Neutral Citation Number: [2022] EWHC 970 (Ch)

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

Claim No. BL-2021-001958

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

Date 28/4/2022

Before:

DEPUTY HIGH COURT JUDGE LANCE ASHWORTH QC

BETWEEN:

PANKIM KUMAR PATEL

Claimant

-and-

(1) MINERVA SERVICES DELAWARE, INC
(2) PAUL BAXENDALE-WALKER
(3) MARK BARRY SLATER

Defendants

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Patrick Harty (instructed by **Bark&co Solicitors**) for the **Claimant**
David Halpern QC (instructed by **Wordley Partnership**) for the **First Defendant**
William Skjøtt (instructed by **Morrisons Solicitors LLP**) for the **Second and Third Defendants**

Hearing dates: 5th & 6th April, 2022

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APPROVED JUDGMENT

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

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LANCE ASHWORTH QC

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10.00 am on 28 April 2022.

Introduction

1. I have before me an application made by Minerva Services Delaware Inc ("**MSD**") seeking a proprietary and personal freezing order against the Claimant, Pankim Patel. The application was issued on 4 April 2022 and was argued on 5 and 6 April 2022. I announced my decision at the conclusion of the hearing. These are my reasons for that decision.

2. Mr David Halpern QC appeared on behalf of MSD and Mr Patrick Harty on behalf of Mr Patel. Mr William Skjøtt was present on behalf of Messrs. Baxendale-Walker and Slater, the Second and Third Defendants, but took no part in this application. I am very grateful to Mr Halpern and Mr Harty for their written and oral submissions, which had to be worked up at some speed in light of the limited notice of the application.

3. This matter was last before me on 1 and 2 March 2022 when a number of matters were dealt with. 2 of them were applications by MSD for relief from sanctions, moved by Mr Challenger who then appeared for MSD. I set out the background to this matter in my written reasons for granting limited relief but refusing the rest. To better understand this judgment, I repeat that background here.

4. On 28 October 2021, the Claimant, Mr Patel, issued a Part 8 claim form, seeking "an anti-suit and anti-arbitration injunction" restraining MSD from taking any further steps in an arbitration it had commenced in Delaware ("**the Delaware Arbitration**"). A similarly described injunction was sought against the Second and Third Defendants, Messrs. Baxendale-Walker and Slater, restraining them from causing or procuring MSD to take any further steps in the Delaware Arbitration and also restraining Messrs. Baxendale-Walker and Slater from commencing or pursuing any other substantive proceedings arising out of or in connection with the same subject matter. In addition a mandatory injunction was sought for the discontinuation of the arbitration.

5. The basis for the claim was that the Delaware Arbitration was "vexatious and oppressive and an abuse of the Court's process, England being the proper forum". The application was supported by a 35-page witness statement from Mr Majid, a solicitor at Bark&co Solicitors on behalf of Mr Patel, with an exhibit running to over 1,400 pages. There were no then current proceedings in England and Wales between MSD and Mr Patel.

6. The witness statement set out a lot of information in respect of Mr Baxendale-Walker and a number of legal cases he has been involved in previously. It was said that the Delaware Arbitration was brought effectively at his behest, following on from a failed application in this jurisdiction for an injunction by a different company, Bay Mining Consultants Ltd ("**Bay**"), which was heard before Tipples J on 30 April 2021. In those proceedings, which had been discontinued in May 2021, Bay had sued as assignee of the benefits of a Deed of Fiduciary Declaration from 2008 (the "**2008 Deed**") and a Deed of Fiduciary Declaration

from 2021 (the "**2021 Deed**"), under which it was claimed that Mr Patel held in excess of £11 million on trust for the principal under the Deeds.

7. Tipples J had refused an application for an interim freezing order on a number of grounds (to which I will return in due course) including that there was no serious issue to be tried that the assignment of the rights under either of the Deeds of Fiduciary Declarations on which Bay was suing was valid. She held that there had been no compliance with section 53(1)(c) of the Law of Property Act 1925 in respect of the assignment. Tipples J certified the application was totally without merit and ordered that Bay pay Mr Patel's costs of £14,508.

8. Tipples J was concerned as to the involvement of Mr Baxendale-Walker and Mr Slater in those proceedings and directed that there be a hearing to determine whether a civil restraint order should be made in respect of either of them. Nonetheless, at the further hearing on 14 May 2021, she did not make a civil restraint order in respect of either of them, although she observed that there was or may be a prima facie case that Mr Baxendale-Walker was the real party behind the proceedings, before holding that she did not need to make any finding on that occasion.

9. Against that background, on 6 August 2021 MSD filed a request for arbitration with the American Arbitration Association effectively seeking to sue on the same Deeds of Fiduciary Declaration for the same sums or at least the majority of the same sums (albeit the claim was put as one for breach of trust and fiduciary duties and it was advanced as a proprietary claim), which had by then purportedly been assigned to MSD under an assignment of June 2021. It is not necessary to go into the detail of that claim for this purpose, save to say that it is not contested that it was in respect of the same sums claimed to have been advanced to Mr Patel and which had been the subject of the English proceedings before Tipples J. It is to be noted that the request for arbitration was supported by a number of declarations by people other than Mr Baxendale-Walker, some of whom he appears to have had some connection with, including Mr Slater.

10. The reason that the matter had been referred to arbitration was that the 2008 Deed had what was said to be a valid arbitration clause, which allowed the principal to bring arbitration proceedings wherever it chose to do so. As the rights of the principal had purportedly been assigned to MSD, a Delaware corporation, MSD sought to institute arbitration proceedings in Delaware.

11. Mr Patel challenged the jurisdiction of the arbitrator in Delaware on the basis that there was no enforceable arbitration agreement and made representations on this to the appointed arbitrator. Before the arbitrator had made any ruling on that, Mr Patel issued the Part 8 claim in England seeking the anti-suit injunction described above. The relief sought is

extremely wide given its worldwide nature. There was no carve out for proceedings to be brought in England and Wales.

