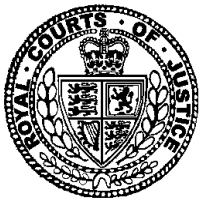

Neutral Citation Number: [2024] EWHC 1737 (ChD)

Case No: CR-2023-005663

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

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

Date: 05/07/2024

Before:

MR JUSTICE FREEDMAN

- -

Between:

DAVID VICTOR GAROFALO

Applicant/Petitioner

- and –

(1) DAVID CRISP
(2) YULIA CRISP
(3) VALOREM HOLDINGS LIMITED
(4) VALOREM CAPITAL ONE LIMITED
(5) VALOREM DISTRIBUTION LIMITED
(6) VALOREM BESPOKE LIMITED
(7) CP PARFUMS LIMITED

Respondents

- -
- -

James Bailey KC and Jessica Brooke (instructed by **Olephant Solicitors**) for the **Applicant/Petitioner**

Paul Nicholls KC (instructed by **Osborne Clarke LLP**) for the **First and Second Respondents**

Hearing dates: 9 & 10 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 2.00pm on Friday 5 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

MR JUSTICE FREEDMAN:

I Introduction

1. This is an interim application ancillary to an unfair prejudice petition under the Companies Act 2006 s.994. It concerns a group of companies (the third to seventh respondents) who are in the business of sale of perfume. There was a Relationship Agreement dated 4 January 2016 between the petitioner ("Mr Garofalo") and the first respondent ("Mr Crisp") who was a director of each company that set out how they would work together. It contained a requirement of the parties to exercise reasonable endeavours to promote the success of the business (clause 2.2), and Mr Crisp was to be allowed free rein without undue interference (clause 3.2).

2. The allegation was that Mr Crisp had caused the Respondent Companies without the knowledge or consent of Mr Garofalo to export perfume to Russia in breach of sanctions regulations. This was alleged to have been done knowing about the breach and in breach of the Relationship Agreement and in breach of fiduciary duty. This led to an application for exceptional relief, namely an ex parte injunction to remove Mr Crisp as a director and the installation of new directors selected by Mr Garofalo. The removal of Mr Crisp was said to be the only way to mitigate the threat to the reputational damage of the companies and ultimately to their viability arising from the breach of sanctions regulations. The injunction was granted by Ms Caroline Shea KC sitting as a judge of the Chancery Division ("the Deputy Judge") on 9 October 2023 ("the Order").

3. At the same time as the order for the removal of Mr Crisp, there were made orders seeking other relief, namely an imaging order in respect of electronic documents of Mr Crisp and the second respondent ("Mrs Crisp"), an order for the delivery up of books and records of the companies and an order for Mr Crisp to deliver up his passport ("the Ancillary Orders"). There was also an order allied to the removal of the directorships to prevent Mr Crisp and Mrs Crisp from doing things on behalf of named companies and going within 50, and later 100, metres of the premises.

4. There have been many affidavits and witness statements, about 30 in all. They are listed at para. 23 of the skeleton argument on behalf of Mr Garofalo and comprise four rounds of evidence. The pre-reading involved about a day, already longer than the time provided for in the skeleton arguments. At the outset of the hearing, there was a suggestion for the first time on behalf of the Petitioner that the case might last 5 days instead of the day allocated. The hearing was listed for only a day, but the Court was able to allocate a second day for the hearing. The pre-reading time was then supplemented by post-reading time after the hearing.

II The parties

5. The Respondent Companies are in the business of the manufacture, distribution and sale of luxury perfumes including a range of perfumes marketed under the brand name 'Boadicea the Victorious' and various related cosmetic articles. The business operates especially in the UK, the Gulf, Europe and the USA. The focus in this petition is about illegal exports to Russia. The UK department stores Harrods and Selfridges are key customers, as is Emirates airline.

6. The third respondent, Valorem Holdings Limited ("VHL") was incorporated on 19 February 2019 in England and Wales as the ultimate parent. Its directors were at the time of the ex parte injunction Mr Garofalo and Mr Crisp. They each own about 41.35% of the issued share capital. The remaining approximately 17.3% is held as to 13.8% by family members of Mr Crisp and friends of family members, and approximately 3.5% by Mr Richmond, an initial investor in the business.

7. The fourth respondent ("VC1") and the fifth respondent ("VDL") and the sixth respondent ("VBL") are all companies incorporated in England and Wales and are wholly owned subsidiaries of VHL. Mr Crisp was a director of each of them and Mr Garofalo was a director of the fourth respondent. The seventh respondent ("CPL") is also incorporated in England and Wales and is a subsidiary of the fourth respondent as from April 2023 when VC1 acquired the remainder of the shares held by another shareholder in CPL. Mr Crisp was a director of CPL together with VC1.

8. Mr Garofalo is a dual British and Italian national who is resident in Malta. He is an entrepreneur and investor. His current business interests include a portfolio of private equity and real estate investments and a portfolio of stocks, bonds and cash.

10. Mr Crisp is a British national and an accountant. He owns a house in Carshalton Beeches, Surrey, SM5 4EW that serves as his director's address at Companies House. He is not resident in the United Kingdom for tax purposes and for that reason cannot spend more than 45 days each year here, and this point has not been challenged.

11. Mrs Crisp is not a de jure director of any of the Companies. She is not a shareholder in any of them. She was "Head of Distribution" for the Valorem business. However, she is a director of other companies in England and Wales, and gives the Carshalton address as her address in respect of them at Companies House.

III Mr Garofalo's involvement in the business

12. Mr Garofalo first invested in the business in 2010 by paying a sum of £50,000 for a 15% shareholding. In May 2016, he paid a further sum of £250,000 to become a 41.35% shareholder, and in effect equal partners with Mr Crisp. At this time, a number of agreements were made to govern the management, investment and relationship between the various companies and directors.

13. By an executive service agreement dated 4 May 2016, VC1 appointed the First Respondent CEO at an annual salary of £100,000. By a non-executive service agreement in the form of a letter dated 4 May 2016, VC1 and the Petitioner agreed the terms on which he would act as non-executive director at an annual salary of £50,000.

14. On 4 May 2016 Mr Crisp, Mr Garofalo and VC1 entered into a "Relationship Agreement". This was not a shareholders' agreement because the 17.35% shareholders are not parties to it, but it has similar characteristics. It was amended on 3 May 2018 to add VHL as a party at a time of further restructuring in 2018. The terms of the Relationship Agreement as amended included the following:

(i) Recital F: Mr Garofalo and Mr Crisp agreed to be equal partners in VHL and VC1, and they had mutual respect and confidence in one another both individually and in their respective roles within VC1.

(ii) Clause 3.2: Mr Garofalo acknowledged that Mr Crisp worked best by being allowed free rein to develop and promote the business of the Respondent Companies without undue interference. Mr Crisp acknowledged that he valued Mr Garofalo's views as Chairman and personally as his mentor; and that on important issues Mr Garofalo wished to be consulted as Chairman and decisions made collectively by the Board.

(iii) Clause 3.2: Mr Crisp, as CEO, was to be responsible for, and entitled to manage, the day to day running of VC1 and VHL, but agreed to refer to and consult with the Petitioner regarding any "DRM", being the Director Reserved Matters listed in the Schedule.

(iv) The DRM include (i) any change in the jurisdiction where the English Companies' business is managed and controlled, and (ii) any decision which could reasonably be anticipated as adversely affecting the Profit and Loss Account and/or Balance Sheet and/or Cash-Flow of VC1, VHL or any subsidiary undertaking, by an amount equal to or greater than 10% within the next 12 months following the date when Mr Crisp first became aware, or should have become aware, that such matter could adversely affect the Respondent Companies in this way.

15. Clauses 4, 5 and 6 concern dispute resolution and deadlock provisions in respect of any dispute defined as "*a difference of dispute of whatever nature between* [Mr Garofalo] *and* [Mr Crisp] *arising under or in connection with*" VC1 or VHL, their articles, or their management. The dispute resolution procedure contained a timetable for the steps to be taken including the parties communicating for at least 6 hours over the course of 12 days.

16. The Articles of Association of VHL and VC1 were updated on 27 April 2018 and 29 November 2019 to reflect the insertion of VHL into the group above VC1.

IV Concerns regarding the management of the Respondent Companies

17. In around April 2019, Mr Garofalo became concerned about failures of the companies to take action to protect their intellectual property rights ("IPR"). This was especially in the UAE where competitors appeared to be using a bottle design of the companies for their own purposes. Mr Crisp assuaged the concern of Mr Garofalo.

18. In March 2022, according to the evidence of Mr Garofalo, Mr Garofalo and Mr Crisp agreed that the Respondent Companies would cease supplying their products to Russia, following Russia's invasion of Ukraine on 24 February 2022.

19. The IPR issue remained a concern. In June 2023, Mr Garofalo instructed Mr Philip Reed, a consultant engaged by the Respondent Companies, to provide a confidential report regarding the business operation. On 25 June 2023, Mr Reed provided his report, which gave rise to various concerns. The Respondent Companies may have been involved in a furlough fraud. The companies appeared to have been using a chemical called lilial in products which had been banned by the EU because it was toxic to fertility.

20. Central to the application for these proceedings, and their trigger, was the discovery that the business appeared to be continuing to fulfil orders placed from Russia. Mr Reed stated that he believed that VDL intended to dispatch orders through a US based distributor and that frequent Russian orders were being processed at the Greenhithe facility. Until that point, the evidence of Mr Garofalo was that he had understood that Mr Crisp was complying with their agreement reached in March 2022 that the Respondent Companies would cease trading with Russia.

21. This understanding was reinforced by the Respondent Companies' consolidated management accounts provided by Mr Crisp to Mr Garofalo which did not record income from Russia post-February 2022. The management accounts for the year ending 31 January 2023 reported that revenue from Russia for the year was £22,023 being the revenue reported for February 2022 against a budget of £1,050,000. This was consistent with the Respondent Companies having ceased supplying Russia from March 2022 onwards.

22. In the light of the concerns as reported by Mr Reed, Mr Garofalo instructed a private investigator, Mr Preusch, to conduct surveillance on Mr Crisp in the USA when he was travelling on business. On 25 July 2023 Mr Preusch struck up a conversation with Mr Crisp in a hotel in Dallas, Texas. Mr Crisp explained that the Respondent Companies' Russia market was doing really well, that he had ignored "government edicts", that the Respondent Companies' business into Russia had not changed between 2020 and 2023, and that he had been in recent weeks to visit the Respondent Companies' Russian distributor in New York. This conversation was recorded on camera in secret surveillance. It contained the following exchange:

> *"Mr Preusch: How's your Russian market?*
>
> *Mr Crisp: Can I? Don't tell anyone. We're doing really well.*
>
> *Mr Preusch: Oh, good for you.*
>
> *Mr Crisp: We ignore government edicts.*
>
> *Mr Preusch: Right, right.*
>
> *Mr Crisp: They said we shouldn't want that to trade there. So, our business in '21 was the same as 2020. It's the same as '22, the same as'23.*
>
> *Mr Preusch: Wow.*

> *Mr Crisp: But it's getting increasingly more difficult to get it there."*
>
> (emphasis added)

23. Following a requirement of the Deputy Judge on the ex parte application, Mr Garofalo has duly obtained evidence to the effect that Mr Preusch was, under the Law of Texas, entitled to record his conversation with Mr Crisp and share this recording.

24. Mr Garofalo instructed a UK-based private investigator in July 2023, Mr Gary Flood, a former detective inspector with the Metropolitan Police. Upon his suggestion, an investigations firm, Animus Associates ("Animus"), was instructed. Animus in turn engaged Moscow-based operatives to make test purchases in Russia of Boadicea the Victorious branded products in order to establish evidence as to whether the product was available in Russia. In late August 2023, operatives made purchases of the products from substantial department stores in Moscow.

