonable reader of the pleading would not have realised that the claims in paras 72 and 75 were the result of an error. On the contrary para 75 in particular was concerned *only* with the assets transferred to the tenth defendant. Any reader would have thought that the claim was deliberately made. The pleading appeared to be carefully drafted and it was obvious that much work had gone into it. And the prayer for relief included a claim made personally against the tenth defendant.

53 In addition, the witness statement of the Administrator, which also summarised the claims, was a substantial piece of work and a great deal of effort and cost had clearly been devoted to its production. I do not think that the Deputy Judge could possibly have been expected to work out that no personal claim was really being brought against the tenth defendant.

54 Moreover, the claim was not simply made in the POC and echoed in the witness statement of the Administrator. It was also highlighted in the skeleton argument.

55 In the course of submissions to the Deputy Judge counsel said that a personal claim was being made for equitable compensation to the extent that assets were no longer in the hands of the tenth defendant. Counsel candidly said in the course of submissions before me that this had been the result of a muddle, but if it was an error, it was a persistent one running through the entire presentation. Moreover, the Deputy Judge understood that the claimants were making a personal claim against the tenth defendant. This is apparent from his judgment.

56 So I conclude that there was no reasonable basis on which the Deputy Judge would have understood that the claimants were not making and intending to make a personal claim against the tenth defendant.

57 The claimants submit next that the WFO was sought and obtained only on the basis of the *Chabra* jurisdiction. Returning to the *ex parte* skeleton, they say that paras 70 and 71 are to be read as containing two elements justifying the *Chabra* order. They say that the matters set out in para 70, which in essence amount to an allegation that the financial affairs of the tenth defendant are under the control of the second defendant, are simply a facet or aspect of their argument on *Chabra* grounds. They say that they did not rely on the personal claims against her in support of the WFO.

58 I am unable to accept these submissions. I consider that the application for a WFO Order was put on two bases. The first was (i) there was a personal claim against the tenth defendant, but (ii) the second defendant controlled their joint finances and (iii) the second defendant was a dissipation risk, so (iv) the court should make an order. The second basis was that the tenth defendant was a nominee for the second defendant regarding the misappropriated assets and the court should therefore make a *Chabra* order. My reasons for reaching these conclusions are these.

(a) The POC contained personal claims, as I have already said. There was no correction of that.

(b) The skeleton for the *ex parte* hearing set out the two grounds for the application. Paragraph 67 said there was a personal claim in knowing receipt. Paragraph 69 said there were two grounds for the WFO. Paragraph 70 said that the factors that made the second defendant a dissipation risk applied to the tenth defendant because they were a single financial unit. Paragraph 71 started with the word, "secondly," and relied on *Chabra*. There was no mention of *Chabra* in the earlier paragraphs. Paragraph 72 set out the *Chabra* principles and para 73 asked for a *Chabra* order concerning the amounts pleaded in paras 70 and 73 of the POC (albeit the latter was wrongly overstated by some £3 million).

(c) The position was repeated by counsel orally. He explained the two bases "in the alternative". Counsel submitted before me that those words naturally meant in the alternative to the basis on which the WFOs were sought against the other respondents. I cannot accept that submission. It is clear from the context that the *Chabra* ground was being advanced as an alternative to the first ground; namely that there was a personal claim against the tenth defendant and that the second defendant, who controlled her finances, was a dissipation risk.

(d) Things were made clearer still by other parts of the submissions. Counsel explained to the judge twice that the maximum sum in the order was the amount claimed by way of equitable compensation. That necessarily entailed the assertion of a personal claim.

(e) The Deputy Judge recorded in his judgment that there was a personal claim against the tenth defendant and then set out the two grounds for the WFO against the tenth defendant in a way that reflected the way the matter had been put to him in submissions. There was no suggestion by the claimants then or later that he had made an error and he was not in any way put right.

59 I therefore conclude that the WFO was made on two grounds, including that there was a personal claim against the tenth defendant. It was not made only on the basis of the *Chabra* jurisdiction.

60 I also note that the *Chabra* ground was restricted to the assets said to have been misappropriated and transferred to the tenth defendant, alone or jointly, with the second defendant. There was no broader allegation of nomineeship.

