[2022] EWHC 2211 (Ch)

Case No: BL 2022-000818

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

22 August 2022

Before :

Jonathan Hilliard QC sitting as a Deputy Judge of the High Court

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(1) MEADOW DESIGNS LIMITED (Company Number 12033595)
(2) RAINMEAD LTD. (Company Number 11398575)
(3) TIDEREALM LTD (Company Number 11318774)
(4) TEMPLEBARN LTD (Company 11318630)
(5) JULIAN LEWIS TENDLER

Claimants

-and-

(1) RISHCO LEISURE LIMITED (Company Number 12111969)
(2) JASON MARC RISHOVER

Defendants

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Sarah Clarke (instructed by **Hamlins LLP**) for the **Claimants**
Bobby Friedman (instructed by **Armstrong Teasdale Ltd**) for the **Second Defendant**
Hearing date: 28 July 2022

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JUDGMENT

JONATHAN HILLIARD QC sitting as a Deputy Judge of the High Court:

Introduction

1. This judgment deals with:

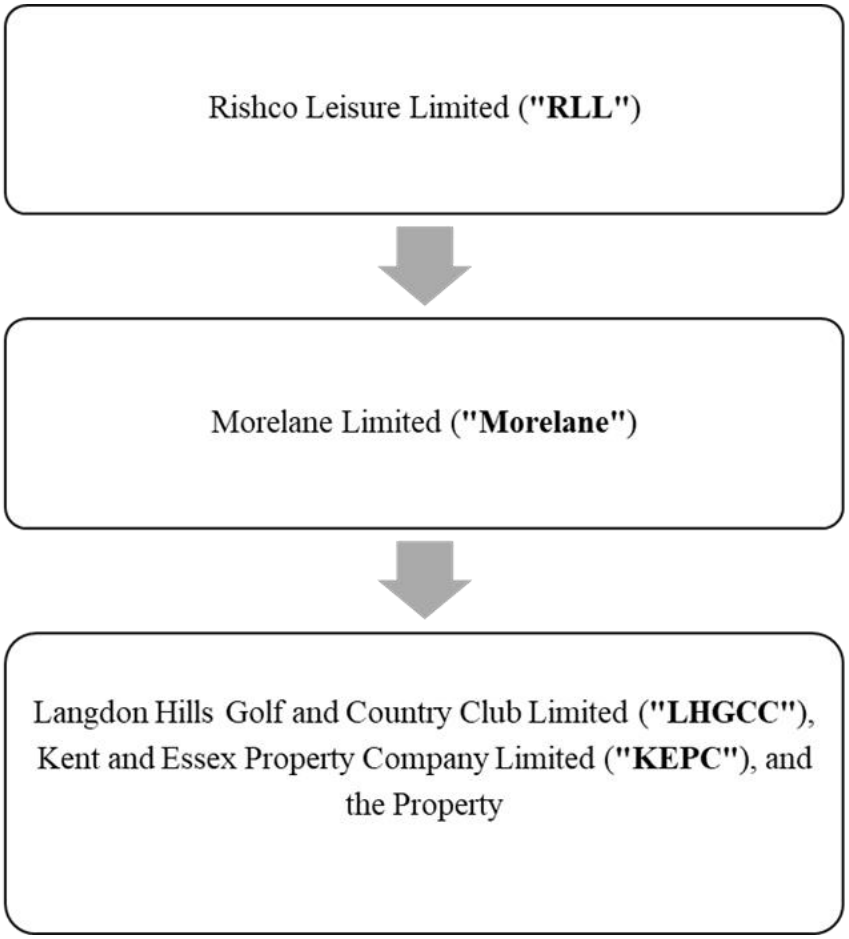
   (1) the 14 June 2022 application of the Second Defendant (**"Mr Rishover"**) to discharge the 13 May 2022 injunction (the **"Injunction Order"**) granted by Adam Johnson J (the **"Judge"**) against the Defendants (the **"Discharge Application"**); and

   (2) the 16 June 2022 application of the Claimants to vary the Injunction Order (the **"Variation Application"**) (together with the Discharge Application, the **"Applications"**).

2. A certificate of urgency was filed for the Discharge Application asking for it to be dealt with prior to the end of term. Both Applications were listed to be heard together before me. In my judgment the Applications need to be dealt with together given that they deal with what, if any, injunctions and linked orders should continue against the Defendants, and therefore what should happen to the Injunction Order. The application notice for the Discharge Application bore a time estimate of 1 day and the notice for the Variation Application no estimate. A number of preliminary points needed to be dealt with at the start of the hearing, and it was not possible to deal with oral submissions on all substantive points within a day. Accordingly, the response and reply to the further orders sought in the Variation Application were dealt with through a series of written submissions.

3. The Applications and original application for the Injunction Order (the **"Original Application"**) concern a joint venture (the **"JV"**) entered into between the Claimants and Mr Rishover to develop a golf club located in Thurrock, Essex into a luxury retirement village and redeveloped golf and leisure club (the **"Project"**). The golf club is Langdon Hills Golf and Country Club, Lower Dunton Road, Bulphan, Upminster, Thurrock RM14 3TY (the **"Property"**). There are four individuals behind the First to Fourth Claimants: Pamela Ray, David Green, Paolo Ingrao and Shane Martin (together with The Fifth Claimant, Julian Tendler the **"Individuals"**). Relations have become strained between the Individuals on one hand and Mr Rishover on the other. That is particularly unfortunate in circumstances where the JV appears to be on the cusp of having completed all planning steps and therefore- subject to financing- being able to move to the development stage of the Project.

4. The relevant corporate structure below the Claimants and Mr Rishover is as follows:



The companies mentioned in the diagram above will be referred to collectively as the **"Companies"**. With the exception of RLL, where Mr Ingrao has recently been appointed to the board, Mr Rishover is sole director of each of the Companies. I understand from Mr Rishover's affidavit setting out the information required by the Injunction Order that Morelane is the legal and beneficial owner of the Property.

5. The Injunction Order ordered that until trial or further order, the Defendants should not dispose of, deal with or diminish the value of any of the injuncted assets (the **"Injuncted Assets"**), and for Mr Rishover to pay the Claimants' costs of the application. The Injuncted Assets comprised all issued shares in the Companies and the Property. Given that the Claimants put the application as one on notice, no return date was ordered, but the order included provision for the Defendants to seek to vary or discharge the order.

6. By the Discharge Application, Mr Rishover applies to discharge the Injunction Order on the following grounds:

   (1) failure by the Claimants to give full and frank disclosure;

   (2) breach of the undertaking given to the Court by the Claimants, Mr Ingrao, Ms Ray and Mr Martin to serve the claim form on the Defendants as soon as practicable after the 13 May 2022 hearing before the Judge;

(3) refusal to correct misleading statements made to the Court in the Original Application and the making of misleading statements in correspondence;

(4) the Claimants' failure to provide to Mr Rishover a note of the 13 May 2022 hearing or to provide to him before the hearing the Claimants' skeleton; and

(5) the *American Cyanamid* test for an injunction against the Defendants not-so Mr Rishover contends- being made out.

7. Grounds (1), (2), (3) and (5) were put as self-standing grounds for discharge as well as- together with ground (4)- grounds that cumulatively justified discharge. The majority of the submissions, both written and oral, were directed at grounds (1) to (4).

8. As explained below, because of a misunderstanding on the part of the Claimants' representatives as to the rules on service, the Original Application was put to the Judge as an application on notice, but in fact it was not. Therefore, the obligation of full and frank disclosure applies, which in turn gives rise to ground (1). The fact that the hearing was not on notice also forms the backcloth to grounds (3) and (4). As to ground (5), both Mr Friedman and Ms Clarke submitted that matters had moved on in a number of relevant respects since 13 May, and so both focused their *American Cyanamid* submissions on how that test applies now. Neither party limited their *American Cyanamid* submissions to new developments since the 13 May hearing, or suggested that I should so limit my evaluation. Given that the original hearing was not on notice, in my judgment that approach is correct: in determining whether I should vary or discharge the Injunction Order pursuant to the provision in it allowing for that, I can apply the *American Cyanamid* test to the facts as they stand now.

9. The draft order accompanying the 14 June 2022 application notice for the Discharge Application sought as a fallback an order varying the Injunction Order to allow (a) the Defendants to deal with the Injuncted Assets (i) where permitted by the 12 September 2019 Joint Venture Shareholders' Agreement (the **"SHA"**), or (ii) where acting in good faith in the ordinary course of business, and (b) Mr Rishover to deal with the shares owned legally and beneficially by him.

10. Mr Rishover also seeks an order that the Claimants pay the Second Defendants' costs of and occasioned by the Injunction Order, the Original Application and the Discharge Application on the indemnity basis, irrespective of whether the Court re-imposes the injunction previously ordered.

11. By the Variation Application, the Claimants apply for:

(1) an order that the Injunction Order should continue subject to a number of variations, (a) inserting a direction confirming pursuant to CPR r.23.7(4) that the Defendants were given sufficient notice of the Original Application, (b) allowing Mr Rishover to deal with the RLL shares that he owns legally and beneficially, as long as such dealing is compliant with the SHA, and (c) varying the costs order granted on 13 May 2022 to reserve the costs of the Original Application to the trial judge;

(2) in the event of the discharge of the Injunction Order, the re-grant of the injunction granted on 13 May 2022 by a further injunction restraining the Defendants from dealing with the Injuncted Assets; and in any event

(3) orders that Mr Rishover (a) causes Mr Ingrao to be appointed as director of the Companies, (b) shall appoint Accura Accountants (**"Accura"**) as auditor of the Companies, and (c) provides (i) the Claimants and Accura with access to, and facilities to make copies of, the books and records of the Companies, and (ii) further or alternatively to (i), a further affidavit setting out various financial information about how the JV has been run, backed by bank statements.

12. By the time of the hearing before me, Mr Ingrao had been appointed director of RLL, so the order in (3)(a) accordingly seeks appointment of Mr Ingrao as director of the other Companies. The Claimants seek the orders in (3) whether or not the Injunction Order remains in place and/or is regranted, but Ms Clarke submitted that if the Injunction Order is discharged and not regranted, that strengthened the case for the orders in (3) being made so that the Claimants could obtain greater visibility of how the JV was being run.

My decision

13. For the reasons set out below, in my judgment:

(1) the Injunction Order should be amended to reduce its scope;

(2) an order should *not* be made that Mr Ingrao is appointed as director of the Companies other than RLL;

(3) an order should be made that Mr Rishover procures the appointment of Accura as joint auditor of RLL (but not the other Companies), and the provision to Accura of such information as it reasonably requires to fulfil that role;

(4) an order should be made for the provision of certain further information, but a significantly narrower class than the Claimants have applied for; and

(5) the costs order made on the 13 May hearing should be discharged.

14. Therefore, while it was advanced attractively, I do not accept Mr Rishover's primary case on the Discharge Application. I consider that the injunction should be reduced in scope, and in fact be narrower than that advanced on Mr Rishover's fallback case. I accept a number of the submissions of Mr Friedman, who appeared for Mr Rishover, that the Claimants breached their duties, and I consider that the Claimants' conduct should be reflected in costs. However, in my judgment it would be disproportionate to discharge the Injunction Order entirely. The appropriate costs order for the 13 May and 28 July hearings can be dealt with at a short consequentials hearing.

Summary of relevant factual background

15. The stages in the Project are the obtaining of planning permission and satisfaction of any conditions attached to it, followed by the development of the site. The JV is nearly at the stage of being able to start development of the site, as I shall return to below. However, distrust has arisen on both sides between the Claimants and Second Defendant, which has led to the present dispute. This dispute includes the point at which the Second Defendant is required to transfer legal title to particular shares to the Claimants. It is therefore necessary to explain briefly the origins of the JV and how this situation has come about, with a particular focus on the terms of the JV, because they are central to the present dispute.

The background to the Original Application

16. The Individuals were involved with the Project before Mr Rishover, at some point between 2015 and 2018. The First to Fourth Claimants, all of which are English companies, were incorporated across the period April 2018 to June 2019. Taking them in turn:

    (1) Meadow Designs Limited (**"MDL"**) (First Claimant): Mr Green has been the only director since 13 September 2019.

    (2) Rainmead Ltd (**"Rainmead"**) (Second Claimant): Ms Ray has been sole director from 13 September 2019 onwards.

    (3) Tiderealm Ltd (**"Tiderealm"**) (Third Claimant): Mr Ingrao has been sole director since 13 September 2019.

    (4) Templebarn Ltd (**"Templebarn"**) (Fourth Claimant): Mr Martin was sole director from 13 September 2019 to 6 June 2020, and Tracy Martin, Mr Martin's sister, has been sole director since.

17. Mr Rishover was introduced to the Individuals by the Fifth Claimant, Mr Tendler, as a person who could secure investment for the Project.

18. Heads of terms were entered into on 29 April 2019.

19. RLL is an English company incorporated on 19 July 2019. Mr Rishover was the initial subscriber to RLL and its first director.

20. On 12 September 2019, the First to Fourth Claimants, Mr Rishover and RLL entered into the SHA. The SHA is governed by English law and its main terms for present purposes are as follows:

    (1) Clause 2.1:

    "*The business of the JVC is to acquire the entire share capital of Morelane Limited (**"Target Company"**), which legally and beneficially owns the entire share capitals of Langdon Hills Golf and Country Club Limited (Company Number 04261234) and Kent and Essex Property Company Limited (Company Number 06123062), to apply and obtain the Planning Permission for the land known as Langdon Hills Golf and Country Club under title number Ex671647, Ex671648 Ex671646 and Ex434109 (the*

"Property" *) and to develop the Property in accordance with all phased development Planning Permission(s) both current and all future proposed development programmes (****"Business"****).*"

Planning Permission is defined in clause 1.1 as:

"*the planning permission to develop the Property to achieve a 64 bed private residential care home, 42 private extra care apartments and 60 luxury extra care cottages for those above 55 years old, a wellness centre, a community hub, up to 25 high end apartments for the open market, a new club house, functions facility and academy centre of excellence along with a complete redesign of the existing golf courses and the introduction of the golf sixes course*".

(2) Clause 2.2:

"*Each party shall use its reasonable endeavours to promote and develop the Business to the best advantage of the JVC.*"

(3) Clause 3.1:

"*Completion shall take [place] on the date of this Agreement at the registered offices of the JVC or any other place agreed in writing by the parties.*"

(4) Clause 3.2:

"*At Completion the Shareholders shall procure that such shareholder and board meetings of the JVC are held as may be necessary to:*

3.2.1 *give the directors the authority to allot the Shares in accordance with clause 3.3;*

3.2.2 *appoint Jason Rishover as an JR Director and Jason Rishover as chair of the Board;*

….

3.2.4 *appoint Accura Accountants Limited and Jeffreys Henry LLP as the joint auditors of the JVC.*"

Shareholders are defined in clause 1.1 as "*the beneficial owner of Shares in the JVC*" and Shares are defined by that clause as "*the Nominee Shares and JR Shares in issue from time to time*". There is no definition of Nominee Shares but a definition in clause 1.1 of Trust Shares as "*the sixty ordinary shares of £1 each in the share capital of the JVC held by JR on trust for MDL, Rainmead, Templebarn and Tiderealm*". JR Shares are defined as "*the forty ordinary shares of £1 each in the share capital of the JVC held by JR*". Finally, JR Director is defined as "*any director appointed to the Board by JR in accordance with clause 5.4*" and the Board as "*the board of directors of the JVC as constituted from time to time*". RLL is termed "*JVC*" in the description of the parties in the SHA.

(5) Clause 3.3 provided that at Completion, the Shareholders shall procure that the JVC issue 99 shares: 16 to each of MDL, Rainmead and Templebarn and 12 to Tiderealm, in each case to be held by JR on trust for the entity in question, and 39 to JR in addition to the 1 that he already holds.

(6) By clause 4, each party shall procure that the JVC shall not, without the prior written approval of MDL, carry out any of the Reserved Matters. Reserved Matters are listed in Schedule 1, and include "*[m]aking any borrowing*" (paragraph 5), "*[a]dopting or amending the Business Plan in respect of each Financial Year"* (paragraph 9) (the Business Plan for each Financial Year requiring Shareholder agreement under clause 10), "*[c]hanging the nature of the JVC's Business…*" (paragraph 12), "*[m]aking any acquisition or disposal of the JVC of any material asset(s) otherwise than in the ordinary course of business*" (paragraph 15), "*[c]reating or granting any Encumbrance over the whole or any part of the Business, undertaking or assets of the JVC or over any shares in the JVC or agreeing to do so*" (paragraph 16), and more generally "*[e]ntering into any arrangement, contract or transaction outside the normal course of the JVCs Business or otherwise than on arm's length terms*" (paragraph 19).

Encumbrance is defined as "*any interest or equity of any person (including any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien, assignment, hypothecation, security interest, title retention or any other security agreement or arrangement*".

(7) Clause 5 deals with directors and management. While the post of chairperson of the Board shall be held by an JR Director (clause 5.3), "*[f]or so long as a Shareholder holder, or joint Shareholders together hold, at least 35% of the total voting rights exercisable in general meeting of the JVC, it shall have the right to appoint a Director on the Board*" (clause 5.4).

(8) Clause 6.1:

"*The parties agree that, subject to clause 4 and clause 10, the JVC shall be financed, if it requires any additional finance, and so far as practicable, from external funding sources and on terms to be agreed between the Board, MDL and any relevant third parties. The parties agree that any security required in relation to such external funding shall, if possible, be provided by the JVC and/or JR if so required.*"

(9) Clause 8.1:

"*Immediately following the approval of the Planning Permission and upon the request of MDL, JR shall transfer the legal title of the Trust Shares to the Beneficiaries respectively with full title guarantee and free from all charges and encumbrances.*"

As explained below, this is one of the important clauses in the dispute between the parties.