12. Permission was sought to serve MSD out of the jurisdiction. This was granted by Master Clark on 25 November 2021, who said that any documents in the proceedings, including the Claim Form, could be served on MSD at an address in Delaware by post pursuant to Article 10(a) of the Hague Service Convention. The order went on to provide that MSD had 22 days after service to file an acknowledgment in respect of the Claim Form. The order refers to the Master having read Mr Majid's first witness statement. I have not seen any other materials that were put before the Master, such as a skeleton argument in support, and I do not know whether she had any further materials. What she does not seem to have been told was that there were no other proceedings in England and Wales between MSD and Mr Patel.

13. For reasons that were debated with counsel at the hearing before me in March, in my judgment in order to be able to seek an anti-suit injunction in a case which does not involve a contract with an exclusive jurisdiction clause in favour of England and Wales, English law requires that the legitimate interest which an anti-suit injunction seeks to protect must be the existence of proceedings in this country which need to be protected by the grant of a restraining order (Turner v. Grovit [2002] 1 WLR 107 at paragraph [27]). Had this been drawn to the attention of Master Clark, which it was not, she may have declined to grant permission for service out of the jurisdiction.

14. Before service had been effected against MSD, both the Second and Third Defendants had been served. Their position then and at all times since has been that the decision to bring the Delaware Arbitration was nothing to do with them. They therefore said that they would take the pragmatic approach that the injunctive relief sought against them would not affect them and therefore were content to consent to injunctions against them. Injunctions were made against them by Marcus Smith J on 17 December 2021 in even wider terms, to which they had consented, than those which had been sought in the Part 8 Claim.

15. It was suggested to me that the hearing before Marcus Smith J was in the interim applications list, which may or may not have been appropriate. As MSD had not been served by then, Marcus Smith J was persuaded to grant permission to serve the Claim Form and all subsequent documents including the order of Master Clark by emailing them to MSD's US attorneys. He ordered that the Claim Form was deemed served on MSD on the date it was emailed and that MSD had 22 days thereafter to file an acknowledgment of service. Again Marcus Smith J was not told that there were no proceedings in existence in this country.

16. Marcus Smith J went on to direct that a first hearing of the matter should be listed on an expedited basis on the first available date after 7 February 2022 and setting out a timetable

for the filing of evidence in opposition to the application and, if so advised, for any application to set aside or vary the order to be made by 14 January 2022, with Mr Patel to serve evidence in response by 28 January 2022. MSD was separately said to have the right to apply to set aside or vary the order within the period set for service of evidence in answer, namely 14 January 2022.

17. Pursuant to the order of Marcus Smith J, the Claim Form and other documents were served by email on MSD's US attorneys on 17 December 2021. 22 days after 17 December was 8 January 2022 but because that was a Saturday, the time for serving an Acknowledgment of Service in fact expired on 10 January 2022, being the next court day.

18. On 27 December 2021, the arbitrator in Delaware held that as there was a dispute as to whether an enforceable arbitration clause existed, as a matter of Delaware law he did not have jurisdiction to determine this, which had to be determined by the courts (this contrasts with the usual position in England). Accordingly, he ruled that the Delaware Arbitration could not be proceeded with.

19. By further order of Marcus Smith J on 14 January 2022, on the application of the Second and Third Defendants, he varied his order of 17 December 2021 to extend the time for service of evidence by 7 days. This had the effect, because of the way his earlier order was drafted, of extending the time for any application to set aside or vary the order made on 17 December 2021 by 7 days too.

20. This does not appear to have been known to MSD's then English solicitors, Moore Barlow LLP, who were first approached by MSD after hours on 7 January 2022. By the time that they had undertaken the necessary client checks and obtained the requisite identification documents it was 11 January 2022. They then had to take instructions from MSD, which they duly did.

21. On 14 January 2022, Moore Barlow filed the Acknowledgment of Service on behalf of MSD and on the same date issued an application seeking an order that the time for acknowledging service be extended to 28 days (so that the filing would be in time) and that the time for putting in evidence in answer to the application and the time for making any application to set aside or vary the order of 17 December 2021 be extended to 28 January 2022.

22. This application was supported by a witness statement of Mr Darvill of Moore Barlow setting out his firm's involvement. He also addressed the status of the Delaware Arbitration and said that as a result of the order of the arbitrator on jurisdiction, MSD was in the process of making an application to the Court in Delaware seeking directions to determine the validity of the arbitration clause. He did not (and it is not suggested by Mr Patel's lawyers that Mr Darvill knew about it) refer to the fact that MSD was also seeking freezing relief

from the Court in Delaware. That relief was obtained ex parte from the Chancery Court in Delaware on 27 January 2022, but discharged by order of 7 February 2022, Vice Chancellor Lister observing that he felt this was a case which should be dealt with in England.

23. For the reasons previously given, I granted relief from sanction in respect of the failure to file an Acknowledgment of Service but refused it in respect of the service of evidence and any application to vary or set aside the order of 17 December 2021.

24. On that occasion, I made an interim anti-suit injunction against all 3 Defendants (with a carve out permitting proceedings in England and Wales) until after the hearing before me on 5 and 6 April, setting out directions to make that hearing effective, which would determine whether the anti-suit injunctions should remain in place until the trial of the Part 8 claim which had been issued by Mr Patel.

25. As I have already stated, in order to be able to seek an anti-suit injunction in a case which does not involve a contract with an exclusive jurisdiction clause in favour of England and Wales, English law requires that the legitimate interest which an anti-suit injunction seeks to protect must be the existence of proceedings in this country which need to be protected by the grant of a restraining order, but there were no such proceedings at that stage.

26. In order to address this (it not having been a point taken by any of the Defendants), I directed that Mr Patel should file either Points of Claim within the Part 8 Claim or a separate Part 7 Claim seeking declaratory relief to the effect that he was not liable to MSD in respect of the claim that it had made in Delaware.

27. On 14 March 2022, having obtained an extension to do so, Mr Patel filed Points of Claim in the Part 8 Claim. In those, he seeks a negative declaration that is to say that he is not liable to MSD under the Deeds it is claimed that he signed in 2008 and in April 2021 and that he does not hold any monies on trust for MSD. He expressly pleaded that he did not sign the 2008 Deed or the 2021 Deed or agree to their terms (paragraphs 37 and 47(a) of the Points of Claim). He also brings a claim in unlawful means conspiracy against MSD and the Second and Third Defendants, seeking both the anti-suit injunction and damages. At least at first sight, somewhat strangely Mr Patel's proposed anti-suit injunction does not have the carve out for proceedings in England and Wales, which was contained in the interim anti-suit injunction I made on the last occasion. Mr Patel has yet to amend the Part 8 Claim Form, which currently only seeks injunctive relief, but I have ordered him to do so.