(b) Does the order of Meade J prevent the tenth defendant from making this application to discharge the WFO?

61 As already explained, the application to discharge was made in July 2021. That was well after 7 December 2020, being the period required by Meade J's order as extended by agreement. The claimants submit that the tenth defendant is in a position analogous to a party seeking relief from sanctions and must therefore satisfy the

requirements of *Denton v. T. H. White Ltd* [2014] 1 W.L.R. 3926; [2014] EWCA Civ. 906.

62 The claimants rely on *Wolf Rock (Cornwall) Ltd v. Langhelle* [2021] 2 All E.R. (Comm) 625 [2020] EWHC 2500 (Ch), a decision of HHJ Paul Matthews sitting as a Deputy High Court Judge. That case concerned a winding up petition. The court had given directions for the filing of evidence to lead up to a final hearing of the petition. Two weeks before the hearing of the petition and three months after the date provided in the directions given by the judge, the company served further witness statements. On the hearing of the petition the District Judge, after applying the principles on relief from sanction, refused the company permission to rely on the further statements and went on to wind up the company.

63 On appeal HHJ Matthews dismissed the appeal. He considered a number of authorities concerned with the concept of implied sanctions. He concluded at para.22 that:

> "... although there are cases where the rule or order does not expressly state a sanction and the court by a process of interpretation nevertheless construes the rule or order as impliedly containing one, there are also cases where there is no intention to create a sanction but the law for policy reasons treats the case as one analogous to an application for relief from sanctions, and applies the *Denton/Mitchell* principles."

64 He also noted at para 23 that in the case of *Djurberg v. Richmond London Bridge Council* [2020] 2 All ER (Comm) 727, Chief Master Marsh took a different view in relation to an application to strike out a claim. HHJ Matthews noted that that was a different case as it was "not about a timetable for evidence for an existing application." It was concerned with "whether an application to the court should be made at all." At para 33 HHJ Matthews concluded that the relevant order in the case before him was to be treated as engaging the *Denton* principles by analogy.

65 I am not persuaded that the approach in *Wolf Rock* applies here. In that case a final hearing of the winding up petition had been fixed. That was in the nature of a trial. Directions were given for the service of witness statements for that hearing and the question was what should happen at the trial of the petition if those directions were not complied with. In the present case the defendants were given an opportunity to apply to discharge the WFOs by a certain date, but there was no hearing fixed to consider the WFOs if they did not do so. The WFOs were simply continued. There was no sanction, whether arising impliedly or by analogy, if the application were not to be made.

66 It appears to me that the position of the defendants after 7 December 2020 was instead governed by the principles concerning abuse of process. The defendants had been given an opportunity to seek the discharge of the WFOs by a certain date and did not do so by that date. They therefore came under the burden of showing a material change of circumstances if they were to make a later application to discharge. The principle underlying that requirement is that parties who are given an opportunity to make an application or advance submissions should bring forward their application or argument at that time, and should not be allowed to hold them

back and launch an application at a later stage. But that is subject to the qualification that, where there has been a material change of circumstances justifying the later application, it is not abusive for them to do so.

67 I am satisfied here that the tenth defendant has shown a material change of circumstances. As explained above the original application was partly based on the allegation that the tenth defendant was personally liable as constructive trustee. The deletion of any personal claim by the claimants was a change in the case and to my mind a material one.

68 The claimants submitted that the tenth defendant's legal team could have seen that there were no allegations of knowledge supporting the personal claims. The claimants referred to the tenth defendant's defence in which she pointed out the absence of an allegation of knowledge; and the tenth defendant's comments on the list of issues for disclosure. The claimants contended that the tenth defendant and her team could have spotted these points before 7 December 2020.

69 I do not accept that submission. The tenth defendant was faced with the claims set out in the pleading and repeated in the skeleton argument that was before the Deputy Judge. It was not for the tenth defendant to work out that the claimants might have made an error in the pleading. As I have already said, if there was an error it was not apparent. Quite the contrary. The tenth defendant, through her solicitor, has explained that she made a pragmatic decision not to apply to discharge the original order because the claimants had brought a personal claim against her. I accept that that was not an unreasonable stance to take. She was faced by a well-resourced and carefully prepared application and was entitled to suppose that the claimants had brought a personal claim against her. That is what they had said after all. Although there was no pleading of unconscionable knowledge, it was reasonable for the tenth defendant to suppose at that stage that if she had sought to discharge the order the claimants would seek to respond with further evidence.