25. Mr Garofalo asked Dominic Fisher (a regulatory consultant with whom he engages in respect of his business affairs) to make an initial report to the Office of Financial Sanctions Implementation on 3 August 2023.

26. On 11 August 2023 Mr Garofalo visited the Greenhithe Facility with Mr Reed, whom he asked to conduct searches of the Respondent Companies' servers, albeit a limited search in order not to raise the staff's concerns. Mr Reed discovered documents including (i) a packing list for 4 pallets of perfumes dated 14 August 2022 issued in the name of VC1 with a Russian entity, LLC UParfume, which has a Moscow address, named as the recipient, (ii) an invoice dated 15 August 2022 issued to Profun for approximately 4 pallets of luxury goods, and (iii) a Dangerous Goods Note dated 17 August 2022 identifying VC1 as the exporter and LLC Uparfume as consignee, and (iv) a sales report dated 4 August 2023 identifying a number of sales to Profun.

27. Animus and Mr Flood obtained information which revealed that Profun International Trading Group ("Profun"), an importer of goods into Russia based in New York, and a distributor linked to Mr Crisp, had imported Boadicea the Victorious perfumes and other branded goods sold by the Respondent Companies to LLC Uparfume in Moscow in 2022 and 2023. The Moscow-based operatives engaged by Animus have set out their findings in a report dated 1 September 2023 ("the Moscow Report").

28. The matter was referred to HMRC. At the time of the application for the ex parte injunction, it was understood that they were conducting a live investigation, and it was then believed that Mr Crisp would be likely to be the subject of enforcement action.

29. In the course of the inquiries about the trade with Russia, the following has been discovered, namely:

    (i) The management accounts record Russian sales by recording them in the Rest of the World category. They had previously been recorded in a Russia category. The management accounts in this form were sent to Mr Garofalo.

(ii) In email correspondence with Mr Garofalo in 2022, Mr Crisp stopped referring to sales to Russia, whereas previously, he had talked frequently about trade with Russia.

(iii) In March 2023, Mr Crisp informed the companies' in-house lawyer that the companies were not trading with Russia, which was untrue.

(iv) In an email of 9 January 2024, Mr Rodney Bellamy-Wood, an in-house lawyer for the Respondent Companies, informed Mr Garofalo that in March 2023, Mr Crisp had led him to believe that Valorem had ceased shipping products to Russia in response to purchase orders from Profun.

V The law relating to sanctions

30. It is now necessary to refer to the legislative provisions regarding sanctions insofar as they affected the Respondent Companies. The reason for this is that the case of Mr Crisp is that whilst he accepts that there has been a breach of regulations, it was an innocent mistake. He denies that it was a deliberate breach, although he accepts for the purpose of this application that there is a serious issue to be tried as to whether the breach has been deliberate.

31. He denies that a higher threshold is crossed for the purpose of an interim application and in particular that there is a strong prima facie case or that the Court can at an interim stage have a high degree of assurance that the Petitioner will succeed at trial.

(1) The Russia (Sanctions) (EU Exit) Regulations 2019

32. The legislative provisions regarding the prohibition on the trade of luxury goods came into force at 5pm on 14 April 2022 by way of the Russia (Sanctions) (EU Exit) (Amendment) (No.8) Regulations 2022 ("Amendment No.8"), which amended the legislation that had been in effect prior to the invasion of Ukraine, being the Russian (Sanctions) (EU Exit) Regulations 2019 ("the 2019 Regulations"). There were subsequent amendments not impacting on the instant matter. The ban was foreshadowed by a UK government press release on 15 March 2022, which stated that the UK was to ban shortly exports of luxury goods to Russia alongside its G7 allies.

33. The relevant provisions of the 2019 Regulations as amended are set out below. All were in effect as at 5pm on 14 April 2022 except where otherwise stated.

(i) The prohibition on the trade of luxury goods

34. The prohibition on the trade of luxury goods is set out in reg. 46B (inserted by reg. 4 of Amendment No.8), which provides:

> ***"Luxury Goods***
>
> ***46B. –***
>
> *(1) The export of luxury goods to, or for use in, Russia is prohibited.*
> *(2) A person must not directly or indirectly—*
>
> *(a) supply or deliver luxury goods from a third country to a place in Russia.*
> *(b) make luxury goods available to a person connected with Russia;*
>
> *(c) make luxury goods available for use in Russia.*
>
> …"

35. A "third country" is defined as a country that is not the United Kingdom, the Isle of Man or Russia (Reg. 46B (5)). Regulation 21(1) of the 2019 Regulations as amended defines "luxury goods" as anything specified in Schedule 3A. There are various exceptions which have no relevance to perfume. Paragraph 7 of Schedule 3A specifies "Perfumes, toilet waters and cosmetics" to be luxury goods, provided that the sales price exceeds a specified figure; for perfumes and toilet waters the sales price is £250 per 6.25 litres. The Respondent Companies' products are sold into Russia at substantially more than this sale price. There are further exceptions here too, also of no relevance to the instant matter.

36. The trade prohibition may be breached by conduct which takes place outside the UK. Regs.3(1) and (3) provide that a "*United Kingdom person*" may contravene "*a relevant prohibition*" (which includes the prohibitions on trading luxury goods) by conduct wholly or partly outside the United Kingdom. "*United Kingdom person*" is defined by adopting the definition in the Sanctions and Anti-Money Laundering Act 2018, and therefore means "*(a) a United Kingdom national, or (b) a body incorporated or constituted under the law of any part of the United Kingdom*". A "United Kingdom national" includes a British citizen.

37. The 2019 Regulations are drafted so as to prohibit participation in efforts to circumvent the effect of the regulations. Reg.55 provides that:

> ***"Circumventing etc. prohibitions.***
>
> ***55. –*** *(1) A person must not intentionally participate in activities knowing that the object or effect of them is, whether directly or indirectly –*
>
> *(a) to circumvent any of prohibitions [which include the prohibition on trading luxury goods], or*

> *(b) to enable or facilitate the contravention of any such prohibition.*
>
> *(2) …"*

38. Further reg.21(2) provides that a person is "*connected with Russia*" if, in respect of individuals, they are ordinarily resident or located in Russia, and, in respect of persons who are not individuals, they are incorporated or constituted under the law of Russia, or domiciled in Russia. Thus, the provision of goods to Russians outside Russian would also be caught.

(ii) Penalties

39. A breach of the 2019 Regulations is an offence. The offence has a maximum custodial sentence of up to 10 years and/or a fine.

40. A person who contravenes reg.46B (2) commits an offence by operation of reg.46B (3) unless they have a defence within reg.46B (4) which provides as follows:

> *"(4) A person who contravenes a prohibition in paragraph (2) commits an offence, but—*
>
> *(a) it is a defence for a person charged with the offence of contravening paragraph (2)(a)*
>
> *to show that the person did not know and had no reasonable cause to suspect that the goods were destined (or ultimately destined) for Russia;*
>
> *(b) it is a defence for a person charged with the offence of contravening paragraph (2)(b) ("P") to show that P did not know and had no reasonable cause to suspect that the person was connected with Russia;*
>
> *(c) it is a defence for a person charged with the offence of contravening paragraph (2)(c) to show that the person did not know and had no reasonable cause to suspect that the goods were for use in Russia."*

41. Further a breach of reg.55(1) (intentionally participating in activities which have as their object or effect the circumvention of the prohibitions on trade) is also an offence by operation of reg. 55(2).

42. Reg.56 makes provision regarding the standard of proof to be satisfied where a defence under reg.46B (4) is relied upon. It provides that, if evidence is adduced which is sufficient to raise an issue with respect to the defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

VI The preservation of the business of the Respondent Companies

43. Mr Garofalo instructed Jonathan Hawker, a specialist crisis communications officer to advise as to how to protect the companies. The advice of Mr Hawker was that from a public relations perspective it was essential that swift action should be taken to remove the wrongdoer from the organisation and that any other course of action would be likely to be terminal for the business. There was a very real prospect that the companies' breach of the UK legislation prohibiting trade with Russia would come to the attention of its customers and suppliers or to the public's attention generally. There was also a very real prospect that its customers would take action to cut ties with the companies and or that the companies would suffer serious reputational damage. The advice was therefore to attempt to take control of the situation by a business transition plan designed to save the business.

44. There was, in the estimation of Mr Hawker, an urgency about this. The flouting of sanctions was highly newsworthy, especially because of the luxury nature of the high-profile companies in the industry and the lack of precedent in other luxury companies for such conduct. It was imperative to have a clear distance between the company and the individual in charge when the wrong occurred. Even a short period of delay could endanger the future of the companies because of the outrage of this conduct.

45. The business had about 30 employees whose jobs would be at risk if effective action was not taken. On the basis that Mr Crisp had deliberately traded in breach of sanctions regulations and without the knowledge of Mr Garofalo, the analysis was that it would be in the best interests of VHL ("the Company") that Mr Crisp would resign as a director of the companies.

46. There is responsive evidence of Mr Scott Langham dated 23 April 2024, senior counsel of Grayling Communications. The point which he makes in a number of different ways is that the allegation about a deliberate breach of sanctions legislation had not been established: see his statement at paras. 19, 26, 27, 28a, 30a, 31 and 42. It had not been properly investigated. He would recommend a more thorough analysis of whether breaches had taken place.

47. Mr Langham accepted that the allegations (of which breaching Russian sanctions was a part) were serious and had the potential to impact on the reputation of the companies: see para.31. Where there is a case to answer, mere statements do not demonstrate the seriousness and rigour of the inquiries. In some cases, the removal of a CEO may be the only option to help restore trust in the organisation. He said that where there is deliberate wrongdoing, it may in some circumstances necessary to remove a CEO, albeit that it is not as binary as Mr Hawker suggested: see Langham paras. 41-42. He challenged that the crisis was as intense as suggested by Mr Hawker, not accepting that the trade in question was high profile.

48. Prior to the application without notice for an injunction, Mr Crisp had told Mr Garofalo that he intended to land at Gatwick Airport in the morning of 10 October 2023. Mr Garofalo scheduled a meeting with Mr Crisp at lunchtime near Victoria Station in London. It was not known how long Mr Crisp would remain in the UK. It was not known whether HMRC would act at that time. It was believed that any action against Mr Crisp whilst his laptop and his phones were outside the jurisdiction would be likely to be ineffective. The concern of Mr Garofalo was that in the event that notice of the injunction was given, then Mr Crisp might choose not to come to the UK and hand over his laptop or phones and/or that information would be wiped. This concern arose as a corollary of the illegal activities, namely that a person behaving as such would be likely to obstruct the retrieval of the information relating to the illegal activity.

VII Other allegations in addition to breach of sanctions

49. Before the Deputy Judge, there were other allegations which were made against Mr Crisp including information obtained from Mr Reed, including that:

(i) the companies may have been involved in a furlough fraud ("the Furlough Fraud Issue") comprising the receipt of furlough monies in respect of staff who were working. Mr Crisp admits that a sum of about £107,000 was received, for 14 members of staff in all, who were working and in respect of whom furlough applications were made. Mr Crisp claims that it was a mistake, and he did not know about it. Mr Garofalo's evidence filed in support of the Original Application that Mr Crisp may have made fraudulent furlough claims was confirmed by evidence that at least 14 employees who were working regular hours received about £107,000 in fraudulently obtained funds. The fraud was hidden from employees by way of doctored payslips. Mr Crisp's suggestion that "*I believed that the Companies had only claimed payments for employees who had been furloughed*" (at para. 107) is at odds with the evidence of Mrs Makwana in her statement of 9 April 2024 at paras. 23-29, who (a) was processing the furlough requests on Mr Crisp's instructions; (b) was herself working as she was processing *her own furlough paperwork on Mr Crisp's instructions*; (c) challenged Mr Crisp's instructions which she felt compelled to follow; and (d) listened to Mr Crisp explain that he, Mr Crisp, was the director and was responsible, and that Mrs Makwana was protected by employment law.