28. It was envisaged at the last hearing in March by Mr Challenger, who then appeared on behalf of MSD (but who has subsequently become too ill to carry on working on this matter) that MSD might seek to challenge the jurisdiction of this court to hear the substantive claim and/or might seek to stay the English proceedings on the grounds that

there is an arbitration clause and MSD had initiated arbitration proceedings. While there may well have been difficulties in bringing any such application in light of my rulings on the applications for relief from sanctions, one of the directions I gave was that any application which MSD wished to be heard at this hearing must be filed and served by 18 March 2022. The parties subsequently agreed to extend that to 23 March.

29. MSD has subsequently taken the entirely pragmatic approach that it is content for its claim against Mr Patel to be determined by the English Courts. Neither it, nor the Second or Third Defendants oppose the interim anti-suit injunction with the carve out for proceedings in England and Wales, the position of the Second and Third Defendants having been throughout that the bringing of the proceedings by MSD is nothing to do with them.

30. Notwithstanding this, on 23 March, the day on which MSD's current solicitors, the Wordley Partnership, came on the record, an application for an interim receivership order was made. That was not the nature of the applications I had in mind MSD might be making when I made the order in March. That was supported by a document headed "Affidavit" from the sole director and shareholder of MSD, Saeedeh Mirshahi, who is also an English qualified solicitor on the Roll. In fact, this was not sworn as an affidavit, but was signed by Ms Mirshahi with a statement of truth. I was handed up during the course of the hearing a further copy of this which had been sworn as an affidavit in front of a Notary Public in California on 30 March 2022. There was also a witness statement from Tomasz Baran who claims to have witnessed Mr Patel signing the 2021 Deed on 31 March 2021.

31. Mr Halpern was instructed on 29 March 2022. It is not clear if this was simply because of Mr Challenger's illness, but this illness has at the very least affected the ability of Mr Halpern to deal with the matter in that he has not been able to discuss the case, and what happened on the last occasion the parties were before the Court, with Mr Challenger. Nonetheless, very shortly after Mr Halpern was instructed, he took the view (undoubtedly correctly in my judgment) that the receivership application was unlikely to succeed when a freezing order would serve the same purpose.

32. Accordingly, on 1 April 2022 his instructing solicitors informed Mr Patel's solicitors, Bark&co, that MSD would be seeking a freezing order against Mr Patel. Bark&co's response the same day in a 3-page letter was to object, including on the basis that the bringing of such an application would require relief from sanctions in light of the deadline I had imposed for applications to be made.

33. Mr Halpern filed his skeleton argument on 1 April 2022 in which he focussed on the application for a freezing order, effectively abandoning (although not formally withdrawing) the application for an interim receiver. The freezing order application was issued on 4 April 2022, supported by a short affidavit from Mr Denny, MSD's solicitor. This cross-referred to various pieces of evidence which were in the bundles before me on

the last occasion, including declarations that had been filed in the Delaware Arbitration on behalf of MSD.

34. As matters currently stand, there is no pleaded Defence and Counterclaim on behalf of MSD in which it positively asserts a claim that Mr Patel holds money on trust, which it is entitled to recover. This is because this claim having been brought as a Part 8 Claim, the Court's permission is required for the service of a Defence and Counterclaim. Part of the application made by MSD was for permission to serve such a document and a draft was exhibited by Ms Mirshahi. Given the nature of the relief now sought in the Points of Claim, there can be no doubt that this claim should henceforth proceed as a Part 7 Claim, a view with which all parties agree and which I ordered, and as such, permission will not be needed to serve a Defence and Counterclaim, albeit I have set a timetable for it to be served. The current draft was settled before Mr Halpern was instructed and he accepts that it is a somewhat unconventional document, which he will re-work.

35. However, the current draft pleads that Mr Patel signed both the 2008 Deed and the 2021 Deed under each of which he acknowledged that monies paid to him by Minerva Services Ltd, a BVI company ("**Minerva BVI**"), or by Baxendale Walker LLP or any other representative (as defined in the 2008 Deed) were held for the benefit of Minerva BVI or (under the 2021 Deed) its successors and assignees. In the draft counterclaim, it is pleaded that Mr Patel received £9.4 million of such monies, reliance being placed on the declaration in the Delaware arbitration by Mr Aulak, which analyses bank statements. It is pleaded that he holds these monies on trust. It is further pleaded how MSD now has the entitlement to sue for their return, by way of assignment from Minerva BVI to a Belize company, Minerva Services Ltd ("**Minerva Belize 2013**") and then from Minerva Belize 2013 to another Belize company, MSL Services Ltd ("**MSL Belize 2018**") and then by MSL Belize 2018 to MSD. The assignments now relied on are one of 4 March 2022 (i.e. after the last hearing) which purported to assign part only of the claim and then a further assignment of 1 April 2022 which assigned the remainder, thereby intending to ensure that there has been a valid legal assignment. These new assignments were entered into to address some of the problems previously identified by Mr Harty on behalf of Mr Patel with the June 2021 assignment, which Mr Harty had submitted at the March hearing was not effective.

36. Mr Harty filed his Skeleton Argument on 4 April 2022 in which he addressed the receivership application at length. He did not address the intimated freezing order, but many of the submissions he made apply equally to the freezing order application. In addition Mr Harty submitted that in light of the terms of my order of 2 March 2022 as to the timing of the making of any application, it was not open to MSD to make the freezing order application without obtaining relief from sanctions. This appeared initially to be accepted by Mr Halpern, although he subsequently retreated from this position, mainly in reaction to observations I made in the course of argument.

37. I should record that I offered Mr Harty the option of seeking an adjournment of the application if he wanted time to put in evidence in answer or needed more time to be able properly to address me on it. He considered this over the short adjournment and said he did not seek an adjournment.

Need for Relief from Sanctions

38. The order that I made on 2 March 2022 in respect of the making of applications is not restricted to applications of any particular nature, although at that stage it is fair to say that I had not envisaged that an application for an interim receiver or a freezing order application was an application which was likely to be made.