70 The claimants submitted that the original order was in any case alternatively justified on *Chabra* grounds. They submitted that the tenth defendant could have raised an earlier challenge to the order insofar as it relied on *Chabra*, and cannot do so now as that would be an abuse of process. Again I am unable to accept that submission.

71 The original order was made on two separate grounds. It was not unreasonable for the tenth defendant to decide pragmatically not to challenge the order insofar as it was based on a personal claim against her. Having made that decision there would have been no purpose in the tenth defendant challenging the order on *Chabra* grounds alone. Conversely the deletion of the personal claim represents an important change in the way the case is put, and it appears to me there would be nothing unjust or abusive about the tenth defendant now being allowed to challenge the second basis on which the order was originally sought.

72 For these reasons I conclude that the order of Meade J does not prohibit the current application.

73 For completeness I record that I would, in any case, have found that the tenth defendant was able to satisfy the *Denton* principles. In the light of my earlier conclusions I shall address this briefly.

74 First, the delay in making the application is reasonably serious and significant. The intention behind the order of Meade J was to get any disputes about interim orders out of the way and allow the substantive proceedings to take place. But on the other hand there is no impact on the timetable for trial and therefore any breach of the order is not particularly serious or significant.

75 Second, for the reasons I have already given, I consider that the tenth defendant had good reasons for not making the application to discharge at an earlier stage. It is as a result of the claimants' decision to delete part of their pleaded case that the tenth defendant has now made the application. The application itself was made promptly.

76 Third, it would not be just in all the circumstances to deprive the tenth defendant of the ability to apply to discharge the original orders. The claimants now accept, indeed assert, that the original pleading contained an error and that it should not have contained a personal claim against the tenth defendant. They therefore accept that the original application to the Deputy Judge was muddled. I have found that the Deputy Judge was led to believe that the claimants were asserting a personal claim against the tenth defendant. To my mind, he was therefore inadvertently misled about the basis of (at least part of) the application. It seems to me that the tenth defendant should not be prevented from making an application when the fault for this lies with the claimants themselves.

(c) Is the WFO independently justifiable on Chabra grounds (in whole or part)?

77 To recap, I have concluded that the original application was brought on two separate grounds. The first has now fallen away. I have also found that the tenth defendant is entitled to seek discharge of the original order. The claimants contend that the order was independently justified on *Chabra* grounds.

78 It is helpful first to set out the relevant legal principles. I have already referred to the summary given by Popplewell J in the case of *PJSC Vseukrainskyi Aktsionernyi Bank* at para 7. I shall not lengthen this judgment by setting them out again but I shall take them as an accurate statement of the law for present purposes.

79 I also refer to a passage in the case of *Yukong v. Rendsburg* [2001] 2 Lloyd's Rep. 113, where Potter LJ said at [44]:

> "... Since the purpose of granting such an injunction against the co-defendant is to preserve the assets of the principal defendant so as to be available to meet a judgment against him, the form of order made against the co-defendant should be as specific as the circumstances permit in respect of the principal defendant's assets of which he has possession or control. Thus, generally, the form of injunction will be tailored to that purpose and should be no wider than is necessary to achieve it.
>
> However, subject to that requirement, if a co-defendant is mixed up in an attempt to make the principal defendant judgment-proof and the assets or their

> proceeds are not readily identifiable in his hands, it is open to the court, where it is just and convenient to do so, to make an order which catches the co-defendant's general assets up to the amount of the principal defendant's assets of which he appears to have possession and control."

80 Three points of particular relevance are made in these authorities. The first is that the test of whether there are assets, held in the name of the defendant which would be amenable to an enforcement process, is that of "good reason to suppose". The second is that the jurisdiction is exceptional and should be exercised with caution, taking care that it will not operate oppressively to innocent third parties who are not substantive defendants and who have not acted to frustrate the administration of justice. The third is that the order should be as specific as the circumstances permit in respect of the principal defendant's assets, of which the third party has possession or control, or in respect of which the claimant may be able, through a process of enforcement, somehow to obtain. There may be cases where it is not possible to specify the relevant assets. One example is *Chabra* itself where the third party was treated on the evidence as the *alter ego* of the substantive defendant.