(ii) the companies appeared to be distributing products containing a substance, butylphenyl methylpropional (known as "lilial"), which had been banned by the EU on the basis that it is toxic to fertility ("the Lilial Issue"). The labels on the products containing lilial, that continued to be supplied to the market, had been altered to remove any reference to it, a process known as "overlabelling".

50. In addition to the above, it is alleged that the following has been occurring, namely:

(i) failing to comply with safety requirements and the fabrication of documents and especially a failure to conduct safety assessments and being attendant to the safety certification required. Insofar as this is evidence of a failure to attend to

important safety requirements, this is not the deliberate conduct which would necessarily justify the injunctions sought at this stage.

(ii) systemic instructions to staff to fabricate and doctor perfume bottle labels and safety certifications and conceal banned substances such as lilial, which might justify relief even at this stage. However, there is a voluminous conflict of evidence: allegations and responses of the kind which it is difficult at this stage to form a very high degree of assurance that they will be established. That is not to say that they are incapable of being relied upon in the section 994 petition.

(iii)failing to protect the business' IPR: There may have at one stage been a concern about a deliberate collaboration with a competitor, but the way that this is put following inquiries is that there has been a failure to exercise due diligence to protect the IPR. This by itself is unlikely to be a basis for the relief claimed at this stage.

51. The Deputy Judge based her judgment on the evidence relating to breach of sanctions, which in her judgment justified the making of the order sought. In this judgment, there will be considered de novo the case about the breach of sanctions, and the consequence of that evidence.

52. Her concern about other allegations were that they might be based on unresearched allegations. Since the matter was before the Deputy Judge, there is more developed evidence both in support of and in opposition to the allegations. The evidence relating to the furlough matter appears to establisha case to a much higher level than an *American Cyanamid* serious issue to be tried.

53. I do not intend to go through the evidence in this judgment in respect of the other allegations. There is voluminous evidence for and on behalf of Mr Crisp and Mrs Crisp seeking to refute the allegations made. Whilst the evidence in respect of a possible furlough fraud seems compelling even after the denials of Mr Crisp, it has not been tested by a trial. As regards the other allegations, there are numerous pages of refutations, and whilst these points appear to raise serious questions to be tried, it would be a very large exercise to assess how much, if anything, they add to the section 994 petition over and above the case about breach of sanctions on which the original injunctions were ordered. It suffices to say the following, namely:

(i) Some of the allegations are, if proven, very serious. They allege deliberately deceptive conduct in particular in respect of (a) defrauding the furlough scheme; (b) the fabrication of documents including important documents relating to the safety of the products, and (c) the concealment of lilial and other banned substances.

(ii) Some of the conduct might amount to negligence rather than deliberate misconduct which would be unlikely by itself to justify the exceptional relief in this case. Examples are the failure to protect IPR falling short of deliberate diversion of IPR e.g. to a competitor with personal benefit. Likewise, lapses in

health and safety at work or breaches of safety requirements falling short of deliberate breaches of duty, whilst serious in themselves, are in the same bracket.

(iii) There has to be caution about the allegations. Whilst serious, if this was a case investigating whether there had been breaches of contract or of fiduciary duty, they might not by themselves justify the bringing of proceedings for interim relief of the kind which has occurred in this case. This is not to undermine the nature of the case or the ability at trial to rely on this material as part of the section 994 petition.

(iv) It is even contended that the Court will have to proceed with caution about employees being asked to uncover matters under new management to bolster the case. It is not possible to make any comment about this suggestion, but the statement that careful inquiry will be required is inevitable.

(v) If it is the case that the relief in this case depends upon the threshold which is higher than *American Cyanamid*, it would require a disproportionate amount of judicial time to investigate the full extent of the evidence required to discern whether a higher threshold is established in respect of these allegations other than the breaches of sanctions. If the case fails in respect of the sanctions, then it seems doubtful on the basis of the consideration of the papers that it will be made out at this interim stage on the basis of the other parts of the case.

(vi) In the circumstances, the case must proceed on the primary basis of being by reference to the breach of Russian sanctions.

VIII The judgment on the ex parte application

54. On the application for ex parte injunctive relief, the Deputy Judge found not only that there was a serious issue to be tried, satisfying the *American Cyanamid* test, but also that there was a very high degree of assurance that Mr Garofalo would succeed at trial [56]. She found that there was an exceptionally strong *prima facie* case that there had been unfair conduct within the meaning of s.994. These conclusions were solely based upon the allegations regarding Mr and Mrs Crisp's involvement in the continued trading with Russia.

55. She found that there was exceptionally strong evidence that (i) Mr Crisp had caused the Respondent Companies' products to be sold to Russia, and (ii) Mr Crisp knew that this constituted a breach of (1) the Relationship Agreement, (2) the agreement to cease to do trade with Russia and (3) the 2019 Regulations. She found that it was highly likely that Mr Crisp was aware of the 2019 Regulations and was knowingly in breach of them. She concluded on the basis of her findings that Mr Crisp's conduct was unfair and had caused prejudice to the Respondent Companies: see the judgment at [29 and 38-44].

56. She went on to find that there was a very strong prospect that Mr Garofalo would succeed in establishing unfair prejudice and in succeeding in the claims for relief contained in the petition. In this regard she said that she would have little hesitation in

holding that Mr Garofalo was more suitable to continue the business than Mr Crisp: see the judgment at [47-49].

57. She found that the balance of convenience lay with granting the injunctive relief sought. She took account of (i) the strength of the evidence to the effect that this relief was the best course of action to take in order to ensure the viability of the business; (ii) the considered and detailed business management plan produced by Mr Garofalo; and (iii) the credentials and experience of Mr Fisher and Mr Diederich, and of Mr Garofalo himself (together "the New Management"). She found that the relief sought at trial would be frustrated if the orders were not made on an interim basis: see the judgment at [57 and 59]. In view of the nature of the Company, Mr Garofalo was unable to affect the removal of Mr Crisp having less than 50% shares in the Company, and hence the only way to effect the removal was through the court intervention ancillary to the Petition.

58. The Deputy Judge made Imaging Orders against Mr and Mrs Crisp. Her reasons for doing so included the strong prima facie case that Mr Crisp had acted in breach of duty and that Mr Garofalo would succeed in the Petition at trial. The damage to Mr Garofalo and to the Respondent Companies was already considerable and would only worsen if the Imaging Order was not made. The fear that Mr and Mrs Crisp might destroy evidence was rational and justified in view of the wrongdoing on which the Petition was predicated; in particular, Mr Crisp appeared to consider himself above the law. As regards Mrs Crisp, her relationship with Mr Crisp and her habitual use of a private email address, meant that it was reasonable to conclude that she was likely to be involved in or aware of the wrongdoing, and justified the fear that there was a real risk that she would aim to destroy evidence. Further, Mr and Mrs Crisp were afforded protection by the provision in the Imaging Orders that no disclosure or inspection would take place prior to the Return Date.

59. Preservation and delivery up orders were made on the basis that Mr Garofalo, as director of the Companies, has a common law entitlement to the Companies' books and records, and also on the basis that such orders were just and reasonable within the meaning of s.37 of the Senior Courts Act 1981 ("SCA 1981"): see the judgment at [70].

60. A passport order was made against Mr Crisp on the basis that the speed of return of his passport was in his own hands and that, if he complied with the Orders, the passport would be returned to him. The Deputy Judge found that he was a flight risk in view of his frequency of travel, the fact that he is not resident in the UK and that he had shown himself willing to sidestep and flout the law when it serves his interest: see the judgment at [76].

61. The Deputy Judge then made orders ancillary to those referred to above, including orders preventing Mr and Mrs Crisp from contacting staff of the Respondent Companies or attending within 100m of the Greenhithe Facility, these being necessary to support the operation and effect of the principal orders: see the judgment at [78].

62. The Deputy Judge referred to the cross-undertaking given by Mr Garofalo, and his evidence that he had assets in the region of £5million and she accepted that he had taken measures to sufficiently fortify the cross-undertaking in damages: see the judgment at [81].

IX Events since the injunction

63. These events are gleaned from the summary in the skeleton argument on behalf of Mr Garofalo for the return day. On 10 October 2023 Mr Crisp was arrested by HMRC on suspicion of breaching the Russian sanctions legislation and his mobile phone, iPad and laptop were confiscated.

64. On 11 October 2023, sealed copies of the Order were personally affected on Mr Crisp by the Supervising Solicitor (as defined in the Injunction at paragraph 6.5), and the New Management immediately took control of the business and the Business Transition Plan put in place. The Petition was issued on the same day. Mr Garofalo issued an application to continue the Deputy Judge's orders on 10 October 2023.

65. On 11 October 2023, Osborne Clarke informed Mr Garofalo's solicitors, Olephant Solicitors, that they were instructed to act for Mr Crisp in the matter, and, two days later, they confirmed that they were also instructed by Mrs Crisp. Mr and Mrs Crisp's employment with VC1 was terminated on 13th October 2023.

66. On 19 October 2023, the Imaging Order was executed, and various email accounts held by Mr and Mrs Crisp were imaged, as was Mr Crisp's WhatsApp account. In accordance with the terms of the Order, Mr Garofalo has not had access to the imaged data, and does not presently seek permission to access the data. He has received disclosure from the Crisps pursuant to the delivery up obligations in the Injunction, which includes material which was imaged.

67. The parties thereafter engaged in correspondence in order that Mr and Mrs Crisp comply with the Injunctive Relief ordered by the Deputy Judge and extensions were agreed to the dates for compliance. Mr Crisp sought Mr Garofalo's consent to the discharge of the Passport Order for reasons including his wish to travel to Japan on a family trip. This was agreed to on or around 30 October 2023 on the basis that he continue to comply with his disclosure obligations arising under the Injunction.

68. The Return Date has been repeatedly adjourned by agreement between the parties, despite Mr and Mrs Crisp filing evidence in opposition to the Application as long ago as 19 December 2023. The Petition was stayed until 29 February 2024 by order of Mrs Justice Joanna Smith dated 20th October 2023, and thereafter stayed generally with liberty to terminate the stay by order of Deputy ICC Judge Schaffer dated 9 January 2024.

69. HMRC has confirmed that Mr Crisp remains under criminal investigation, albeit that from 22 March 2024, he was informed that he was no longer on bail and released from having to report on 26 March 2024. In the event that there were proceedings initiated by the Crown Prosecution Service, he would be notified.

X The case of Mr Crisp regarding breaches of sanctions

70. It is accepted on behalf of Mr Crisp that there has been a breach of sanctions legislation, but it is submitted that this was a genuine and understandable error, which was shared by others. It is said that it appears that HMRC is 'not trying to unduly penalise honest

mistakes' (per HM Treasury Office of Financial Sanctions Implementation quoted by Mr. Langham, vol I, p. 49, para 30(c)). Without prejudice to this, it is accepted on his behalf that there is a case with a real prospect of success that the Petitioner has made out a serious case to be tried that (a) there have been breaches of sanctions legislation with Russia, and (b) such breaches were knowing breaches. However, it is not accepted that the higher threshold is proven, namely of a high degree of assurance that it will be proven at trial or a strong or very strong prima facie case.