(10) Clause 8.2:

"*Until the Beneficiaries become the registered holders of the Trust Shares in accordance with clause 8.1 JR appoints MDL…as its attorney (**Attorney**), with full power to exercise all rights in relation to the Trust Shares in the JVC registered in the name of the [sic] JR as MDL in its absolute discretion sees fit, including (but not limited to) [the matters set out in clauses 8.2.1 to 8.2.4.]*"

(11) Clause 11.2:

"*In the event that Planning Permission is refused or within 12 months from Completion (whichever shall be later) JR shall have full authority to dispose of the JVC's entire share capital at his sole discretion, provided that such disposal shall be to a third party at arm's length. In such circumstances, the consideration paid by a third party buyer less the repayment of all loans, allowable expenses reasonably and necessarily incurred by the JVC and liabilities owed by the JVC (**Profit**) or, if the amounts due and payable by the JVC is greater than the consideration paid by a third party buyer, any such surplus obligations which shall be the amounts due and payable by the JVC less the consideration paid by a third party buyer (**Liabilities**), shall be split between the parties in the following proportions:*

11.2.1 the sum equivalent to sixty percent of the Liabilities shall belong to the Beneficiaries; and

11.2.2 the sum equivalent to forty percent of the Profit shall belong to the Beneficiaries;

11.2.3 the sum equivalent to sixty percent of the Profit shall belong to JR; and

11.2.4 the sum equivalent to forty percent of the Liabilities shall belong to JR."

The Beneficiaries are defined in clause 1.1 as MDL, Rainmead, Templebarn and Tiderealm.

(12) Clause 16.1:

"*No Shareholder shall create any Encumbrance over, transfer, or otherwise dispose of or give any person any rights in or over any share or interest in any share in the JVC unless it is permitted or required under this agreement and carried out in accordance with the terms of this agreement. If a Shareholder transfers (or purports to transfer) any share or interest in any share in the JVC other than in accordance with this clause, it shall be deemed to have served a Transfer Notice.*"

The Transfer Notice triggers a pre-emption process pursuant to the remaining sub-clauses of clause 16.

(13) Clause 25.1:

"*Subject to clause 25.2, no party shall make, or permit any person to make, any public announcement, communication or circular (**announcement**) concerning the existence, subject matter or terms of this agreement, the wider transactions contemplated by it, or the relationship between the parties, without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed). The parties shall consult together on the timing, contents and manner of release of any announcement.*"

21. The SHA has a number of drafting infelicities. For example, clause 3.3 requires the Shareholders to procure that the JVC issue 99 Shares, but the Shareholders definition refers to the beneficial owner of Shares and the Shares are the shares in issue, so that MDL, Rainmead, Tiderealm and Templebarn cannot- if the SHA is read literally- become Shareholders until the 99 Shares are issued. However, it is common ground between the parties that Shareholders includes as a matter of construction these companies. Similarly, it is common ground that the reference to Nominee Shares in the Shares definition should be read as a reference to Trust Shares.

22. On 13 September 2019, the day after execution of the SHA, RLL entered into a share purchase agreement to acquire the issued share capital of Morelane for £8m. This was primarily funded by a £6.6m facility advanced by UE SFA 1 Limited, secured over the assets of the Companies pursuant to agreements dated 13 September 2019, and a £2.25m secured term loan facility advanced jointly by Get Going Finance Limited and Gerrard Capital Limited, secured over assets of RLL and Morelane pursuant to deeds and debentures also dated 13 September 2019.

23. The SHA has been varied or supplemented by five subsequent agreements:

    (1) A Joint Venture Participation Agreement and Declaration (the **"JVPAD"**), which was an adapted and amended version of the SHA signed by Mr Tendler and Mr Rishover on or around 29 October 2019. It incorrectly provided in clause 3.1 that RLL had at the date of the JVPAD already issued 39 further shares in RLL, when in fact, as explained below, none of the 99 further shares in RLL had been issued until following the 13 May 2022 hearing. It then went on to provide in clause 4 that Mr Rishover would hold 2 of his 50 shares in RLL on trust for Mr Tendler on the same basis as shares were held for the other beneficiaries named in the SHA. For simplicity, where the SHA and JVPAD contain equivalent provisions, I shall refer in this judgment to the relevant provision in the SHA.

    (2) Four further deeds were executed, between 10 February and 7 June 2020, principally to alter the respective sizes of the Claimants' and Mr Rishover's shareholdings in RLL.

24. The net result of the changes made to the shareholding structure in the SHA by the above five subsequent agreements was that the Claimants and Mr Rishover were intended to have the following respective percentages of the issued share capital: MDL 2.5%, Rainmead 25%, Tiderealm 14.5%, Templebarn 15%, Mr Tendler 5% and Mr Rishover 38%.

25. Returning to the chronology, on 7 November 2019 a planning application (the **"Planning Application"**) was made in respect of the Property. As explained below the Claimants and Mr Rishover have competing submissions on when there has been "*approval*" of Planning Permission for the purposes of the SHA so as to trigger the obligation to transfer legal title to the relevant RLL shares under clause 8.1 of the SHA. However, it is common ground in the statements of case that the Planning Application would meet and exceed the definition of *Planning Permission* in the SHA.

26. On 8 June 2020, the relevant planning committee resolved to approve the Planning Application, subject to referral to the Secretary of State and to conditions.

27. The referral to the Secretary of State was made on 22 July 2020. On or around 3 September 2020 the Secretary of State confirmed that he had decided not to call in the application.

28. This left the need to reach agreement with the local planning authority under s.106 of the Town and Country Planning Act 1990 (the **"s.106 Agreement"**). I shall return to that later in the chronology.

29. Relations between the Individuals and Mr Rishover appear to have deteriorated from around late 2021.

30. Up until that point, none of them appear to have picked up on the failure to have issued the 99 shares as required by clause 3.3 of the SHA.

31. In her witness statement in support of the Original Application, Ms Ray states that she had made a number of requests of Mr Rishover since late 2021 to issue the 99 shares so that 62 of them could be held on trust for the Claimants, but that he had refused. She refers by way of example to discussions on 28 October 2021, 30 November 2021 and 11 February 2022. Mr Rishover does not deal specifically with those discussions in his 21 July 2022 witness statement but states that the failure to issue the 99 shares "*was simply a matter of this [sic] provisions being overlooked*". Similarly, Mr Rishover's 26 July 2022 defence states that on proportionality grounds it is not pleading to the specific paragraph of the particulars of claim (paragraph 53) that sets out the alleged requests to issue shares, given that those paragraphs relate to the issue of shares in RLL and those shares have now been issued (on 19 May 2022). Mr Rishover's more general stance in the defence on the issue of the shares is that he denies on a number of grounds that he was in breach, including that the Claimants proceeded on the basis that there was no need to issue the shares, that if he was in breach the Claimants were too given that the joint obligation procure the issue of the shares and that it was only in the context of the "*present attempt by the Claimants to manufacture a dispute*" that the point was raised (paragraph 44).

32. Following an e-mail from Ms Ray on 14 February 2022, Mr Rishover did confirm by e-mail the next day to Ms Ray- with whom his relationship appears at that point to have been better than with the other Individuals- that he was holding shares in trust for her company and would transfer them once planning permission was issued. Ms Ray mentioned this in her 9 May 2022 statement. In

the context of an e-mail dialogue with Mr Tendler on 4 January 2022 relating to a potential sale of the business, Mr Rishover also referred to shares being held on trust, as Ms Ray again mentions in her witness statement in support of the Original Application.

33. As with the issue of the shares, it appears that initially no-one took any steps to bring about the appointment of Accura as joint auditors. However, from late 2021, requests were also made of Mr Rishover to provide financial information requested by Accura and to accept and bring about Accura's appointment as joint auditors. As set out above, clause 3.2 of the SHA provided that the Shareholders should bring about on completion of the SHA the joint appointment of Accura and Jeffreys Henry LLP as joint auditors. Mr Rishover had selected Jeffreys Henry LLP and the Claimants Accura.

34. Ms Ray sets out a number of e-mail requests in her witness statement in support of the Original Application and says that the requests were not met. For example, by 7 October 2021 e-mail, Melvyn Langley at Accura e-mailed Mr Rishover asking for management accounts for the Companies to allow him to audit. Mr Rishover replied to Mr Langley, copying the Individuals, that he would not respond.

35. By late 2021 or early 2022, Mr Rishover's general stated position appears to have been that he had put too much money and effort into the Project compared to the Individuals and wanted recognition of that or to exit the Project. For example, in a 17 February 2022 e-mail to the Individuals in relation to planning permission, he suggested that he would be happy to be bought out for £20m, and that if the Individuals could not raise the money within a reasonable period "*it will go on the market*", and closed by stating that "*[t]his journey has been full of false promises and it's only cost me tons of cash and missing out on many other opportunities*". Similarly, 18 February 2022 WhatsApps from Mr Rishover to Ms Ray asking her to call him, included "*No call?? Putting it on the market you need to call me or Liam*", "*What I have done financially for you all and how you are treating me is a disgrace how dare you !!!!!!!!!*", and, on not receiving a response, "*Now watch me*".

36. Following a meeting with her on 28 February 2022, in March 2022, a witness statement was obtained by the Claimants from Dinah Hoare, who was an accountant who had been the previous finance manager at LHGCC from September 2019 to July 2021. She gave a statement setting out a number of financial transactions in relation to the Companies that the Claimants contend suggest impropriety or at least concerning behaviour on Mr Rishover's part. I return to those below.

37. Therefore, by this stage, the Claimants had in mind the possibility of litigation with Mr Rishover. Mr Rishover also appears to have been readying himself for such litigation. Ms Ray's notes of a 14 February 2022 call with Mr Rishover state that his lawyer looks over all e-mails coming from Mr Martin, and her notes of a 21 February 2022 call with Mr Rishover stating that every e-mail he got was checked by lawyers.

38. Matters appear to have deteriorated further over the refinancing of the lending to the JV. Mr Rishover explains in his 21 July 2022 witness statement that as it took much longer than expected to obtain planning permission, he needed to refinance the Project, and obtained a facility from West One. However, the West One facility expired in April 2022 and the planning permission had still not been finalised to allow the development work to proceed. Therefore, he needed to obtain further bridging finance to provide funding for the Project until the planning permission had been finalised.

39. On 3 March 2022, Mr Rishover forwarded to Ms Ray and Mr Ingrao a dialogue with a possible lender called "TAB" stating "*Another lender in the mix….*". He sent a further e-mail to them on 15 March 2022, stating that he thought that they needed to accept the TAB terms attached to his e-mail, explaining that he "*[h]ope[d] this is acceptable as I am acting for the best interest of us all especially with Danny's loan expiring shortly and no extension offered*". He followed that up with a further e-mail to them on 20 March 2022, asking to discuss the latest terms, saying that they were now the only ones on the table. Those terms included a 100% personal guarantee from Mr Rishover. Mr Rishover expressed his discomfort with that feature in his e-mail to Ms Ray and Mr Ingrao, stating that he currently only gave a 20% personal guarantee under the existing facility.

40. Ms Ray states in her 16 June 2022 witness statement that she met Mr Rishover on 25 March 2022 following the 20 March 2022 e-mail, and that Mr Rishover had stated that he did not want Mr Ingrao at the meeting. She states that Mr Rishover said that he did not know if he was going to proceed with TAB but confirmed that they were his backstop, and that he did not talk about the terms of the facilities. She states that she did not receive further information about the TAB facility before Mr Rishover executed the documentation on 8 April 2022. She received a WhatsApp from him on 8 April confirming he had taken out the facility but did not see it at the time.

41. Mr Rishover states in his 21 July 2022 witness statement that he tried to discuss the urgent need for funding with both Ms Ray and Mr Ingrao, and that on sending them the 15 March 2022 e-mail, neither of them asked any questions about the proposed lending or offered any alternative, and Mr Ingrao merely commented that Mr Rishover's ability to obtain funding was "*never in doubt*".

42. The TAB facility agreement (the **"TAB Facility Agreement"**) was entered into on 8 April 2022 between TAB ACM Limited and TAB London Limited (together **"TAB"**) as lenders with Morelane as borrower. The Claimants did not see the TAB Facility Agreement until it was provided to them pursuant to the information obligations under the Injunction Order. The facility agreement contains the following provisions that are relevant for present purposes:

    (1) TAB grants a facility of up to £16.92m (clause 2) at an interest rate of 0.9% per month (clause 6), comprising lending of (a) £13.374m immediately plus (b) the lower of £3.546m and the Maximum LTV Ratio (45%) when planning permission was granted in accordance with "Special Conditions" set out in the agreement.

(2) The sums shall be repaid by 12 months after funds were first drawn down (clause 10).

(3) Morelane shall promptly notify TAB if there is a "Change of Control" or Morelane becomes aware of circumstances that might constitute such a change (clause 9.1). If TAB considers on such notification that the Change of Control constitutes a material adverse change then it may cancel the facility and declare the whole loan to be immediately repayable. Change of Control means "*any removal, replacement, amendment or addition to the directors or shareholders of the Borrower…or a person or group of persons acting in concert gains direct or indirect control of the Borrower…*" (clause 1.1). For these purposes, control of the Borrower includes the power to cast or control the casting of 50% of the maximum number of votes that might be cast at a general meeting of the Borrower.

(4) The occurrence of an Event of Default shall render the loan, accrued interest and all other amounts immediately due (clause 12). The Events of Default are set out in Schedule 2 and include "*[a] distress, attachment, execution, expropriation, sequestration or other legal process is levied, enforced or sued out on, or against, the assets of any party comprising the Borrower is not discharged or stayed within Twenty (20) Business Days*" (paragraph 4). Considerably more than 20 Business Days have elapsed since 13 May.

Mr Rishover gave a 100% personal guarantee in respect of the facility.

43. The same day, 8 April 2022, Rishco Limited, Heronslea Limited and Mr Rishover entered into a written facility agreement with Morelane (the **"Rishco Facility"**), which records that it documents the terms of a loan of £754,656.54 that has been made to Morelane. The facility agreement states that the loan is to be repaid on demand and to be secured by a legal charge over the Property. I understand the two lending companies to be linked to Mr Rishover. I understand that the Claimants and Individuals had not seen this written agreement until they were provided with a copy of it pursuant to the Injunction Order. The charge itself, dated the same day (the **"Rishco Charge"**) includes provisions giving a power of sale in the event of default (paragraph 2 of schedule 5) and the ability to appoint a receiver or administrator (paragraphs 6 and 15 of schedule 5 respectively). Ms Clarke notes in her submissions that the draft Morelane financial statements for the year ended 30 April 2022 only mention debts of £13,374,000, described as bank loans, which tallies with the figure for the *TAB* Facility, so that there does not appear to be mention of the sum referred to in the Rishco Facility.

44. Mr Rishover states in response in his 21 July 2022 statement that he has been required to provide significant personal funding to keep the Project afloat in circumstances where the cost of the Project has exceeded the agreed estimates. He states that as at today, RLL and its subsidiaries owe Mr Rishover and his companies over £1.03m and that the purpose of the Rishco Facility and Charge was "*to provide me with comfort and security regarding the amount I was owed*". He states that "*I did not attempt to keep the charge a secret from the Claimants and documents relating to the charge are publicly available at Companies House*".

45. Mr Rishover e-mailed the Individuals (other than Mr Green) on 22 April 2022, setting out the basic terms of the TAB Facility, and explaining why he had to enter into it with a 100% personal guarantee. He wrote to put the recipients on notice of two things, namely:

> "• *Before I will agree to transfer any shares under the terms of our agreement, I must either be released from my PG [personal guarantee] which is being given to TAB or, alternatively you each provide me with cross guarantee commensurate with your respective shareholdings.*
>
> • *Under the terms of the loan facility and debenture, a change of control is not permitted without TABs consent. This means that we will need to either refi the property prior to transfer of shares or obtain TAB's consent before shares can be transferred.*"

Mr Rishover states in his 21 July 2022 witness statement that the TAB Facility is a bridging loan required to bring the Project to the stage of planning permission, so that on the grant of the planning permission, a development loan can be taken out for significantly higher sum and the TAB Facility repaid, which in turn means that the TAB Facility will provide no obstacle to transfer of legal title of the relevant RLL shares to the Claimants.

46. On 6 May 2022, the local authority, who had required a further planning permission to widen access to the Property to be made before agreeing the s.106 Agreement, approved that planning permission. As I come to below later in the chronology, it is currently expected that the s.106 Agreement will be signed off very shortly in light of this planning permission having been granted.

47. Also on 6 May, following various e-mails between them, Mr Ingrao, Mr Martin, Mr Tendler, Ms Ray and Mr Rishover agreed to meet at a café in Bushey in the morning of 9 May at 9 or 9.15am. Ms Ray states that Mr Rishover said at the meeting that he would not issue shares until they had agreed to give personal guarantees, and that a third charge had been placed on the JV to protect his position, which appears- although there is no suggestion the Individuals knew it at the time- to be a reference to the Rishco Charge. Ms Ray says that (a) Mr Rishover continued that he could do what he wanted with the asset without intervention from them, (b) Mr Martin then questioned Mr Rishover about the lack of information that he had felt Mr Rishover was providing and about the points that Ms Hoare had mentioned to them, and (c) on Mr Rishover denying having taken any Covid or business interruption loans (two of the loans referred to by Ms Hoare), Mr Martin accused Mr Rishover being untruthful and (d) Mr Rishover then threw Mr Martin into the window, hitting his head and dazing him, and the police were called by Mr Martin and arrested Mr Rishover.

48. In his 21 July 2022 witness statement, Mr Rishover does not give a specific account of this meeting, but states that "*[g]iven the seriousness of the allegations Ms Ray makes regarding my alleged assault of Mr Martin I wish to make clear that I deny the allegations and that no charges have been brought against me*". Therefore, Mr Rishover does not give his own account of what was said about the meeting, including what if anything was said about Mr Rishover's use of the assets or information requests.