39. The "sanction", if there was indeed one included in the order, can only have been that an application issued after 18 March (subsequently extended by consent to 23 March) would not be heard at this hearing. It was not a sanction saying that no application of any nature could be brought after 23 March. The application for an interim receiver was brought within the extended time period. Mr Halpern has now expressly abandoned that application.

40. This is a somewhat strange application, being a freezing order made on notice to Mr Patel, it not being usual for a freezing order to be made on notice, as that tends to defeat the very purpose of the application for the order. Normally such an application is made without notice and the first the other party knows of it is when he is served. In the circumstances of this case, it is perfectly understandable and indeed proper that some notice should have been given of the application, albeit as I shall discuss in due course, full notice was not given of it.

41. In my judgment, my order of 2 March 2022 should not be construed so as to extend to an application for a freezing order, given the nature of the application. Accordingly, MSD did not need relief from sanctions in order for me to hear this.

Relief from sanctions

42. If I am wrong on this, applying the 3-stage test in Denton v. TH White Ltd [2014] 1 WLR 795, namely (1) the seriousness and significance of the breach; (2) why the default occurred and (3) all the circumstances of the case including CPR r 3.9(1)(a) and (b), I would grant relief from sanctions.

43. As to (1), the breach was not in my judgment serious and significant, given that this hearing was listed, the other business which had been anticipated would take place has for the most part been resolved between the parties so that this time could be used for this hearing and there has been no disruption to this litigation or to litigation generally. The basis for the

application is very similar to the application for an interim receiver, which was issued in time, and the evidence was very similar.

44. As to (2), the default has occurred because of events to do with MSD, that is to say there is no contribution by Mr Patel to the default. I do not know the full reasons, but Mr Challenger's very serious illness has played some part in this, along with a further change of solicitors. The change of counsel has, with no disrespect to Mr Challenger, brought about a more focussed analysis from Mr Halpern. It was submitted that a change of counsel cannot amount to a good reason, with reliance being placed on dicta of Carr J (as she then was) in Quah Su Ling v. Goldman Sachs International [2015] EWHC 759 (Comm) in the different context of applications for late amendments to pleadings which threaten to derail a trial. In my judgment, Mr Harty's submission on this was too broad, as each case must turn on its own facts. There may well be cases where a change of counsel could be a good reason in the sphere of relief from sanctions; it all depends on the facts of the particular case. Having said this, I cannot hold that on the evidence presented to me MSD have discharged the onus of showing there is a good reason for the default.

45. As to (3), all the circumstances of the case are such that I would grant relief, if it was necessary, notwithstanding there being no good reason for the default. I take into account (i) the nature of the application; (ii) the manner in which such applications are normally made; (iii) the fact that there was court time available to deal with this such that it would not disrupt the litigation; (iv) that if I did not hear the application, it would have to be dealt with on another occasion probably in front of another judge who does not have the background knowledge that I do about this case; (v) that the application has many features in common with the application for an interim receiver which was issued in time; (vi) that Mr Harty did not seek an adjournment to be able to file any evidence or for more time to prepare; and (vii) Mr Harty was more than capable of dealing with the application given its closeness to the application for an interim receiver which he had spent 18 pages in his Skeleton Argument addressing.

Nature of the Application

46. The application was issued one day before the hearing, albeit notice it was going to be brought had been given one working day earlier. Mr Halpern has not sought to abridge time for the hearing of the application. Accordingly, this is an application which is brought on short notice.

47. I was referred by Mr Harty to the decision of Silber J in CEF Holdings v. Mundey [2012] EWHC 1524 (QB); [2012] FSR 35 at paragraphs [180]-[183], in which he addressed an argument that because counsel for the defendants appeared on short notice and made very brief representations, the duty to give full and frank disclosure was reduced or discharged. Silber J rejected this holding that where an application is brought on short notice, the applicant remains under an obligation to comply with its full and frank disclosure

requirements even where the other party is represented. The applicant is only absolved from this duty in respect of those legal and factual matters to which the other party's representative has drawn the court's attention.

48. I agree with Mr Harty's submission that MSD remains subject to the duty of full of frank disclosure, notwithstanding Mr Harty's presence at the hearing. I note that there is no section in the supporting evidence or Mr Halpern's skeleton argument for the hearing, which addresses the question of whether full and frank disclosure has been given. Mr Halpern did not say that he had given full and frank disclosure in the way it is now traditional to be done. This is particularly surprising given the criticisms made by Tipples J in the application brought by Bay which I deal with below.

Abuse of Process

49. Mr Harty submitted that the current application is, nonetheless, an abuse of process. Although he dealt with this in the middle of his submissions on the application for the freezing order, and noting Mr Halpern's submission that this is a merits based doctrine, not a technical one, in my judgment it should be addressed first.

50. In Koza Ltd. v. Koza Altin Isletmeleri AS [2021] 1 WLR 170 at paragraph [41] Popplewell LJ stated that the abuse of process principles deriving from Henderson v. Henderson (1843) 3 Hare 100 and from Hunter v. Chief Constable of the West Midlands Police [1981] 3 WLR 906 apply to interlocutory decisions and applications. He quoted from the judgment of Nugee J (as he then was) in Holyoake v. Candy [2016] 6 Costs LR 1157 at paragraphs [13]-[17] as a helpful summary of authorities concerned with interlocutory decisions and what was thought to be a difference of approach between them. At paragraph [42] Popplewell LJ said:

> "In my judgement the tension is more apparent than real. The *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. ***Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing***. This is not a departure from the principle in Johnson v Gore Wood & Co [2002] 2 AC 1 that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in Woodhouse v Consignia plc [2002] 1 WLR 2558 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final

> hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paras 30–40 above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions." (emphasis added)

51. The basis for the abuse of process argument is that given the judgment of Tipples J refusing a freezing order in the proceedings brought by Bay in April 2021 (Bay Mining Consultants Ltd. v. Patel [2021] EWHC 1304 (QB)), it would be an abuse for Bay to have brought a further application for a freezing order. Mr Harty submits that it cannot be any different simply by reason of MSL Belize 2018 having now purported to assign the claims to a different assignee, namely MSD.