71. As regards the nature of the breach, Mr Crisp's case is that any breach was due to a misunderstanding, widely shared, about the parameters of the restraints. The sanctions were limited by price: there was not an outright ban on the sale of perfumes. Mr Crisp's evidence is that he had not understood the limits that were imposed on the price per volume of perfumes. He thought that the limit applied to goods sold at a particular price level *per item* (as was the case under very similar EU rules) and not, as was in fact the case in the UK, at that price *per 6.25 litres*.

72. Mr Crisp says that he is being criticised for unguarded comments to someone whom he says was trying to entrap him. Mr Crisp's explanation is that he was trying to impress his interlocutor and was speaking of avoiding political pressure rather than evading the law.

73. Mr Crisp disputes that there was ever an agreement with Mr Garofalo not to trade with Russia and points out that there is no documentary record of it. He says that this is irreconcilable with the communications Mr Crisp sent to Mr Garofalo and others referring to trade with Russia. Mr Crisp points to a number of documents which he says show that he did not realise that there was a breach of sanctions legislation. Further, he says that he was open about the companies' activities, showing that he did not believe that sanctions applied to the companies' trading.

74. In particular, he refers to the following documents, namely:

(i) There was WhatsApp message in March 2022 from Mr Crisp to a sales manager saying:

'We are about to receive a new order from Russia … Are you happy we accept the order? So far as we are aware, we are not in breach of any sanctions as of today in the U.K.'

(ii) When he communicated with insurers in January 2023, Mr Crisp mentioned trade with Russia. He also referred in an e-mail to Mr Garofalo to insurers saying, 'we are ok to trade with Russia'.

(iii) Mr Crisp points to sharing accounting information with Mr Garofalo which showed that sales had been made to Russia and had other exchanges which showed that the companies were continuing to trade with Russia. Mr Crisp refers specifically to an e-mail of 19 July 2023 which mentioned sales to Russia. Mr Garofalo says he did not read it until after seeing the video of the conversation with Mr Preusch of 25 July 2023, but the important point is said to be that Mr Crisp sent it.

75. Mr Crisp also relies upon the fact that he has not been charged. If the case against him had been so strong, then it would have been expected that he would have been charged.

XI The case of Mr Garofalo regarding breaches of sanctions

76. These points are answered on behalf of Mr Garofalo as follows. First, it is not accepted that the mistake was an innocent mistake. On the contrary, the video evidence of the private investigator speaks for itself. I shall return to that in the section headed "discussion" below.

77. Second, the message in March 2022 was an inquiry at the time when sanctions had not yet come into force, which they did in April 2022. This email of March 2022 therefore does not advance Mr Crisp's case.

78. Third, as regards communications with the insurers in January 2023, that does not take the position any further for these reasons, namely:

    (i) It does not refer to the fact that there has been trading going on with Russia since May 2022: there is no indication that the insurers were informed about that. The expression that "we are ok to trade with Russia" appears to refer to future trading.

    (ii) In any event, what is missing in all of this is the fact that there was an exclusion in the insurance policy as of 31 January 2023 of trading with Russia generally. This indicates that (i) it was not the case that the insurers were permitting trade with Russia, and (ii) worse still, the business with Russia was being carried out without insurance.

79. Fourth, to the extent that there is a point the other way to be derived from the email of 19 July 2023, referring to trading with Russia, this has to be seen against the totality of the evidence. Until early 2022, Mr Garofalo has pointed to numerous references to sales to Russia in correspondence between Mr Garofalo and Mr Crisp: see pages 330-365 of the exhibit of DVG5 to Mr Garofalo's witness statement of 9 April 2024. That witness statement contained positive monthly comments in respect of trade with Russia in the following months, namely in September, October and November 2020, in January 2021 (referring to an increase in Russian sales of 40% over the previous year), March and May 2021, August and September 2021 and November 2021 and the sales for 2021 showing an increase of about 25% over the 2020 sales: see paras. 42-60. Once the sanctions kicked in, and following the agreement between Mr Garofalo and Mr Crisp came to an end, these references came to an end: see paras. 61-64 of the witness statement. In fact, the profits for 2022 were almost the same as the previous years, namely £1,067,157. In the next year (February to August 2023), the amount was £528,458, which annualised at £905,928, despite the absence of comment about profits from January 2022.

80. Given that the prevalence of the evidence is that the information about Russia was withheld from Mr Garofalo, then Mr Crisp mentioning, as the email did, that June had been a good month for sales for "UAE, Emirates and Russia" is likely to have been an error on the part of Mr Crisp in referring to trading with Russia. Otherwise, there is no

reason why the pattern of revealing trading with Russia did not continue in the many months from early 2022 to June 2023.

81. Fifth, the operations manager of the Respondent Companies Emma Crouch has given evidence that Mr Crisp directed her before she went to a meeting in Malta with Mr Garofalo not to say anything about trading with Russia: see para. 13 of her statement of 9 April 2024. It is not possible to tell whether the refutation of this by Mr Crisp is correct, saying that Mrs Crouch must have confused this with another conversation not relevant to the instant case, but Mrs Crouch's recollection in the light of everything else seems plausible, and the refutation less so.

82. Sixth, as noted above, in March 2023, Mr Crisp informed the companies' in-house lawyer, Mr Bellamy-Wood that the companies were not trading with Russia, which was untrue.

83. As regards the criminal process, there was sufficient in this for HMRC to have taken action by arresting Mr Crisp, retaining his laptop, and taking possessions. Although Mr Crisp was released from bail, the indication is that the matter is still being considered by the Crown Prosecution Service.

XII Discussion regarding breaches of sanctions

84. It is important to note that this discussion occurs after the case has moved on since the judgment of the Deputy Judge. Since then, there has been a plethora of witness statements and so the case is considered de novo with a new evidential complexion.

85. The deliberate nature of the breaches arises from the content of the conversation with the inquiry agent. This is compelling evidence that Mr Crisp knew that he was in breach of the sanctions legislation. Regard should be had particularly to the following, namely:

(i) Mr Crisp's statement that his trade with Russia should not be disclosed by Mr Preusch, that this was a secret;

(ii) Mr Crisp's statement that he ignores "government edicts" (i.e. the law) and that the UK government's position is that he "*shouldn't*" trade with Russia;

(iii) Mr Crisp's statement that it was increasingly difficult to trade with Russia.

86. Mr Crisp's case is that these were unguarded comments to someone who was trying to entrap him. They were certainly unguarded comments, and they were to someone who was trying to get information for a person engaging him as an inquiry agent. In that capacity, he was pretending to be something that he was not, such as to convey the impression that he might be a valuable business contact. That did not mean that the information which was being provided was any less reliable. There was not an entrapment in the sense that Mr Crisp was entering into a transaction which otherwise he might not have done.

87. Mr Crisp says that he was trying to impress. That was undoubtedly so, but that does not detract from the content of what he was saying. He says that he was speaking of avoiding political pressure rather than evading the law. The words on their face are not about a recognition of political pressure. The reference is explicit that "we ignore government edicts". This clearly means the law and the UK government position that they "shouldn't" trade with Russia.

88. The reference to it becoming increasingly more difficult to get it there does not in the context of the preceding words mean avoiding political pressure, even if it could have had that connotation in a different context. Whatever he might say at a trial, on the information before the Court, at this stage there is a very high degree of assurance provided that he was admitting to being in breach of sanctions legislation.

89. As regards the alleged openness of Mr Crisp in January 2023 in communications with Mr Garofalo about the insurance broker saying that they could trade with Russia, the answer is as follows. Mr Garofalo did not think that Mr Crisp was being open about trading with Russia, but rather that Mr Crisp was seeking to persuade him to resume sales to Russia. In fact, he was not being open because he did not communicate the correspondence with the insurance broker (Gallagher) at that stage, and the exclusion about trade to Russia. It therefore followed that Mr Crisp effected trade with Russia without insurance being in place. This cannot have escaped him. There is no evidence that this was communicated to Mr Garofalo, or of how he could have exposed the companies to risks that come from uninsured trading.

90. There are other features which contradict a case about openness. In particular, there is the way trading in Russia was removed from the headlines of the management accounts by labelling as "Rest of the World" a large amount of trading previously identified as Russia. Mr Crisp could have expected that Mr Garofalo was only looking at the big picture. There was no sensible reason to change the reporting from Russia as an entity on its own to lump it into Rest of the World.

91. Mr Crisp's explanation is that it followed WhatsApp messages between him and Mr Garofalo about negativity about trade with Russia in the light of the events in Ukraine. The suggestion is that the change occurred in case accounts were requested by the bank at any stage: see Mr Crisp's witness statement of 19 December 2023 at para. 66. This itself was a form of concealment. In any event, the explanation seems contrived, coming as it does at the very time when the sanctions legislation was about to make the continuation of trading with Russia illegal.

92. It is much more plausible that this was intended to conceal the position generally including from Mr Garofalo. The management accounts show each month after February 2022 that there was no trading with Russia, but that there was trading with ROW, meaning the Rest of the World. Mr Garofalo expressed in his witness statement of 9 April 2023 at para. 72 that he was 'flabbergasted' by Mr Crisp's explanation that the conversation about negativity about trade with Russia led to the management accounts being manipulated so as to conceal trading with Russia under the category of ROW.

93. The evidence of Ms Makwana, the financial controller of the Respondent Companies (at paras. 17 and 18) is that in late April or early May 2022, she had a telephone conversation with Mr Crisp in which he instructed her to change the management

accounts going forward, so as (i) to record all Russian sales under the "ROW" tab, and (ii) to remove the Russian sales and costs from the four spreadsheets in which they were previously recorded (P&L, LY Comp, Russia, and Russian Trend). This was before she had produced the March 2022 management accounts.

94. In addition to the above, the statements of Mr Crisp about his lack of knowledge are unlikely to be correct, albeit that the question as to whether this was true is for trial. Mr Crisp's evidence is that he was aware that in March 2022 there was sanctions legislation in place. Further, in May 2022, Harrods sent to Mr Crisp a warning about trading with Russia, including a hyperlink to government legislation and offered to provide support if the reader had further questions about the UK regulations. Other communications were referred to of April 2022 from UK FT and Morgan Lewis which did not show that it was lawful to carry out business that would then ensue with Russia. There were hyperlinks which he claims that he did not look at, which is difficult to accept as true.

95. If he was intending to find out the true position in respect of something important for the companies, then he would be expected to seek legal advice. His failure to seek legal advice on this point is revealing. He could have consulted the in-house lawyer Mr Bellamy-Wood, and he would have been expected to do so rather than rely on his own research. He could have consulted with the outside solicitors for the companies, and he would have been expected to do so if Mr Bellamy-Wood had not been able to provide the answer, but he evidently did not do so. It was so obvious that he would have so consulted that, consistently with the recording with the inquiry agent, his failure to do so indicates that he knew that such trading was in breach of what he called "government edicts".

96. Mr Crisp has referred to a different regime of sanctions of the EU, but there was no reason for him to be confused between UK sanctions and EU sanctions. Mr Crisp referred to an email involving a possible order in March 2022 involving Russia, but that was before the advent of the sanctions on 14 April 2022: see Mr Crisp's statement dated 19 December 2023 at paras. 43-46. Mr Crisp did not take the legal advice available both from within and outside. When the importance of acceding to sanctions legislation was abundantly apparent, it is difficult to give any credence to the suggestion of Mr Crisp was making an innocent mistake.

97. Whilst not making findings in respect of each of the other allegations as being a basis for the petition, the evidence about furlough is strong evidence of dishonesty on the part of Mr Crisp. This is not to say that there is a final finding of dishonesty, because that must be a matter for trial. Nonetheless, the Court is entitled to take into account the strength of the evidence of dishonesty in respect of furlough in the evaluation of the reliability or otherwise of Mr Crisp's evidence regarding his having made an innocent mistake regarding trading with Russia.