81 Counsel for the tenth defendant submits that the order made by the Deputy Judge could not have been justified on *Chabra* grounds. The maximum sum of £12.86 million was the amount of the personal claims then pleaded. But the order extends to all of the assets of the tenth defendant up to that limit and there was no attempt to tie such assets to those held as nominee, or which might otherwise be amenable to an enforcement process against the second defendant.

82 The tenth defendant also refers to the fact that proprietary orders have since been made, which provide protection to the claimants in respect of the specific assets covered by them. Counsel submits that any order under the *Chabra* jurisdiction should have been no wider than is necessary to protect the legitimate interests of the claimant.

83 The claimants submit that the order is justified on established *Chabra* principles. They say, first, that some of the assets transferred from the claimants came into the joint or sole hands of the tenth defendant. Those are the £12.86 million of assets referred to in the original pleading, less the £800,000 which has been removed by the separate amendment. They say that this itself gives rise to an inference that at least to some extent the tenth defendant acted as nominee for the second defendant. They contend that against the background it is a small step for the court to conclude more generally that there is good reason to suppose that other assets of the tenth defendant would be amenable to an enforcement process in respect of a judgment against the second defendant.

84 They rely, second, on the evidence of certain payments, which they say were made at the direction of the second defendant, even in respect of assets to which the tenth defendant claims ownership including part of the £5.1 million paid in respect of the sale of the shares in L Ltd.

85 Third, in the sixth statement of Mr Davis, the claimants have adduced evidence that certain specific assets appear to have been put into the name of the tenth defendant for no consideration. Specifically Mr Davis describes in detail the history in respect

of a property, which I shall call "H House," which was originally owned by a company which I shall call “B LLP”. The second defendant was initially the principal ultimate beneficial owner of B LLP. Subsequently H House was transferred to another company which I shall call “WE Ltd”. Fifty per cent of the shares in WE Ltd were held by the second defendant, with the other 50 per cent being owned by the tenth defendant. At some point the second defendant ceased to be the owner of the shares. This is shown by an email dated 7 February 2017 which states that the second defendant gave his 50 shares to the tenth defendant. It appears that the share capital of WE Ltd has since been increased to 200 shares. The current position is that the tenth defendant owns 100 per cent of WE Ltd. Mr Davis says that there is no evidence to suggest that the tenth defendant ever paid anything to the second defendant in return for this. The claimants say that in the light of this evidence there is good reason to suppose that the shares in WE Ltd will be amenable to a process of enforcement, either on the basis that the tenth defendant holds them as nominee or on the basis of a possible claim under s.423 of the Insolvency Act 1986, to unwind the transactions by which she became the sole owner of the shares.

86 The claimants also say that a property in Central London which I shall call "58 EP" was purchased by the second defendant using monies from a joint account, and that the second defendant transferred the property to the tenth defendant. They say that there is no evidence that the tenth defendant ever paid any consideration to him in return for this. For her part, the tenth defendant says that the property is held by her for her three children and that she claims no beneficial interest in it. But the legal title of the property is registered in her name.

87 The claimants also referred to some historical dealings in respect of another piece of real property which I shall call "2 TM," which has been sold. They say it fits the same pattern, namely that it appears that property was acquired using monies deriving from the second defendant but held by the tenth defendant. The claimants submit on the basis of this evidence that the court may properly draw the inference that all of the property of the tenth defendant is held as a nominee for the second defendant and that, therefore, an unlimited freezing order, or at least one limited to the maximum sum in the order against the second defendant, is justified against her.

88 In response the tenth defendant submits that none of these points provide the proper basis for an order on *Chabra* grounds. The assets originally referred to in the application are covered by the proprietary injunctions. That covers the £5.1 million referred to in the original application. The payments made into the joint account with the second defendant are, they say, covered by the proprietary order against him. The tenth defendant makes no claim in respect of those particular assets. The tenth defendant submits that there is no justification for any broader freezing order. She specifically contends that there is no evidential basis for supposing that she is a nominee generally for the second defendant, or that her assets would be amenable to enforcement of a judgment against him.