The Original Application

49. Some of the challenges mounted to the Injunction Order stem from the defective service of the Original Application.

50. Summarising the dialogue between the Claimants' solicitors and the Defendants in the lead up to the 13 May 2022 hearing:

(1) The Claimants' solicitors, Hamlins LLP (**"Hamlins"**) sent a lengthy letter before action to Mr Rishover by e-mail at 11:01 on Monday 9 May 2022 and sent the same to him and RLL by post the same day. Therefore, the application had been in preparation before the 9 May meeting with Mr Rishover in Bushey. The letter before action listed a number of alleged breaches of the SHA, namely (a) failure to issue the 99 additional shares, (b) failure to transfer legal title to those shares to the Claimants, (c) failure to produce the appointment of Accura and Jeffreys Henry LLP as the joint auditors of RLL, (d) failure to provide information to the Claimants when requested, including monthly management or audited accounts of the Companies, and (e) failure to hold shareholder meetings when requested. The letter asked for (i) confirmation that the shares of RLL were held on trust in accordance with the percentages set out above, (ii) that 200 shares be issued rather than 100 given that some of the % shareholdings were not integers, (iii) the shares be issued by signing and returning the relevant documentation, (iv) the shares be transferred to the Claimants by signing and returning the enclosed documentation, and (v) Mr Rishover sign and return the enclosed restriction notice in relation to the Property.

(2) An unissued application and supporting evidence were sent to Mr Rishover by e-mail at 16:49 the same day, and by post to Mr Rishover and RLL.

(3) At 9:32 the next day, Tuesday 10 May 2022, the issued application and supporting evidence were e-mailed to Mr Rishover, and the same were sent by post to him and RLL the same day. Hamlins e-mailed Mr Rishover at 13:26 the same day a further version of the application notice itself, endorsed with the date and time of the hearing- namely 10:30 am on Friday- and the same was sent by post to him the same day.

Pausing there, given that Mr Rishover had not accepted service by e-mail, valid service could not take place by e-mail: PD6A, paragraph 4.1(1). Therefore, service had to take place by post, and only took place two days after the issued application was sent by post: CPR 6.26. That meant that service only took place on 12 May 2022, the day before the 13 May 2022 hearing. This was not appreciated by the Claimants at the time of that hearing but is now common ground between the parties.

(4) Mr Rishover responded to the above documents by detailed letter to Kate Andrews at Hamlins, e-mailed on 11:14 on Thursday 12 May 2022. Ms Andrews is the partner with conduct of the matter for the Claimants. That letter was prepared with legal input. Among other things, the letter stated that (a) the date of Ms Hoare's statement and the meeting with her made clear that the application was not urgent and the supposed urgency was an

attempt to deny him the ability to respond properly, (b) there was no evidence that he was seeking to dispose of or diminish the value of the shareholding in RLL or RLL's assets, (c) "*I understand that your clients are under a duty to provide the Court with full and fair disclosure in relation to the Application*", that nothing in his letter detracted from that obligation and he did not consider that the evidence complied with that obligation, (d) he could not respond to the amount of material so quickly so his response was only an initial one, (e) the fact that he had recently agreed the TAB Facility, backed by a personal guarantee from him, made clear that there was no risk of him selling the Property or the RLL shareholding, (f) it was entirely inadvertent that the 99 shares had not been issued, (g) there had not yet been a final grant of planning permission to trigger the obligation to transfer legal title to the 99 shares to the Claimants, and it was clear from a 1 March 2022 e-mail that he attached that the Individuals understood that it had not yet been granted, (h) he confirmed that the shares in RLL "*are, and will be (following issue of additional shares…*)" held for the Claimants, (h) that he would instruct RLL's accountants to issue additional shares forthwith in the number requested by the Claimants, (i) that he would continue to hold the shares in RLL in accordance with the SHA, (j) that he would transfer the shares to the Claimants on the grant of the planning permission, subject only to the requirements of TAB, and (k) that he would not take any steps to sell the Property without the Claimants' written consent and was taking advice as to whether the entry of a restriction was appropriate from the solicitors that he was in the process of instructing. He concluded that there was therefore no need for the Original Application to proceed the next day, and asked for confirmation it would not do so.

(5) An e-mail dialogue followed over the terms of the order. The order could not be agreed so the application proceeded before the Judge the next day. Mr Rishover did not attend. The Judge suggested that the parties seek to try to agree matters given the limited differences between the parties on the application but the order could not be agreed, so the hearing proceeded before him that afternoon. The e-mail dialogue included, in Mr Rishover's e-mail sent on 12 May 2022 at 22:17 a request for confirmation that the Claimants were proceeding tomorrow and if so, confirmation that this correspondence would be placed before the Court in compliance with the Claimants' duty of full and frank disclosure, to which Ms Andrews responded "*Absolutely. All communications between us will be placed before the Court.*"

<u>The hearing before Adam Johnson J and his 13 May 2022 judgment (the **"Judgment"**)</u>

51. The Original Application was couched by the Claimants in Ms Clarke's skeleton as an urgent application, on notice, for injunctive relief to prevent Mr Rishover from dealing with or disposing with the shareholding or assets of RLL in breach of agreements between the parties and/or his fiduciary duty. The injunction was not put as a freezing injunction but rather an interim injunction pending specific performance and/or a proprietary injunction and/or an injunction to restrain a potential breach of contract, to be determined on normal *American Cyanamid* principles.

52. It was stated that at the heart of the dispute was Mr Rishover's failure to issue additional shares or transfer them to the Claimants ([9] of Ms Clarke's skeleton), and that the Claimants had tried to resolve matters without needing to issue proceedings. However, that had not succeeded and following the granting of the Revised Access Application on 6 May 2022, they were concerned that with the planning work complete a significant restraint which might otherwise have deterred Mr Rishover from acting to the Claimants' detriment was removed. Therefore, the final attempt on 9 May 2022 to persuade Mr Rishover to issue and transfer the shares having failed and instead having led to Mr Rishover again saying that he could do what he wanted with the assets, the Claimants considered that they needed urgent relief to protect their position until the substantive proceedings were determined.

53. The application was accompanied by an unissued claim form and draft particulars of claim.

54. In his Judgment, the Judge explained why he considered that the Injunction Order should be granted.

55. He explained that he understood that Mr Rishover had been given notice of the application, the relevant documents having been provided to Mr Rishover, initially in unissued form, on Monday 9 May, shortly after the 4pm deadline for service, but not materially late. (I interpose that the reference to 4pm should be to 4.30pm.) He stated that in any event, Mr Rishover was aware of the proceedings and had been able to engage with them, as his 12 May letter showed: [2].

56. The Judge went through the background and the Claimants' concerns over the shares not having been issued or transferred to them, over Mr Rishover taking steps to sell assets, and over the lack of financial information about the Companies that they had been provided with and whether assets may have been misappropriated or improper transactions entered into. He concluded at [20]-[22] as follows:

(1) There was something in the point that the urgency had abated in light of Mr Rishover's 12 May 2022 letter, but

> "*I have been persuaded that I should make an order largely because of the history. It is true that Mr Rishover now says that he will instruct RLL's accountants to issue the additional shares, but I have been shown evidence relating to communications with him going back to at least October of last year dealing with the same topic and still the new shares have not been issued.*" ([20])

(2) There was a concern that without the discipline of an order, Mr Rishover would not carry through on his apparent commitment, and the same logic applied to the request for information: [21].

(3) The balance of convenience was tilted in favour of an order, because there was little disadvantage in an order being made, as it imposed no serious

obligation on Mr Rishover going over and above his obligations under the SHA and the commitments he has given in correspondence.

The Injunction Order

57. The Injunction Order ordered that:

(1) the Defendants should not dispose of, deal with or diminish the value of any of the Injuncted Assets (paragraph 3);

(2) Mr Rishover should pay the Claimants' costs (paragraph 9);

(3) the Respondents by 4pm on 18 May 2022 inform the Claimants' solicitors of (a) the identity of the current legal and beneficial owners of the Injuncted Assets, (b) of any mortgage, charge or other encumbrance affecting the Injuncted Assets at the date of service of this order, and (c) any pending transactions or dealings which would result in the disposal or diminution of value of the Injuncted Assets, and/or any offers, proposals or ongoing negotiations relating to such transactions or dealings in the Injuncted Assets (paragraph 5); and

(4) the Defendants by 4pm on 20 May 2022 swear and serve on the Claimants' solicitors an affidavit setting out the information in (3) above and exhibiting copies of the mortgage or loan agreements relating to any mortgage, charge or other encumbrance affecting the Injuncted Assets at the date of service of this order, and a complete copy of the management accounts of the Companies from September 2019 to date (paragraph 6).

The order also provided that anyone served with or notified of it could apply to the Court at any time to vary or discharge it (paragraph 10).

The correspondence following the Injunction Order and the lead up to the issue of the Discharge and Variation Applications

58. There has been a significant volume of correspondence during this period. For present purposes, the most important points are as follows:

(1) By 16 May letter, Hamlins asked among other things for confirmation that the shares would be issued by 20 May, and stated that in addition, the Claimants required the auditors to be appointed and Mr Ingrao to be appointed as a beneficiary director under clause 5.4 of the SHA, asking for confirmation that this would be done by 27 May.

(2) Information was provided on 18 and 20 May above pursuant to the information obligations in the Injunction Order. This did not include monthly management accounts for any of the Companies other than RLL, and Mr Rishover has stated that they do not exist.

(3) The additional 199 shares were issued on 19 May, and that was confirmed by Mr Rishover's solicitors, Armstrong Teasdale Ltd (**"AT"**), by letter the same day.

(4) AT wrote to Hamlins on 23 May, among other things (a) pointing out that Mr Rishover had not been served until 12 May, so that the Court had been misled as to the period of formal notice given, (b) asking whether the Claimants had purported to give full and frank disclosure, (c) stating that the order was on any view too broad, given that it prevented Mr Rishover dealing with his own shares, contained no exception allowing Mr Rishover taking steps in the ordinary course of business even if they diminished the value of the Injuncted Assets, and prevented Mr Rishover taking steps to enforce his rights under the SHA such as his pre-emption rights, (d) suggesting that there was no basis for a costs order to have been made which required Mr Rishover to pay the Claimants' costs in circumstances where the ordinary order was to reserve the costs of the application until determination of the substantive issue, and (e) stating that Mr Rishover and RLL should have been served with the claim form pursuant to the Claimants' undertaking to the Court to serve it as soon as practicable, but had not been. In relation to (b), by their 26 May letter, AT then raised a significant number of what they submitted were apparent breaches of the duty to give full and frank disclosure.

(5) Mr Rishover was ultimately served with the claim form on 24 May and RLL on 9 June.

(6) In their letter of 25 May, Hamlins stated among other things that they would consider the proposals to cut down the order in the manner set out in (4)(c) above if Mr Rishover confirmed the appointment of Mr Ingrao as beneficiary director of RLL and the subsidiaries and confirmed the appointment of the auditors.

(7) On 26 May, Hamlins wrote, stating among other things that the Claimants were concerned by the apparent absence of monthly management accounts for the subsidiaries, and therefore asking urgently for a number of other financial documentation relating to these companies to fill the gap. They also wrote separately the same day asking for confirmation that Mr Rishover was agreeable to Mr Ingrao being appointed as beneficiary director.

(8) After further exchanges on the point since AT's 23 May letter, Hamlins wrote on 7 June accepting that the Original Application had only been served under cover of the letters sent on 10 May and therefore only deemed served on 12 May. However, they stated that "*in light of the informal notice provided by e-mail and the other matters set out in our letters dated 25 May 2022 we do not accept your client was given insufficient notice of the application in real terms*".

(9) The following dialogue has taken place in relation to TAB and the TAB Facility:

(a) AT raised in their 31 May letter Mr Rishover's concerns that TAB would be likely to have serious concerns in connection with their facility if Mr Ingrao was appointed director of RLL at the same time that the Claimants had ongoing litigation against Mr Rishover and an injunction in place, so invited Hamlins to agree- in return for Mr Ingrao's

appointment to the board of RLL- to withdraw the injunction, stay the litigation and withdraw their application to register a unilateral notice against the Property.

(b) In their 1 June letter, Hamlins stated that the most pressing issue at present was that TAB might call in loans and enforce security and that the Claimants were concerned that this could happen without them being involved in discussions with TAB. Therefore, the Claimants wished to make TAB aware that they have independent funding sources that could be called upon to repay the loan without the need for TAB to enforce its security, and they wished Mr Rishover to work together with Mr Ingrao to address the position of TAB.

(c) AT suggested in their 6 June letter that as the Claimants had no relationship with TAB, all discussions with TAB would need to be handled with considerable circumspection. AT mentioned that TAB had been making enquiries about the Claimants' application to register a unilateral notice.

Events since the issuing of the Discharge and Variation Applications

59. By 23 June letter, Hamlins wrote to TAB to explain the litigation, stating that they understood from AT that TAB were aware of the Claimants' involvement as a result of the Claimants placing a unilateral notice on the title of the Property. They sought to reassure TAB that the repayment of the TAB Facility was not at risk.

60. AT wrote to Hamlins the next day, expressing their concern that TAB would withdraw the facility in light of the letter, and suggesting that the Claimants had breached their obligations under clauses 2.2 and 25.1 of the SHA.

61. By 14 July e-mail, TAB shared excerpts from the legal advice that they had received about the dispute. The advice expressed concern that Mr Rishover had focused on procedural objections to the Injunction Order and stated that they expected that he would have provided more of a response to the substantive allegations made against him. By 21 July e-mail, TAB responded to Mr Rishover's 18 July e-mail to them, commenting among other things that "*[g]iven your failure to disclose the dispute until Hamlins wrote to us, and the background to it when we lent you the funds, trust is in short supply at the moment*". In response to Mr Rishover's expressed confidence that the Injunction Order would be discharged, they stated that "*[w]e hope it comes to that and look forward to being provided with the relevant information to put us in the position of having your confidence about the outcome*".

62. In his 21 July witness statement, Mr Rishover explained that the final stage of the planning permission- the s.106 Agreement- had been approved, subject only to annotating to the plan which is to be attached to the s.106 Agreement. He stated that he was awaiting the completion of the registration of TAB as the new lender for the purposes of the agreement as the Council required evidence of that before they would seal the document, but that he understood that

registration was due to be completed imminently. He stated that once the s.106 Agreement was sealed the planning consent will be issued.

63. On 22 July, Mr Ingrao was appointed to the board of RLL.

The type of injunction sought

64. The logical staring point is to explain the type of injunctions sought in the present case. This was the subject of a number of the submissions before me, both written and oral, particularly in relation to the proprietary and freezing injunctions. The basic submission made by Mr Friedman was that while the injunction had been couched as a proprietary injunction or an ordinary *American Cyanamid* interim injunction, in a number of respects it was not, because it was not holding the ring until trial and was an attempt to seek an injunction unrelated to the final relief at trial. Unless such an injunction satisfied the requirements for a freezing injunction, which it did not, then it should not be granted. I took him to pray this point in aid of his ground (5) for discharge that I have set out in paragraph 6 above, namely that the ordinary test for granting an injunction had not been met. Therefore, I shall deal with this element of his submissions on ground (5) in this section.

Proprietary injunctions

65. A proprietary injunction is one that restricts the use of assets whose ownership is in dispute. Interim proprietary injunctions fall within CPR r.25.1(c)(i), which allows for interim orders preserving relevant property. Relevant property is property subject to a claim or as to which any question may arise on a claim.

66. Given that it only restricts the use of a particular asset whose ownership is in issue, such an injunction does not prevent the respondent dealing with any other assets, and therefore is less restrictive of the respondent's autonomy than a freezing injunction.

67. This aspect of the difference between the two forms of injunction is responsible for a number of differences in the approach taken to whether to grant such an injunction:

    (1) there is no requirement to show a real risk of dissipation;

    (2) the test for granting liberty to use the assets to fund legal or business expenses is more demanding because the respondent needs to show that he cannot use assets that are incontrovertibly his to fund those expenses; and

    (3) the court will take into account the more limited nature of the order when deciding whether to discharge (and if discharged, whether to re-grant) the order for breach of full and frank disclosure or other similar obligations: *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm) at [253]-[254]. I deal with this further below.

68. The *American Cyanamid* test applies to the grant of the injunction.

69. Here, the situation as matters currently stand is that:

(1) a further 199 shares have been issued and are held in Mr Rishover's name;

(2) Mr Rishover accepts that 124 of those are held on trust for the Claimants on the terms of the SHA;

(3) there is a dispute about whether Mr Rishover is presently required under the SHA to transfer legal title to those 124 shares to the respective Claimants, or whether that obligation only arises at a later point, such as on the signing of the s.106 agreement or when the period for judicial review to be brought against that s.106 agreement has expired; and

(4) the Claimants seek in the substantive proceedings an order for specific performance of the obligation of Mr Rishover under the SHA to transfer legal title to them.

70. A classic example of a proprietary injunction is where there is a dispute over whether a proprietary claim consequent on tracing can be brought against a particular fund and therefore whether that fund is held on trust for the claimant or not. This is not that sort of case.

71. However, here there is a dispute as to the terms on which the 124 shares are held, as set out in (3) above. The fact that the dispute is as to the terms of the SHA does not alter that, because it is the SHA that sets the terms on which the 124 shares are held on trust. The trust arises in the first place because of the SHA and the SHA sets the express terms of the trusts, including that the shares are to be transferred to the Claimants on planning permission being obtained. Given that there is a trust of the shares even before the Planning Permission is approved, I do not need to get into the question of whether the obligation to transfer legal title shares becoming specifically enforceable on the approval of Planning Permission gives rise to such a trust.