98. In all the circumstances, I am satisfied beyond that which is conceded that there is a strong *prima facie* case that Mr Crisp traded with Russia knowing that this was in breach of Regulations. On the basis of those findings alone, and without reference to the other allegations, there is a strong *prima facie* evidential basis for the allegations that Mr Crisp was in breach of the Relationship Agreement, his fiduciary duties, the Russia Agreement, and his statutory duties as a director and that it was unfair. Recognising that these allegations remain to be proven at a trial or final hearing of the

petition, at this stage, the Court has a high degree of assurance that they will be made out at a trial or final hearing.

XIII Was without notice relief required?

99. There are consequences which follow from the assessment of the case relating to the Russian sanctions allegation. They are relevant to the following issues, namely:

(i) whether ex parte relief was required;

(ii) whether a removal of a directorship was justified at an interim stage.

In this part of the judgment, there will be considered the first of those issues. There will also be considered in respect of the Ancillary Orders whether the Court should adjourn issues regarding their discharge or continuation to trial or until further order.

100. This can only be justified in circumstances where the giving of notice may lead to a defendant taking advantage of the notice period in some way to frustrate the relief which is sought or where there is not enough time to give notice because the apprehended event is about to happen: see CPR 23.9 and CPR PD23A para. 3 and in particular that *"3. An application may be made without serving an application notice only: (1) where there is exceptional urgency, (2) where the overriding objective is best furthered by doing so…".*

101. In the instant case, Mr Garofalo has been able to justify making the application without notice. If notice had been given, there was the obvious danger that Mr Crisp would decide not to come to the UK on the basis of wanting to avoid a prosecution or not wanting to have to answer for his actions. He was no longer domiciled in the UK. If that were to occur, he would not have provided his laptop to the authorities. That would have affected the ability of Mr Garofalo to obtain the information required in order to appreciate the full extent of such trading and of the knowledge of Mr Crisp in this regard. There was a very real risk that by giving notice, the ability to get hold of the laptop and being able to get answers to questions and to get effective delivery up orders would have been lost.

102. This was clearly expressed by the Deputy Judge at [24] of her judgment where she summarised the point as follows:

> *"If the First Respondent were to be forewarned either of this Application or of the HMRC investigation the Petitioner fears he would cancel his visit to the United Kingdom, thus creating considerable difficulties as regards service. The effect of any orders that were made after that point in time would be compromised, jeopardising the damage limitation measures the Petitioner has been advised to take."*

103. The submission was made on behalf of Mr Crisp that the injunction could have been sought on notice without tipping off about the HMRC inquiry and possible imminent

arrest. In my judgment, that would not have been realistic since the intended actions of the HMRC were an integral aspect to the application and to the history at the point of issue of the petition. It was rightly, as Mr Bailey KC put it, at the front and centre of the application: see the first skeleton on behalf of Mr Garofalo at [5-9] and [14].

104. In addition to the need to move without notice in order not to tip off Mr Crisp about the imminent arrest, on the basis of a strong *prima facie* case of deliberate illegality about sanctions and attempting to conceal matters in the management accounts, there was reason to fear that Mr Crisp would without more destroy, conceal or interfere with records of the English Companies. Such books and records of the companies were required in order to be able to uncover the full extent of the Russian operations. It was also necessary to seek such documents from Mrs Crisp because of concerns that she would be involved in such a business being a Russian national, having been born in Kazakhstan, and for whom Russian was her first language. Without more evidence, she could be expected to be loyal to her husband. Further, there is a good argument to the effect that the material sought is company property in any event. The loss of those materials would be very damaging to the business with respect to business continuity. The passport order was required in order to ensure that there would be compliance with the disclosure requirements.

105. I am at this stage satisfied that it was justified to move without notice, bearing in mind that there was a strong *prima facie* case about the illegality in connection with sanctions. The effect was that the Deputy Judge took the view (a) that such information was required in principle, (b) there was a serious danger that it would be withheld and/or concealed if there was notice. If notice had been given, there was good reason to believe that Mr Crisp may not return to the UK.

106. It was submitted on behalf of Mr Crisp that the orders sought and obtained were disproportionate and that such orders would not have been obtained in the event that the Court had been referred to *Lock v Beswick International plc* [1989] 1 WLR 1268: see the skeleton for Mr Crisp and Mrs Crisp at [51]. This was expressed not as a breach of the duty to make full and frank disclosure, but as a challenge to the orders on the ground of proportionality. In fact, there was reference to the appropriate form of disclosure: see the skeleton on behalf of Mr Garofalo at paras. 82-93, and at [90] where there was express reference to *Lock v Beswick International plc*.

107. It could be said that when he returned, HM Revenue and Customs could be expected to arrest Mr Crisp and to obtain from him these documents. The answer to this is that that would not necessarily occur, and it was important for Mr Garofalo to have the orders of the Court to ensure that information would be obtained either in case HM Revenue and Customs did not take the action expected or to the extent that they did not obtain all of the information required for the Respondent Companies. For these reasons, it was justified to make the application without notice.

108. The Court indicated during the hearing that it might not be necessary for the Court to make rulings about these Ancillary Orders at this stage. That is because they have been fully executed in the sense that the documents have been delivered up, the documents imaged are safe and with the supervising solicitor and there is no need to decide at this stage what is to be handed over for inspection. The parties did not object to this indication, perhaps conscious that there was a lot of material to consider without this in the course of the hearing. In any event, it is not, in my judgment, necessary at this stage

to make a final ruling on the Ancillary Orders comprising the orders for the delivery up, Imaging Order, the provision of information and the passport orders.

109. Various documents have been produced under the delivery order and the Imaging Order has been carried out so as to preserve electronic documents. These documents have been taken into the possession of the supervising solicitor and have not at this stage been handed over to Mr Garofalo or his solicitors. The required information has been provided. As regards the passport order, the passports were taken, but they have been returned following the execution of the orders about delivery up, the Imaging Order and the provision of the information.

110. There are continuing negative injunctions, but they are to facilitate the change in the management of the Respondent Companies as directed by the order of the Deputy Judge. They are ancillary to the change of management order and not to the ancillary disclosure of information orders.

111. It therefore follows that as regards the Ancillary Orders in the nature of the provision and preservation of information, they are executed, or insofar as there is a further stage to them for the handing over of the information, that has not arisen and is not about to arise.

112. The Court is entitled in these circumstances to exercise a discretion not to deal with whether the Ancillary Orders were properly ordered until a later stage which may be a trial or consequential upon findings at the trial. In *Booker McConnell plc and Another v. Placow and Others [1985] R.P.C. 425*, the Court of Appeal considered the timing of the hearing of an application for the continuation or discharge of executed orders. At p.435, Kerr L.J. indicated that only exceptionally should the court entertain an immediate application for a discharge of a search order which has been fully executed, and that ordinarily such applications should be dealt with at the trial. On the other hand, Dillon L.J. said, at p.443, that it was essentially a matter for the discretion of the judge before whom the immediate application came as to whether to deal with it or adjourn it to the trial. I have approached the matter on the basis that the timing of when such an application is to be heard is a matter for the discretion of the judge as to whether to deal with it or adjourn it to the trial.

113. The following factors indicate that these matters should be adjourned to trial or to a later stage for so long as no further order is required in respect of them. This is for the following reasons, namely:

(i) the orders are fully executed to the extent that no further action is required as of now or in the immediate future;

(ii) there is no separate application to discharge the orders based on a failure to make full and frank disclosure as an independent ground from the challenge on the merits of the application as a whole;

(iii) the primary reputational concerns arose out of the change of management order rather than the Ancillary Orders;

(iv) the consideration of these Ancillary Orders at trial will be more informed than a consideration at this stage, and there is no interim urgency which has been identified;

(v) there are benefits for all parties about deferring such consideration. At trial, there will be a more informed ability to adjudicate upon whether the Ancillary Orders should fall away either with the section 994 application more generally or because in the context of the findings at trial, they were considered unnecessary;

(vi) the issue of substance whether to enforce the cross-undertaking should be decided at the trial on the basis of all the evidence then available.

114. For these reasons, any issue about the discharge or continuation of the other Ancillary Orders will be adjourned to trial with liberty to apply to restore in the event for example that there is an issue about the documents being released from the supervising solicitor at an earlier stage. The Court would at that stage consider whether it was appropriate to hear such an application prior to trial.

XIV Unfair prejudice relief

115. Thus far, the analysis has been whether Mr Crisp in particular was causing or procuring the companies to trade without sanctions knowing that such trading was illegal. The next stage of the judgment is to consider whether this conduct amounted to unfairly prejudicial conduct, and the appropriate remedy for such conduct at an interim stage.

116. I respectfully adopt what the Deputy Judge said about this in her judgment, which has not been controversial. She said the following:

> *"Unfair Prejudice*
>
> *To invoke the relief available under a s.994 petition, it must be established that the affairs of the company have been conducted in a matter which is unfair and that this conduct, or its results, have prejudiced the interests of the petitioner of or the shareholders generally.*
>
> *In establishing prejudice, a petitioner must show that he is substantially in a worse position as a result of the unfair conduct: Hollington on Shareholders' Rights 9th Edition at 7-01, 7-28, 7-33 and 7-57*[1].
>
> *The concept of unfair prejudice must be understood within the context of company law; non-compliance with respondent shareholders' duties will generally indicate that unfair prejudice*

[1] The 10th Edition has since been published with the same paragraphs supporting the same proposition.

has occurred: see Arden LJ (as she then was) in Re Tobian Properties Ltd [2013] Bus LR 753, at [21].

The company affairs referred to in s.994 can include the affairs of wholly-owned subsidiaries with common directors if the affairs of the subsidiary are being conducted in a manner which damages the subsidiary and so the value of the holding company: per David Richards J (as he then was) in Re Coroin [2012] EXHC 2343 at [628]; Re Canterbury Travels (London) Ltd [2010] EWHC 1464 (Ch) at [18] [19].

Equitable principles are also invoked by the petitioner. There are a number of circumstances in which the role of equitable principles arises, including an association formed or continued on the basis of a personal relationship involving mutual confidence: Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379D-G. Also relied on are directors' duties as set out in ss. 171-177 of the 2006 Act, in particular, the requirements that:

(1) a director must act in accordance with the company's constitution and only exercise their powers for the purposes for which they are conferred (s.171);

(2) a director must act in the way s/he considers, in good faith, would be most likely to promote the success of the company (s.172).

(3) a director must exercise reasonable care, skill and diligence (s.174).”

XV Injunctive relief

(a) The power to make a change of management order

117. As the Deputy Judge rightly addressed, and as I do , borrowing some of her language, the first question is whether the court has the power to order the interim relief sought, in terms of the removal of the First Respondent as director of the English and appointment of others in his place. The power to grant interim relief in support of a s.994 petition arises under s.37 SCA 1981 under which the Court has power to make interlocutory orders by way of injunction, or the appointment of a receiver, in all cases in which it appears to be just and convenient to do so. The removal of directors by way of interim relief had been recognised as relief that is capable of being granted in certain circumstances: *Re Premiere Care Holdings Ltd* [2021] EWHC 1595.

118. The test is whether it is just and convenient to grant an order, although in the ordinary case intrusion should be kept to the minimum of what the court considers necessary and appropriate: *Re Premiere Care Holdings Ltd* [2021] EWHC 1595 (at [55]). Whilst the

Court was not referred to any case in this jurisdiction where such an order had been made in a section 994 petition, reference was made to a decision of a Hong Kong court in which interim relief introducing new directors in place of an existing director had been granted: see *Shih-Hua Investment Co. Ltd v Zhangaidong and others* [2017] 3 HKC 393 (Mr Justice Anthony Chan in the First Instance Court). This kind of order, referred to as a reconstitution order, was in the context of a successful and profitable trading company. The underlying reasoning was that the Court had a power to appoint a receiver, but that would give rise to a perception in the market of insolvency or a business crisis, and the receivers would not hit the ground running as they would have to familiarise themselves with the business.

119. It is important to note that such an order was described as exceptional in the *Shih-Hua* case. This would be particularly so on a without notice application. The reasons for this can be gleaned in part from the case of *Re Premiere Care Holdings Ltd*, where the Deputy Judge (Mr Hugh Sims KC), having recognised the jurisdiction, refused to exercise it for the following reasons among others, namely:

(i) intrusion in the internal affairs of companies by order of the court should be kept to a minimum;

(ii) such an interim order was inconsistent with the accepted position that each director was entitled to participate in management;

(iii) there was uncertainty as to what would be the final result after the judgment and who would end up in the overall control of the companies;

(iv) it was more appropriate to address concerns about the running of the companies by requiring undertakings or granting interim injunctions in respect of the particular issues raised.

120. As regards the last of those points, an injunction is a flexible remedy such that a petitioner could be protected by a variety of other orders designed to preserve the pre-existing possession until trial. Generally, on a s.994 petition it is desirable to preserve the *status quo*, or not change it more than is absolutely necessary, although this guideline only seems to be important if a change in the *status quo* would "*affect the remedy which may be available*": *Pringle v Callard* [2008] 2 B.C.L.C. 505 at [24]-[26]. In that case at [33], Arden LJ said the following:

> *"In essence it is contrary to principle to impose a director on a company. It is highly impractical so to do in any event where there are disputes between the directors or indeed, as here, allegations of improper conduct. Accordingly, the court would have to be extraordinarily cautious before imposing a director on a company by way of an interim remedy, but as I have said it is not necessary to decide that point."*

121. It was submitted by Mr Nicholls KC on behalf of Mr Crisp that the removal of a director is an extraordinary order ancillary to a section 994 unfair prejudice petition. This is for the following reasons, namely:

(i) A usual interim order is to preserve the *status quo*. The Order granted is not just the removal of a director. It changes the operation and control of the company. Whilst not the ultimate final relief, it takes the parties some of the way down the line to a buyout which would be the final result of the petition.

(ii) The starting point of a section 994 petition is to consider the parties' conduct against the contractual arrangements: see *O'Neill v Phillips* [1999] UKHL 24, [1999] 1 WLR 1092. The contractual arrangements of these parties were that Mr Crisp would operate the business without undue interference from Mr Garofalo. This was being turned on its head by the order.

(iii) The dispute resolution procedure contained a timetable for the steps to be taken including the parties communicating for at least 6 hours over the course of 12 days. That might militate against without notice relief.

(iv) The order was doing this at the behest of another minority shareholder and was potentially against the wishes of the majority of the shareholders of the Company, particularly bearing in mind the minority shareholders who were members of Mr Crisp's wider family.

(v) A very common reason for an unfair prejudice petition is that the majority is excluding the minority from management of the company. The removal of a director by court order might be the court itself imposing an order amounting to unfair prejudice.

(vi) There could have been simply an injunction to prevent any further dealings with Russia and provision of detailed information in respect of such trading.

122. There has not been identified an authority in this jurisdiction before this case in which an ancillary order was made on a section 994 petition or in legislation which preceded it removing a director and replacing them with another director, whether on a without notice application or at all. That is not to say that it cannot be justified in principle.

(b) The possibility of a more graduated order

123. The effect of the foregoing is to raise the question as to whether it would have sufficed in this case to have had an injunction in respect of the particular issues in this case e.g. an injunction to restrain Mr Crisp from trading with Russia or acting in breach of sanction legislation and to compel him to provide information regarding such trading. On this basis, he would have remained a director until the holding of say a speedy trial. In this way, the *status quo* would not be changed, the intrusion in the affairs of the

companies would have been kept to a minimum and the accepted position of Mr Crisp in the participation of management would not have been brought to an end.

124. The submission of Mr Crisp is that the Court could have taken a less invasive approach e.g. to involve Mr Garofalo more closely in the business. It is said that it was wrong to alter or disturb the position of the company more than was absolutely essential between the presentation of the petition and the hearing, all as part of the *American Cyanamid* principle of preserving the *status quo*: see *Re A Company* (002612 of 1984) [1985] BCLC 80,82 and see also *Premiere Care Holdings* above. It is said that this would have reflected the content of the Relationship Agreement without having the effect of the Order of the Deputy Judge: see the skeleton argument on behalf of Mr Crisp and Mrs Crisp at paras. 67-68. It is said that this allowed a minority shareholder to prevail over the majority, and that the composition of the board should be a matter for the shareholders: see paras. 69-70 of the same skeleton. As will be shown below, the evidence justified the making of a change of management order on a without notice application: see the reasoning in the section "XVI Is the threshold for a change of management order satisfied in this case?" at para. 137 and following below.

(c) The appropriate threshold

125. There are orders which are made which are particularly invasive at an interim stage in litigation. One of those orders is the search and seizure order, where having regard to the invasive nature of the order, the Court requires a very strong prima facie case before making such an order. An Imaging Order is a modern version of the search and seizure order, the former having its origin around physical documents, and the latter being around electronic documents. Another order where a high standard is also required is where the relief granted at the without notice or interim stage might be dispositive of the case as a whole: see *NWL Limited v Woods* [1979] 1 W.L.R. 1294.

126. Likewise, in the case of a mandatory order, the Court requires a high degree of assurance that the applicant is likely to succeed at trial because the risk of injustice is usually higher after a defendant is required to do something: see *Nottingham Building Society v Eurodynamics Systems plc* [1993] FSR 468. In that case, Chadwick J (as he then was) said:

> *"In my view, the principles to be applied are these: first this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong. Secondly, when considering whether to grant a mandatory injunction, the court 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, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does have a high degree of assurance that the claimant will be able to establish this right at a trial. That is because the greater the degree of assurance the claimant will ultimately establish is right, the less will be the risk of injustice*

> *if the injunction is granted. Fourthly, but even where the court is unable to feel a high degree of assurance that the claimant will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist whether risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted."*

127. In referring to the least risk of injustice, Chadwick J was referring back to the formulation of Hoffmann J (as he then was) in *Films Rover International v. Cannon Film Cells Ltd* [1987] 1 W.L.R. 670, who observed, at page 680E:

> *"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for interlocutory injunctions are derived from this principle."*

128. In her judgment, whilst referring to American Cyanamid and the serious issue to be tried, the Deputy Judge then applied a test of an exceptionally strong prima facie case in respect of the imaging and delivery up orders, and of a strong prima facie case in respect of the change of management order.

129. In the course of written argument, namely a supplementary submission dated 13 May 2024, it was submitted on behalf of Mr Garofalo that the *American Cyanamid* threshold of serious issue to be tried is appropriate. It was submitted on behalf of Mr Garofalo that the change of management order did not involve a mandatory order, but only a prohibitory order, and so only a serious issue to be tried was required. Further, insofar as there were requirements to hand over information to new management (paras. 27.2.4 and 27.2.5), they are no longer required. Thus, it was submitted that to the extent that the Deputy Judge applied a higher test, namely a strong prima facie case or high degree of assurance, this was strictly unnecessary.

130. In the submissions on behalf of Mr Crisp and Mrs Crisp, whilst accepting the use of the serious issue to be tried test, a closer look at the merits was appropriate. In the skeleton argument at paras. 56-57, the following was submitted:

> *56. It is accepted that the question for the Judge at this stage was the well-known American Cyanamid test whether there was a serious issue to be tried and, if so, whether the balance of convenience favours the grant or refusal of relief. However, in the*

> *case where the relief sought is tantamount to being final relief, the Court may need to take a closer look at the merits of the case and not confine itself to considering whether there is a serious issue to be tried: Lansing Linde v Kerr [1991] 1 WLR 251, 258; MI Squared v King [2022] 2 BCLC 279, para 10.*
>
> *57. It is also the case that the relief sought is a mandatory injunction. It is well settled that the courts are more cautious about granting mandatory than prohibitory injunctions."*

131. In *MI Squared v King* above, Foxton J at [10] used the language that *"in cases in which the decision whether or not to grant an injunction will effectively be determinative of the application, the court will look more closely at the relative merits of the parties' positions, rather than simply asking whether the applicant has shown a serious issue to be tried."*

132. The position is hybrid in this case. The interim order is not determinative of the application in the petition in the sense that it does not lead automatically to an order whereby Mr Garofalo buys out the shares of Mr Crisp. In the instant case, Mr Crisp has friends and family having together with him a majority of the company, and there is a possibility is that Mr Crisp might acquire the shares of Mr Garofalo, albeit that at the time of the hearing, some seven months after the order, Mr Crisp had not formed or formulated such an intention. Given the effective relief sought is that Mr Garofalo should have an order to buy out Mr Crisp, whilst the order does not have that effect, it can be said that the exclusion of Mr Crisp pending the hearing of the petition enhances the chances of Mr Garofalo obtaining such relief. It also reduces the chance of Mr Crisp obtaining an order whereby he obtains an order to buy out Mr Garofalo if he becomes desirous of such an order.

133. It is possible that the decision of the Deputy Judge is to be seen in the context of her order being both in the nature of an imaging/delivery up order and a change of management order. It may have been in that context that the threshold for the former infected the threshold that she applied for the latter. Whilst that is possible, an enhanced threshold over and above the serious issue to be tried test was, in my judgment, appropriate in the case. The reasons for this are as follows:

(i) This was an exceptional order which was going to change the *status quo* of the person who was in day-to-day charge of the companies and was having an immediate impact on the relationship of the parties in the Relationship Agreement. I am fortified in this reasoning by the rarity of a case involving an interim order for the reorganisation of the boards of companies with a heavy starting point of not intruding in the management structure of a company.

(ii) The need for caution was particularly great given the fact that the unusual application was made originally on a without notice basis.

(iii) Whilst it may not have been in large part a mandatory order, it was analogous in that the order was one which *"may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action".*

(iv) Just as Chadwick J in the case of *Nottingham Building Society v Eurodynamics Systems plc* had in mind the possibility that a high degree of assurance may not have to be proven in every case of an interim mandatory action, so in an appropriate case, a high degree of assurance might be required in a case of what as a matter of form is still an interim prohibitory order.

(v) The need to be guided more by the injustice ensuing from the "*risk that the court may make the "wrong" decision"* than by the form of the injunction is apparent from the *Film Rover* case. Whilst that might be directed more to the balance of convenience than the threshold for grant of an injunction, in a case as unusual and as invasive as the order in this case, a higher threshold might be required. It was a matter of form and not substance that this was in effect a mandatory injunction so transformative of the *status quo*.

(vi) There is also an analogy with the case of *NWL Limited v Woods*: whilst this was not the grant of substantially what was sought at trial by way of an interim order (in which case a standard higher than the *American Cyanamid* threshold was appropriate), it was an injunction that was taking Mr Crisp significantly further along the path to a buy-out than an injunction simply holding the ring to trial.

134. For these reasons, I have applied a higher threshold than a serious issue to be tried. I have applied the high degree of assurance test, namely that Mr Garofalo will succeed at trial. I mention a high degree of assurance because the fulfilment of this test resonates with the desire to make an order which carries the least risk of injustice. Whilst I have adopted some of the reasoning of the Deputy Judge, I have been mindful that the Court is considering the application de novo. The evidential lie of the land is greater given the fact that the evidence has moved on considerably since the without notice application. The question is whether a higher threshold is satisfied in this case.