89 I have concluded that the answer falls between these two extreme positions. I do not accept the claimants' submission that the court should properly regard all of the tenth defendant's assets as being amenable to enforcement in the sense described in the *Chabra* authorities. The court must proceed on solid evidence and must be cautious to avoid oppression to a third party. This is not a case where, to my mind, the

evidence suggests that the tenth defendant is merely the *alter ego* of the second defendant, or simply holds all of her assets for him, or that all of her assets would be amenable to another enforcement process were judgment to be given against him. She is an independent person and has been involved in business herself. I do not think that the court can properly draw the inference that she has no independent assets of her own. I also consider that the court must recognise that some of the assets are covered by existing proprietary orders. The court should not make freezing orders wider than those reasonably necessary to give legitimate protection to a claimant.

90 On the other hand, there is good reason on the evidence to suppose that there are some specific assets which would be amenable to a process of enforcement, either on the basis that they are held by the tenth defendant as nominee or on the basis of a possible claim under s.423 of the Insolvency Act and these should be protected.

91 The first is the shares in WE Ltd. I have summarised the evidence above. That evidence has not been contradicted. There is to my mind good reason to suppose that the shares are held on trust for the second defendant, or that the title to them would be amenable to reversal under a process such as s.423 of the Insolvency Act. The shares do not fall within the scope of the existing proprietary injunction made against the tenth defendant. They do, on the other hand, fall within the scope of the existing WFO (being specific assets listed in that order). It seems to me appropriate that those assets should remain protected.

92 The second asset is the property at 58 EP. The tenth defendant does not seek to say that she gave any consideration and accepts that it was acquired using monies from the second defendant. The tenth defendant says that the property is held in her name on trust for her children. She accepts that it is not covered by the proprietary order against her, but notes that it is covered by the proprietary order against the second defendant. However the property is registered in her name and the claimants have entered a restriction or caution against that property on the Land Register on the basis of the WFO against the tenth defendant. I am satisfied to the appropriate standard that this asset may be amenable to enforcement of any judgment against the second defendant. There appears to me to be no real hardship to the tenth defendant in continuing the WFO in respect of this property. She is, on her own case, a bare legal owner and makes no claim to the benefit of the property.

93 It also seems to me that the proprietary injunction against the second defendant is not complete protection as the claimants seek to prevent any dealings with the legal title. In the case of registered property, dealings with the legal title are of the greatest importance. The restriction or caution has been entered on the basis of the WFO and it seems to me that the claimants should continue to have the protection it affords. I have therefore come to the conclusion that I should vary the WFO so that it is restricted to the shares in WE Ltd and 58 EP.

94 Finally I turn to the question of discontinuance or amendment of the pleadings to delete the claim made personally against the tenth defendant. The tenth defendant contends that the effect of the amendments to delete the claim amount to a discontinuance within Part 38 of the CPR.

95 They rely on the decision of Chief Master Marsh in *Galazi v.Christoforou* [2019] EWHC 670 (Ch). In that case proceedings had been brought on a number of bases against a number of defendants. The claimants amended to delete various of the claims and the defendants submitted that the case fell within Rule 38 of the CPR. Chief Master Marsh concluded that there was indeed a discontinuance within Rule 38. He concluded that it was possible for that rule to apply to some claims within a set of proceedings, even though other claims continued. He considered the obiter comments of Leggatt J in *Kazakhstan Kagazy Plc v. Zhunu*s [2017] 1 W.L.R. 467; [2016] EWHC 2363 (Comm), where the judge had concluded that the word "claim" in Rule 38 did not mean a single cause of action and that the word "claim" in the rule must refer either to the entire action of, at its narrowest, all causes of action asserted by a particular claimant against a particular defendant. Chief Master Marsh came to the conclusion that that was not correct and that on a fuller and more extensive analysis of the wording of the rule, concluded that the deletion of a particular cause of action within a claim was capable of falling within Part 38. I conclude that the reasoning of Chief Master Marsh on this point is to be preferred and I also conclude, for the following reasons, that there has indeed been a discontinuance in this case.