52. It is necessary to consider the application before Tipples J and her reasons for refusing to make a freezing order. The order sought was described in paragraph 4 of the judgment as "an interim injunction ordering disclosure from [Mr Patel and his partner Ms Sheppard] and restraining [Mr Patel] from disposing of certain assets". The draft order provided with the application notice bore no relation to the standard forms of freezing injunctions set out in CPR Practice Direction 25A. The application was supported by an affidavit from Mr Slater, the Third Defendant in these proceedings. He described himself as a director of Bay, which he said was the assignee of MSL Belize 2018.

53. The Judge focussed on what she described as the main issues. It is clear that there were a number of other issues or problems with the application, but she did not need to deal with them all. First, Tipples J held (at paragraphs [11]-[14]) that service had not been effective, that the application having purportedly been made on notice there had only been short notice and that the skeleton argument in support of the application was misleading on the question of service, such that there had not been full and frank disclosure (the Judge noting that there had been no section of the skeleton argument addressing the obligations of full and frank disclosure).

54. Secondly, the Judge addressed the cause of action (at paragraphs [15]-[18]) noting that the claim was based on a purported assignment from MSL Belize 2018 on the previous Friday

by email. She stated that there were "a myriad of points that could be made about the alleged assignment" but that for the purposes of the application before her, it was sufficient to rely on one. That was that the purported assignment did not comply with section 53(1)(c) of the Law of Property Act 1925 and was therefore incapable of disposing of any interest under a trust by MSL Belize 2018 to Bay, because it was not signed in writing by the assignor, MSL Belize 2018.

55. Thirdly, she dealt with the cross undertaking and damages at paragraph [19] where she said:

> "**Assuming I am wrong about my conclusion in relation to the cause of action or my analysis of the legal position**, I asked Mr Hackett to direct me to the evidence in support of a cross undertaking in damages. He responded first of all by saying that his client had not agreed to fortify the cross undertaking. That of course is not the point. There is no evidence whatsoever in the papers before me or filed in support of this application to support a cross undertaking in damages. No financial information has been provided about the Claimant at all. **There is no basis that the Court will grant any relief sought without such a cross undertaking together with evidence to show that that cross undertaking is meaningful**. In my view the Claimant's application for injunctive relief against the First and Third Defendants is hopeless and it is dismissed. Further, I certify the application as being totally without merit." (emphasis added)

56. Tipples J considered this issue independently of her conclusions on the validity of the assignment. That is to say that she would have dismissed the application on her third ground alone. This is, in my judgment, of significance when considering whether the current application is an abuse of process.

57. Assuming that Bay, having had the benefit of the judgment of Tipples J, went away and procured MSL Belize 2018 to grant a valid, that is to say compliant with section 53(1)(c) of the Law of Property Act 1925, assignment of exactly that which was covered by the purported assignment, and then made a fresh application for a freezing order offering a cross-undertaking in damages properly supported with evidence, the Court on that fresh application would have to decide whether it was an abuse of process to do so. In my judgment, such an application would amount to an abuse of process. Although there would have been a significant and material change of circumstances in one respect, namely the new assignment, as regards another, being the third of the Judge's reasons in respect of the cross undertaking in damages there would have been no change of circumstances, nor could it be said that Bay had become aware of facts which it did not know and could not reasonably have discovered at the time of the first hearing. All that would have happened would have been that Bay had got its tackle in order. There is no reason why it could not, and should not, have done so first time round. That point was sufficient on its own for Tipples J to dismiss the application. Taking into account the Court's duty to ensure efficient case management and the public interest in the best use of court resources, in my

judgment it would be an abuse for a party to come back to have another go, having rectified this omission.

58. The application before me was not made by Bay, but by MSD, on the basis of the fresh assignments in March and April 2022. It is not said on behalf of Mr Patel that those assignments fall foul of the Law of Property Act 1925. Mr Harty did raise the possibility in argument that Tipples J might have been wrong on the analysis of section 53(1)(c) because of the ability for an email signature to satisfy the requirements of being signed in writing by the assignor, so that the purported assignment in April 2021 might have amounted to an equitable assignment. The effect of this, he submitted, would be that MSL Belize 2018 could not have assigned to MSD the alleged benefits under the 2008 Deed and 2021 Deed without getting Bay to reassign those benefits to MSL Belize 2018. However, in my judgment it is not open to him to argue this on this application given the terms of the judgment of Tipples J. Rather, I proceed on the basis that the March and April assignments are effective.

59. If, as I have found, an application by Bay would have been an abuse of process, the question is whether the fact that the application before me is brought by another assignee is similarly abusive. In my judgment it is. Under the purported assignment to Bay, the recoveries were intended to be for the benefit of MSL Belize 2018. Under the March 2022 assignment to MSD, MSD is entitled to keep 10% of the recoveries with 90% being remitted to MSL Belize 2018. In paragraph 15 of Mr Denny's affidavit in support of the current application, he says that "MSL Belize 2018 first attempted to bring proceedings in England by means of an assignment to Bay … but Mrs Justice Tipples held that the assignment was defective". This was mirrored in paragraph 33 of Mr Halpern's skeleton argument for the hearing.

60. It is therefore clear, in my judgment, that the assignees are merely being used as litigation vehicles for MSL Belize 2018 to seek to recover the sums said to be owing (I note in passing that it has never been explained why MSL Belize 2018 could not have brought the proceedings in its own name). It cannot be right that a party can avoid being held to be abusing the court's process by bringing an application through one assignee, failing in that application, discontinuing those proceedings and then assigning to a new assignee before starting the whole process again including the seeking of an interim freezing order.

61. I therefore accept Mr Harty's submission that this application is an abuse of process. On that ground alone, I would dismiss the application.

62. In case I am wrong in this, I will consider the application on its merits.

Tests for the grant of injunctive relief

63. In order to obtain a freezing order, it is necessary for the applicant to show a good, arguable case, that there is a real risk that judgment would go unsatisfied by reason of the disposal

by the respondent of his assets unless he is restrained by the court from disposing of them, and that it would be just and convenient in all the circumstances to grant the freezing order (Thane Investments Ltd. v. Tomlinson [2003] EWCA Civ 1272 at [21]).

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

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

> "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
> (3) The risk of dissipation must be established separately against each respondent.
> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
> …
> (6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
> (7) Each case is fact specific and relevant factors must be looked at cumulatively."