135. It is not clear the extent to which a strong prima facie case is different. As noted, this might have had its origin in the Imaging Order. However, insofar as the Deputy Judge applied it, it is significant because if the Court were to find in its de novo assessment that the Deputy Judge had not come to the correct conclusion, then the concern might be that the Petitioner obtained an unfair advantage by the order made. I have therefore in the alternative to the higher threshold of a high degree of assurance also considered whether there is and was a strong prima facie case.

XVI Is the threshold for a change of management order satisfied in this case?

136. I refer to the section above headed "Discussion about breach of sanctions". This contains an analysis not limited to the evidence before the Deputy Judge, but with the benefit of the various rounds of evidence from numerous sources after the judgment of the Deputy Judge. Even with all the evidence which came thereafter, I came to similar reasoning to that of the Deputy Judge.

137. On the evidence before the Court, there is a high degree of assurance that there has been unfair conduct within the meaning of s.994. The evidence shows to a high probative degree that Mr Crisp has been causing the Respondent Companies' products to be sold to Russia. I refer to the following evidence:

(i) the statements made by Mr Crisp to Mr Preusch during the conversation recorded in the hotel, to the effect that the sales income from Russia since the epidemic had held up at pre-pandemic levels;

(ii) the paperwork uncovered by Mr Reed and Mr Garofalo, which shows invoices, despatch notes and sales reports for products to be despatched to Russia from the Greenhithe Facility in 2022 and also in August 2023;

(iii) the reports form the Animus operatives that the English Companies' products were on sale in Russian retail outlets as recently as August 2023.

138. The Deputy Judge considered the status, in particular the admissibility, of the video evidence. Mr Preusch in his affidavit asserts that he did not act in contravention of any enactment of United States Federal Law nor of the Law of Texas, where the conversation was recorded. He states that he is authorised to share the recording under section 4(c) of the Texas Penal Code, section 16.02, which provides that it is an affirmative defence to prosecution if one of the parties to the communication has given prior consent to the interception (which Mr Preusch confirms that he did and does). The Deputy Judge required that these matters be confirmed by evidence as to foreign law, which has now been done.

139. There is a high degree of assurance that Mr Crisp knew that despatching products to Russia was a breach of (1) the Relationship Agreement, (2) the Russia Agreement, and (3) the 2019 Regulations. The first and second of those operate together: clause 4 of the Relationship Agreement expressly refers to the importance of the personal relationship of Mr Garofalo and Mr Crisp, and requires that they work together with openness, transparency and in utmost good faith in all their dealings with each other. Mr Garofalo's evidence is that he and Mr Crisp spoke together soon after the Russian invasion of Ukraine and agreed to cease supplying products to Russia. Subsequent email traffic between them is consistent with the Russia Agreement: an email exchange between 15 March 2022 and 18 April 2022 making express references to the cessation of the Respondent Companies' trade with Russia is consistent with the Russia Agreement: it strongly suggests that this had been implemented in full. For Mr Crisp to have continued to cause the English Companies to trade with Russia was a breach of the terms of that agreement, and his fiduciary duties.

140. The management accounts sent directly by Mr Crisp to Mr Garofalo show no income from Russia since March 2022. Given the strong evidence that products had been sold into Russia, the most likely explanation is that the management accounts had been prepared deliberately not to reflect the true position. The increase in income shown from "the Rest of the World" was very close to the income from the previous years' sales to Russia, sales which Mr Crisp told Mr Preusch had held up at the same level since the invasion. For the purposes of the Application, I find that there is a high

likelihood that this will prove to be well founded when the underlying documents are considered.

141. Similarly, on the basis of the information currently before the Court, there is a high degree of assurance that Mr Crisp was aware of the 2019 Regulations and was knowingly in breach of them. His reference to Mr Preusch to taking no notice of "*government edicts*" must in the context be a reference to that legislation. The clear tenor of his assertion is that he knew of the 2019 Regulations and continued to sell products to Russia knowing that he was in breach of them.

142. This concentrates on the evidence as it was before the Deputy Judge, but the purpose of setting out the cases of the respective parties and the discussion section at paras. 84-97 above is to show how even when the case had moved on evidentially, the result is the same, namely a strong *prima facie* case, as the Deputy Judge held or a high degree of assurance, that (a) the conduct of Mr Crisp was unfair, (b) the conduct of Mr Crisp was in breach of the Relationship Agreement, his fiduciary duties, the Russia Agreement, and his statutory duties as a director, and (c) prejudice has been caused to the Respondent Companies as a result.

143. The report of Mr Hawker states unequivocally that severe reputational damage would be suffered by the Respondent Companies upon news of the breach of the 2019 Regulations becoming public in the event that no immediate steps had been taken to distance the companies from Mr Crisp. That reputational damage, if not addressed swiftly and effectively, was severe enough to jeopardise the future viability of the Respondent Companies, as retailers and end users become aware of the situation. As analysed above, the responsive expert evidence of Mr Langham recognises the serious impact to the reputation of the English Companies if there has been deliberate wrongdoing, but recommends a more thorough appraisal of the nature of the wrongdoing. With the benefit of the evidence in response since the judgment of the Deputy Judge, the Court has come to a conclusion broadly similar to the conclusion of the Deputy Judge. On the premise of a strong prima facie case that Mr Crisp deliberately was in breach of sanctions, his evidence provides, if anything, partial support for the evidence of Mr Hawker and the case presented on behalf of Mr Garofalo.

144. The dispute resolution mechanism in the Relationship Agreement stipulates that where a dispute arises 6 hours must be spent in face-to-face discussions over a period of 12 days. I agree with the submission of Mr Bailey that is inappropriate for, and cannot be construed as intended to apply to, a situation in which urgent relief is required; *a fortiori* where it was necessary for that relief to be obtained *ex parte*. Alternatively, as a matter of obviousness, reasonableness and business efficacy, it would be reasonable for a like term to be implied so that it did not apply.

145. I find accordingly a high degree of assurance that Mr Garofalo will succeed in establishing unfair prejudice under s.994, and that such a case will be established at trial or at a final hearing. If this is established at trial, s.996 provides wide powers to grant relief, as follows.

> *(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.*

> *(2) Without prejudice to the generality of subsection (1), the court's order may–*
>
> *(a) regulate the conduct of the company's affairs in the future;*
>
> *(b) require the company–*
>
> *(i) to refrain from doing or continuing an act complained of, or*
>
> *(ii) to do an act that the petitioner has complained it has omitted to do;*
>
> *(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;*
>
> *(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;*
>
> *(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.*

146. It is necessary to have in mind the ultimate relief that would be sought on the petition in order to consider whether the relief sought is truly ancillary. On the basis of Mr Garofalo's *prima facie* evidential case, were there to be any suggestion of Mr Crisp seeking to buy out Mr Garofalo's share, it appears that Mr Garofalo is more suitable to continue the business. This is in line with the guidance given in *Oak Investment Partners XII Ltd Partnership v Boughtwood* [2009] 1 BCLC 453 at [3], [4] and [120], that where one party had behaved much worse than the other, it is that party who should be required to sell. It is relevant to the foregoing that Mr Garofalo has given evidence of his wealth and his ability to pay millions of pounds, if that were required in a buyout. By contrast, Mr Crisp has given no such evidence, and has not yet reached a position as to whether he would wish or had the resources to buy out Mr Garofalo, despite the lapse of seven months from the without notice order to the return date.

147. In connection with that ancillary relief, it is of importance that the value of the companies is protected and preserved. To that end, the injunctions sought and ordered on the without notice application and now sought to be continued are justified in order that the relief sought on the petition will not be negated.

148. On the issue of the court's power and willingness to order the reconstitution of the Board, the court takes a flexible approach regarding such grant of relief as may be appropriate to the facts of the case, In *Hawkes v Cuddy (No.2)* [2008] BCC 390, in which Lewison J (as he then was) made an order giving one party the ability to enlarge the board of the company, thereby giving him control of it (at [290]).

149. I am satisfied that the removal of the First Respondent as director, the appointment to the Respondent Companies' Boards of the Petitioner, Mr Diederich and Mr Fisher, and the purchase by the Petitioner of the First Respondent's shares in the Respondent Companies, are orders which could be granted as final relief on a s.994 petition under s.996 or are appropriate relief ancillary to the relief sought in this case of a buy-out of Mr Crisp's shares. On the basis of the evidence before the Court, there is a high degree of assurance that such orders will be appropriate either on the basis that they are appropriate by themselves or they will be found to have been appropriate ancillary to the final relief which will be ordered.

150. The argument has to be appraised in the light of the evidence about reputational damage to the Respondent Companies consequent upon Mr Crisp operating in deliberate breach of the sanctions legislation. The evidence of Mr Hawker was to the effect that this provided an existential threat to the business of the companies unless dealt with swiftly such as to distance the wrongdoer from the companies. That evidence of Mr Hawker is entirely plausible having regard to the importance attributed to honouring sanctions legislation and the opprobrium coming from stealing a march on those who observe such legislation. The argument, as to which there is a high degree of assurance that it would succeed after a trial, is that deliberate breach of sanctions is so serious that it required such an unusual order. A breach of sanctions has a maximum sentence of 10 years' imprisonment. It steals a major advantage over competitors, who have to suffer as a result of a lucrative market being closed to them, only to watch the competitor business from continuing to benefit from the market.

151. If the Respondent Companies had retained Mr Crisp as a director for any time at all, the message of total distance from him would not have been effective. The problem was that he was not only a director, but he was in day-to-day charge of the companies. It would not have been practicable to have simply suspended him. That would have dealt with his position as an employee, but not as a director. The Respondent Companies would still be associated with this trading through the retention of Mr Crisp as a director.

152. There was also the danger of the prosecution not only of the director, but also of the Company itself. There was a highly persuasive case that such distance from the director and cooperation and full disclosure with the authorities is the most effective way of seeking to persuade the authorities that the Company is not associated with such trading.

153. There is inherent in the trading a dishonesty and a concealment so as to avoid detection. Thus, the management accounts concealed the Russian trading by sweeping it into the Rest of the World category. Even Mr Crisp recognises in his evidence some intent of concealment so that the banks did not notice the trading with Russia. That takes the analysis far down the line that there was an intent to conceal. The explanation given by Mr Crisp that the insurers were content with this trading is contradicted by the fact that, as Mr Crisp must have known, trading with Russia was not covered by insurance.

154. In the light of the above, this an exceptional case requiring a change of management at an interim stage for the following reasons, namely:

(i) a convincing case supported by the expert evidence of Mr Hawker, partially corroborated by the evidence adduced by Mr and Mrs Crisp of Mr Langham about

the existential nature of the reputational consequences for the Respondent Companies unless they removed Mr Crisp as a director;

(ii) the gravity of not just being in breach of the criminal law, but the particular opprobrium attaching to trading with Russia in deliberate breach of sanctions;

(iii) the strong prima facie case of powerful evidence of active steps to conceal such trading and apparently misleading evidence given by Mr Crisp in respect of his conduct;

(iv) the section headed discussion about breach of sanctions at paras. 84-97 above contain a litany of excuses for the conduct, as to which there is a high degree of assurance that a trial or a cross-examination of Mr Crisp will lead the Court to reject the case that there was no deliberate breach of sanctions on the part of Mr Crisp.

155. In the circumstances, I am satisfied that an enhanced threshold test is satisfied, whether it is simply higher than the serious issue to be tried test or a high degree of assurance that the orders will be maintained at trial or the full hearing of the petition or that Mr Garofalo has a strong prima facie case.