72. Given the above, in my judgment, to the extent that the injunction sought to restrain transfer of the *RLL* shares, Ms Clarke is correct to put the injunction, as she did in her skeleton for the 13 May hearing, as a proprietary injunction or- which in my judgment amounts to much the same thing in practice on the present facts- an injunction in aid of specific performance. That protects the asset to be transferred until it is transferred, because of the possibility that it should be transferred now and therefore that the applicant is being kept out of the control of his asset in the meantime.

73. Ms Clarke's skeleton also put forward a third alternative- that the injunction was restraining a breach of contract. I return to that below after dealing with proprietary injunctions.

74. The fact that a proprietary injunction is tied to the preservation of particular property rights also means that where those property rights become otherwise protected in another way, it is no longer necessary or appropriate for the proprietary injunction to continue. For example, if a fund whose beneficial ownership is disputed is placed into the hands of an independent third party, it may not be appropriate for the proprietary injunction against a respondent to continue. Likewise, here, if the 124 shares held beneficially for the Claimants

are transferred to the Claimants, then the basis for the proprietary injunction would fall away.

75. Finally, the typical proprietary injunction bars not only transfer of the relevant assets, but dealings with it that would diminish its value. Often such an unqualified restriction will be appropriate, given that the injunction does not stop the respondent dealing with his other assets. However, if, as here, the assets are shares and the person being restrained has a role in running the company (the **"top company"**) and/or subsidiary companies, that injunction would, if unqualified, bar him from using such a role in a way that reduced the value of the shares in the top company. Therefore, in such a case it is necessary to consider a carve-out to allow the individual to continue with his role in the companies without fear of taking a step in the ordinary course of business that turns out to have the effect of reducing the value of the top company shares and therefore breaching the injunction. It is also necessary to take any effect on running the business into account in assessing where the balance of convenience lies. Both of these points apply in the present case. I shall return to them below.

76. If the top company has one or more wholly owned subsidiaries, as is the case here, a proprietary injunction against the shares in the top company does not itself prevent disposal of the shares of a directly or indirectly held subsidiary. For example, if a company has 10 operating subsidiaries held two corporate layers down from the top company, a sale of one of those subsidiaries at market price would not diminish the value of the top company shares and therefore not breach an order restricting disposal of, dealing with and diminution in value of the top company shares. Therefore, on its own a proprietary injunction against the top company shares does not itself, or at least not automatically justify a proprietary injunction directly restricting dealings with the shares of operating subsidiaries. Ms Clarke pointed out that in *Wilton-Davies v Kirk* [1997] B.C.C. 770 at 775, the Court considered that there was jurisdiction to appoint a receiver over a subsidiary in aid of an unfair prejudice petition relating to the parent. However, in my judgment a proprietary injunction against the top company shares does not *of itself without more* justify an injunction against the shares of the subsidiaries, and *Wilton-Davies* does not detract from that.

77. This raises the question of whether any injunction here should extend- as the Injunction Order does- to assets other than the RLL Shares. It is here that I consider that Mr Friedman's submissions have most force. To deal with this issue, it is necessary to examine the third basis on which the injunction was put before the Judge. I mentioned above that the injunction sought before the Judge was also characterised as an injunction to restrain a threatened breach of contract. The contractual obligations referred to included obligations not to sell the shares of assets of RLL. As with a proprietary injunction, an injunction sought to restrain a threatened breach of contract would not be a freezing injunction. Rather it would be governed by *American Cyanamid* principles.

78. Ms Clarke submitted in her skeleton for the 13 May hearing that one of the breaches that Mr Rishover had threatened was disposing of the assets of RLL and that this was contrary to paragraphs 12 and 15 of Schedule 1 to the SHA. Clause 4 of the SHA requires the parties, including Mr Rishover, to procure that the JVC (RLL) shall not carry out any of the Reserved Matters in Schedule 1

without the prior written approval of MDL. Paragraph 12 of Schedule 1 comprises changing the nature of the JVC's Business or commencing any new business that is not ancillary or incidental to the Business, and paragraph 15 comprises making any acquisition or disposal by the JVC of any material asset(s) otherwise than in the ordinary course of business. In my judgment, paragraph 15 is the relevant one. If Mr Rishover procured that RLL sold its assets- namely the shares in Morelane- without MDL's consent, he would breach clause 4.

79. Therefore, in principle, an interim injunction can be granted on *American Cyanamid* principles to prevent Mr Rishover from disposing of RLL's shares in Morelane. A final injunction preventing this without the consent of all Claimants is sought in the claim form and prayer in the particulars of claim (albeit that as the Defence points out there is nothing pleaded in the main body of the Particulars in support of this).

80. However, in my judgment, the grant of an injunction in respect of the RLL shares (or the Morelane shares) does not of itself justify including within the Injuncted Assets the shares in KEPC or LHGCC or the Property itself. As Mr Friedman submits, that is not the relief sought at trial. Accordingly, in light of the submissions put to me, I do not consider that the KEPC and LHGCC or the Property itself should be included in any injunction. I shall return in the principal section on *American Cyanamid* below to the parameters of any injunction that should be continued, including whether it should catch the Morelane shares.

The grounds in the Discharge Application

81. I shall take in turn the five grounds set out in paragraph 6 above.

82. By way of preliminary point, I understand that there was an objection taken on the morning of the hearing before me by the Claimants as to the permissibility of Mr Rishover's reliance on the detail of Mr Martin's spent conviction. In order to avoid the need for lengthy debate on the point, which could have required the hearing to go part heard, Mr Friedman pragmatically took the stance that for the purposes of his submissions he would not rely on such detail but that he made no broader concession. I should say that I cannot see that such detail would make any difference to the ultimate result. He took an analogous stance in relation another substantive point that arose to be dealt with at the outset of the hearing, namely a dispute over whether the Claimants had waived privilege over material in an earlier version of Ms Andrews' witness statement that had mentioned internal discussions within her team. After Mr Rishover's representatives had suggested that privilege had been waived and sought disclosure of the full run of documents evidencing the internal discussions, the Claimants replaced Ms Andrews' witness statement with a new version that removed the offending passages. Mr Friedman's stance for the hearing was that he would not take points based on the original version of the statement to the extent that it differed from the revised version and that I should not take into account the old version of the statement or any submissions based on those parts of the old statement that were not replicated in the new one. I am content to

proceed on that basis. Mr Friedman made clear that Mr Rishover reserved the right to contend subsequently that privilege had been waived.

83. Given the focus of the submissions on the Discharge Application, I need to deal at some length with the arguments based on alleged breaches of duty by the Claimants in making the Original Application and in the period following it.

84. Before getting into the detail, I should make clear that while it was accepted that the Claimants did not appreciate that they were under a duty of full and frank disclosure, in my judgment Ms Clarke's skeleton and oral submissions made to the Judge did seek at a number of points to draw the Judge's attention to contrary arguments.

Full and frank disclosure

85. Subject to one point, there was no disagreement before me as to the content of the duty of full and frank disclosure, and the consequences of breaching it.

86. Starting with the *content* of the duty, this can conveniently be taken from the judgment of Eder J in *Elektromotive Group Ltd v. Pan* [2012] EWHC 2472 at [33], relied on by Mr Rishover:

> *"i. The duty on the applicant in such circumstances goes beyond merely identifying points of defence which might be taken against them, important though that is;*
>
> *ii. The applicant has to show the utmost good faith, identify the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents*
>
> *iii. The applicant has to investigate the nature of the claim asserted and the facts relied on before applying, and has to identify any likely defences. He has to disclose all facts which reasonably could or would be taken into account by the Court. The duty is not restricted to matters of fact, but extends to matters of law;*
>
> *iv. The applicant also has a duty to investigate the facts and fairly to present the evidence;*
>
> *v. There is a high duty to draw the Court's attention to significant factual, legal and procedural aspects of the case;*
>
> *vi. Full disclosure has to be linked with fair presentation. The judge has to have complete confidence in the thoroughness and the objectivity of those presenting the case for the applicant; and*
>
> *vii. It is the undoubted duty of counsel to draw to the judge's attention weaknesses in his case and to make sure the judge understands what might be said on the other side even if the judge says he has read the papers…*"

87. As set out in *CEF Holdings v Mundey* [2012] FSR 35, this duty applies on a short notice application as well as a without notice application, because short

notice is not valid notice. As explained at [183] of that case, the duty applies even if the respondent is represented at a short notice hearing. The reason for this is, as explained in [181], that:

> "*[t]he purpose of this requirement imposed on an applicant for an injunction of giving "not less than 3 days notice" is to allow the respondents to the application adequate time in which to consider the applicant's case on both factual and legal issues and also to enable them to be properly prepared so as not only to be able to address all relevant issues of fact and of law, but also to be able to adduce all relevant evidence and to make full submissions on all legal and factual issues. In other words, the period of three clear days is the minimum period specified to ensure that proper legal and factual submissions of the respondent can be put before the court so as to represent their interests.*"

In that case, the respondents only received informal notice of the application on the evening before the hearing: [185].

88. The consequences of non-disclosure were summarised in *Re Yugraneft* [2010] BCC 475 at [102]-[103], which Mr Rishover relies on. Christopher Clarke J quoted at [102] the nine main principles set out in *The Arena Corp Ltd v Schroeder* [2003] EWHC 1089 (Ch) at [213]:

> *"(1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application,* ***the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial****.*
>
> *(2) Notwithstanding that general rule, the Court has jurisdiction to continue or re-grant the order.*
>
> *(3) That jurisdiction should be exercised* ***sparingly****, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.*
>
> *(4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.*
>
> *(5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.*
>
> *(6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.*

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the Court should therefore have regard to the proportionality between the punishment and the offence.

(9) ***There are no hard and fast rules*** *as to whether the discretion to continue or re-grant the order should be exercised,* ***and the Court should take into account all relevant circumstances****."* (I have used bold text where Christopher Clarke J italicised the quote)

89. Christopher Clarke J stated at [103]:

> "*I regard that as a helpful review of the applicable principles, subject to the overriding principle, reflected in proposition (9), that the question of whether, in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the Court's discretion, to which… the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the Court, like Janus, looks both backwards and forwards.*"

90. Ms Clarke relied on the more recent decision of HHJ Klein sitting as a judge of the High Court in *Wild Brain Family International Limited v Robson* [2018] EWHC 3163 (Ch) at [45]-[49]. That sets out the content of the duty by reference to the judgment of Popplewell J in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 (Comm). Popplewell J explained at [52] that "*the ultimate touchstone is whether the presentation of the application is fair in all material respects*". This reflects the modern formulation of the duty of full and frank disclosure as a duty of fair presentation, so I shall use that terminology in my judgment. *Wild Brain* also sets out at [45] the consequence of failure to comply with the duty, by reference to the judgment of Ralph Gibson LJ in *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356-7. I do not detect in *Wild Brain* any substantive difference from the principles set out in the earlier cases, and Counsel did not suggest to me that there were any.

91. Given that the authorities put before me summarised above related to *freezing* injunctions, I raised with the parties whether the decision of Flaux J in *Boreh v Republic of Djibouti* suggested that the different nature of a proprietary injunction should be taken into account when deciding whether to discharge (and if discharged, whether to re-grant) a proprietary injunction. In that case, a freezing injunction was set aside but the proprietary injunction was not. Flaux J explained at [253] that the proprietary injunction is fundamentally different to the freezing injunction, and accepted at [254] the submission of the Lord Falconer that:

> "*(i) a proprietary injunction over particular assets on the basis that the claimant has an arguable case that they are his property is far less intrusive than a freezing injunction. It preserves the asset until trial but it does not freeze a defendant's own assets or prevent a defendant from carrying out*

his day to day business and (ii) that the discharge of a proprietary injunction has a far greater effect on the substantive claim. If the defendant disposes of the asset, the claim becomes nugatory."

92. Flaux J also took into account at [255] that the deliberate misleading of the Court did not really concern the proprietary aspect of the relief sought.

93. It was submitted by Mr Friedman that *Boreh* was decided on the basis of the point at [255]. I reject that submission. As Ms Clarke submitted, the point at [255] was a supplementary one, as clear from Flaux J starting [255] by making express that this was a "*further*" point that did not detract from the general points at [253]-[254].

94. Therefore, in my judgment, I should take into account the characteristics of a proprietary injunction in deciding whether to discharge and/or regrant such an injunction. The reason for doing so is that the question of the effect of continuing the injunction on the Claimants and on the Defendants is relevant to whether the injunction should be continued. In considering this, it is the impact of the injunction on the present facts that is important. For example, in our case, unlike in *Boreh*, the injunction *could* absent a course of business carve-out be breached by Mr Rishover carrying out his role in the running of the Companies.

95. Turning to the facts here, as formal service only took place the day before the 13 May 2022 hearing, this is a short notice case, to which the duty of full and frank disclosure applies. Therefore, I take in turn the arguments raised by Mr Friedman. This is a slightly unusual case because Mr Rishover did have the application documents- albeit including an unissued application notice- since 16:49 on 9 May 2022, so I shall need to return to the significance of that below.

1. Breach of the pre-emption provisions

96. Mr Friedman submits that the Claimants should have disclosed that Mr Martin had transferred his interest in Templebarn to his sister in breach of the pre-emption provisions in clause 16.1 of the SHA, because it was in his submission obviously material that someone on the Claimants' side was in breach of the SHA. Ms Clarke's response was that there was no breach of the SHA because there had ben no transfer of "*any rights in or over any share or interest in any share in the JVC*", as that only caught shares and interests in shares in the JVC, which was defined as RLL. The transfer here had been of shares in Templebarn. In reply, Mr Friedman submitted that it would emasculate the pre-emption provisions if they were read as limited to dealings with the shares in RLL.

97. In my judgment, there was no breach of the duty of fair presentation in this respect. I do not consider that the Claimants were required to anticipate such an argument.

98. Without deciding the true construction of clause 16.1, the ordinary meaning of the words quoted above seems to me to be that they are limited to shares in RLL and interests in those shares. On this reading, clause 16.1 is imposing obligations on the Shareholders concerning the transfer of *their* interests, and the Shareholders are the Claimants and Mr Rishover, not the individuals who

own the shares in the Claimants. That would be consistent with the opening words of clause 16.1 ("*No Shareholder…*"), the second sentence of clause 16.1 ("*If a Shareholder transfers…*"), clause 16.2 ("*A Shareholder may do anything prohibited by this clause if the other Shareholder has consented to it in writing*") and clause 16.3 ("*The Shareholder…wishing to transfer its shares…must give an irrevocable notice…*"), all of which focus on and are limited to the actions of the Shareholder. Shareholders is defined as "*the beneficial owner of Shares in the JVC*", and the JVC is defined as RLL.

99. I have no evidence before me that an interest in the RLL shares held by any of the Shareholders has been transferred. Rather Mr Friedman's argument is that the transfer of the interest in *Templebarn* was a breach of clause 16.1. The Individuals (and now Ms Martin) appear to be the shareholders of the Claimant companies, rather than the Claimant companies also holding their shares in RLL on trust for the individuals concerned. For example, Ms Ray describes herself in her witness statement as the shareholder of Rainmead.

2. Failure to draw the Court's attention to the ordinary costs order

100. Where an interim injunction is granted, the Court will normally reserve the costs of the application until the determination of the substantive issue: *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2020] EWCA Civ 1647 at [35]-[36].

101. The draft order put before the Court on 13 May placed in square brackets in the paragraph on costs the alternative possibilities of Mr Rishover paying the Claimants' costs or reserving costs to the return date. However, it did not provide for the possibility of reserving costs until trial and the submission made to the Judge was simply that Mr Rishover should pay the Claimants' costs, which the Judge accepted.

102. Ms Clarke accepted that the ordinary costs order should have been drawn to the Court's attention, and Hamlins accepted this when the point was raised by AT. In my judgment, it should have been drawn to the Judge's attention and this should have been done whether or not the hearing was on short notice, given the duty to draw the Court's attention to authority against one's point. This was plainly not a deliberate one. Rather the relevant authority or legal principle was overlooked.

103. Ms Clarke submits that the error here was one of legal submission that did not deprive the Court of knowledge of a material circumstance and therefore did not constitute a material non-disclosure. She relies on *Wild Brain* at [49] for the proposition that incorrect legal submissions do not amount to non-disclosure providing that they do not deprive the Court of knowledge of any material circumstance, and also points out that the Variation Application contains a paragraph varying the costs order in this regard. I reject that argument. The failure to draw the Court's attention to *Melford* and the ordinary rule on costs in such circumstances meant that the Court did not have before it the relevant material to decide the correct costs order. The situation is not one where the correct legal principle or authorities were put to the Judge, and then erroneous legal submissions made off the back of that. However, while the correct legal

position should have been put to the Judge, this error did not relate to whether the injunction should be granted in the first place, so while it should not have happened, in my judgment it should be kept in proportion when considering its impact on whether the injunction should remain.

104. Mr Friedman also contends that the Judge's attention should have been drawn to the fact that the failure to provide a costs schedule was a ground on which the Court might disallow all or part of the Claimants' costs. While this is a minor breach, I accept that submission. Paragraph 9.6 of PD44 provides that a party's failure without reasonable excuse to provide a statement of costs will be taken into account by the Court in deciding what order to make about the costs of a claim, hearing or application and about the costs of any detailed assessment hearing that may be necessary as a result of that failure. Ms Clarke did flag up to the Judge that the Claimants did not have a costs schedule for summary assessment, but that was to found the submission- accepted by the Judge- that the appropriate order was for detailed assessment if costs could not be agreed.

3. Failure to draw the Court's attention to the fact that Mr Rishover was only served on 12 May, the day before the hearing

105. Again, the Claimants accept that this should have been done. I accept Mr Friedman's submission that this was a material breach. Therefore, I take this into account in determining whether the Injunction Order should be discharged. However, I consider that what is more important is what *substantive* points the Claimants did and did not put before the Judge in relation to the case for an injunction.

106. Explaining the failure in more detail, while it was flagged orally to the Judge that Mr Rishover was e-mailed with the application documents a few minutes after 4.30pm on Monday 9 May, and that the application notice provided at that point was unissued, with that caveat the application was put as one on notice. That was made clear in the opening paragraph of the Claimants' skeleton, in the submission made in the skeleton and orally on why a return date was not necessary, and more generally in oral submission, including in the submission on costs that he had been given notice and had chosen not to attend. The Judge was aware that Mr Rishover had received the supporting evidence together with the unissued application notice by e-mail on 9 May shortly after the 4.30pm cut-off and that Mr Rishover had responded in some detail on the morning of 12 May. Therefore, he knew what time Mr Rishover had received to respond and was comfortable with going ahead with the hearing in those circumstances.

107. It cannot be known whether the Judge would have been content for the hearing to proceed on 13 May if he had been told that Mr Rishover had only been validly served on 12 May. In my judgment, he may very well have been given that (a) Mr Rishover had been provided with the documents three clear days before the hearing, even though that did not amount to formal notice and the application notice was unissued at that point, (b) the Judge made clear at [2] of the Judgment that he considered that Mr Rishover's long 12 May letter demonstrated that he had been able to engage with the application, (c) the Claimants' account of the 9 May meeting did provide justification for an urgent application; and (d) Mr Rishover could apply in due course to vary or discharge the application.

108. However, it would have been a slightly different question that the Judge would have been asking himself or at least the facts he would have been taking into account would have been different. In a situation where Mr Rishover had not received even one clear day's notice of the hearing, he would necessarily have asked himself whether the matter was sufficiently urgent that it should be allowed to proceed despite such limited formal notice, or whether the more appropriate course would be to adjourn the hearing of the application for a few days to allow proper notice to be given. Giving 3 clear days' notice would have required the hearing to be put back to Wednesday 17 May. Therefore, the hearing may have gone back to 17 May through the Judge's decision at the hearing or if the Claimants had- appreciating the correct service position- opted to proceed on full notice.

109. Ms Clarke submitted that it is likely that the Court would if asked have made a CPR r.23.7(4) direction and allowed the hearing to proceed on short notice, on the grounds that (i) Mr Rishover had been formally served by the time of the hearing and had been sent the application documents by e-mails on 9 and 10 May, (ii) he had acknowledged receipt of the 10 May e-mail, (iii) he had prepared a detailed response by 12 May with the assistance of legal advisors, and that response contained no request to adjourn the hearing to allow him to retain legal representation or otherwise, (iv) he had given no indication of his intention to attend the hearing and (v) when invited to agree a consent order which provided for the hearing to be adjourned in exchange for Mr Rishover providing undertakings, he did not agree to the hearing being adjourned with the costs reserved to a later hearing.

110. There is force in these points, particularly (i) to (iii). However, in my judgment, one cannot rule out the possibility that the Judge would have adjourned the hearing, for the reasons set out above. Moreover, there is in my judgment a limit to how far one should go into counterfactuals in a situation where such counterfactuals arise from the Claimants' failure to put the correct service analysis before the Court (or to ask for a CPR r.23.7(4) direction) and thereby to have placed the Judge in a position to determine what should have been done in light of the true position. The Court was misled, albeit unintentionally, as to the correct position.

111. Finally, Mr Friedman submits that if the defect in service had been pointed out, there would have been a return date at which the continuation of the Injunction Order had to be continued. In my judgment that is not necessarily the case: the Judge could have made a CPR r.23.7(4) direction for example. However, there is at the lowest no guarantee he would have made such a direction, and I consider that I should take this into account in assessing materiality, given the discipline that a return date brings. Nevertheless, I consider that the point should not be overstated given that Mr Rishover could bring the matter back before the Court to seek to discharge or vary it without the need for a return date.

4. Failure to raise a threat to the financing facility

112. Mr Friedman submits that the Claimants should have drawn the Court's attention to the likelihood that the making of the Injunction Order was likely to be a serious threat to the continuation of the TAB Facility, and therefore to the

Project as a whole and to Mr Rishover himself through the personal guarantee that he gave.

113. Starting with what was said at the 13 May hearing, it is clear from the transcript that the Judge was aware that (i) there was secured lending against the structure that had been used to finance the Project but that there was not visibility about what the terms of the loan were (page 20), (ii) that Mr Rishover wanted the Individuals to give their own guarantees in respect of the financing (page 12), (iii) that the Claimants' position was that under the SHA it was Mr Rishover's responsibility to provide security for any financing (page 19), and (iv) that relations between the parties had deteriorated as issues like the need to refinance had become relevant (page 21).

114. The question is whether the Claimants should have gone further as submitted by Mr Friedman. In my judgment, it was *not* incumbent on the Claimants to suggest that the making of the Injunction Order could threaten the continuation of the TAB Facility and lead to the calling in of Mr Rishover's personal guarantee.

115. The starting point is that it is relevant to take into account lending to and charges over a structure when determining whether to grant an injunction over assets held in it, because this gives rise to the possibility that legal proceedings against the structure might constitute an event of default under the facility.

116. However, here Mr Rishover had mentioned the TAB Facility and his personal guarantee at a number of points in the detailed 12 May letter, written with the benefit of legal input. He stated that he considered that its presence indicated how unlikely it was that he would sell the Property or RLL shares, he explained that the transfer of legal title to the RLL shares in due course would need to be consented to by TAB, and he set out some of the terms of the facility and that he considered that the Individuals should have provided an indemnity in respect of it. There was no suggestion that the injunction that was being sought would pose any problem for the facility or Mr Rishover's personal guarantee. Therefore, there was nothing in this to suggest that Mr Rishover, who- unlike the Claimants- knew at the time the detailed terms of the TAB Facility and had a copy of it, saw a risk in this regard. In these circumstances, I do not consider that it was incumbent on the Claimants to suggest that the injunction could constitute a serious threat to the facility or give rise to a serious risk of Mr Rishover's personal guarantee being called on.

117. Further, the TAB Facility is a bridging facility advanced to get the Project through to the end of planning permission, the Project has nearly reached that stage, and the best route for recovery for TAB would likely to be to wait for repayment in the ordinary course, knowing the security that they have over the structure and from Mr Rishover personally if that does not happen. In my judgment, that is also relevant in considering how likely it would have appeared that the injunction would have imperilled the facility and therefore whether this should have been flagged to the Judge.

118. By way of sense-check of this, the point was not- as far as I can see- made immediately by Mr Rishover in the correspondence after the 13 May hearing,

such as AT's 23 May letter. When it was raised, the risk was not put at quite the level that it is in Mr Rishover's skeleton, namely that "*the making of the Injunction Order was itself likely to be a threat to RLL's financing facility with TAB*". For example, AT's 31 May letter states that "*our client anticipates that TAB are likely to have very real (and, quite possibly, existential) concerns in connection with the facility if Mr Ingrao was to be appointed as director of RLL at the same time as your clients have ongoing litigation against our client and an injunction in place*" (underlining added) and this point was repeated in AT's 6 June letter. The concern appears to have been that it would appear to TAB as if the persons instigating the action against the structure lent to would also be taking more control of it.

119. I deal separately below in applying the *American Cyanamid* test to what the position with TAB is now, but it is important to separate that out from how matters appeared at 13 May.

5. Allegation of holding to ransom the s.106 Agreement

120. Ms Ray states in her 9 May witness statement that Mr Rishover told her on 21 February 2022 that he would not sign the s.106 Agreement until Mr Martin agreed to go. Ms Clarke took the Judge to that in oral submission and submitted that this amounted to Mr Rishover seeking to put improper commercial pressure on the Individuals and abusing his position as director.

121. Mr Friedman submits that the Claimants should have put to the Judge that Mr Rishover might have a defence to this assertion or disagree with its characterisation. He pointed to Mr Rishover's evidence that the delays have been down to the local planning authority, that negotiations have been going on throughout and that the s.106 Agreement should be finalised and agreed imminently. He submitted that it should have been pointed out by the Claimants to the Judge that (1) it was self-evidently in Mr Rishover's interests to have the s.106 Agreement finalised, given that it will cause an immediate uplift in the value of the Property and allow Mr Rishover to replace the TAB Facility with lending that does not require a personal guarantee from him, and (2) that there were reasons for the delay in signing the s.106 Agreement that could not be laid at Mr Rishover's door.

122. In response, Ms Clarke points out that Mr Rishover does not deny that he made the statement referred to by Ms Ray about not signing the s.106 Agreement and that the causes of the delay in *issuing* the s.106 Agreement were a separate matter.

123. In my judgment, there was no breach of duty by the Claimants in this regard. As Ms Clarke made clear in the relevant passage in the transcript, the broader point being made by the Claimants was that Mr Rishover was issuing a number of threats of acting in breach of the SHA. The fact that there were other causes of the delay in getting to a position where the s.106 Agreement was ready for signature does not detract from that.

6. The unacceptable breadth width and breadth of the Injunction Order was not mentioned

124. The first question is whether it should have been flagged to the Judge here that without an exception allowing Mr Rishover and RLL to take steps in the ordinary course of business, they would be exposed to the risk that ordinary commercial actions could have the effect of reducing the value of the Injuncted Assets and thereby breach the Injunction Order, unless conducted with the prior written consent of the Claimants.

125. The Injunction Order provides at paragraph 3 that "*the Respondents must not, without the Applicants' prior written consent, in any way dispose of, deal with or diminish the value of any of the Injuncted Assets*". The natural meaning of "*diminish the value*" is to *cause* to be less valuable, and in my judgment there is no requirement that the person in question must be trying to reduce the value or acting negligently in reducing the value. Even if, contrary to that, there is more room for argument about whether, particularly read in the context of an injunction order that is seeking to protect the shares in the Companies and the Property, something more is required than an act that causes the value to be reduced, nevertheless a respondent should not be placed in a position of any uncertainty on what practical steps are permitted by the order given the potential consequences of breaching it.

126. Ms Clarke put the following to the Judge on the point:

(1) Ms Clarke took the Judge orally through what became paragraph 3 of the Injunction Order (paragraph 4 of the draft order), including drawing to his attention the two different sets of exceptions she had canvassed in the draft order to the prohibition in that paragraph, namely written consent or the giving of 7 days' advance notice.

(2) Ms Clarke's skeleton- which was read by the Judge- explained that the information sought as part of the Injunction Order was "*to allow the injunction to function properly because it is information that is needed to enable the Respondents to make an informed decision on any request for consent to a transaction restrained by an injunction*: [36], and item 3 of the information sought was details of "*[p]ending transactions or dealings which would result in the disposal or diminution of the value of the Injuncted Assets*": [35]. That item was replicated in paragraph 6(c) of the draft order, and Ms Clarke took the Judge specifically to paragraph 6 (which became paragraph 5 of the Injunction Order).

127. Therefore, there was material put before the Judge on the effect of paragraph 3 and the need for a mechanism to deal with transactions that might diminish the value of the Injuncted Assets.

128. However, the focus of the oral submissions was on the prohibition on dealing with the shares and Property themselves. Therefore, in my judgment, it should have been flagged to the Judge that the effect of the Order was that any transaction or business dealing which actually caused a reduction in the value of the Injuncted Assets, whether intended to or not, could violate the Order, and therefore that Mr Rishover might be expected to contend that there should be an exception for dealings in the ordinary course of business. Often such a carve-out does not need to be considered on an application for an injunction restraining

the use of a particular asset, because such a restriction will not directly affect the running of a business. It is true that the Companies do not house businesses that for example buy and sell investments each day, where a multitude of actions could reduce the value of the shares in the businesses. Therefore, one should not overstate its practical significance. However, the restrictions imposed by the Injunction Order would still potentially affect the running of the Companies and therefore the Project, so it was necessary for this point to be flagged. Ms Clarke realistically accepted in oral submissions that on reflection this was a point that should have been raised before the Judge.

129. Second, I also consider that it should have been flagged that once the further shares were issued, the effect of the Injunction Order would be to stop Mr Rishover dealing with shares that he owned legally and beneficially. It is true that, as Ms Clarke made clear to the Judge, at the time of the hearing before him there was only one issued share, and Mr Rishover had- prior to his 12 May letter- declined to issue further shares. However, part of the purpose of the injunction was to help to encourage Mr Rishover to issue the remaining shares, and at this point it would be possible for the order to carve out shares owned by him.

130. Finally, Mr Friedman also submitted that it should have been flagged to the Judge that the order would restrict Mr Rishover's rights under the SHA, insofar as those rights involved dealing with any of the Injuncted Assets. Mr Friedman points to the fact that the order would prevent Mr Rishover exercising his pre-emption rights under clause 16 of the SHA without written consent. As set out above, in my judgment there was no obligation to put to the Judge that there may have been a breach of clause 16 that Mr Rishover might wish to redress. Therefore, this point about clause 16 appears to me to be more theoretical than real. Similarly, Mr Friedman also points out in the section of his skeleton on *American Cyanamid* that the Injunction Order would prevent Mr Rishover effecting a compulsory transfer of the RLL shares under clause 17 of the SHA from the Claimants if that clause was triggered, for example by the insolvency of one of the Claimants, and would prevent him seeking to buying the Claimants' shares under clause 15 in a case of deadlock. Again, these are not situations that have yet ever arisen and it should be remembered that there is a written consent exception that the Judge was taken to, so this point appears to me to be of limited practical importance.

131. I take this point into account in applying the *American Cyanamid* test and determining the terms of any injunction that should continue, and- as explained below- I consider that any revised injunction should contain a carve out to ensure that Mr Rishover's rights under the SHA remain fully intact. However, I do not consider that it was incumbent on the Claimants to flag this point up to the Judge, and in any event any failure to do so would be of limited significance.

7. Failure to provide the document relied on by Mr Rishover

132. In his 12 May letter, Mr Rishover set out in some detail his position that Planning Permission had not yet been approved for the purposes of the SHA. As part of this, he stated that it was clear from the 1 March 2022 e-mail chain between among others Trevor Hutchinson (the planning consultant for the

Project), the Individuals (save for Mr Green) and Mr Rishover that the Claimants were well aware that at that date planning permission had not yet been granted. Mr Rishover attached the e-mail chain to his letter, but the e-mail chain was not provided to the Judge or drawn to his attention.

133. I understand that a clip of recent documents was handed to the Judge during the hearing but through inadvertence that copy did not contain the e-mail chain. The Claimants submit that in any event, the document was not material.

134. Ms Clarke submitted that having heard Mr Friedman's submissions, she understood what points might have been raised in relation to the document, but she submitted that the document would not have appeared to be material at the time.

135. In my judgment, the document should have been provided to the Judge and drawn to his attention given Mr Rishover's reliance on it. However, the failure to do so was innocent and I regard the document as of limited relevance.

136. The chain relates to the Revised Access Application. The statement that Mr Rishover places reliance on was a comment made by Mr Ingrao in response to Mr Hutchison forwarding on confirmation that the Revised Access Application had been received and acknowledged by the local planning authority. Mr Ingrao wrote to Mr Hutchison to thank him for his work and commented "*Let's hope the next 8 weeks organically roll out in the right direction*".

137. Mr Rishover states that this demonstrates that the Claimants appreciated that planning permission had not been granted. However:

(1) On ordinary construction principles, it is not relevant to the interpretation of the SHA, both because it post-dates the SHA by two years and because it is at best evidence of the subjective understanding of one or more of the signatories to it.

(2) In any case, it does not appear to have been a comment about what approval of Planning Permission meant for the purposes of clause 8.1 of the SHA.

(3) Moreover, the Claimants acknowledge that the Revised Access Application was made this year and granted on 6 May 2022. For example Ms Clarke mentioned to the Judge orally that after the original planning was granted, there was a need for a s.106 Agreement and a "*revised access application*", and the Claimants positively rely on the grant of the Revised Access Application on 6 May 2022 as being something which caused them concern because they contend that it increased the risk that Mr Rishover felt free to dispose of the Business now that the Revised Access Application had been resolved.

(4) The primary argument being made by the Claimants is that planning permission was approved when the main original planning permission application was approved back in 2020, subject to a s.106 Agreement and referral to the Secretary of State, irrespective of what steps remained to be

taken after that point to get to a position where the development work could begin.

(5) Further, given that the Revised Access Application had been granted by the time of the 13 May 2022 hearing, the Claimants argue that if they are wrong on their primary argument, the granting of that application constituted the final step in Planning Permission being approved for the purposes of clause 8.1 of the SHA, so the fact that it had not been granted at 1 March 2022 is of limited assistance to Mr Rishover.

8. Fair presentation of the financial allegations against Mr Rishover

138. Ms Clarke submitted to the Judge that there was a concern about misappropriation of assets, relying on the 24 March 2022 witness statement of Ms Hoare. Mr Friedman submits that the Claimants failed to give a fair presentation of the allegations.

139. The main different strands of the allegations were as follows:

(1) LHGCC had taken out a £250,000 Covid relief loan, which was immediately transferred to RLL. The submission was that the loan was supposed to be used for the purpose of the trading entity, not to be passed up to the holding company.

(2) LHGCC received in the first half of 2021 a business interruption insurance pay-out of £100,000, which again was transferred to RLL. The submission of Ms Clarke was that it should have been used by the trading entity, and there was also a concern that it had been transferred out to other businesses linked to Mr Rishover, albeit that the Claimants could not substantiate that allegation.

(3) Ms Hoare stated that £80,000 worth of plants were paid for by LHGCC for one of Mr Rishover's personal developments and invoiced back from LHGCC to two separate developments, as advised by the accounts department of Heronslea, which is the name of companies linked to Mr Rishover. Ms Clarke submitted orally that this demonstrated that there were grounds for concern that sums were being transferred to Mr Rishover's entities.