96 First, I reject the submission of the claimants that there cannot have been a discontinuance because the cause of action was never properly pleaded. It seems to me that the claimants pleaded a claim for equitable compensation for knowing receipt. The fact that it was not properly pleaded in the sense that there was a missing element does not mean that there was no pleading of the claim. It just means it was inept.

97 Second, I reject the claimants' submission that what has happened here is mere mislabelling. A personal claim was alleged and it has now been deleted. The fact that the pleading was faulty or incomplete does not mean that the claim was not brought. It was just badly pleaded. It has now been removed from the pleading and has therefore been discontinued.

98 The usual cost consequence under CPR 38 is that an order is made for the discontinuing party to pay the costs but for assessment to be postponed until the end of the case. This is subject to any order to the contrary. The claimants submit that the court should make a different order, namely that these costs should not be separately dealt with at all. They say that the costs of the assessment will be disproportionate. I do not accept that. I see no reason why the assessment of these costs should be costly or complex. They are likely to be limited and should take little time at the assessment to determine. A claim has been brought and discontinued and the usual consequences under Part 38 should follow.

99 I will now deal with the question of costs. The tenth defendant applies for the costs. Counsel submits that the tenth defendant has been the successful party because she has succeeded in discharging the order that was made, and in relation to the discontinuance part of the application has succeeded entirely. In more detail the tenth defendant’s counsel submits that the order originally made was not justified. As I have found, to some extent at least, order was grounded in a mistake as to the nature of the claim and the Deputy Judge, not surprisingly, believed that there was a personal claim. The tenth defendant says that when the matter was first clarified in relation to the personal claim, her solicitors wrote saying that the order should now

be set aside and the claimants' solicitors responded by refusing to accept that. There was no suggestion in Mr Davis' statement of any alternative order. Counsel says that the first indication that some other order might be appropriate was in the claimants skeleton, but not before then and it is not for the tenth defendant to present other options. It is for the claimants to justify any order.

100 Counsel for the claimants says that this is one of those cases where it is impossible to say in any meaningful way which party was successful. One can look at it from each end of the spectrum. The tenth defendant sought to apply to discharge the order in its entirety. The draft order served with the application sought that. The skeleton argument and the submissions made before me were on the footing that there was simply no basis at all for any order on the *Chabra* basis. He points out that the order I have found to be appropriate continues to freeze two particularly valuable assets. He says that where matters have ended up is a halfway house. He also points out that part of the reasoning in my decision for saying that the order should apply only to various assets is that some of the other assets were covered by the proprietary injunctions, which were only made in February. He says that the key issue is whether there was a successful or unsuccessful party and that there was not, and that therefore the correct order is no order as to costs.

101 The tenth defendant's counsel responds by saying that this was not a halfway house. That there were three main issues and that the tenth defendant succeeded on the first two and to the extent that the claimants succeeded on the third it was far from being a complete success.

102 I start by saying that I do not think it is particularly helpful to consider on an application of this kind which party has won on the particular issues advanced in the course of argument. The issues are a useful way of dividing up the debate analytically. But it seems to me that on an interlocutory hearing of this kind it is important to look at the outcome of the overall application and see where matters have landed practically.

103 I have reached the conclusion that this is a case where it is difficult to say who has achieved success. Both parties say that they have been successful and I agree with the submission of counsel for the claimants that it depends on which way you chose to look at it. It is right to say that the tenth defendant has succeeded in reducing the reach of the WFO, but it is also right to say that she has not succeeded in her aim of discharging the order fully. It is not easy to say exactly how important the assets still covered by the order may be. The tenth defendant says they are not very significant; the claimant says that they are. But it appears from the material before the court that the shares in WE Ltd may be reasonably valuable and it also seems to me that the maintenance of the order in respect of the property may also have some importance in maintaining the existing caution or restriction at the Land Registry.

104 It seems to me overall that neither party can properly be regarded as the successful party. I have concluded that the just overall result is that there should be no order as to costs. The costs of the discontinuance application are straightforward. The tenth defendant has won in relation to that and should have her costs, and counsel for the claimants did not suggest otherwise.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge