Neutral Citation Number: [2021] EWHC 655 (Ch)

Case No: BL-2020-000437

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST
CHANCERY DIVISION

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

Date: 23/03/2021

Before:

MRS JUSTICE FALK

- -

Between:

KEVIN TAYLOR	**Claimant/ Applicant**
- and -	
(1) MOHAMMED KHODABAKHSH **(2) NEW BEGINNINGS TECHNOLOGIES LLC** **(3) RHINO OVERSEAS INC (aka Rhino Overseas Limited)**	**Defendants/ Respondents**

- -

James Ramsden QC and Daniel Benedyk (instructed by **Keystone Law**) for the **Claimant**
Lance Ashworth QC and Dan McCourt Fritz (instructed by **Archerfield Partners LLP**) for the **Defendants**

Hearing dates: 9 and 10 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.00 am on Tuesday 23 March 2021.

Mrs Justice Falk:

1. This is my decision on the Claimant's on-notice application for freezing and proprietary injunctions, together with certain other relief, against the Defendants. The application was issued in proceedings that seek to set aside a decision of Ms Julia Dias QC, sitting as a Deputy High Court judge (the "Decision"), on the basis that it was procured by fraud. The application was issued as long ago as 17 April 2020.

Background and procedural history

2. The background and procedural history are relatively complex. I will attempt to confine myself to the salient points.

3. On 24 July 2015 the Claimant, Kevin Taylor, agreed to lend the sum of US$1,591,040 for a period of six months pursuant to written Heads of Terms ("the Heads of Terms") which named the borrower as Van Dutch Marine Holdings Ltd ("VDMH"). VDMH is a Maltese company. It has a subsidiary incorporated in England and Wales, Van Dutch Marine Ltd ("VDML"). VDMH is co-owned by two individuals, Hendrik Erenstein and Ruud Koekkoek. VDMH, VDML, Mr Erenstein and Mr Koekkoek are referred to below as the "Original Defendants". At the relevant time VDML carried on a business of designing, manufacturing and selling luxury leisure yachts under the "Van Dutch" brand.

4. The Heads of Terms contemplated that a formal loan agreement would be entered into. A loan agreement was produced with all four of the Original Defendants named as parties, and was executed by them. However, it was never executed by Mr Taylor and it did not take effect. Further, Mr Taylor did not receive the benefit of the security that he had been offered.

5. The loan was not repaid on maturity. On 17 May 2016 Mr Taylor commenced proceedings against the Original Defendants seeking damages for breach of contract and misrepresentation, alternatively rescission or damages in lieu. On 21 June 2016 Mr Simon Monty QC, sitting as a Deputy High Court judge, granted a limited proprietary freezing order related to the security that had been offered and made orders for disclosure. The disclosure orders were not complied with. Norris J extended the relief granted to include a worldwide freezing order, in the sum of approximately £2.1 million, on 7 July 2016. Permission was also obtained to commence committal proceedings against Mr Erenstein and Mr Koekkoek. On 21 July 2016 Robin Hollington QC, sitting as a Deputy High Court judge, continued the injunctions "until further order". Mr Taylor's position is that these injunctions have never been discharged.

6. On 2 August 2016 Mr Taylor obtained default judgment against the Original Defendants for the amount of the loan, contractual interest to date and further damages to be assessed. Damages were awarded after assessment by an order dated 24 November 2016. The default judgment remains unsatisfied. No steps have been taken to set it aside and some steps were taken towards enforcing it.

7. On 21 September 2017, following an application made a week earlier, a consent order was made by Morgan J which joined the Defendants and Respondents to this application, namely Mohammed Khodabakhsh, New Beginnings Technologies LLC

("NBT") and Rhino Overseas Inc ("Rhino") (together, "the Additional Defendants"), as defendants to the proceedings and gave Mr Taylor permission to amend his particulars of claim to advance claims against the Additional Defendants for breach of contract, misrepresentation, conspiracy, unjust enrichment and constructive trust. I will refer to these proceedings against the Additional Defendants, which resulted in the Decision, as the "Original Proceedings".

8. The first of the Additional Defendants, Mr Khodabakhsh, is an engineer and inventor who as explained below became involved with the Van Dutch business in connection with a proposed joint venture. NBT is a company incorporated in Delaware that Ms Dias QC found was owned by Mr Khodabakhsh (although the evidence before me from his former associate, an individual called Terry Vechik, is that Mr Vechik co-owns it). Rhino is a Panamanian company which, following VDMH's incorporation in April 2015, was owned by VDMH as a sister subsidiary to VDML. Rhino owns the intellectual property rights, moulds and tools relating to VDML's yacht business: as I understand it, the only valuable capital assets of the business. Mr Khodabakhsh's position, and that of Mr Vechik at the trial in the Original Proceedings, is that NBT has been the beneficial owner of Rhino since 30 May 2015. This is not accepted by Mr Taylor.

9. The starting point for the involvement of the Additional Defendants in the Original Proceedings was the committal proceedings against Mr Erenstein and Mr Koekkoek. Those proceedings led to Mr Erenstein and Mr Koekkoek being committed to prison for six months by Warren J, suspended to allow them a further chance to comply, on the basis that the judge would then consider whether to remit the sentence in whole or in part. Mr Erenstein and Mr Koekkoek then purported to provide the disclosure required and applied to vary or set aside Warren J's judgment (the "remittal application"). In affidavits served on 23 November 2016 in support of the remittal application, they asserted among other things that valuable assets which Mr Taylor had understood to be owned by VDML were in fact owned exclusively by Rhino, and that Rhino was not owned by the Original Defendants but was instead owned by Mr Khodabakhsh.

10. The assertions as to ownership of Rhino were supported by statements signed by Mr Khodabakhsh in December 2016, introduced in circumstances that Mr Taylor says are summarised in recitals to an order made by Barling J on 12 January 2017, at an adjourned hearing of the remittal application. The recitals to this order refer to Mr Khodabakhsh effectively intervening in the proceedings by producing what purported to be his First Affidavit, but which is recorded to have been a document of a "wholly unsatisfactory nature", at a hearing on 8 December 2016, asserting that he owned Rhino. On the same day Barling J ordered that if Mr Erenstein and Mr Koekkoek intended to rely on the evidence then a duly sworn affidavit was required to be served by 15 December 2016. A further document stated to be Mr Khodabakhsh's First Affidavit, and maintaining his ownership of Rhino, was then filed and served on 15 December. This purported to exhibit documents relating to the ownership of Rhino but did not in fact do so, Mr Khodabakhsh's position apparently being that he needed to return to the United States to get them. The recitals further record that Mr Khodabakhsh then arrived late at court for the hearing on 12 January having apparently brought certain documents with him, and then absented himself without notice during a short adjournment, taking the documents with him. The recitals state that counsel and solicitors representing Mr Erenstein and Mr Koekkoek then withdrew from their

representation "on the grounds of professional embarrassment", apparently by reference to the documents they had seen. This led to Barling J's order of 12 January, which was an order against Mr Khodabakhsh (then a non-party) to preserve and disclose the documents he had brought to court and shared with counsel and the solicitors, together with any other documents relating to the ownership of Rhino.

11. I should record that although Mr Ramsden, for Mr Taylor, relied on these recitals, Mr Ashworth, for the Defendants, referred me to witness evidence of Mr Khodabakhsh on this issue which was not challenged at the trial in the Original Proceedings. This evidence points out that Mr Khodabakhsh was not a party to the claim at the time, had not been given notice of any application and was not involved in drafting the order. No order had been made requiring him to attend or stay at court and he remained in the vicinity of the court, having told the Original Defendants' solicitor where he was, and left only when he was told that the hearing had concluded.

12. NBT first appeared in the proceedings on 21 April 2017, through an email sent to Mr Taylor's solicitors which asserted that it and not Mr Khodabakhsh owned Rhino, and that Mr Khodabakhsh had acted on its behalf.

13. These events led to applications by Mr Taylor seeking further disclosure and ultimately to the joinder of the Additional Defendants.

14. The claims in the Original Proceedings were tried in April and June 2019. The Decision ([2019] EWHC 1951 (Ch); [2019] Bus LR 2610) was handed down on 22 July 2019, and dismissed all of Mr Taylor's claims. Mr Taylor was ordered to pay costs, including an interim payment on account of £400,000.