140. Mr Friedman makes a number of specific submissions on this, that I shall deal with briefly in turn.

141. First, he submits that it should have been made clear that Mr Rishover was likely to say that he had not misappropriated funds and that he had put significant funds into RLL far in excess of the amounts complained of, such that on any view Mr Rishover would be owed money by RLL. He points to a passage in Mr Rishover's 21 July 2022 witness statement saying that he understands that as at May 2022 he and his companies were owed £1.03m. In my judgment, it should have been flagged that Mr Rishover and his companies had injected significant funding into the Project. On the documents that I have seen, the Individuals were aware of this, not least as one of the key recent complaints from Mr

Rishover in 2022 has been that he had funded the Project to a greater extent than he was happy with, so it should have been mentioned by way of context. However, in my judgment this point should not be overstated, given that it does not provide a direct answer to any of points (1) to (3) above.

142. Second, Mr Friedman submits that it should have been explained that a number of the transactions were *intra-group* transactions where there could be no possible adverse impact on the Claimants. I reject that submission. Ms Hoare makes clear at paragraph 10 of her witness statement, which the Judge was taken to, that there was a significant intercompany balance between LHGCC and RLL, and it was made clear in the submissions that the transactions referred to at (1) and (2) involved the transfer of monies by LHGCC up to RLL.

143. Third, he submits that Ms Hoare was likely to have an axe to grind, that this would have been clear on reasonable enquiries and that this should have been mentioned to the Court. He points to a passage in the 14 June 2022 witness statement of Mr Paydon, the partner with conduct of the matter at AT, that Mr Paydon is instructed by Mr Rishover that the account by Ms Hoare of her resignation is misleading. I reject this submission. In my judgment, this was a point for Mr Rishover to take if he considered it to be the case, not for the Claimants to raise. I note that Mr Rishover does not deal specifically with the points in (1) and (2) above in his 21 July 2022 witness statement. Therefore, on what I have before me I do not consider that the Claimants should have suggested that Mr Rishover would contend that that Ms Hoare's evidence was likely to have been coloured by the circumstances of her resignation. Further, I would have expected Mr Rishover to have dealt in his own witness statement with the point if he was to make allegations about the motives of Ms Hoare.

144. Fourth, he submits in relation to point (3) above that the Claimants should have put forward Mr Rishover's potential defences. The general manager of LHGCC, has provided an e-mail to Mr Rishover since the 13 May 2022 hearing explaining that the cost of the plants was approximately £18,500 rather than £80,000, that the reason for LHGCC ordering the plants was that it had an active account with a tree and plant supplier and that the "*recharge*" invoices were paid by one of Mr Rishover's Heronslea companies. It is suggested that this could have been discovered through reasonable enquiries. In my judgment, the Claimants were entitled to rely on Ms Hoare's evidence, which they took the Judge to. While the £80,000 figure appears to have been wrong and that it should have referred to £18,500, Ms Hoare did say that the sum was ultimately recharged to the Heronslea companies. It appears to be accepted that the plants were ordered by LHGCC, for one or more of Mr Rishover's companies, and that Mr Rishover's other companies ultimately met the cost. In my judgment, while it is true that the Claimants could have asked Mr Rishover about this in the period since Ms Hoare's statement, in my judgment it was not incumbent on the Claimants to interrogate the £80,000 figure provided, or otherwise seek further evidence as to Mr Rishover's possible response to this. It should be remembered that there had been a number of occasions after Ms Hoare's statement where one or more of the Individuals, particularly Mr Martin, asked Mr Rishover for more financial information about the Companies, and Ms Ray's account in her witness statement is that such information was not provided.

9. Failure to explain that the Claimants' undertaking in damages might well be insufficient

145. In response to a question from the Judge about the financial worth of the Claimants in the context of their undertaking in damages, the transcript records that Ms Clarke responded that "*obviously they are notional shareholders with a shareholding of £15 million on their own assessment*".

146. Mr Friedman submits that this was misleading. He accepts that a £30m valuation of the Property had been obtained, but submits (1) that the lending was more than £15m, (2) that the value of the shareholding would be far less than £15m on a fire sale if the lending was called in by TAB, and (3) even if the Property was worth more than the value of the lending, that would be of little use to Mr Rishover if the personal guarantee was called on, because RLL would not be able to meet any demand for immediate payment such that Mr Rishover would be liable for the full amount to TAB.

147. Taking (1) first, the £30m valuation appears to be the Colliers valuation as at 29 September 2021, which put the value of the Property without planning permission at £30m, and £38m with such permission. The loan monies advanced under the Rischco and TAB Facilities are together of the order of £14m. I have not been provided in submissions with details of what Mr Rishover contends the full scale of lending is beyond that or the true value of the shares, and one of the Claimants' complaints is that they do not have a clear picture of the full creditors and debts of the different Companies. From what I can tell, the lending is of the order of £15m. Therefore, in my judgment, the comment of Ms Clarke should likely have referred to the collective shareholding of the parties including Mr Rishover, rather than the Claimants' 62% shareholding, so that the figure would need to be scaled down accordingly. While that appears to me to have been an error, I do not consider it changes the general picture: putting to one side the situation of a fire sale- which I deal with in relation to point (2) below- the Claimants' shareholding is worth a very significant amount.

148. In my judgment, points (2) and (3) are dependent on there being an obligation to suggest to the Judge that there was a significant risk that the TAB Facility or the personal guarantee ancillary to it would be called in. I have dealt with that above: I do not consider that there was such an obligation.

Summary

149. Whilst they were attractively put by Mr Friedman, I have rejected a significant number of Mr Rishover's submissions.

150. Nevertheless, in my judgment there were breaches of the duty of fair presentation, albeit a number of them were minor.

151. To evaluate the appropriate response to them, I will take them in the round together with the other grounds for discharge, and the arguments as to whether the *American Cyanamid* test is satisfied. Therefore, I deal with those first, before setting out my conclusions.

The Claimants' application for a retrospective order under CPR r.23.7(4) permitting short service

152. This is a convenient point at which to take the element of the Claimants' Variation Application that seeks an order under CPR r.23.7(4) retrospectively directing that sufficient notice had been given. I take the reasoning for seeking this to be that if that application succeeds, then sufficient notice will have been given and there is not a breach of the duty to give full and frank disclosure. This element of the application was responded to by Mr Friedman in his skeleton. Ms Clarke explained in the opening section of the hearing that she was not pursuing the point, but given that the point was raised in the application and that- if there is still jurisdiction to make a CPR r.23.7(4) order- the Court can in theory make one of its own volition, I shall deal briefly with the point.

153. I refuse this element of the Variation Application.

154. CPR r.23.7(4) provides that:

> "*(4) If—*
> *(a) an application notice is served; but*
> *(b) the period of notice is shorter than the period required by these Rules or a practice direction,*
> *the court may direct that, in the circumstances of the case, sufficient notice has been given, and hear the application*."

155. In my judgment, the provision makes clear that it is intended that the direction will be given *before* the Court goes on to hear the application. Therefore, such an order should be sought and obtained before the Court hears the matter on short notice, which was not done here.

156. In any case, in my judgment it would not be appropriate to make such an order retrospectively here even if that is possible, in the circumstances. The true position on service was not put to the Judge at the 13 May hearing when it should have been, so that the Judge could not himself consider on an informed basis at that hearing whether to make such an order. Therefore the consequences of the failure to comply with the duty of fair presentation should be evaluated on ordinary principles.

Breach of the undertakings to serve the claim form as soon as practicable

157. The unissued claim form had been provided to Mr Rishover with the initial application papers. By paragraph (2) of Schedule B(2) to the Injunction Order, the Claimants, Mr Ingrao, Ms Ray and Mr Martin undertook that "*[a]s soon as practicable the Applicants will serve an issued claim form in the form of the draft produced to the court*".

158. The claim form was served on Mr Rishover on 24 May 2022, ten days after the hearing, and on RLL on 9 June 2022.

159. In respect of service on Mr Rishover, Ms Andrews states in her witness statement that she mistakenly thought that the Injunction Order provided the

Claimants with 14 days to serve the claim form and particulars of claim. That tallies with her 24 May letter to AT, which suggested that this was the order that the Court had made. In respect of service on RLL, she explains that she sought to serve the claim form on RLL at the same time as on Mr Rishover, but through an internal error at the Claimants' solicitors this was not done and- on Ms Andrews discovering on 1 June that the claim form had not been served- a further error meant that the claim form was not sent out then.

160. Mr Friedman contends that this breach of the undertakings itself justifies discharge of the Injunction order. He relies on the explanation of Neuberger J in *Flightwise Travel Services Ltd v Gill* [2003] EWCA Civ 3082 (Ch) at [28] that:

> "*it is important that undertakings given by an applicant, effectively in return for which the freezing order is granted, are complied with, and if they are not that there is a good explanation as to why. The fact that there is a failure to comply with an undertaking given by the applicant to the court, in return for which the injunction was granted, is a potentially serious matter and may, in appropriate circumstances, justify the discharge of the injunction. Bearing in mind the nature and effect of a freezing order, and the fact that it is granted initially ex parte, an applicant should be in no doubt that the court will regard any failure to comply with an undertaking given in the freezing order itself is seriously viewed. Of course, if the breach of the undertaking does not cause the respondent, or anyone else, any damage that would be a mitigating factor. But it does not discharge the gravity of failure to comply.*"

161. Mr Friedman points out that the failure to serve on time gave the Claimants the advantage of being able to consider while finalising the particulars of claim whether the claim form needed amendment before making a decision as to whether to seek to amend the claim form without permission. He also points out that AT stated in a number of letters from 23 May 2022 that the claim form had not yet been served on RLL.

162. In response, Ms Clarke submits that there has been no prejudice through the breaches and that RLL is a neutral entity so that lessens the seriousness of the breach in relation to it.

163. In my judgment, these breaches do not on their own justify discharge of the Injunction Order.

164. They should not have happened and they arose through a series of errors. Moreover, they were significant delays. However, as Ms Clarke submits the Defendants have not been materially prejudiced by the breaches in circumstances where they had the unissued claim form before the 13 May 2022 hearing. Neuberger J was clear that in an appropriate situation, a breach of undertaking should lead to discharge, but in my judgment this is not such a case. Absence of prejudice is a mitigating factor, as Neuberger J explained in *Flightwise,* as did Mann J in *Gorbunova v Berezovsky* [2013] EWHC 76 (Ch) at [55]. Nor have the Claimants benefited from the breach: the claim form was not amended and I have not seen any evidence that they sought to consider

whether to amend it in the time between the 13 May 2022 hearing and service of it.

165. In my judgment, the breaches should instead be taken into account together with the other breaches of duty in determining whether the Injunction Order should be discharged.

Refusal to correct misleading statements made to the Court in the Original Application and the making of misleading statements in correspondence

166. Mr Friedman puts forward three propositions of law.

(1) there is a duty to return to the Court if the basis on which the Court has granted relief no longer applies: *Gee on Commercial Injunctions* (7th ed, 2021) at [9-028];

(2) there is a duty to correct promptly affidavit or witness statement evidence which was materially misleading when sworn or deployed before the Court, which should be done where the matter is still ex parte by returning to the Judge so that he can reconsider the position: *Gee* [9-002]; and

(3) where a party has acted in breach of duty, it cannot mislead the other side by pretending that there was no breach.

167. I accept that propositions (1) and (2) are correct. In my judgment, proposition (2) extends beyond affidavit and witness statement evidence to other statements made to the Court. I also accept proposition (3): it is obviously not proper for one party to intentionally mislead another in relation to the breach of duties to the Court.

168. Mr Friedman makes two submissions on the facts:

(a) that the Claimants deliberately and knowingly failed to return to Court when they knew that they had misled the Court as to the position on service of the Original Application; and

(b) they sought to cover up their breach in correspondence.

169. These are serious allegations to make. Therefore, I shall sketch briefly the main correspondence between the parties on the point after the 13 May 2022 hearing:

(1) AT pointed out in its 23 May letter that deemed service took place on 12 May and asked Hamlins for confirmation that the Claimants accepted this.

(2) Hamlins' 25 May letter did not expressly accept that deemed service only took place on 12 May, and contended that given the informal notice provided and the dialogue with Mr Rishover on 12-13 May, "*we do not consider that there is any merits [sic] in the points you take regarding notice*".

(3) AT responded the next day, 26 May, asking among other things for express confirmation that the Claimants accepted that service only took place on 12

May and therefore that sufficient notice of the hearing was not provided, and for an explanation of why the Court was told that the application was on notice.

(4) AT sent chasers on 31 May, 1 June and 6 June, Hamlins having sent a holding response on 1 June and stated that they needed to take instructions. Mr Friedman points out that the 1 June letter provided a substantive response to other issues that had been raised.

(5) Hamlins responded substantively on 7 June, stating that:

> "*Until we received your letter dated 23 May 2022 this firm and counsel, having inadvertently overlooked practice direction 6A, had operated on the mistaken, but honestly held, belief that the application had been validly served by e-mail. We acknowledge that this was an error and that the application was formally served under cover of letters sent on 10 May 2022….*
>
> *We acknowledge that, in light of the deemed date of service the application was formally on short notice but in light of the informal notice provided by email and the other matters set out in our letter dated 25 May 2022 we do not accept your client was given insufficient notice of the application in real terms.*"

(6) The matter was then ultimately brought back before the Court by Mr Rishover's 14 June Discharge Application and the Claimants' 16 June Variation Application.

170. Ms Andrews explains in her witness statement that she was out of the office from 27 May to 13 June and that she tried to respond to AT's requests as quickly as possible.

171. Mr Friedman contends in respect of the correspondence that the 25 May response was deeply inappropriate and that the Claimants then tried to close down the matter by refusing to respond to correspondence.

172. In my judgment, the Claimants should have expressly accepted considerably sooner than 7 June that proceedings had only been served on 12 May in light of AT's 23 May letter. The service point was a relatively straightforward one to consider once raised. Further, in my judgment, the matter should have been brought back to the Court sooner so that the Court could consider how to proceed.

173. To the extent that Mr Friedman is putting his submission higher than that, I reject it. Nor do I consider that Hamlins or the Claimants sought to cover up their breach in correspondence. The 25 May letter explained in some detail why the Claimants did not at that stage consider the points taken by AT to be material ones, and this was a stance that Hamlins maintained in their 7 June letter. I also bear in mind in evaluating the delay in providing through the 7 June letter the confirmation sought about the date of formal service that there was an extremely

significant volume of correspondence from AT in the period from 23 May and Ms Andrews was out of the office from 27 May.

174. In my judgment, the failure to accept sooner the defect in service and bring the matter back to the Court should not itself lead to discharge of the Injunction Order. The matter was brought back to Court by the mid-June applications, and the point was ultimately accepted by Hamlins on 7 June.

175. However it should be taken into account with the other breaches in determining whether to discharge all or part of the Injunction Order.

Failure to provide a note of the 13 May 2022 hearing or the skeleton argument

176. While Mr Friedman does not put this as a freestanding ground for discharge of the Injunction Order, he contends that this reinforces the unsatisfactory nature of the Claimants' conduct.

177. Taking first the note, the Claimants did not provide a note of the 13 May hearing to AT. Instead, a transcript was provided on 30 May. Mr Friedman emphasises by reference to *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, The Times, 10 November 1999, the importance of providing such a note. Lightman J explained in that case that "*[t]his is essential so that the parties affected may know exactly what occurred and the basis and material on which the order was made, and so that in this way they may be provided with the material to make an informed application for discharge*".

178. I consider that a note should have been provided before 30 May, particularly in circumstances where AT had pointed out in its 23 May letter that 3 days' formal notice had not been given of the Original Application, so that the hearing should be treated as one on short notice. I will take this into account when determining what the appropriate order is in respect of the injunction.

179. Turning to the provision of a skeleton, Mr Friedman contends that Mr Rishover should have been provided with one before the hearing but was not. Ms Clarke submits that the Chancery Guide (as it stood at the time of the 13 May hearing) provided at [21-76] that skeleton arguments should be *exchanged* and that there was no obligation to provide one to Mr Rishover before the hearing. I accept Ms Clarke's submission there was no obligation to provide such a skeleton before the hearing.

The application of the *American Cyanamid* test

180. Mr Friedman submitted that- even putting to one side the breaches of duty by the Claimants- the ordinary test for granting an injunction was not satisfied here and for good measure had not been satisfied at the time of the 13 May 2022 hearing in light of the information that should have been put before the Judge at that point, although his focus was on the present position.

181. The strength or weakness of the substantive case for an interim injunction is also a factor relevant to whether I should exercise my discretion to discharge the Injunction Order on the grounds of breaches of the duty of full and frank disclosure and/or regrant the injunction as sought in the Variation Application, as for example Christopher Clarke J explained in *Yugraneft* at [103].

182. I consider that the main question here is where the balance of convenience lies. I shall focus on applying the *American Cyanamid* test to the facts as they stand now, rather than at the 13 May 2022 hearing.

Serious issue to be tried

183. In my judgment, there is a serious issue to be tried here, because there is a decent argument that Planning Permission has already been approved for the purposes of clause 8.1 despite the fact that the s.106 Agreement has yet to be sealed. There is no express requirement that the planning permission be approved on an unconditional basis, and the act of approval could be argued to refer to the act of the planning body, to be distinguished from the satisfaction by the Claimants of any conditions attached to the approval. The SHA uses in clause 11.2 the concept of *refusal* of planning permission, which reads as if it is referring to the decision to reject the initial planning application, and the argument would be that the act of approval is likewise something that happens when the planning body takes its decision as to whether to refuse or grant the planning permission. I can see the counter-argument that the approval of Planning Permission is intended to mark the end of the first stage of the Project and that the development work can begin and that this may be said to be a purposive interpretation, and one that reflects a decision to make Mr Rishover the front-man for the Project that dealt with third party planning bodies until the development work was ready to begin. However, there appears to me to be on the wording of the SHA a decent argument to the contrary.