66. One of the issues which is often relevant to the grant of a freezing injunction is delay. While delay is far from an automatic bar to freezing relief, and the mere fact of delay or that the application is first heard *inter partes* does not mean that, without more, there is no risk of dissipation: the court may be satisfied on other evidence that there is such a risk. Even if the delay demonstrates that the applicant does not consider that there is a real risk of dissipation, that is only one factor to be weighed in the balance (Madoff Securities International Ltd v. Raven [2012] All ER (Comm) 634 at [156]). Delay may, nonetheless, be an important factor (Taylor v. Khodabakhsh [2021] EWHC 655 (Ch) at [109]).

67. As to proprietary injunctions, the applicant has to show a serious issue to be tried, but it is not necessary to show any risk of dissipation of assets. It can be granted notwithstanding a delay which might have led to the refusal of a freezing injunction. The test is the American Cyanamid balance of convenience test, which has been described as taking the course which seems likely to cause the least irremediable prejudice to one party or the other (per Lord Hoffmann in National Commercial Bank Jamaica Ltd v. Olint Corpn Ltd [2009] 1 WLR 1405 at [17]). Mr Harty and Mr Halpern were in agreement that when considering the balance of convenience and exercising discretion whether to grant a proprietary injunction, delay was a factor which could and would usually be taken into account.

Evidence in Support of the Application

68. In the Court of Appeal decision in Thane Investments Ltd. v. Tomlinson (supra) at paragraphs [21] and [26], emphasis was placed on the importance of adducing solid evidence of the likelihood of dissipation of assets and that the practice direction required that to be by way of affidavit evidence, setting out the facts on which the applicant relies for the claim being made against the respondent to the freezing order application, including all material facts of which the court should be aware.

69. On this application, there was one affidavit from Graham Denny sworn on 4 April 2022. He set out the source of his information as being matters known from information provided by Ms Mirshahi, MSD's sole director and shareholder, and "*from my review of the main bundle which was before the Court on 2 March 2022 and the supplementary bundle for the forthcoming hearing … and are true to the best of my knowledge, information and belief*".

70. In his affidavit, he referred back to declarations made by among others, Mr Aulak, Mr Slater and Mr Herbert in the Delaware Arbitration. Each of those bore the equivalent of a statement of truth. On the basis of the declarations, Mr Denny said that he believed that Mr Patel had received around £9.4 million from Minerva BVI (or those acting for it) and that Mr Patel received the sums as bare trustee for Minerva BVI in accordance with the 2008 Deed, the monies being intended to be available to meet claims by clients who invested in tax-avoidance schemes that were unsuccessful.

71. Mr Denny also exhibited a number of assignments showing the interest in these sums transferring from Minerva BVI to Minerva Belize 2013 and then from Minerva Belize 2013 to MSL Belize 2018 and then from MSL Belize 2018 to MSD, concluding that MSD was now entitled to the beneficial interest in the monies said to have been advanced to Mr Patel.

72. In addition, Mr Denny provided a witness statement dated 4 April 2022, supported by a statement of truth, to deal with comments made in the skeleton argument on behalf of Mr Patel, and to show that each of the companies to which a relevant assignment had been purportedly made were in existence at the time the assignment was said to have been made.

73. There are also the witness statements from Ms Mirshahi and Mr Baran, albeit that they were initially prepared for the now abandoned application for the appointment of a receiver, on which Mr Halpern relied. Additionally, in the bundle was the 19-page witness statement of Mr Baxendale-Walker dated 21 January 2022 served in compliance with the order of Marcus Smith J of 17 December 2021, in which he set out the background to his relationship with Mr Patel, including the entering into of the 2008 Deed.

74. Mr Harty complains that this is not sufficient. Mr Denny does not claim to have spoken to anyone other than Ms Mirshahi to take any steps to check for himself that what they each say is true. Therefore, Mr Harty says that as the only affidavit in support of the freezing order application comes from Mr Denny, MSD has not complied with its duty to investigate the facts and legal issues fairly (CEF Holdings v. Mundey (supra) at [175]).

75. In my judgment, in circumstances where the solicitor instructed in this matter, Mr Denny, is relying on what he has been told by his client's sole director and shareholder, who is also an English solicitor on the Roll, and on declarations in the Delaware Arbitration and further witness statements signed under statements of truth, it cannot be said at this stage that just because Mr Denny does not claim personally to have spoken to each of the declarants and witnesses, MSD has not complied with its duty to investigate the facts and legal issues fairly. That is not to say that if a freezing order were to be made, it would not be open to Mr Patel at some later stage to make that complaint good, rather that it is not open to me to come to that conclusion at this stage simply on the basis that Mr Denny has not spoken to those individuals.

76. Mr Patel did not put in any evidence in response to Mr Denny's evidence, which is unsurprising given when the application was issued and served. Nor did he put in any evidence in reply to Mr Baxendale-Walker's witness statement. He did, however, file a witness statement by his solicitor, Mr Majid, (his fourth statement) on 1 April 2022 in response to the application for a receiver. That was a detailed statement running to 22 pages. Much of it was argument or submission, which, as judges have repeatedly said, ought not to have been included in a witness statement.

77. Putting that on one side, Mr Majid explains that Mr Patel says that he did not sign the 2021 Deed. He says that the reason that he is only saying this now, despite it appearing from Mr Majid's earlier witness statement that Mr Patel's position was that he could not remember whether he signed it, was because it had not been necessary to get full instructions from Mr Patel previously. Mr Majid says that Mr Patel received the 2021 Deed from Mr Baran in an envelope, he took the envelope inside so that he could not be seen by Mr Baran and sellotaped it shut without signing it, before handing back the sealed envelope to Mr Baran.

78. While not saying so expressly, it is implicit from Mr Majid's witness statement that someone subsequently must have forged Mr Patel's signature and Mr Baran must then have fraudulently signed as having witnessed Mr Patel's signature. As Mr Majid acknowledges, the question of whether Mr Patel signed the 2021 Deed is a matter which will have to be resolved at trial. It is not something that I can resolve at this stage. It is, nonetheless, to be noted, that in the recorded telephone conversation between Mr Patel and Mr Baxendale-Walker on the day following the date on which it is said that Mr Patel signed the 2021 Deed and in which conversation Mr Baxendale-Walker said that Mr Patel should now return the £11.5 million, Mr Patel did not respond by saying that he had not signed the 2021 Deed.