15. Limited permission was given by Rose LJ to appeal certain aspects of the Decision. On 23 January 2020, before the appeal was heard, Mr Taylor applied in the appeal seeking permission to rely on new evidence involving allegations of fraud, an order staying the appeal and an order remitting the fraud allegations to the High Court. This application was considered by Phillips LJ, who made an order on 7 February 2020 listing the application for a hearing on 13 February. The application was dismissed by Phillips LJ at the hearing on 13 February on the basis that Mr Taylor should instead issue fresh proceedings. This is reflected in an order dated 17 February, under which Mr Taylor was also ordered to pay costs summarily assessed in the sum of £35,000. Mr Taylor then issued the current proceedings.

16. In a decision handed down on 10 March 2020, the Court of Appeal also dismissed the substantive appeal ([2020] EWCA Civ 353; [2020] Bus LR 1486). Mr Taylor then filed a further stay application in the Court of Appeal, seeking a stay of the costs order made by the trial judge and costs orders made in the Court of Appeal. On 3 April 2020 that application was dismissed on the papers, the costs of the stay application were awarded against Mr Taylor, and Mr Taylor was ordered to pay £30,000 on account of those costs. The reasons for the dismissal are worth setting out in full:

> "1. As the Respondents point out, what the Appellant is really seeking by his application is freezing relief in support of his new proceedings. As such, the Appellant's proper remedy is to apply to a Judge of the Chancery Division on notice for a freezing order. That will enable the application properly to be considered with the possibility of an appeal to this Court.

> Moreover, even if granted, freezing relief would be subject to proper protections for the Respondents.
> 2. This Court's provisional view, which is not intended to bind the Judge hearing the application, is that there is no basis for preventing the Respondents from paying the sums they owe to Mr Davies under the funding agreement given the absence of any proprietary claim by the Appellant.
> 3. There is in any event no basis for ordering a stay of the costs of the Appeal since those costs were plainly not caused by any fraud on the part of the Respondents."

17. The reference to Mr Davies is to a Mr Robert Davies. The Defendants' position is that it was loans from Mr Davies that enabled Mr Khodabakhsh to fund the defence in the Original Proceedings.

18. Following refusal of the stay application, on 16 April 2020 Amended Particulars of Claim were served in the current proceedings, and the application for an injunction was issued the following day. No doubt in response to the Court of Appeal's comments, the Amended Particulars of Claim include a proprietary claim. This is stated to relate to funds transferred to the Defendants pursuant to adverse costs orders (other than those made by the Court of Appeal). To the extent transferred, it is pleaded that those funds would be held by the Defendants as constructive trustees for Mr Taylor, who it is said "retains an equitable proprietary interest" in them.

19. The status of the current proceedings is as follows. The application before me originally included an application for permission to serve out of the jurisdiction. That application was consented to, although by correspondence the Defendants' solicitors stated that this was without prejudice to their clients' rights in all other respects. Particulars of Claim have been served but the proceedings are otherwise stayed pending the outcome of the application. As a result the Defendants have not yet been required to serve a defence.

The claim in the current proceedings and interim relief sought: summary

20. The precise nature of the claims made in the current proceedings is to some extent in dispute. This is considered further below, but in summary Mr Taylor claims (a) that the judgment in the Original Proceedings was obtained by fraud and/or dishonesty, (b) that the Defendants conspired to injure Mr Taylor by unlawful means, and (c) in deceit. There is also a claim for a declaration as to the ownership of Rhino, said to be consequential on the other claims.

21. The focus of the fraud claim is documents apparently entered into in 2015 which, on the Defendants' case, related to or effected the transfer of beneficial ownership of Rhino out of the VDMH group to NBT. The documents comprise a so-called "Draft Letter of Intent" dated 22 April 2015, a "Request for Transfer of Shares" dated 24 May 2015 (the "Request"), a Transfer Agreement dated 30 May 2015 and a "Protected State Agreement" also dated 30 May 2015 (the "PSA").

22. Mr Taylor's position is that the relevant documents were prepared subsequently, after Mr Taylor obtained the worldwide freezing order against the Original Defendants and the default judgment in July and August 2016, and were backdated. The idea, so Mr Taylor says, was to create the false impression that Rhino had been transferred to Mr

Khodabakhsh or NBT in May 2015 (prior to the loan being made) such that Rhino and its assets were not subject to enforcement under the default judgment or within the scope of the freezing order.

23. By the application before me, Mr Taylor seeks what he says is proprietary relief in respect of the interim payment on account of costs of £400,000 ordered to be paid by Mr Taylor in the Original Proceedings, a worldwide freezing injunction against the Defendants up to the value of £2.5 million, and a declaration that the orders previously made by Norris J and Mr Monty QC apply to Rhino and are continued.

The claim to set aside: legal principles

24. Both parties accepted that the principles to apply in determining an application to set aside a judgment for fraud are those set out by Aikens LJ in *Royal Bank of Scotland v Highland Financial Partners* [2013] 1 CLC 596 ("*Highland Financial*") at [106] and approved by the Supreme Court in *Takhar v Gracefield Developments Ltd* [2020] AC 450 ("*Takhar*") at [56], [57] and [67], as follows:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

25. To the extent that Mr Taylor's claim is based on setting aside the Decision, I need to determine whether there is a good arguable case (or, in the case of a proprietary injunction, a serious issue to be tried) that that claim would succeed. I therefore need to consider the claims made in the Original Proceedings and the Decision.

The claims in the Original Proceedings

26. References in the following paragraphs to numbers in square brackets are to paragraphs of the judgment of Ms Dias QC.

27. The primary claim against the Additional Defendants in the Original Proceedings was that one or more of them had been the undisclosed principals of the Original Defendants with whom Mr Taylor had contracted in relation to the loan, and were liable on that basis. In closing submissions this was confined to an allegation that the Original Defendants acted as agent on behalf of Rhino ([247]). This claim was rejected. The

judge found that the relevant documents entered into by Rhino in 2007 and 2013 did not confer authority to enter into the loan on VDML, the entity that had entered into those documents with Rhino ([273]), and that VDMH could not have been a party to any agency relationship that had been created because it did not exist at the time and there was no evidence of any other agency relationship ([274] and [275]).

28. The judge also found that the loan agreement did not take effect, so the only binding document as far as Mr Taylor was concerned was the Heads of Terms, to which VDMH was the sole counterparty ([277]).

29. In addition, Mr Taylor pleaded claims in (1) misrepresentation (but not in deceit, judgment at [286]), (2) unlawful means conspiracy (the alleged unlawful means being the alleged misrepresentation) and (3) (predicated on the alleged conspiracy, see [313]) restitution, on the basis that the Additional Defendants had been unjustly enriched by the loan. The loss claimed was by reference to the amount of the loan and interest, damages for breach of the loan agreement and misrepresentation, and rescission of the loan agreement or damages in lieu.

30. The judge dismissed all the claims. Limited permission to appeal was granted in respect of agency-related matters and, as has already been indicated, the appeal was dismissed.

Relevant findings of fact by the judge

31. During the course of her judgment the judge reached some conclusions about the ownership of Rhino and the motivation for its transfer to NBT. In summary, she accepted the Additional Defendants' case that the effect of the Transfer Agreement was that VDMH transferred beneficial ownership of 100% of Rhino to Mr Khodabakhsh as nominee for NBT.

32. The background to this, as found by the judge, was a joint venture which it was intended would develop a green technology motor for marine use (the "E-Generator"). The technology was in the course of development by Mr Khodabakhsh. It is not disputed that the joint venture was documented by a Joint Development Agreement ("JDA") dated 30 May 2015 between VDML and NBT. This agreement provided for VDML to pay US$400,000 to NBT in monthly instalments. In the event that the E-Generator was successfully developed then VDML would provide NBT with a one third equity interest either in VDMH or another joint venture company incorporated to hold the IP and know-how in the E-Generator ([84]).

33. The judge referred to two letters of intent signed before the JDA, in April 2015. The first, the Draft Letter of Intent dated 22 April 2015, recorded an intention to enter into a joint development agreement by 31 May under which NBT would provide the technology and give shares in a new joint venture company holding the technology to "Van Dutch Marine", while Van Dutch Marine was to provide shares or other assets to NBT in an equal or greater value. The latter provision was said to be included to reflect a concern of Mr Khodabakhsh and his associate Mr Vechik that the technology should not be relinquished without getting something in return ([74]). The judge concluded that the second letter of intent, dated 24 April, supplemented the first and that the two documents should be read together ([76]).

34. The judge also referred to the Request entered into on 24 May 2015, following a discussion she found that Mr Erenstein and Mr Khodabakhsh had about the Van Dutch contribution, which Mr Erenstein is said to have proposed should take the form of shares in Rhino. This document provided for the transfer of 100% of the shares in Rhino on 30 May for €10,000 ([81]-[83]).

35. The judge found at [85] and [87] that, in addition to the JDA, two further documents were entered into on 30 May 2015. The first, the Transfer Agreement, was a document by which VDMH undertook to transfer 100% of Rhino's shares to Mr Khodabakhsh, acting as agent for NBT, the next business day. The judge concluded that this effectively crystallised the Draft Letter of Intent and Request, and represented the "assets of equal value" contemplated by the former. The second, the PSA, was a document that referred to the Rhino shares being held "in a protected state for use by VDMH in its normal business operations until such time that [Mr Khodabakhsh] and VDMH agree that VDMH is once again solvent and free of liens or any other holds". The judge accepted that, despite its wording, in the context of the other documentation its purpose was not to conceal the valuable shares in Rhino from creditors ([88]-[91]).

36. VDMH did not transfer the Rhino shares as provided for in the Transfer Agreement. The JDA was terminated in August 2016, after VDML ceased making payments. However, Mr Khodabakhsh subsequently returned from the United States to Europe with Mr Vechik and met Mr Erenstein and Mr Koekkoek on 29 October 2016, during which they found out about the English proceedings. The Judge found that an emergency meeting of NBT was held the same day under which it was resolved to authorise Mr Khodabakhsh to notify the English court of NBT's position in relation to Rhino and also to finalise the transfer of its shares ([133]-[135]). This led to a resolution of the directors of Rhino on 25 January 2017 that all its shares should be issued to NBT ([172]).

The judge's reasoning

37. The judge concluded that the claims based in agency failed for reasons unconnected with any alleged fraud. The claim for misrepresentation failed because it was not established that any of the Additional Defendants were party to the loan arrangements such as to found a claim under the Misrepresentation Act 1967, and no duty of care or special relationship was pleaded sufficient to found a tortious claim for negligent misstatement [283]; further it was not established that any representations to Mr Taylor were made with any of the Additional Defendants' authority or consent ([286]).

38. As explained further below, the unlawful means conspiracy claim was formulated in submissions in terms of a combination between the Original Defendants and the Additional Defendants to use unlawful means, comprising the entering into of agreements in April and/or May 2015 and/or making misrepresentations as to the ownership and status of Rhino "for the purpose and with the intention of obscuring the true ownership of Rhino or the underlying assets of Van Dutch" and thereby causing loss.

39. The judge gave a number of reasons for rejecting this claim at [291] onwards. She concluded that she thought Mr Erenstein and/or Mr Koekkoek had in all likelihood been "spinning a double line", in which they had disposed of Rhino but continued to represent to the rest of the world, in particular Mr Taylor and other potential investors,

that Rhino and its assets were still held within the group. However, as far as the Additional Defendants were concerned there was no element of deliberate combination: the case failed on the facts ([296]).

40. It also faced what the judge described at [297] as "formidable legal difficulties", the first being a failure to plead what the ownership of Rhino actually was ([298]). At [299] the judge remarked that the falsity of any representations about the ownership of Rhino "depends critically on whether there was or was not a genuine transfer". If there was no genuine transfer of Rhino and it remained with the Original Defendants then there were no misrepresentations and therefore no unlawful means, although she commented that in that event it would be an extremely odd conspiracy for Mr Khodabakhsh to enter into as it would have involved him surrendering his green technology for no benefit. Alternatively if the transfer genuinely occurred, including in circumstances where it was done with a view to "shielding" Rhino's assets, there was no combination to use unlawful means (and no lawful means conspiracy was pleaded). As she rather pithily put it "There is nothing unlawful about entering into an obscure agreement".

41. The second legal difficulty, identified at [300] to [303], was the requirement for an agreement to act unlawfully, in this case an agreement for a misrepresentation to be made. The judge concluded that careless conduct was insufficient, and there was no allegation of deceit. The third was absence of knowledge that the conduct was unlawful and a related absence of intention to cause loss ([304] to [306]). The fourth was lack of knowledge of Mr Taylor as lender and the absence of evidence of communication between Mr Khodabakhsh and the Original Defendants between the end of May and December 2015 ([307] to [309]). The fifth was the difficulty of demonstrating loss, because if beneficial ownership of Rhino remained with the Original Defendants Mr Taylor could still enforce against its assets. If the transfer was genuine no loss was suffered because he could never have enforced against its assets anyway ([310]). Ultimately, the two insuperable problems were that entering into an obscure agreement could only be relied upon as part of a lawful means conspiracy, which was not Mr Taylor's case, and secondly there could not be a conspiracy to injure by means of negligent misrepresentation, [311]. Any case of deceit should have been explicitly pleaded and proved.

The fraud allegation now made

42. Mr Taylor's allegations of fraud are based on evidence from Mr Vechik and from Mr Koekkoek. Mr Vechik gave evidence for the Additional Defendants in the Original Proceedings, alongside Mr Khodabakhsh. Mr Taylor's position is that Mr Vechik unexpectedly "crossed the floor" in December 2019 and admitted that evidence given had been false and that documents had been forged to present a fictitious transfer of Rhino. Mr Koekkoek has also provided witness evidence that appears to support Mr Vechik's account.

43. The credibility of Mr Vechik's evidence is obviously affected by the fact that it amounts to an admission of perjury. It conflicts with both his written and oral evidence at the trial. There is also clear evidence of a falling out between Mr Vechik and Mr Khodabakhsh and of Mr Vechik's apparent desire for some form of retribution against him. The credibility of Mr Koekkoek's evidence is affected by the fact that the new version of events contradicts the affidavit evidence he gave the court in support of the

remittal application, to the effect that Mr Khodabakhsh owned Rhino. However, Mr Taylor says that Mr Vechik's account has now been vindicated by expert evidence.

44. In summary, Mr Vechik's evidence is that, of the documents said to have been signed in May 2015, only the JDA is genuine. The requirement in that document to provide NBT with a one third equity interest either in VDMH or another joint venture company incorporated to hold the IP and know-how in the E-Generator was fulfilled through the provision of a 40% shareholding in another company, SCI Volta. In 2015 neither Mr Khodabakhsh nor Mr Vechik had heard of Rhino. In late 2016 Mr Khodabakhsh decided to create an illusion that the shares in Rhino had been transferred to NBT and forged documents for that purpose. The motivation started out as a desire to protect his joint venture partners from their creditors, but evolved opportunistically into a chance to take control of valuable assets.

45. The expert evidence that has been obtained relates to a version or versions of the Draft Letter of Intent (purportedly dated 22 April 2015) and what are said to be inaugural minutes of NBT's Board (purportedly dated 22 June 2015). The evidence suggests that the documents produced by Mr Vechik were, in the case of the Draft Letter of Intent, created on 30 March 2017 (rather than 22 April 2015), and, in the case of the minutes, created on 14 September 2017. There is no expert evidence in relation to the Request or the Transfer Agreement, or indeed in respect of the PSA. Copies of the Request and Transfer Agreement were produced by Mr Khodabakhsh to Mr Taylor's solicitors on 13 January 2017 pursuant to the order of Barling J on 12 January, and appear to be the documents that Mr Khodabakhsh brought to court on that date.

46. Mr Taylor also relies on what he says was a failure to disclose the relevant documents pursuant to specific disclosure orders in the Original Proceedings.

The Defendants' position

47. The Defendants deny the fresh allegations. Mr Ashworth referred to the obvious questions over the credibility of Mr Vechik and Mr Koekkoek and pointed to inconsistencies between the various witness statements that Mr Vechik has now produced in support of Mr Taylor's case. However, the Defendants are prepared for the court to assume, for the purposes of this application, that there is a good arguable case as to the existence of forged documents, being those documents considered by the experts. But they say that Mr Taylor's case nonetheless fails to meet the hurdle of good arguable case, essentially on the basis that the evidence that would be impugned by a demonstration of dishonesty would not have been "material" in the required sense, because it was not an operative cause of the trial judge's decision to dismiss the claims against the Additional Defendants.

Serious issue to be tried/good arguable case: the claim to set aside

48. As explained in further detail below, the claim in the current proceedings is at least primarily a claim to set aside the Decision.

49. I am conscious that the tests of serious issue to be tried and good arguable case are not particularly high thresholds[1], and it is not my role on this application to determine the claim. However, I have to say that I have some real doubts as to whether the fraud allegations would be "material" in the sense described by Aikens LJ in *Highland Financial*.

50. It is clear that the new allegations would make no difference to the agency or misrepresentation claims. The position in relation to the claim in conspiracy is less clear. But there appears to me to be a strong argument that what is alleged now is a fundamentally different conspiracy to the one that was the subject of the conspiracy claim in the Original Proceedings. The original conspiracy claim not only positively averred the existence of arrangements said to have been entered into in April and/or May 2015, before the loan was made in July 2015 (and which effectively induced the loan to be made), but importantly the nature of the loss claimed is very different.

51. The pleaded unlawful means in the Original Proceedings included:

    a) entry into of a series of agreements in or around May 2015 for the purpose of obscuring the true ownership of Rhino and the underlying assets;

    b) action said to have been taken by Mr Erenstein in July 2015 in sharing misleading information with Mr Taylor about the ownership of Rhino and the underlying assets;

    c) failure to disclose an agency relationship between Rhino and VDML;

    d) making misleading and/or contradictory statements about the true owner of Rhino and the underlying assets; and

    e) failing to provide disclosure pursuant to court orders which might have provided a "true and complete explanation" of such ownership.

52. On the face of it elements d) and e) (which are alleged to have occurred "at all times") might also be relevant to the conspiracy now alleged. However, the judge explained at [290] of her judgment that she had struggled to understand precisely what was being alleged, particularly with regard to the ownership of Rhino, and she went on to say:

> "Nonetheless, the mast to which Mr Ramsden firmly pinned his colours was that there was a combination between the Original Defendants and the Additional Defendants to use unlawful means, namely (i) entering into the agreements of April/May 2015 and/or (ii) making misrepresentations as to the ownership and status of Rhino "*for the purpose and with the intention of obscuring the true ownership of Rhino or the underlying assets of Van Dutch*" thereby causing loss to Mr Taylor."

A footnote was added before the words in italics which reads:

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[1] The test of good arguable case provides a higher hurdle than serious issue to be tried: see *Gee on Commercial Injunctions, 7th Ed.* at 12-032. The good arguable case test was summarised by Haddon-Cave LJ in *Lakatamia Shipping Company Ltd v Morimoto* [2020] 2 All ER (Comm) 359 at [38], by reference to the judgment of Green LJ in *Kaefer v AMS* [2019] 3 All ER 979 in the context of jurisdictional gateways, as involving a central concept of "a plausible evidential basis".

> "Other conduct pursuant to the alleged conspiracy was also pleaded, such as a failure to disclose the alleged relationship of undisclosed agency, but Mr Ramsden did not ultimately suggest that such conduct amounted to independently unlawful means. In particular, he did not suggest that there had been any conspiracy that Mr Erenstein and Mr Koekkoek should commit contempts of court, or that the alleged breaches of court orders by the Additional Defendants were anything more than a continuing manifestation of the conspiracy."

53. The new allegation is of a different sort, namely a conspiracy entered into in 2016 and/or 2017 to put assets out of Mr Taylor's reach. The parties to the alleged conspiracy might be the same, but the time it is said to have been entered into and its nature and effect are quite different. In particular, the loss under the alleged 2015 conspiracy was by reference to the loan advanced by Mr Taylor in July 2015, based on his alleged misunderstanding of the ownership position at the time. The loss claimed by reference to the conspiracy now alleged is not the same, and relates essentially to the costs incurred in the Original Proceedings.

54. If the shares in Rhino were not transferred as Mr Taylor now maintains, then there was no misunderstanding when Mr Taylor made his loan. To the extent that Mr Taylor could ever have enforced his default judgment against any of the Original Defendants (noting the judge's conclusion that the only legally binding agreement that he had was with VDMH), then it might be thought that in principle he could still do so. Any loss caused by actions of the Additional Defendants would relate to the costs of abortive proceedings against them and the consequences of delay in taking enforcement action.

55. In summary, if Mr Taylor had known about the alleged fraud at the time then, if he had brought a claim at all, he would in all likelihood have brought a different conspiracy claim, and potentially a claim in deceit. The conspiracy claim that was actually brought, seeking the relief that he sought in respect of the loan, would simply not have been advanced. On that basis it is not easy to see how the test described by Aikens LJ in *Highland Financial* is met. As he explained there, the question is not what decision might have been made if the claim were retried on honest evidence, but rather the impact of the fresh evidence on the evidence supporting the original decision. That seems to me to refer to the decision the judge made on the claims that she was required to adjudicate, not what decision might have been made in respect of hypothetical claims that might have been made if the new evidence had been available, and which would have entirely different consequences.

56. It is the case that the question of ownership of Rhino was the subject of findings of fact by the judge, and she recorded at [10] that the beneficial ownership of Rhino was a matter of dispute before her. There are also comments at [175] that the "critical question is whether the share transfer took place in pursuance of a genuine *bona fides* transaction", and that the finding that it had "puts a wholly different complexion" on the Additional Defendants' conduct.

57. I accept that the test for setting aside a judgment on grounds of fraud does not require a determination that the judge would have reached a different conclusion. However, the question of ownership of Rhino was not even pleaded or listed as an issue for determination at the trial. The comment at [175] relates to whether transactions in April or May 2015 were *bona fides*, rather than to whether they occurred at all. The judge

dismissed the conspiracy claim because, on the facts, she found that there was no conspiracy in April or May 2015, and because the claim failed in any event for a number of legal reasons. Those reasons included that if Rhino had not in fact been transferred then there would have been no misrepresentations and no unlawful means (see [40] above).

58. In determining whether a judgment should be set aside on an appeal the focus is on the result or outcome of the case, rather than the reasons given: see generally *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2003] 1 WLR 307. Mr Ashworth submitted that the same principle applies in actions to set aside a judgment for fraud. I do not accept that. The question that generally arises on an appeal is whether the decision was wrong. The test for setting aside a judgment on grounds of fraud does not go that far. It involves consideration of "the way in which the first court approached and came to its decision" and whether the fraudulent conduct was "an" (not "the") operative cause of the court's decision to give judgment as it did. That must extend to the reasons for the decision.

59. For example, a litigant who is seeking to set aside a judgment for fraud would be unlikely to be confined to points made in the original pleadings or, for example, to the same legal basis for the claim, in arguing that the test of materiality was met. This can be seen from the facts of *Takhar*. In that case Mrs Takhar sought to avoid transfers of properties made to Gracefield Developments. Her claim at the original trial was based on retaining beneficial ownership, or alternatively on undue influence or unconscionable conduct. She did not assert that the profit share agreement on which the defendants relied was a forgery, but merely that she could not recall signing it. When seeking to set aside the judgment she relied on it being a forgery. Lord Kerr described this at [35] as a "quite different" relief.

60. However, what Mrs Takhar was seeking, and would have continued to seek in the subsequent litigation following the judgment being set aside, was to avoid or set aside the transfers of the properties. Following the Supreme Court decision the original judgment was set aside ([2020] EWHC 2791(Ch)) because the judge at the original trial had heavily relied on the profit share agreement in reaching his decision not to grant the relief sought, so the test of materiality was met.

61. The question to be asked is whether the previous evidence was "an operative cause of the court's decision to give judgment in the way it did". The judge's reasoning is clearly relevant. However, the focus must still be on the decision reached on the claim for relief actually brought, and the reasons underpinning that. If the fraud could not touch on the conclusions reached in respect of that claim then it seems unlikely that set aside would be appropriate. The fraud would not have been causative in the sense referred to by Aikens LJ. This makes sense: in those circumstances it is hard to see how any fresh trial following set aside could lead to a different result. A fresh trial on the same claim would have little point.

62. What Mr Taylor sought in the Original Proceedings was, essentially, recovery in respect of the loan that he had been induced to make. In contrast, what Mr Taylor now seeks relates to the costs incurred in bringing the Original Proceedings. That seems to me to be a claim relating to a different conspiracy, and in respect of which the relief sought relates to a different loss.

63. Where a particular finding of fact is procured by fraud it is hard to see how a litigant would be estopped from asserting in future litigation that he is not bound by that finding. It would not be necessary first to set aside the earlier decision, and indeed it would not be possible to do so if the test for materiality was not met on the facts.

64. When making an order in the appeal on 7 February 2020, Phillips LJ said this:

> "There is a question as to whether the Appellant now seeks to reverse the decision below (and on what basis), or whether his complaint is that he need not have brought the claim against the Respondent in the first place, the real issue being costs. If the latter is the case, the appropriate course may be to start fresh proceedings to recover those costs."

65. In summary, there is a great deal of force in that observation.

Serious issue to be tried/good arguable case: the scope of the current claim

66. In response to Mr Ashworth's submissions and to questions I raised about whether Mr Taylor's real complaint was that, had he known what he alleges to be the true facts, he would have brought a different claim, Mr Ramsden submitted that setting aside the Decision was not an essential part of the pleaded claim. He submitted that the claims in conspiracy and deceit did not necessarily require the Decision to be set aside. He relied on certain paragraphs of the Amended Particulars of Claim in support of this.

67. The Amended Particulars of Claim describe in some detail the history of the Original Proceedings, including (at paragraph 13) the remittal application and Mr Khodabakhsh's intervention. This is followed at paragraph 23 by details of evidence and submissions on the part of the Defendants "at and for the purposes of the trial" of the Original Proceedings, including in relation to the proposed joint venture, the two letters of intent, the Request, the JDA, the Transfer Agreement and the PSA. There is then set out details of Mr Taylor's evidence and submissions, the judge's findings (at paragraph 27) and the appeal.

68. Paragraphs 33 and 34 describe Mr Vechik's approach to Mr Taylor's representative in December 2019 and a meeting at which Mr Vechik explained that the evidence given at the trial relating to the purported transfer of Rhino in mid 2015 was untrue.

69. Paragraph 35, under the heading "Obtaining the Judgment by fraud and/or dishonesty", states:

> "The Defendants obtained the Judgment by fraud and/or dishonesty."

70. This is followed by a series of sub-paragraphs under the heading "Particulars of fraud and dishonesty". The first of these reads:

> "(1) The Judgment was obtained by fraud and/or dishonesty because the written and/or oral evidence of the Defendants in the Original Proceedings and/or the submissions advanced on their behalf in the Original Proceedings was dishonest and untrue."

71. A number of other sub-paragraphs follow. These assert in particular that the Draft Letter of Intent, the Request, the Transfer Agreement and the PSA are inauthentic, and were backdated and advanced by the Defendants to:

> "…defraud and/or mislead the Court and/or the Claimant and/or to obtain the Judgment fraudulently and/or dishonestly."

72. Sub-paragraph (5) of the particulars asserts that Mr Khodabakhsh devised a "fraudulent and/or dishonest scheme" to give the false impression that beneficial ownership had been transferred in May 2015. Sub-paragraph (6), which (together with paragraph 46, set out below) was heavily relied on by Mr Ramsden in reply to Mr Ashworth's submissions, reads as follows:

> "(6) Pursuant to that fraudulent and/or dishonest scheme, [Mr Khodabakhsh] and/or NBT:
> (a) fraudulently and/or dishonestly intervened in the Original Proceedings from 7 December 2016 in the manner described at paragraph 13 above;
> (b) fraudulently and/or dishonestly created and fraudulently and/or dishonestly back-dated each of the Draft Letter of Intent, the 24 May 2015 Request, the 30 May 2015 Transfer Agreement and the 30 May 2015 Protected State Agreement;
> (c) fraudulently and/or dishonestly procured the registration of Rhino's shares in the name of NBT on 25 January 2017;
> (d) fraudulently and/or dishonestly contested the Original Proceedings from the point of their intervention described at sub-paragraph (a) above;
> (e) fraudulently and/or dishonestly withheld information in relation to, and obscured and misled the Claimant and/or the Court as to, the true circumstances of Rhino's ownership;
> (f) fraudulently and/or dishonestly withheld information in relation to, and obscured and misled the Claimant and/or the Court as to, the matters set out at paragraph 23 above;
> (g) fraudulently and/or dishonestly failed to comply with disclosure obligations in the Original Proceedings;
> (h) fraudulently and/or dishonestly failed to comply with orders of the Court in the Original Proceedings; and/or
> (i) fraudulently and/or dishonestly obtained a judgment on the terms of the Judgment, including on the matters set out at paragraph 27 above."

73. The allegation of conspiracy to injure by unlawful means is pleaded as follows:

> "36. Further, or in the alternative, the Defendants have conspired and combined together wrongfully and with an intention to injure the Claimant and/or of causing loss to the Claimant by obtaining the Judgment by fraud and/or dishonesty.
> 37. Pursuant to and in furtherance of the conspiracy pleaded at paragraph 36 above, the Claimant repeats the matters pleaded at paragraphs 23 and 33-35 above.
> 38. As a result of the Defendants' conspiracy as set out at paragraphs 36 and 37 above, the Claimant has suffered loss and damage as set out further below."

74. The claim in deceit is pleaded as follows:

> "39. The Claimant repeats the matters pleaded at paragraphs 23 and 33-35 above.
> 40. The matters pleaded at paragraphs 23 and 33-35 above constitute a series of false representations of fact made by words and/or conduct by the Defendants (or any one of them), such false representations:
> 40.1 being made with the knowledge that they were false and/or made in the absence of any genuine belief that they were true and/or recklessly;
> 40.2 being made with the intention that they should be acted upon by the Claimant in the manner which resulted in damage to him;
> 40.3 were acted upon by the Claimant; and
> 40.4 caused damage to be sustained to the Claimant in so doing.
> 41. As a result of the Defendants' deceit as set out at paragraphs 39-40 above, the Claimant has suffered loss and damage as set out further below."

75. Under the heading "Causation and Loss" Mr Taylor then pleads at paragraph 43 that he has suffered loss and damage as a consequence of the Defendants fraudulently obtaining the judgment and/or their conspiracy and/or deceit. He pleads at paragraph 45 that the claim in unlawful means conspiracy would have succeeded absent the Defendants' fraud or dishonesty, and that that conduct was an operative cause of the decision to dismiss the claims. The following is then pleaded at paragraph 46 (still under the heading "Causation and Loss"), a paragraph also heavily relied on by Mr Ramsden:

> "46. Further, in consequence of the fraudulent and/or dishonest conduct of the Defendants fraudulently and/or dishonestly obtaining the Judgment and/or their conspiracy and/or deceit:
> 46.1 The Claimant joined the Defendants to the Original Proceedings and pursued the Original Proceedings against the Defendants from the date of their fraudulent and/or dishonest intervention on 7 December 2016.
> 46.1 The Claimant did not and/or could not enforce the Default Judgment and the costs orders obtaining against the Original Defendants in the Original Proceedings against Rhino and Rhino's assets.
> 46.2 The trial of the Original Proceedings was pursued by the Claimant against the Defendants and was required to take place: (a) at all; and/or (b) on the basis of the matters pleaded against the Defendants, because if the Defendants had not acted as pleaded at paragraphs 33-43 above the Claimant would have enforced the Default Judgment against the Original Defendants in the Original Proceedings, which would have extended to Rhino and Rhino's assets, and he would not have sought to join the Defendants to the Original Proceedings in the manner described at paragraphs 18-20 above.
> 46.4 The Claimant failed in the Original Proceedings on his unlawful means conspiracy claim against the Defendants."

Details of loss are pleaded at paragraph 48, in particular in respect of costs.

76. As explained by Lord Woolf in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793a-b, pleadings must mark out the parameters of the case advanced, identifying the issues and the extent of the dispute and making clear the general nature of the case. Particulars do not define the scope of the facts on which the claim is founded: *Pinson v Lloyds and National Provincial Foreign Bank Ltd* [1941] 2 KB 72. All material facts must be pleaded and the proper function of particulars is not to state material facts omitted from the statement of claim, *Pinson* at p.75.

77. It is far from apparent that the existing drafting is clear enough to expand the claim in the way that Mr Ramsden sought to argue, either in conspiracy or deceit.

78. On the contrary, it seems clear from paragraph 36 of the Amended Particulars of Claim that the fresh claim in conspiracy is confined to "obtaining the Judgment by fraud and/or dishonesty". I do not see how the claim in conspiracy could succeed independently of a successful attack on the Decision.

79. The claim in deceit is by reference to the matters pleaded at "paragraphs 23 and 33-35". Paragraph 23 is concerned with evidence given and submissions at the trial. Paragraphs 33 to 35 describe Mr Vechik's approach and simply plead that the Defendants "obtained the Judgment by fraud and/or dishonesty". It is difficult to see how the particulars that follow paragraph 35 can properly be read as expanding on this, either for the purposes of paragraph 35 itself or, as Mr Ramsden sought to argue, by being effectively brought into the deceit claim by virtue of the cross-reference to paragraph 35 in that claim (a cross-reference that I note in any event does not in terms extend to the particulars that follow it).

80. Paragraph 46, on which Mr Ramsden also relied, is part of a section headed "Causation and Loss". It is hard to see how this can fairly be read as expanding the scope of the claims in conspiracy or deceit.

81. I understand Mr Ramsden's point that the Amended Particulars of Claim do include, in the description of the history of the Original Proceedings as well as in sub-paragraph (6) of the particulars that follow paragraph 35 and in paragraph 46, statements of facts relied on which would be consistent with a claim in conspiracy that extended beyond obtaining the Decision to (for example) losses arising from prosecuting the claim against the Additional Defendants in the first place. But as already explained the claim in conspiracy is simply not formulated in that way. In my view it is strongly arguable that the same applies to the claim in deceit.

82. Mr Ashworth pointed out additional potential difficulties with the claim in deceit, formulated as it is by reference to the Decision. In particular, he submitted that any action in deceit (or unlawful means conspiracy) by reference to what was said or submitted to the trial judge would circumvent the immunity from suit that any witness or party has by reference to what is said in court (*Heath v Commissioner of Police of the Metropolis* [2005] ICR 329 at [17]-[18]).

83. In short, there are some significant difficulties with Mr Taylor's claim as currently formulated. I have considered in the light of that whether I should conclude that there is no serious issue to be tried, or no good arguable case, and refuse injunctive relief on that basis. Overall, however, I think it is preferable not to make a decision on that basis but instead also to consider the other requirements for injunctive relief, which were

fully argued and which would also remain relevant if (for example) the claim were reformulated.

The claim to a proprietary injunction

84. As already indicated, Mr Taylor's proprietary claim is stated to relate to funds transferred to the Defendants pursuant to adverse costs orders (other than those made by the Court of Appeal). Since Mr Taylor also seeks a stay of any detailed assessment of the Defendants' costs of the Original Proceedings, the particular focus of the proprietary claim is the £400,000 payment on account ordered to be paid pursuant to the order of 22 July 2019.

85. Mr Taylor's pleaded case is that any costs paid by him under that order would be transferred pursuant to a fraud and would be held by the Defendants as constructive trustees for him. Mr Ramsden submitted that the tests for a proprietary injunction were met, noting that it was not necessary to show any risk of dissipation of assets and that a proprietary injunction could be granted notwithstanding a delay which might have led to refusal of a freezing injunction. He referred to the focus, in determining whether the balance of convenience favoured an injunction, of taking the course which seems likely to cause the least irremediable prejudice. He submitted that there was "very strong evidence" that the judgment was procured by fraud, and that this had been vindicated by independent expert analysis to which Mr Khodabakhsh had very little to say in response.

86. Mr Ramsden relied on the following dictum of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669 at p.716C-D:

> "I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it…"

87. Mr Ramsden submitted that if the £400,000 was transferred then Mr Taylor would in principle be able to trace it in equity (albeit that Mr Taylor considered it highly unlikely that he would in practice be able to recover the funds transferred). At the least, there was a serious issue to be tried in respect of the proprietary claim. Mr Ramsden referred to the court's ability to grant an order for the preservation of property under CPR 25.1(c)(i). He pointed out that the rule in *Siskina v Distos SA (The Siskina)* [1979] A.C. 210, to the effect that freezing relief of the *Mareva* variety cannot be granted until an anticipated cause of action has arisen, does not apply to a proprietary claim (see *Gee on Commercial Injunctions, 7th Ed.* at 12-004; see also 12-020). He relied on the Court of Appeal decision in *Koza Ltd v Koza Altin Isletmeleri AS* [2021] 1 W.L.R. 170 ("*Koza*") as being what he says was a recent application of this principle. He further referred to the requirements for granting *quia timet* relief and submitted that they were satisfied, although by the end of his submissions he appeared to suggest that his primary submission by reference to the stolen moneys analogy did not require reliance on *quia timet* principles.

88. I do not consider that there is a sound basis on which to grant a proprietary injunction.

89. I cannot see how payment of money pursuant to a court order that has not yet been set aside, and which the court clearly had jurisdiction to grant, can be compared with Lord Browne-Wilkinson's example of stolen money. There can be no doubt that the order of 22 July 2019 is valid unless and until it is set aside. Any money paid pursuant to it would transfer both legally and beneficially to the payee.

90. In *Rashid v Nasrullah* [2020] Ch 37 at [53], Lewison LJ said:

> "It is, of course, the case that the mere fact that fraud is involved somewhere does not of itself mean that there is a separation of legal and beneficial title."

He went on to approve a passage from *Snell's Equity, 33rd ed.* as correctly distinguishing between two types of case. The passage appears in similar, though not identical, form in the 34th edition. As it now appears it reads as follows:

> **"26-012 (b) Fraudulent taking.** A distinction must be drawn between fraud consisting in the outright taking of a person's property, wholly without his consent, and a transaction induced by a fraudulent misrepresentation. In the first case, it has been said that a thief who steals the property of another holds it on constructive trust for the claimant. The thief's possessory title is subject to the claimant's equitable entitlement to have the property specifically restored to him so that he holds it as a constructive trustee. The consequence is that the claimant need not rely on the less advantageous common law rules of tracing to recover his property.
>
> **26-013 (c) Fraudulently induced transfer.** In the second case, where the claimant is the victim of a fraudulent misrepresentation which induces him to transfer his property to his defendant, the transaction is valid until the claimant elects to rescind it. In the meanwhile, the defendant holds his legal interest in the property as beneficial owner, though subject to the claimant's equity to rescind. This right has a slight proprietary character, but only in the sense that the right of rescission may sometimes be exercised against a third person to whom the defendant transfers the asset. On rescission by the claimant, the defendant holds his legal interest in the property on resulting trust. Since the trust arises only at that stage, the defendant cannot be taken to have owed duties qua trustee before then. Nor can any misapplication of money by the defendant be treated as a breach of trust until after rescission. The possibility of rescission leading to the imposition of a resulting trust will be barred if the claimant has elected to affirm the transaction."

91. Lord Browne-Wilkinson's comment obviously provides authority for the first of these propositions. Mr Ramsden bravely submitted that the key distinguishing feature was consent, and because Mr Taylor now knew about the fraud and was not willing to consent to the payment, his case was closer to the first scenario rather than the second, such that a constructive trust would arise immediately upon payment.

92. I disagree. Whilst Mr Taylor would not be making the payment because he freely chooses to do so, the reason he would be making it is because he is compelled by a

court order, and not because someone has wrongly taken his property without his consent. The circumstances are entirely different.

93. If there is any analogy with the two scenarios referred to in *Snell's Equity*, the facts are closer to the second. A court order is valid until set aside. As a result, payments made pursuant to it will vest both legally and beneficially in the payee, just as with a voidable transaction (see the further discussion by Lewison LJ in *Rashid v Nasrullah* at [54] and [55], by reference to Rimer J's decision in *Shalson v Russo (Mimran, Part 20 claimants)* [2005] Ch 281).

94. However, I am not persuaded that a payment pursuant to a regular court order does fall into the same category as a payment pursuant to a fraudulently induced transfer. A court order is only ever regular or irregular and is not appropriately described as void or voidable (*Isaacs v Robertson* [1985] 1 AC 97 (PC), at 103E, which specifically refers to the contrasting concepts of voidness and voidability as forming part of the English law of contract and being inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation). A regular court order is valid and binding until it is set aside (also referred to as "rescinded") by a further decision of the court. It is not open to a litigant who considers that he has been defrauded simply to elect to rescind an order against him. Instead he must persuade the court that it is required. What he has is a cause of action to have the judgment set aside (*Takhar* at [60], per Lord Sumption). If and when he establishes to the court's satisfaction that set aside is required, the consequences will depend on the terms of the further court order. In the normal course that further order may well include provision for repayment of any amounts paid pursuant to the order that has been set aside. But it seems highly unlikely to me that it would involve any form of proprietary relief in respect of monies paid, particularly in circumstances where the concept of a remedial constructive trust is not part of English law (*FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [47], *Snell's Equity, 34th ed.* at 26-015).

95. Mr Ramsden relied heavily on the following passage in the judgment of Popplewell LJ in *Koza* at [83]:

> "Section 37(1) of the Senior Courts Act 1981 is in very wide terms…but I accept that its exercise must be principled. Where a claimant has a proprietary claim to assets, there is obviously a principled basis for preserving those assets pending trial, and a proprietary freezing order is commonly granted in such circumstances. In the present case Koza Altin has no proprietary claim as such to the assets in question: the funding will be from assets owned by its subsidiary, Koza Ltd. However, a parent company does have an interest in the use by its subsidiary of the latter's assets because such use affects the value of its shareholding in the subsidiary, and such interest is proprietary in nature because the shareholding is a species of property. It is, therefore, in accordance with principle that the court's wide jurisdiction under section 37 should be exercisable to protect such a proprietary interest in appropriate circumstances. Koza Altin's proprietary interest in preserving the value of Koza Ltd's assets, and the consequent value of its own shareholding, is a legitimate interest which is capable of justifying protection by the grant of a freezing order. It is a separate question whether the circumstances justify the grant of such an injunction in any particular case; but the existence of a

> power to grant it is consistent with principle. Indeed if Mr Flynn were right and there were no such power, it would leave an unfortunate gap in the court's ability to do justice where the circumstances justified making such an order."

96. I do not agree that *Koza* assists Mr Taylor. The facts were very different. They involved a dispute over the right to control Koza Ltd. Koza Ltd had obtained an injunction against its parent, Koza Altin, which was continued on the provision of an undertaking not to dispose of its assets other than in the ordinary course of business. The question arose as to whether an arbitration could be funded out of the assets of Koza Ltd consistently with the undertaking, and the parent applied for an injunction restraining the expenditure. An interim injunction was granted, and the decision to do so was upheld in the Court of Appeal. As can be seen from the passage set out above, Popplewell LJ did rely on a form of proprietary analysis by reference to the parent's interest in its subsidiary, which the court concluded that it should protect by way of ancillary order to the (main) injunctive relief that it had granted. But a key point is that there was a dispute over the right to control the subsidiary, and it was appropriate to grant relief with the aim of ensuring that the value of the parent's interest in the subsidiary was preserved pending determination of the dispute (see paragraphs [90] and [91] of the judgment). In contrast, in this case Mr Taylor seeks to develop a proprietary claim by reference to funds that are not the subject matter of the dispute but comprise, or would be derived from, property that he undoubtedly currently owns and which he is required to pay over under an existing court order.

97. A further point is that if interim relief is granted in Mr Taylor's favour on a proprietary basis, that would effectively finally determine the pleaded constructive trust claim. This is because the supposed trustee would never receive the assets and the trust would not be constituted. On that basis a closer examination of the merits is required, taking account of the strength and weaknesses of the case and the likelihood of success at trial (*Araci v Fallon* [2011] EWCA Civ 668 at [33] and [39]). Popplewell LJ referred to this in *Koza* in the following terms at [77]:

> "Cases not infrequently arise of interim injunction applications where the circumstances mean that the grant or refusal of relief will in practice be finally determinative. In such situations the court does not say that it has no power to restrain a threatened invasion of a disputed right simply because there will never be a final determination of that issue. Rather it recognises that the grant or refusal of the injunction will be a permanent and unjustified invasion of one party's rights, and so grants or refuses an injunction on the basis of the least irremediable prejudice, recognising that there is a heightened emphasis on the merits of the claim and that the court may need to have a high degree of assurance that the threatened conduct is an actionable invasion of the claimant's rights. It is not necessary to cite extensive authority for this well-known practice and the applicable principles: see, for example: *NWL Ltd v Woods* [1979] 1 WLR 1294; *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251; and *Forse v Secarma Ltd* [2019] IRLR 587. There is still a threshold of a "serious issue to be tried" in the sense of a seriously arguable case that the threatened conduct is an invasion of the claimant's rights even though, if the injunction be granted, there will never be a trial of that issue. But the merits on the issue also come

> in at the discretionary stage of balancing the least irremediable prejudice and may be a very important part of that balancing exercise."

98. I consider that the lack of merit in the proprietary claim is a significant factor in the balancing exercise that weighs against granting an injunction on a proprietary basis. I accept that Mr Taylor is concerned that he would not be able to recover any costs paid over. He has also offered to pay the £400,000 into court pending resolution of the dispute, and has produced some evidence about his own financial position to support a cross-undertaking in damages. However, Mr Khodabakhsh's position is that the funds are required to repay part of the loan advanced by Mr Davies (to whom Mr Khodabakhsh is in debt for over €1 million), and that if he does not do so then it may not be possible for the defence of these proceedings to be funded. That concern is supported by a witness statement from Mr Davies himself dated 23 March 2020, which was produced in connection with an attempt by Mr Taylor to involve Mr Davies more directly in the litigation.

99. Mr Taylor relies on this in support of his concern that Mr Khodabakhsh would not be able to pay back the £400,000, because he has evidently been unable to repay Mr Davies from other sources. However, overall the evidence does not convince me that Mr Taylor's concerns about recovery should outweigh the lack of merit in the proprietary claim, the fact that there is a valid costs order that has been in place since July 2019 that has been entirely unsatisfied (and which Mr Taylor appears to be quite capable of meeting), and the concern that if the costs order is not complied with then there is an increased risk that funding for the defence to these proceedings may not be available. In assessing the significance of the costs order, I also note that it is likely that a significant element of the costs in the Original Proceedings will have been incurred in respect of the agency and misrepresentation issues, which would have failed irrespective of any fraud.

The claim to a freezing injunction

100. I am also not persuaded that a non-proprietary freezing injunction is appropriate.

101. Freezing relief is sought in an amount of £2.5 million. I note that there is no clear evidence to support this figure. It no doubt reflects the claim form, which includes a statement that Mr Taylor expects to recover damages in excess of £2.5 million. A witness statement from a partner in Keystone Law, Mr Taylor's solicitors, refers to the figure in the claim form as being made up of Mr Taylor's adverse costs liability and a damages claim in respect of his own costs and associated losses. However, no details are provided.

102. I have already considered the question of good arguable case as to the existence of a cause of action. The other key requirements relate to the existence of assets and a real risk of their dissipation. If these requirements are established the court must consider whether it is just and convenient in all the circumstances to grant the injunction.

103. Mr Taylor must satisfy the court that there are grounds for believing that each of the Respondents is in possession of assets which can be caught by the order (*Ras al Khaimah Investment Authority v Bestfort Developments llp* [2018] 1 WLR 1099 at [39]). The point is that freezing injunctions are granted in cases where there is evidence that the defendant has some assets to dissipate, and that there is a risk of dissipation. Mr

Taylor has not clearly identified assets that require to be effectively protected by an injunction. The unchallenged evidence of Mr Khodabakhsh is that NBT's only assets are the shares it owns in Rhino. I appreciate that Rhino is a Panamanian company whose shares might be disposed of readily and (potentially) without transparency, but on Mr Taylor's case Rhino's shares are not owned by NBT or Mr Khodabakhsh at all. Rhino's assets are said to be the intellectual property rights, moulds and tools relating to the Van Dutch yacht business. They are presumably identifiable with the Van Dutch brand and it is not apparent to me how those assets could be readily dissipated.