184. Mr Friedman's submission on the serious issue to be tried requirement is a different one. He submits that the injunction is not holding the ring until trial, because the Claimants are seeking an order to freeze the Injuncted Assets, which is an injunction unrelated to the final relief sought by the Claimants. As explained above in the section on the types of injunction, I accept that submission in respect of the KEPC and LGHCC shares and the Property, but reject that submission in respect of the RLL and Morelane shares. In respect of the RLL shares, for example, the final relief sought is specific performance of the obligation to transfer to the Claimants legal title to the relevant shares, which the Claimants contend is an obligation that has already fallen to be performed. As I have explained above, in my judgment an interim injunction can in principle be sought in support of that claim which protects those shares and their value.

Whether damages are an adequate remedy

185. Mr Friedman submits that damages would be an adequate remedy here. He points to two cases. The first is *Re Canterbury Travel (London) Limited* [2010] EWHC 1464 (Ch). In that case Briggs J held on an application by one shareholder for an interim injunction in aid of an unfair prejudice petition

against another shareholder restraining the latter from passing various resolutions that damages were an adequate remedy because while the damage caused by the resolutions could be irreparable in relation to the company, such resolutions were unlikely so to diminish the value of the company that the applicant could not be properly compensated for it: [25]. The second is *AB v CD* [2014] EWHC 1 (QB), where Stuart-Smith J held that damages would be an adequate remedy for terminating a license agreement despite the fact that it could destroy the applicant's business, because the fact of destruction could be taken into account in assessing damages: [24].

186. In my judgment, damages would not be an adequate remedy for the following reasons: (1) neither of the two cases referred to by Mr Friedman are dealing with proprietary injunctions- such injunctions support a claim for particular property, here particular shares in RLL, that the claimant contends that they are entitled to, and (2) specific performance is commonly available in relation to breach of an obligation to transfer shares in a private company.

Balance of convenience

187. The relevant factors here have moved on in significant respects from those before the Judge on 13 May.

188. I have considered, in light of the breadth of the original Injunction Order, the points on balance of convenience dealt with below and also taking into account the Claimants' breaches of duty summarised above, a considerably cut down injunction, that would:

(1) include a carve-out to allow Mr Rishover to take steps in the ordinary course of business;

(2) allow him to deal with his own shares;

(3) allow him to exercise his rights under the SHA;

(4) only include RLL shares within the definition of Injuncted Assets, rather than the shares of any other Companies;

(5) not include within the definition of Injuncted Assets the Property;

(6) apply against Mr Rishover but not RLL (given that barring Mr Rishover from taking any steps that diminish the value of the shares will catch taking steps to procure RLL to carry out such actions); and

(7) unless an application was made to renew the injunction on different grounds, not continue past the transfer of legal title to the Claimants of the RLL shares. If for example, as intimated, an unfair prejudice petition might be brought at that stage, then any injunctive relief sought in relation to that would be on quite a different basis.

Steps (4) and (5) would still prevent disposal of, dealing with or diminution in value of the RLL shares other than steps taken in the ordinary course of business in the running of the Business as defined in the SHA. Therefore, this would still

bar improper steps being taken in the running of the Business that were outside the ordinary course of business and could reduce the value of the RLL shares. One of the consequences of the limitation in (4) would be the injunction would not catch the assets over which TAB have security or the assets mentioned in the relevant part of the Event of Default definition in the TAB Facility, namely the assets of Morelane. I do not consider that it is necessary to have the Morelane shares within the scope of the assets injuncted, because the prohibition on diminishing the value of the RLL shares provides the Claimants adequate protection while they do not have legal title to those shares.

189. In my judgment, if an injunction is to be continued, it would need to be on those cut down terms.

190. I consider that the balance of convenience lies in favour of such an injunction, for the following cumulative reasons.

191. First, Mr Rishover has made statements that he can do what he wants with the assets. Even if those were made in the heat of the moment, at least in some cases, they indicate at best a lack of respect for the fundamental terms of the SHA and how the assets held in the structure should be dealt with.

192. Second, he failed to issue the shares on request until an application was made. The parties have plainly fallen out and there is a risk that he will not comply with the SHA if the discipline of the Court order is removed.

193. Third, he has not dealt head-on in his witness statement with a number of the allegations made against him, such as those relating to the Covid loans and business interruption insurance, or what he said and did on 9 May 2022 that the Claimants contend formed the immediate backdrop to the Original Application.

194. Fourth, Mr Rishover has, despite the apparent conflict of interest, procured that the Rishco Charge be entered into to give himself and companies linked to him security for sums apparently advanced to the joint venture structure. I consider this gives rise to concern about his attitude towards discharge of his obligations in respect of the SHA. Ms Clarke runs a number of further specific arguments about the Rishco Facility and Charge but I do not need to deal with them, because even without getting into them, the Rishco Charge gives cause for concern.

195. Fifth, Mr Rishover's evidence is that the Companies below RLL do not have draft management accounts, which suggests that the financial affairs of those companies have at best been dealt with in an informal manner that does not give confidence that everything has been done properly.

196. Sixth, he has refused to agree to the appointment of Accura as joint auditor of RLL.

197. Seventh, as Ms Clarke submitted orally by reference to the RLL management accounts, while there are greater debts owed by RLL *to* Heronslea companies linked to Mr Rishover, there are debts owed by the Heronslea companies to the

JVC structure, which suggest that there have been payments out of the structure to such companies.

198. Therefore, taken cumulatively there is some cause for concern about aspects of how the Companies have been run. Mr Rishover's suggestion in [6] of his 21 July 2022 witness statement that he had understood until the present proceedings that the Claimants were content with how the Project was being run is difficult to square with the contemporaneous e-mails and WhatsApps, and the requests for auditors and financial information since at least late 2021.

199. Eighth, the cut down injunction set out in paragraph 188 above would impose few restrictions on Mr Rishover beyond not being able to dispose of or deal with the shares held for the Claimants.

200. Ninth, while I consider that TAB's position needs to be taken seriously, I doubt that discharging the Injunction Order will put an end to a number of TAB's other expressed concerns, such as that they were not previously informed of the litigation prior to Hamlins' 23 June letter, that they were not told about the disputes with the Individuals at the time that the lending was taken out and that the Claimants are concerned about how the Companies have been run.

201. I was taken to the recent correspondence that Mr Rishover has had with TAB. It was submitted by Ms Clarke that the concern of TAB related more to the substantive claims against Mr Rishover rather than the injunction. My reading of the correspondence is that TAB are concerned by the possibility of a dispute between Mr Rishover and the others involved with the Project, particularly if there are any allegations that there have been financial irregularities within the Companies that could impact on TAB's ability to be repaid. Therefore, from the perspective of the JV, I do not see how what has happened to cause a problem with TAB can be fully undone. Rather the realistic hope from the JV's perspective must instead be that if TAB does consider that an event of default has technically occurred, TAB will take the pragmatic view that the sensible course would be to wait to see whether a development loan is obtained to repay the TAB Facility in full. The sealing of the s.106 Agreement is hopefully imminent, and whether or not Mr Rishover waits until the expiry of period for judicial review to transfer legal title of the relevant shares to the Claimants, steps towards obtaining a development loan could presumably begin.

202. I have taken into account carefully the arguments that the balance of convenience point against an injunction.

203. First, as Mr Friedman submits, an important aspect of the Judge's reasoning in his Judgment was that an injunction would increase the prospect of Mr Rishover issuing the relevant shares: [20]-[22]. That has now been done. However, that was not the only reason for the injunction: it was stated to continue until trial or further order, and similar logic applies to the transfer of legal title to the shares.

204. Second, Mr Rishover has reiterated that the relevant shares are held on trust for the Claimants and that he will transfer legal title when the planning process has come to an end, subject to TAB's consent, and has stated that formally in his defence filed at Court, verified by a statement of truth. However, in my

judgment there remains- on the basis of his past conduct mentioned above- cause for concern as to whether in the absence of the discipline of a Court order he will indeed transfer them when the transfer process has come to an end and without conditions, as the Judge had concerns about whether he would issue the shares without a Court order in place. The fact that Mr Rishover has issued the shares following the making of the Injunction Order does not dispel this concern. I bear in mind in this regard that he sought in for example the 22 April 2022 e-mail to impose conditions on the issue of the shares. I also bear in mind that his position on the precise date on which he will transfer the shares after the s.106 Agreement is sealed does not appear to have remained constant- AT's 8 July letter 2022 for example referred to the obligation arising on the s.106 Agreement being finalised and- save for the requirement of TAB consent- Mr Rishover's 12 May 2022 letter did not mention any further conditions, but Mr Rishover's 26 July 2022 defence referred to the date at which the period for a judicial review challenge to the agreement had expired: [18.1].

205. Third, to the extent that I consider that it is appropriate to order the appointment of Accura as auditor to RLL and for Accura and the Claimants to be provided with certain financial information, that provides an additional protection against Mr Rishover taking steps that might improperly reduce the value of the RLL shares. As set out below, I do consider it appropriate to order this. However, this does not provide an immediate or full answer to the concern.

206. Fourth, Mr Ingrao has now been appointed director of RLL and therefore, while I appreciate that there has been disagreement over what information he is entitled to see in that role, he can use his role to assist in the running of the Project and checking that RLL and- through RLL- the other Companies are run properly. This seems to me to be a factor to take into account, but it does not provide the restriction on disposal, dealing with or diminishing the value of the Claimants' shares that the injunction does.

207. Fifth, in my judgment, it is unlikely that Mr Rishover will seek to *dispose* of the relevant shares (as opposed to take steps that could diminish their value) to persons other than the Claimants under the gaze of the Court, the Claimants and TAB. That would not be a straightforward exercise and Mr Rishover would know that such action would be heavily criticised by the Court and that he would likely to be required to compensate the Claimants if he did so. It could well also constitute a Change of Control for the purposes of the TAB Facility and therefore risk that facility and Mr Rishover's personal guarantee being called on, unless TAB was supportive of the disposition. Further, while he has made a number of ill-advised threats at various points to dispose of the business or shares, I have no evidence before me that he has sought at any point to make them good.

208. Ms Clarke submitted that a lender might be persuaded to put one of the Companies into administration and that the business could then be sold under a pre-pack without the Claimants or the Individuals having a chance to object. I doubt *TAB* would have any appetite to take any steps in concert with Mr Rishover, who they have expressed in their recent correspondence distrust of. However, as Ms Clarke has pointed out, the Rishco Charge entered into on 8 April gives the power for the lender- two of Mr Rishover's companies and Mr

Rishover himself- to sell if the facility is not repaid on demand, or to appoint an administrator or receiver. Therefore, even if unlikely, this sort of possibility cannot be ruled out, in circumstances where the granting of that charge is a matter of concern.

209. Sixth, my reading of the dialogue with TAB is that TAB would prefer that the injunction was discharged, whatever concerns they may hold about the claim more generally, and therefore discharge could reduce to some degree the risk of the loan being called in or the personal guarantee being called upon. However, TAB's attitude is difficult to predict with certainty, and its position appears to be rather more nuanced than simply depending on whether the Injunction Order is discharged, as explained above.

210. Seventh, Mr Friedman points out that by virtue of clause 8.2 of the SHA, on issue of the 199 shares, Mr Rishover appointed MDL as attorney able to exercise all rights in respect of the Trust Shares. That is true, and I consider this should be taken into account. However, given that Mr Rishover does not appear to have been fully respecting the operation of the SHA, I do not consider that is a decisive factor in judging whether additional protection for the Claimants is warranted in a situation where there is a serious issue as to whether they should already have been given legal title to these shares.

211. Finally, Mr Friedman points to the undertaking that Mr Paydon states at paragraph 70(d) of his first statement that Mr Rishover is willing to give, namely to comply with the terms of the SHA. The difficulty with this undertaking is that the parties' interpretations of the SHA appear to differ significantly in a number of respects, and in my judgment a general undertaking of this kind offers significantly less practical protection than a specific injunction in the terms of the Injunction Order or the cut down version set out at paragraph 188 above, or- if Mr Rishover decided to give one- an undertaking mirroring the terms of such an injunction. Therefore, again I consider that this is relevant but not decisive.

Conclusions on the American Cyanamid test

212. I consider that the cut down form of injunction that I have set out above satisfies the *American Cyanamid* test. The points that have particularly resonated with me on balance of convenience are as follows:

(1) There is some cause for concern that Mr Rishover would otherwise take steps to reduce the value of the RLL shares, which are shares whose legal title should have already been transferred to the Claimants if they are correct on their construction of clause 8.1 of the SHA, and on the flipside cause to consider that the presence of an injunction will (a) deter him from doing so and (b) increase the chance that he transfers legal title to the shares when he has stated that he will.

(2) The cut down version of the injunction does not restrict Mr Rishover's powers in relation to the running of the Business, or to exercise his rights in respect of his own shares or under the SHA.

(3) I do not consider that the presence of the TAB Facility is a decisive objection, in circumstances where (i) the absence or presence of an injunction does not itself determine whether Mr Rishover has been running the Business in an appropriate manner in all respects, (ii) the realistic hope is that TAB will not seek to take urgent action in circumstances where the sealing of the s.106 Agreement is hopefully imminent, and (iii) the injunction is limited to the RLL shares.

(4) Unless the Claimants were to successfully apply to continue it on other grounds, the injunction will fall away on transfer of legal title of the relevant shares to the Claimants.

213. Therefore, in my judgment, the *American Cyanamid* test is made out.

Drawing together the threads

214. In my judgment, the key question is whether the breaches of the duty of fair presentation are sufficiently serious, taken against the backdrop of the other breaches of duty, to justify complete discharge of the Injunction Order, or whether- despite the breaches- a lesser response is warranted, such as the cut down injunction referred to above coupled with the possibility of a significant costs award against the Claimants.

215. I have a discretion in this regard. I have considered this point with particular care, taking into account the penal nature of the jurisdiction to deal with breaches of the duty of fair presentation.

216. There have been a significant number of errors on the part of the Claimants in relation to the Original Application and the period following the Injunction Order which Mr Friedman dealt with in detail in his submissions.

217. The errors should not have been made and I do not consider that these breaches can be dismissed, as the Claimants sought to do at points, as merely technical ones. As a practical illustration, had the Claimants realised the correct service position, they may have decided to list the hearing for the following Wednesday and thereby give 3 clear days' notice, which would have given a greater opportunity for Mr Rishover to instruct Counsel to turn up to oppose the order, in order to seek to nip the injunction application in the bud before the injunction was granted. Similarly, as I have set out above, while the Judge may very well have agreed to hear the application if the true service position had been put before him, it is by no means certain that he would have: he may have adjourned the matter to the following week or (if he was willing to deal with it on 13 May) have refused to make an order under CPR r.23.7(4), thereby requiring the Claimants to provide full and frank disclosure. The fact that Mr Rishover was able to put in a long letter on 12 May is relevant, but it is no substitute for having legal representatives turn up at the hearing to oppose the injunction, or for full and frank disclosure being made in the absence of full notice to him.

218. Further, there were breaches of the duty of fair presentation, albeit in my judgment in most cases of a minor nature, and those failures are aggravated by the fact that the need to make full and frank disclosure was drawn to the

Claimants' attention in writing twice by Mr Rishover, on 12 and 13 May respectively, the breaches that occurred after the 13 May hearing and the failure to bring the matter back to the Court expeditiously.

219. These are serious points to take into account, and I note the comment of Christopher Clarke J in *Yugraneft* at [104] that the Court strongly inclines to setting aside an injunction in the case of substantial breach, at least in the case of a freezing injunction.

220. However, in my judgment, the appropriate course would be to allow the injunction to continue in the cut down form set out in paragraph 188 above, and penalise the Claimants in costs, rather than discharge the Injunction Order entirely, for the following cumulative reasons:

(1) In my judgment none of the breaches were deliberate.

(2) The failure to draw the correct principles to the Court's attention on costs did not relate to the pros and cons of granting the injunction.

(3) While the errors in relation to service- both before and after the 13 May hearing- were unfortunate and involve fault on the part of the Claimants' representatives and therefore for present purposes the Claimants, in my judgment the more important question is what substantive points were and were not put to the Judge that were relevant to the grant of the injunction. In that respect, putting to one side the failure in relation to costs set out in (2) above, most of the breaches of the duty of fair presentation were minor.

(4) Tied to that, the question of whether the injunction could have been granted if these breaches had not occurred is relevant, and in my judgment the injunction in cut down form could- and would- still have been granted.

(5) The errors made as to the scope of the order are capable of being cured for the future by cutting down the Injunction Order, and I have- as set out above-cut it down significantly.

(6) In my judgment, as I have explained above, there is cause for concern about whether Mr Rishover will adhere to the relevant parts of the SHA in light of his past conduct, and it is important that the jurisdiction to discharge orders obtained without full notice is not allowed to become an instrument of injustice.

(7) The cut down injunction would be of more limited scope than the initial order.

(8) The cut down injunction would relate to the specific property that the Claimants seek the transfer of legal title to, namely the RLL shares, and would- unlike a freezing order- not prevent Mr Rishover dealing with his own assets, so in my opinion on the basis of *Boreh v Djibouti* the more limited consequences in this regard of continuing the order compared to a freezing order should be taken into account.

(9) It would also- unless an application was made to renew it on different grounds- not be appropriate for it to continue on the transfer of legal title to the RLL shares, which even on Mr Rishover's construction of the SHA should fall to be performed relatively shortly, so that is relevant to the degree of intrusion that continuation of the injunction in some form would involve compared to an injunction that would continue until trial.

(10) In the case of the breaches after the hearing, in my judgment they did not prejudice Mr Rishover, save for increasing the costs that he incurred on legal fees, which can be redressed by a costs order.

(11) The parties' costs for the hearing before me were substantial, so reflecting the breaches of duty in costs would be a significant sanction.

The remaining elements of the Variation Application

221. That leaves three elements of the Variation Application to be dealt with, namely the applications for (a) the appointment of Mr Ingrao as director of the Companies other than RLL (having already been appointed to the RLL board), (b) for the appointment of Accura as joint auditor, and (c) for various financial information.