79. There is also a dispute as to whether Mr Patel signed the 2008 Deed. There is no signed copy available, that being the rationale for getting the 2021 Deed signed, according to MSD's evidence. This, again, is not an issue that I can determine at this stage one way or another.

80. Mr Patel (through Mr Harty) does accept that he has received approximately £7.5 million, not £9.4 million, but does not accept that any of the money received was from Minerva BVI or any of the assignees under the 2008 Deed or at all. He says that he received these sums from Mr Baxendale-Walker or his former business Baxendale-Walker LLP and that they were remuneration. He says that he was the subject of an investigation by HMRC because he had not declared any of this as income and that he turned to Mr Baxendale-Walker for help. He says that Mr Baxendale-Walker came up with the idea of signing the 2021 Deed in order to be able to say that the money was not his, so that he could not be liable for tax on it.

81. Mr Patel claims that he was uncomfortable about this, because he says it is not true, and in fact made a disclosure under the COP9 procedure in which he voluntarily revealed that he had under-declared his income. He has now declared the £7.5 million as income, claiming that he previously understood from Mr Baxendale-Walker that the tax on the amounts he had received had been paid at source and therefore the income did not need to be declared. There is no explanation as to what Mr Patel was doing by way of employment to earn these very substantial sums. In Mr Majid's fourth witness statement, he estimates Mr Patel's liability for unpaid tax (excluding penalties and interest) at £2.6 million. He says that Mr

Patel has paid £300,000 on account to HMRC, and will be making 2 further payments of £100,000 each by the end of April.

82. Mr Halpern took me to emails between Mr Patel and HMRC, including Mr Patel's response to an Information Notice, in which Mr Patel claimed only to have received a very small income by way of dividends for the relevant tax years and refused to provide any further information to HMRC. He did not tell HMRC at that stage that he had received very substantial income but he understood it to have been taxed at source. The contemporaneous documents are inconsistent with what Mr Patel is now claiming, but are wholly consistent (so Mr Halpern says) with the claim that the monies were held by Mr Patel on trust for Minerva BVI and its assignees.

83. On the other hand, Mr Harty took me to some of the bank statements in the bundle attached to Mr Aulak's declaration in the Delaware Arbitration, from which he said it could be seen that a number of the payments to Mr Patel were made out of the Baxendale-Walker LLP office account. Mr Harty submits that this is inconsistent with the sums transferred to Mr Patel being client monies, as he says they would have to have been held in segregated client accounts. Rather, he submits, it is consistent with the sums being paid by way of income to Mr Patel.

Good Arguable Case/Serious Issue to be Tried

84. I cannot resolve these issues on the basis of affidavit or witness evidence. I have therefore not set out in anything approaching the level of detail of the submissions made to me all of the facts and matters relied on by each side. For the purposes of this judgment, what is clear to me is that there is a good arguable case (and therefore also a serious issue to be tried) that monies received by Mr Patel via the offices of Baxendale Walker LLP and/or other "fiduciary companies" were monies paid to him pursuant to the 2008 Deed and were meant to be held on trust by Mr Patel for Minerva BVI.

85. While Mr Patel has invoked the COP9 procedure claiming the receipts to be income on which he should have paid and now wishes to pay tax, and it is said on his behalf that this shows that the monies were not held by him on trust, this is not a conclusion that I can come to at this stage. It might be held at trial that the monies were never income, but were held on trust, and the fact that Mr Patel has sought in his dealings with HMRC to categorise them many years after the event as income cannot affect that finding as to the basis on which they were paid over to him.

86. Further, there is a good arguable case (and therefore also a serious issue to be tried) that the interest in those monies has been assigned a number of times, such that the right to pursue their recovery now lies with MSD.

Risk of Dissipation – Freezing Order

87. Mr Halpern was unable to point to any recent evidence of dissipation by Mr Patel. Although the 2008 Deed granted Minerva BVI a power to appoint someone to inspect Mr Patel's bank accounts to check what money was there, at no point had Minerva BVI or its assignees ever sought to exercise that power.

88. A home was purchased in June 2013 in Mr Patel and his partner, Ms Sheppard's, joint names for £2.4 million. There is no mortgage registered against the property. Mr Halpern submitted that the purchase must have been with the money from Baxendale Walker LLP and/or other "fiduciary companies". However, he accepted that there was no evidence that Mr Patel was seeking to dispose of his property or to charge it.

89. What Mr Halpern was able to point to were Mr Patel's bank statements for the financial years ending in April 2018 and 2019 which Mr Patel had provided to Mr Baxendale-Walker in connection with his representation of Mr Patel in the initial dealings with HMRC about those tax years. They demonstrated a number of payments being made by Mr Patel of a domestic nature and some substantial cash withdrawals. In addition, there were transfers made to Ms Sheppard in this period of £580,000. No explanation of why these payments were made has been put forward.

90. As at May 2019, there was £2.1 million in Mr Patel's current account and £111,000 in his Everyday Saver account. The evidence from Mr Majid was that apart from the sums in these 2 accounts, Mr Patel has 2 other accounts with only £48,000 between them. Mr Majid does not say what sums are at present in the 2 accounts for which statements up to May 2019 were available, but implies (in paragraph 77(d) of his fourth witness statement) that the contents of those accounts will be used to meet the outstanding liability to HMRC of approximately £2.3 million (taking into account the £300,000 already paid). Mr Halpern properly does not suggest that discharging a liability to HMRC could amount to an unjustified dissipation of Mr Patel's assets.

91. There has been very significant delay in seeking to secure these sums. I have already referred to the lack of the appointment of an inspector, or any attempt to appoint one, to check what has happened to the monies said to have been paid over to Mr Patel. It was said that it was only when Mr Patel contacted Mr Baxendale-Walker in early 2021 in connection with his tax affairs and provided his bank accounts that MSL Belize 2018 became aware that Mr Patel was not holding the monies as he should have been. It has taken approximately a year since then until this application was made. While there have been attempts to obtain a freezing order in England before Tipples J, before the arbitrator in the Delaware Arbitration and in the Court of Chancery in Delaware (which was granted but then discharged), there was a substantial delay between Tipples J's judgment and the first attempt to assign to MSD and then again between that attempt and the bringing of this application.