104. As far as Mr Khodabakhsh is concerned, Mr Taylor relies on the E-Generator technology together with other technology that Mr Khodabakhsh has also developed. Whilst I accept that Mr Taylor may be unclear about how these assets are held, it is far from clear how they might readily be dissipated. The only other assets identified are two properties in California which Mr Khodabakhsh has previously given as addresses in witness statements, for which Mr Taylor's solicitor provides estimated values based on internet searches, totalling around US$1 million. However, there is no evidence that these properties are actually owned by Mr Khodabakhsh or, if they are, whether they are encumbered.

105. In reality, it is clear that the main focus is on the Defendants' entitlement to costs against Mr Taylor. There is no suggestion that there is a risk of the Defendants attempting to assign this right, so it is only when those costs are paid that there would be an asset which might require protection.

106. As to the risk of dissipation, the key principles were summarised by Haddon-Cave LJ in *Lakatamia Shipping Company Ltd v Morimoto* [2020] 2 All ER (Comm) 359 at paragraph [34] (taken, subject to one correction, from the decision of Popplewell J in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm)):

> "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
>
> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
>
> (3) The risk of dissipation must be established separately against each respondent.
>
> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
>
> …
>
> (6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a

> defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
>
> (7) Each case is fact specific and relevant factors must be looked at cumulatively."

107. Mr Ramsden submits that the alleged dishonesty is directly relevant to the issue of dissipation. It is not evident to me that that is the case. The alleged dishonesty involves presenting a picture of assets being owned by the Defendants (or more accurately by Mr Khodabakhsh and/or NBT) that, on Mr Taylor's case, have never been acquired by them. The evidence does not point to the conclusion that assets may be dissipated. There is no evidence at all of a risk of dissipation of any assets of NBT or Rhino. Mr Khodabakhsh does intend to use any amount Mr Taylor pays to make a partial repayment to Mr Davies. However, any repayment would not reduce his net assets. In the absence of evidence of insolvency it would not seem to me to involve dissipation at all. In any event I am not satisfied that repayment of a genuine loan taken on to fund legal expenses can really amount to an "unjustified" dissipation. As stated in the passage set out above, it is not sufficient that proposed conduct could prejudice the ability to enforce a judgment. The purpose of a freezing order is not to give security for a claim.

108. Mr Ashworth also relies on what he says is extreme delay. Delay is of particular significance in the context of an application for a freezing order, *Cherney v Newman* [2009] EWHC 1743 (Ch) at [73], [77]. As explained at [77], freezing orders are normally sought without notice because of the risk of unjustified dissipation in response to the claim. Delay might be excused based (for example) on the need to complete enquiries. But where a claim has been intimated then unjustified delay may be fatal, because the court may take the view that the existence of the delay is an indication that the claimant does not genuinely believe that there is a real risk of dissipation which requires to be safeguarded, and/or that any damage will have been done by intimating the claim and allowing time for dissipation to occur (such that injunctive relief would be pointless). Although an applicant may argue that he should still be allowed to freeze whatever remains, the court should be wary of acceding to such arguments (*Cherney v Newman* at [77(5)]).

109. I agree with Mr Ramsden that delay is far from an automatic bar to freezing relief. As Flaux J explained in *Madoff Securities International Ltd v Raven* [2012] 2 All ER (Comm) 634 at [156], the mere fact of delay or that the application is first heard *inter partes* does not mean that, without more, there is no risk of dissipation: the court may

be satisfied on other evidence that there is such a risk. Further, even if the delay demonstrates that the claimant does not consider that there is a risk of dissipation, that is only one factor to be weighed in the balance. I would add that it may, nevertheless, be an important factor.

110. Mr Vechik first contacted Mr Taylor's representative in December 2019. The Court of Appeal suggested the possibility of an on-notice application for a freezing order, and the application for such an order was made, during April 2020, some 11 months ago. I agree with Mr Ashworth that if Mr Taylor had really been concerned about a risk of dissipation – or at least one that extended beyond unpaid costs – then he would have been more active in ensuring an early hearing. I do not accept that the hearing could not have occurred earlier. I also note that Mr Taylor did not seek undertakings pending the hearing. Further, if the Defendants are as dishonest as Mr Taylor maintains that they are (and it were the case, as Mr Ramsden maintains it is, that the dishonesty is directly relevant to the risk of dissipation) then it is hard to see why any damage would not already have been done.

111. It is also noteworthy that no injunctive relief was sought against the Defendants when they were joined in the Original Proceedings. Mr Taylor has been litigating against them, and appears to have been taking the view that there has been dishonesty, since 2017. He at no stage sought to extend the injunctive relief already in place in the Original Proceedings to the Additional Defendants or requested undertakings from them. The period during which there would have been a risk of dissipation is, in reality, far longer than the date when these proceedings were brought.

112. Mr Ramsden suggested that, as well as Mr Khodabakhsh's alleged dishonesty, the court should be concerned about his behaviour in the litigation, of which various aspects were criticised. I will not address these points in detail, but do note that it is not the case that Mr Khodabakhsh is simply failing to engage in this litigation. All three Defendants have consented to service, and although criticism is made of alleged evasiveness in connection with the expert evidence, the Defendants also engaged in appointing their own expert.

113. Looking more broadly at the question whether in all the circumstances it is just and convenient to grant freezing relief, I do not consider that it is. I have set out in some detail my concerns as to the strength of Mr Taylor's case as pleaded, and about whether there is a real risk of dissipation. To this I would add that Mr Taylor's primary objective appears to be to avoid making any payment under a costs order that was made as long ago as July 2019 and that remains wholly unsatisfied, despite the fact that he is evidently able to make the payment on account that the order required (and bearing in mind that a significant element of the costs in the Original Proceedings are likely to have been incurred on the agency and misrepresentation issues, which would have failed irrespective of any fraud). Further, the evidence indicates that Mr Khodabakhsh requires the funds to repay a genuine loan, and that not doing so may impact on the Defendants' ability to fund their defence.

114. Based on the evidence available, and taking account of all the circumstances, my assessment is that the injustice of granting freezing relief would outweigh any benefit.

The Norris J and Simon Monty QC orders

115. As already mentioned, Mr Taylor also seeks a declaration that the orders previously made by Norris J and Mr Monty QC apply to Rhino and are continued. In submissions Mr Ramsden indicated that this should properly be a reference to the order of Mr Hollington QC.

116. I cannot see how this application can succeed. It is predicated on the assumption that Rhino remained within the VDMH/VDML group such that it was caught by the injunctions previously granted. However, even if, on its proper interpretation, the order of Mr Hollington QC remains in force following the default judgment (a proposition which Mr Ashworth challenged, and the correctness of which I do not need to decide), at most the injunctive relief continued by that order would extend to shares of Rhino held by the Original Defendants. The order granted by Mr Hollington QC, as with the previous orders, was granted against the Original Defendants only. It has never been extended to any other person. The only exception to this is the standard provision making it clear that any third party notified of the order who knowingly assists a breach of it would be in contempt of court. Since the terms of the order are expressed not to affect anyone outside the jurisdiction it is unclear that even this provision would have extended to Rhino (who was not a party to the proceedings at the time). But in any event it obviously relates to assisting the Original Defendants, and I also did not understand Mr Taylor to be relying on it. The order could not independently apply to Rhino itself without naming it as a respondent.

117. In any event, any application in respect of the order of Mr Hollington QC would appropriately be made in the Original Proceedings and not in these proceedings. Any application for a continuation of freezing relief following judgment would presumably also need to take account of the trial judge's findings that Mr Taylor's legal relationship was with VDMH only, and not with the other Original Defendants.

Stay of detailed assessment of costs

118. In the light of my conclusions I do not consider it appropriate to stay the detailed assessment of the Defendants' costs of the Original Proceedings. The Defendants have not pursued this to date, but I do not consider that a stay that would prevent them from doing so is appropriate or that it is required in accordance with the overriding objective. I appreciate that if the Decision were wholly set aside then any detailed assessment would have been a waste of time, but it is far from clear to me that that will occur, and in the meantime the Defendants are being kept out of their costs. Again, it is relevant that a significant element of those costs will have been incurred in respect of issues which would be unaffected by any fraud.

Conclusions

119. In conclusion, I dismiss the applications for proprietary and freezing injunctions, the application that the orders of Norris J and Mr Monty QC in the Original Proceedings apply to Rhino and are continued, and the application to stay a detailed assessment of costs.