222. Mr Friedman contends as a preliminary point that all three elements are an impermissible second bite of the cherry. His submission is that it would be an abuse of process to allow such an application to proceed now in circumstances when it could and should have been brought at the time of the Original Application. He relies on the following authorities for the proposition that where a wider application could have been made initially, an applicant should not be able to make it subsequently:

(1) the explanation in *Gee* [24-005] that "*[s]uccessive applications…seeking to obtain more on the second application than he applied for on the first application are normally not to be permitted*".

(2) The decision of the Chancellor in *Holyoake v Candy* [2016] EWHC 1718, rejecting a subsequent application for a freezing injunction by the claimants after they had initially applied for a notification application and made the decision not apply for a freezing injunction. The Chancellor held that:

> "*The starting point in such a case…is that the claimants must point to something that has happened since the original order. They must show something material has changed to make it appropriate to investigate the same issues over again on yet another extensive hearing with even more voluminous evidential material…*"

(3) The comments to similar effect of the Court in *Orb a.r.l v Ruhan* [2016] EWHC 850 (Comm) at [81]-[82].

223. I reject this submission. Since the 13 May 2022 hearing there have been two relevant material developments, namely (1) the discovery that Mr Rishover does not consider that any management accounts have been produced for the

Companies other than RLL, and (2) the disclosure of the Rishco Charge, both of which the Claimants contend have caused them concern about how the Companies have been run. Therefore, in my judgment something material has changed to make it appropriate to allow the Claimants to bring such applications to deal with these concerns. Specifically, I consider that these two developments do give such grounds for concern. Mr Friedman points out specifically in relation to the appointment of a director to the boards of the Companies that the draft consent order circulated by the Claimants to Mr Rishover on 12 May contains as part of the proposed agreement the appointment of a second director to the boards of the Companies. However, in my judgment that is not decisive in light of the development in the factual position set out in (1) and (2) above. In any event, as explained below, I do not consider that an interim order should be made for the appointment of Mr Ingrao to the boards of any Companies.

Appointment of Mr Ingrao to the boards of the Companies other than RLL

224. This is an application for a mandatory injunction. I do not view this as an order that is necessary to make to give effect to the main injunction, so if it is to be made, it must be justified on its own merits as a mandatory injunction.

225. Mr Friedman submitted that the test is as explained by the Court of Appeal in *Zockoll Group v Mercury* [1998] FSR 354, quoting the speech of Lord Jauncey in *R v Secretary of State for Transport, ex parte Factortame Ltd (No.2)* [1991] 1 AC 603 at 683: (1) "*the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong'*", (2) "*the cost must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action*", and (3) "*it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial*". Ms Clarke did not dissent from this. I adopt these principles for this element of the Variation Application and those dealt with below. These principles are not intended to constitute a separate test from the ordinary *American Cyanamid* test. Rather points (2) and (3) are points to bear in mind when considering where the balance of convenience lies, because mandatory injunctions are typically more intrusive and difficult to undo than the consequences of prohibitory injunctions.

226. I reject this element of the Variation Application. In my judgment, the argument that the Claimants are entitled under the SHA to have Mr Rishover cause Mr Ingrao to be appointed to the boards of the subsidiaries is a weak one, and does not come close to giving me a "*high degree of assurance*" that the Claimants would establish the right they contend for at trial. Clause 5.4 of the SHA provides for the right to appoint a Director to the Board, a Director is defined as a director of the JVC, the Board is defined as the board of the JVC, and RLL is defined as the JVC, because it is the joint venture company. Therefore the structure appears to be that a director can be appointed to the board of RLL, and RLL has the degree of power in relation to its subsidiaries that the SHA envisages. Consistent with this, clause 2.1 of the SHA clearly distinguishes between the JVC and the subsidiary companies. In such circumstances, in my

judgment I should not order on an interim basis the intrusive step of ordering the appointment of Mr Ingrao to a number of company boards.

Appointment of Accura as joint auditors of the Companies

227. Clause 3.2.4 of the SHA provides that at Completion the Shareholders shall procure that such shareholder and board meetings of the JVC are held as may be necessary to "*appoint Accura Accountants Limited and Jeffreys Henry LLP as the joint auditors of the JVC*".

228. Hamlins requested on 16 May that an auditor be appointed and have repeated that request several times thereafter.

229. Starting with the appointment of Accura as an auditor of RLL, while Mr Friedman suggests in his skeleton that Jeffreys Henrys LLP have been appointed auditor, I understand from Mr Rishover's witness statement that at present that while Jeffreys Henrys LLP have acted as accountants to RLL, they have not been appointed auditor. Jeffreys Henrys were Mr Rishover's chosen auditors, and Accura the Claimants'.

230. In my judgment, an order should be made for the appointment of Accura as an auditor of *RLL*. Given the concerns over the financial management of the Business, it is important that an audit is carried out as soon as possible. For example, while a matter for the auditor, one would expect an audit of RLL to catch issues like the transfer of sums relating to RLL and intercompany balances, which are two of the three issues described by Ms Hoare in her witness statement. In my judgment, there is a "*high degree of assurance*" that such an order would be made at trial. Therefore, in my opinion this order can be justified on its own merits as a mandatory injunction. I do not consider that the fact that the injunction remains in a place in a cut down form removes the importance of an audit being carried out.

231. Mr Friedman runs three arguments against this. First, he contends that the obligation is on the Shareholders rather than just Mr Rishover. In my judgment, there is nothing in this point because the other Shareholders- the Claimants- are seeking the order. The recitals to the order can reflect, through an undertaking if necessary, the commitment of the Claimants to procure the appointment of Accura. Second, Mr Friedman contends that the obligation was a once and for all obligation on Completion and therefore does not apply subsequently. In my judgment, if not performed on completion, the obligation remains. There is nothing to remove it and it would be surprising if it lapsed immediately after Completion. Third, Mr Friedman contends that the parties did not proceed with the appointment of Accura at the time and thereby acquiesced in this state of affairs. However, there is no evidence before me close to sufficient to give rise to an estoppel claim or a variation of the SHA, and I note that a variation requires signed writing.

232. I do not consider that damages would be an adequate remedy. As Ms Clarke submits, the entitlement to require accounts to be audited is an important mechanism by which shareholders who are not involved in management are able to obtain accurate information about a company's financial affairs. Moreover,

it will in practice be difficult to prove specific loss from the failure to have an audit conducted so as to claim damages.

233. In relation to the balance of convenience, Mr Friedman submits that it is contrary to the interests of RLL to have to pay for two auditors, so that the balance of convenience weighs against this. In my judgment, this point is outweighed by the fact that the SHA provides for Accura and Jeffreys Henry to be joint auditors, and this appears to have been deliberately chosen to allow one outfit chosen by Mr Rishover and one by the Claimants. Similarly, I do not consider that this point is disturbed by the fact that Mr Rishover has made an open offer to appoint an independent firm of accountants. The Claimants are entitled to have the auditors that they bargained for.

234. Further, and importantly, I do not consider that there is any significant harm caused to Mr Rishover by having an audit conducted of RLL by joint auditors. Obviously there is some cost attached to it but an audit seems to me a sensible step, and Mr Rishover's stance does not contradict that, since he proposes that an independent third-party auditor be appointed.

235. The final point is that the obligation under the SHA is to appoint Accura *and Jeffreys Henry LLP* as joint auditors, and this is reflected in the order sought in the claim form, but the draft order seeks the appointment of Accura as auditor without mention of Jeffreys Henry. In my judgment, the order should be for appointment of Accura as *an* auditor so as not to prevent the appointment of Jeffreys Henry alongside them. Further the obligation under clause 3.2.4 of the SHA is that the Shareholders procure that such shareholder and board meetings of RLL are held as may be necessary to bring about the appointment, so the order should reflect that.

236. Turning to the appointment of Accura as auditor of the Companies other than RLL, in my judgment the argument that the Claimants are entitled under the SHA to have Accura appointed as an auditor to the subsidiaries is a weak one. RLL is defined as the JVC, because it is the joint venture company, so on the face of it clause 3.2.4 is only requiring the appointment of Accura as an auditor of RLL. Consistent with this, clause 3.2.3 requires the registered office of the "*JVC*" to be a particular address in London, and so JVC is used there too to refer to RLL rather than more broadly. Similar points can be made about the use of JVC in clause 3.1.3, and clause 2.1 of the SHA, which clearly distinguishes between the JVC and the subsidiary companies.

237. I can see that there is room for argument about whether something has gone wrong in the wording, given that the SHA contains a number of drafting errors, such that JVC should be read as extending to the other Companies. For example, clause 12.3, discussed below, gives as an example of information that will assist in keeping the Shareholder informed about the Business the monthly management accounts of the *JVC*. However, I consider this to be a weak argument, and I do not consider that such an argument gets close to giving me comfort to a "*high degree of assurance*" that the right that the Claimants assert would be made good at trial, so I do not consider that I should order an intrusive step such as appointment of auditors to a number of Companies in such circumstances.

238. I also note for completeness that the issued claim form and the draft amended claim form prepared by the Claimants only provides for the appointment of Accura as auditor of RLL, although I do not view this as decisive given that the Claimants could apply if need be to amend the claim form.

Provision of further information

239. The Claimants seek by paragraph 5 of their application notice an order that Mr Rishover "*provide the [Claimants] and Accura…with access to, and facilities to make copies of, the books and records of the Companies, including any such books and records held by third parties but subject to [Mr Rishover's] control*", and further or alternatively by paragraph 6 of their application notice an order that Mr Rishover provide a further affidavit setting out various financial information and exhibiting backing bank statements. Again, this is an application for a mandatory interim injunction.

240. This element of the application relies on the obligation of Mr Rishover under clause 12.3 of the SHA to "*procure that the JVC shall supply each Shareholder with the financial and other information necessary to keep the Shareholder informed about how effectively the Business is performing and in particular shall supply each Shareholder with [1] a copy of each year's Business Plan for approval in accordance with clause 10.3; [2] a copy of the audited accounts of the JVC prepared in accordance with the laws applicable in and the accounting standards, principles and practices generally accepted in the United Kingdom, within 3 months of the end of the year in which the audited accounts relate; and [3] monthly management accounts of the JVC to be supplied within 5 days of the end of the month to which they relate, which shall include a profit and loss account, a balance sheet and a cashflow statement and such other information as each Shareholder may reasonably require*".

241. Given that this element of the application seeks books and records of the Companies, I should also set out clause 12.2, which provides that "*[e]ach Shareholder and its authorised representatives shall be allowed access at all reasonable times to examine the books and records of the JVC and to discuss the JVC's affairs with its directors and senior management*".

242. Taking provision of information to Accura first, in my judgment, given the order for the appointment of Accura, the appropriate information order is that Mr Rishover procure that Accura is provided with such books and records as they may reasonably require to perform their task as joint auditor. It is implicit that the appointment of the auditor will carry with it the provision of necessary information to the auditor so that the auditor can fulfil his appointed task. I do not consider that a wider order should be granted in respect of Accura: the obligation to give access to books and records is an obligation under clause 12.2 to provide the *Shareholder* with books and records of the *JVC* (rather than the Companies more generally), and clause 12.3 does not provide anything about supply of information to the auditor(s).

243. Turning to the provision of information to the *Claimants*, other than that supplied to Accura, I consider that the order sought by the Claimants extends beyond the information provided for under clause 12.3. Clause 12.3 deals with

"financial and other information necessary to keep the Shareholder informed about how effectively the Business is performing", which is narrower than all books and records of the Companies.

244. What the Claimants have received- through the exhibits to Mr Rishover's 20 May 2022 affidavit, are unaudited annual accounts (including management information) for Morelane, KEPC and LHGCC for 2019, 2020 and 2021, draft annual accounts for the same for 2022, monthly management accounts for RLL from July 2019 to 30 April 2022 and the profit and loss report for KEPC for 2021-22. There were apparently no management accounts for the subsidiaries.

245. I consider that the absence of management accounts in respect of the subsidiaries is troubling, particularly in circumstances where Ms Hoare has asserted that when employed as finance manager of LHGCC from September 2019 to July 2021 she produced full management accounts for that company.

246. I also note that clause 12.3 refers to what information is necessary to keep the Shareholders informed about how effectively the *Business* is performing rather than just the JVC (RLL).

247. Mr Friedman submits in his skeleton that given that Mr Rishover must procure that *the JVC (RLL)* provides information under clause 12.3 and that the Business is defined as the acquisition of Morelane, applying and obtaining for Planning Permission and developing the Property, the information covered by clause 12.3 does not extend to the business of the subsidiaries such as LHGCC, which runs the golf club. I can see the force of the submission that there must be some limits on the clause 12.3 obligation. However equally clause 12.3 relates to the performance of the Business which extends beyond RLL.

248. In my judgment, without deciding the precise limits of clause 12.3, I can have the requisite "*high degree of assurance*" that the Claimants would be entitled at trial to *some* further information on top of what they have received. Without more information, it is difficult for the Claimants to know how the Business is performing. In my judgment it is important that they receive some further information given the troubling absence of management accounts at subsidiary level and some of the other information that I have referred to above as giving cause for concern about how the Business has been run, and I do not consider that it gives rise to any countervailing significant disadvantage to Mr Rishover to procure the provision of it.

249. I do not consider that damages would be an adequate remedy for breach of the clause 12.3 obligation, particularly in circumstances where it will be extremely difficult for the Claimants to show any specific loss caused by such breach. Nor do I consider that the recent appointment of Mr Ingrao as director of RLL diminishes the importance of all of the Claimants being provided with the information that they are entitled to under clause 12.3, and I do not consider that I can assume that Mr Ingrao will in practice be provided with all information that would fall under that clause.

250. More difficult is to identify precisely *what* further information I can be confident that clause 12.3 requires Mr Rishover to procure the provision of by

RLL. At this stage, the key information that I am confident falls within clause 12.3 is that set out in paragraph 6c of the Variation Application, namely information setting out any transactions that have occurred between (i) the Companies on one hand and (ii) Mr Rishover and/or companies connected to him on the other (the **"Transactions"**). The companies mentioned in (ii) are not intended to include the Companies and a suitable definition of "connected" can be found in section 249 of the Insolvency Act 1986. The information in paragraph 6c is the information that deals with the key concern, exacerbated by the absence of management accounts, namely the dealings between Mr Rishover's own companies and the Companies. The sums that have passed between the Companies and Mr Rishover or his companies are relevant to the performance of the Business, because they go to what sums have been injected into the structure of Companies (whether for funding the project or otherwise) and what sums have flowed out, other than those related to unconnected third parties. Further, in considering how onerous or otherwise it would be to provide such information, I note that (a) Mr Rishover explains in his witness statement at [45] that sums have passed between the structure and him or his companies, and that his accountants have advised that Mr Rishover and his companies are owed £1.03m as at May 2022, and (b) they are transactions concerning him and his companies. Therefore, it appears to me that he can be expected to be able to provide information in respect of the relevant transactions.

251. I do not consider that the information set out in paragraph 6b, namely information about claims and funding related to Covid, falls into the same category, as- unless this results in transactions with Mr Rishover's own companies- this appears to me to be more concerned with the employees of the operating subsidiaries rather than the Project and Business itself, and I do not consider that the argument for this information being included is strong enough to grant a mandatory injunction in respect of it. The information in 6a- information backing any amounts owed by or to the Companies as set out in the accounts exhibited to Mr Rishover's 20 May 2022 affidavit- seems to me at least arguably to extend beyond information necessary to keep the Shareholders informed about how the business is performing.

252. Accordingly, I order that Mr Rishover provides for each of the Transactions the document(s) that set out the transaction in question, save to the extent that such documents have been provided by Mr Rishover to the Claimants already. For a loan, that document would be the loan document if it exists, for a sale, the contract of sale, and so forth. To the extent there is no such document or there is no document in Mr Rishover's possession or control, Mr Rishover should set out briefly to the best of his knowledge the terms and date of the transaction in question. Given that these are transactions relating to Mr Rishover and/or his companies, in my judgment it is simplest to order Mr Rishover to provide these documents himself rather than procure their provision.

253. An alternative route to the conclusion that I have reached is that the relevant material should be provided *as ancillary to the main injunction*. I have cut down that main injunction significantly, and given that it no longer catches shares other than those of RLL, I do not consider that the consequence of there being no management accounts for the subsidiaries should be provision of full

equivalent information relating to those subsidiaries. However, in my judgment, it is nevertheless necessary- in the absence of management accounts and given the concerns raised by the Rishco Facility and Charge- for the Claimants to have clarity as to the full extent of any dealings between the Companies on one hand and Mr Rishover and his companies on the other, so as to have visibility as to the value of the RLL shares that the injunction is seeking to protect from diminution, and therefore also whether any future transaction does breach the injunction by diminishing the value of the Claimants' RLL shares.

254. If the Claimants consider that they need more information than the above, then a prompt *final* determination of what information is caught by clause 12.3 will need to be sought.

255. For completeness, in my judgment, the alternative relief sought in paragraph 6 of the application notice, namely an *affidavit* backed by documents, does not fall within clause 12.3, which contains no requirement for an affidavit.

256. Finally, Mr Friedman submits in his skeleton that the claim for financial information pleaded in the particulars does not fall within the ambit of the claim form, but the Claimants provided under cover of Hamlins' 30 May letter a proposed amended claim form that does include a claim for information and the amendments were consented to by AT on Mr Rishover's behalf.

Next steps

257. Looking to the future, there were a number of references to the possibility of the transfer of legal title to the shares heralding wider litigation in the form of an unfair prejudice petition and the possibility of injunctive relief being sought in relation to that. Any rulings on that will necessarily be matters for another day, but one cannot but view with dismay a situation in which a JV on the cusp – after a number of years' effort- of being able to turn to the development itself, finds itself mired in litigation that has already been both hard fought and expensive. The parties will no doubt reflect on that and whether there are any other ways of resolving their differences.