92. If Mr Patel was determined to dissipate his assets unjustifiably, he could have done so in this period. There is no evidence he has sought to do so. The delay would not, of itself, have been determinative on the issue, but in the absence of any other solid evidence of a risk of unjustified dissipation, it is indicative that there is no such risk.

93. In my judgment, there is no solid evidence of a risk of unjustified dissipation of assets by Mr Patel. Accordingly, if I had not held that the application was an abuse of process, I would have refused to grant the relief sought on this basis.

Proprietary Injunction

94. As stated above, there is a serious issue to be tried as to whether monies received by Mr Patel via the offices of Baxendale Walker LLP and/or other "fiduciary companies" were monies paid to him pursuant to the 2008 Deed and were meant to be held on trust by Mr Patel for Minerva BVI.

95. However, as Mr Halpern realistically accepted, he cannot demonstrate on the evidence before me that the property was purchased with monies which came from this source. He sought to do so in relation to the money in the bank accounts, such as it may be, comes from that source. However, in my judgment the evidence does not support this. There are no details of what is in the bank account as of today. Mr Patel was involved in the entertainment industry for a number of years and I have no information as to whether those activities generated sums which could now be in the bank accounts.

96. Accordingly, I am not satisfied that there is a serious issue to be tried as to whether the remaining assets in Mr Patel's name are held on trust for MSL Belize 2018.

97. Even if I were satisfied that there was a serious issue to be tried, I would not have granted a proprietary injunction. In my judgment the balance of convenience comes down firmly in favour of declining to do so. Mr Patel faces a liability to HMRC which I am told is around £2.6 million of which £300,000 has so far been paid. The only means of meeting this (in part if not in full) is from the current account.

98. If the monies used to pay HMRC are paid out of this account and it is determined at trial that they were trust monies belonging to MSL Belize 2018 or MSD (following the assignments), if HMRC are put on notice of the claim by MSD, they will receive the monies as constructive trustees. HMRC will have to account to MSL Belize 2018 or MSD for this sum. HMRC will not actually lose out as the premise for the tax liability is that the monies received by Mr Patel were income, which if they are found to be held on trust will have been untrue. The income tax liability would not have been a genuine one and any payment made on account of it will be a windfall in the hands of HMRC. That is not to say that Mr Patel would not remain subject to the liability as he will have entered into a settlement

under the COP9 procedure which is likely to be fully enforceable, but he will have brought that on himself.

99. If on the other hand a proprietary injunction were to be made at this stage so that Mr Patel could not discharge the liability to HMRC, he would be subject to ongoing interest, possibly to further penalties (assuming that there will be some penalties in any event given the non-disclosure of income) and might find himself the subject of bankruptcy or other enforcement procedures. If it were to transpire at trial that MSD's claim is bad and that the monies in the bank account were not held on trust, it is difficult to see that this is the sort of damage which could be adequately compensated for under the cross-undertaking in damages (assuming that it was sufficiently fortified to the Court's satisfaction).

100. In my judgment, in this case the course of action which seems likely to cause the least irremediable prejudice to one party or the other is to decline to make a proprietary injunction.

101. The fact that I am declining to make the proprietary injunction at this stage does not mean that any monies used by Mr Patel, for example, to pay legal fees are free from any claim by MSD in due course. If they are held at trial to be trust monies, MSD may well be able to recoup them from anyone who receives payment out of these funds.

Full and Frank Disclosure

102. While it is not determinative, I should also comment on the issue of full and frank disclosure. The highest that Mr Halpern was able to put matters was that MSD were being frank that they had not been able in the time since he and his solicitors had been instructed to carry out the same level of investigation as would normally have been carried out. In my judgment that is no answer to the obligation to provide full and frank disclosure on an application of this nature. This was not an application which had to be made urgently. If more time was needed to make the proper investigations, that time should have been taken before the application was issued. Had I not dismissed the application or declined to make the orders sought on other grounds, I would have needed a lot of persuading that the limits on the ability to provide full and frank disclosure should not have led to me declining to make the orders sought as a matter of discretion.

Information Orders

103. The application also sought the usual information orders that are found in freezing orders. As I would have declined to make the orders, had I not dismissed the entire application as an abuse of process, I would not have made the information orders. In my judgment, information orders made under section 37(1) of the Senior Courts Act 1981 are usually ancillary to freezing or proprietary injunctions to ensure that those injunctions are effective (A. J. Bekhor & Co Ltd v. Bilton [1981] QB 923).

104. Mr Halpern relied on the decision of Millett J (as he then was) in Maclaine Watson & Co. Ltd. v. International Tin Council (No.2) [1987] 1 WLR 1711 at 1716G-H in support of the proposition that an order for discovery cannot only be made as an ancillary order to a freezing order. That much is undoubtedly correct; such an order can be made under section 37 in aid of execution where it appears to the court to be just and convenient to do so. That is because a judge has a duty to prevent the court being misused as far as the law allows, that is to say that he has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy, even though not previously made or expressly authorised.

105. In this case, however, there is no order which I have made which obviously requires an ancillary order for its efficacy. Rather what Mr Halpern is seeking is a free-standing information order. In my judgment, there is no jurisdiction to grant such an order even if I would have been minded to make such an order on the facts of this case (which I would not have been). The jurisdiction is not to be found in CPR rule 25.1(1)(g) which relates to assets which are or may be the subject of freezing orders. While Mr Halpern referred to the Court's equitable jurisdiction over trust property, he did not take me to any authorities to show that this went as far as he contended, namely the Court could (and should) make an information order in a case where a Court has merely determined that there was a serious issue to be tried as to whether monies had been paid to another party on trust and not made a final finding that it had been so paid.

Conclusion

106. As I announced at the conclusion of the hearing, I dismiss the application for a freezing order, proprietary order and information order as an abuse of process. If I had not dismissed it on that basis, I would have declined relief for the reasons set out above.

107. I invite the parties to agree the terms of an order to reflect this judgment. To assist in that, I do not hold that this application was totally without merit. In the event that the parties are unable to agree the terms of an order, I will deal with any disagreements on written submissions from the parties, those submissions not to exceed 3 sides of A4 paper and to be filed within 7 days of the handing down of this judgment.