XVII Balance of convenience

156. As for the general principles governing the grant of injunctive relief in support of a s.994 petition, the well-known principles established in *American Cyanamid Co v Ethicon Ltd (No.1)* [1975] A.C. 396 HL apply by analogy: see *Re Posgate & Denby (Agencies)* [1986] 2 BCC 993 at 45, acknowledging that:

> *"[o]ne cannot literally ask whether damages would be an adequate remedy because sec. 461 [the relevant section under the predecessor to the 2006 Act] does not provide for an award of damages at common law. But the section allows the court to order various forms of financial compensation …"*

157. Taking into account the need for a higher threshold than serious issue to be tried, the other *American Cyanamid* principles which might still apply are as follows. If the threshold merits are satisfied, does the balance of convenience lie in favour of granting or refusing the interlocutory relief sought? More specifically:

(i) If Mr Garofalo were to succeed at the trial in establishing his right to a permanent injunction, would he be adequately compensated by an award of damages? If he would, and the respondents would be in a financial position to pay them, no interlocutory injunction should normally be granted.

(ii) If damages would not provide an adequate remedy for the petitioner, the court should then consider whether, if the respondents succeeded at trial, they would be

adequately compensated under the petitioner's undertaking. If they would, and the petitioner would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

(iii) Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the question of balance of convenience arises. These will vary from case to case. Where other factors appear to be evenly balanced measures should be taken to preserve the *status quo*.

158. Applying the above, I consider the first stage. An award of damages in this case would not compensate Mr Garofalo. The reason for this is that in the event that Mr Crisp had remained in control of the day-to-day management of the companies or if his directorship were reinstated, the existential threat to the companies would be recreated. That would have the effect of risking the destruction of the companies. In that event, any order for the purchase of the companies would be a pyrrhic victory in that the relief would be rendered of no value. There was the possibility of an order for damages or compensation of the companies against Mr Crisp, but there was no evidence to suggest that he would be good for the very large number of damages or compensation that might be ordered. Therefore, the first stage does not lead to a conclusion that there ought to be no interim injunction.

159. In respect of the second stage, this is a case where Mr Crisp would be protected by the cross-undertaking, subject to fortification to which I shall refer below. The reason for this is that if Mr Crisp succeeds at trial and the Respondent Companies are restored to his management, insofar as he is entitled to be compensated for the period of his loss of control, Mr Garofalo appears to be good for large sums of money, and the contrary is not suggested. Further, if it were the case that the injunction had been obtained by false evidence, it might then be possible in addition to the basis of the cross-undertaking as to damages for Mr Crisp to cross-petition for section 994 relief on the basis that he had lost his legitimate expectation to manage the companies, and under that umbrella to be bought out, or to buy out Mr Garofalo. Whatever it is, the second stage does not provide a ground to refuse an interlocutory injunction.

160. I now refer finally to the third stage, namely the balance of convenience, or which party would suffer the greater risk of injustice, namely Mr Garofalo in the event that there is no injunction/the current injunction is discharged, or Mr Crisp in the event the injunction is made/continued. I am satisfied that the greater risk of injustice on the evidence before the court would be to Mr Garofalo in the event that there is no injunction/the current injunction is discharged. The reason for this is the existential danger to the companies in the event that Mr Crisp were to remain in or to be reinstated to management despite the strong prima facie case that he was deliberately trading or causing the companies to trade in breach of sanctions.

161. The respective parties make submissions as to what has been the consequence in the interim. The initial submission of Mr Garofalo that the English Companies would fail has, according to Mr Crisp's case, been shown to be fallacious. The reason for this is that the companies have not failed despite the judgment of the Deputy Judge being published and the entering into the public domain of the illegal trading. Likewise, the

fact that the Respondent Companies have continued to trade at a profit is said to give the lie to the case of Mr Garofalo.

162. That proposition cannot be established without more. The premise of the order was in order to avert crisis and trading collapse, and it appears to have worked. The counter-factual of what would happen if Mr Crisp had remained in control has not been tested, but there is a good deal of evidence, especially from Mr Hawker, to indicate that the consequences could have been very adverse for the Respondent Companies if Mr Crisp had remained in control as a director.

163. In all the circumstances, the preponderance of the evidence is that the change of control of the board has worked out well. That is the position of the companies under new day-to-day management. If the injunctions are lifted and the *status quo* ante the without notice injunctions is restored, the consequences are difficult to imagine. If management reverts to Mr Crisp, then the consequences of having someone who has been knowingly in breach of sanctions in control is the return of reputational damage.

164. It is necessary to give some consideration to evidence to contrary effect. An alternative argument of Mr Crisp is that he had an integral and not easily replaceable role. There are criticisms about the size of the new management team to replace him. There is a statement from Collette McBarron which raises criticisms of new management, complaining that they are less focussed and that there are problems about stock levels.

165. It is not possible to resolve these matters conclusively at this stage. However, it is counter-balanced by the following features, namely:

(i) The evidence that despite cessation of trading with Russia, the financial report of almost six months from the date of the injunction (to 30 April 2024) shows good cash generation, sales and profitability. In particular, sales have increased above the level prior to the change of management. There has been little staff turnover.

(ii) Whilst the other allegations are not considered as independent grounds for the petition, and it is noted that they are challenged and are not established, there has been disruption in dealing with these issues. Ms McBarron's complaint about stock levels is made during a period when content and labelling issues are being addressed.

(iii) It is an odd feature of the evidence of Ms McBarron that she has been on maternity leave in the period from the Order of the Deputy Judge until the time of her witness statement. She complains about being out of the loop, but this might be an incident of her maternity leave.

166. In interim injunction cases, there is usually a desire to maintain a *status quo*, as is apparent from the third stage of *American Cyanamid*. That factor would indicate not making such an invasive order, unless there were strong reasons to do so. The *status quo* factor, and the consideration of reverting to the *status quo* before the action would have a greater resonance in the event that this was a return day some 10-14 days after the original injunction. In such a case, the conventional approach is to consider the

balance of convenience on the basis of the *status quo ante*, that is to say the *status quo* before the wrong or before the proceedings were commenced. It is not from the perspective of the *status quo* with the benefit of the injunction. For that to create a new *status quo* could mean that a petitioner would take advantage of an inappropriate injunction and so it would perpetuate a wrongly obtained injunction. It would undermine the de novo nature of the application on the return day of an injunction.

167. That said, there are two important qualifications. First, in circumstances where it has taken over half a year for the return day to come on, it is unrealistic for the *status quo* to be treated as that far back, when the reality is that there is a new *status quo*.

168. Second, even if the *status quo ante* is the important consideration even 7 months on, the *status quo* is only a factor. It is not the decisive matter: otherwise, there could be no scope in an exceptional or unusual situation to have an invasive order. For the reasons given by the Deputy Judge, this was an appropriate case to have a change of management order, bearing in mind the potentially catastrophic consequences to the English Companies and to Mr Garofalo in the event that there was not a change of management control in the events which had occurred.

169. After 7 months of operation under new management and Mr Crisp having ceased to be not only a director, but also an employee, there is in effect a new *status quo*. That is that the Respondent Companies are and have been for many months under new day-to-day management and have thrived. It is in the Respondent Companies' interest that the new management maintains control.

170. The position can be expressed in this additional way. The consideration that after 7 months of such control, Mr Crisp should be restored to directing the companies and the additional directors should be removed (or even not removed) would lead to the likelihood of insuperable difficulties for the management of the companies in the immediate future. These difficulties would be between the shareholders and between Mr Crisp and the existing employees who have now taken their direction from the new management and must be aware of some of the difficulties up to now, as is evident from those who have provided evidence. In the short-term future, the direction of the Respondent Companies with Mr Crisp in sole charge of the day-to-day management or with Mr Crisp sharing day to day management with persons who believe that Mr Crisp cannot be trusted would be very unsatisfactory. All of this points to preserving the injunctions until trial.

171. It is also to be noted that it is not apparent at this stage that Mr Crisp wishes to acquire the Respondent Companies or that he has the wherewithal to do so, even if the Court would make such an order at trial. This is all in the context of a petition where there is a strong prima facie case which might lead to Mr Crisp's shares in the Respondent Companies being acquired. It is therefore the case that the restoration of Mr Crisp as a director when by the time of trial, he may end up ceasing to be a director is a further unsatisfactory aspect of a discharge of the injunctions at this stage.

172. Another possibility is that the companies should be managed by receivers or independent third parties pending a trial. That does not provide a satisfactory way forward as the Deputy Judge appreciated or must have appreciated. The reasons for this are as follows. First, independent directors will not hit the ground running, but will have to find out how to run the companies. Second, if they are court appointed or

receivers, there is likely to be a perception of companies with solvency difficulties, again adversely affecting the companies. Third, the cost of such an exercise can be significant and even prohibitive, whereas the business transition plan started in this case by the without notice injunction is more satisfactory.

173. In considering the balance of convenience, the delay on the part of Mr Crisp in coming back to Court is significant. There appears to have been time spent negotiating. Whatever the reasons, time passes by, and the order originally made cannot be simply undone without major problems ahead. That is why the *status quo* has perceptibly changed. The overall balance of convenience is now heavily in favour of continuing the injunctions. It is apparent from para. 59 of the judgment on the without notice application that the Deputy Judge had in mind that the change of management order was reversible on the return date which was fixed for about 2 weeks after the order, and there was liberty to apply earlier if required.

174. The Court in a case like this would be prepared to consider an early trial. That is not a basis for making the orders which have been made. If this is to be meaningful, consideration must be given as to shortening the issues for the trial in order to make it realistically possible to get the trial into as short a focus as possible so that it can be tried as a speedy trial. The court at a consequentials hearing would be prepared to entertain consideration of such an outcome. Having said that, it must be plain that the orders made are unaffected by whether or not a speedy trial is possible. The result of the consideration is that subject to the issue of fortification of the cross-undertaking as to damages discussed below, the principled and just and convenient result is that the injunctions should continue.

175. It follows from the above that the balance of convenience considerations are different at this stage from what they were at an earlier stage because the order has been in operation for 7 months until the time of the hearing. Despite this, it is still necessary on the de novo application in which the injunction ordered at the without notice stage is being considered for the first time to have regard as to whether it was appropriate in the first place. The indicators in the case law which militate against an order to remove or appoint directors at a without notice stage are because it is desirable to preserve the *status quo* and it is not desirable to do more than is absolutely necessary to change matters.

176. In my judgment, in the unusual circumstances of this case, it was necessary to have the order sought and it is no more than is absolutely necessary to preserve the goodwill of the Respondent Companies. Further, and in any event, for the reasons set out above, the possibility at this stage of reversing what has been done and leaving the parties to it makes no commercial sense. The only logical place to effect a change of the control of the Respondent Companies would be at a trial in which a buy-out of the interests of Mr Garofalo arises for consideration either on the basis of a cross-application or cross-petition under section 994 or pursuant to enforcement of the cross-undertaking as to damages. The decision does not depend on the possibility of a speedy trial, but nonetheless, the Court will be prepared to consider any proposals for a speedy trial, possibly of issues, upon dealing with the consequentials arising out of this judgment.

177. Where the balance of convenience is evenly balanced (this is not such a case), it may be appropriate to consider further the merits and the prospect that the petitioner will succeed at trial. As noted in the section about whether an enhanced threshold on the

merits is satisfied, a further consideration of the merits only adds to the analysis that the balance of convenience favours the making or the continuation of the change of management order.

XVIII Fortification of cross-undertaking as to damages

178. This ought to be considered as a consequential order in this case. If Mr Garofalo is as rich as suggested, then it ought to be possible for him to provide security of money whether in court or protected by bank guarantees of very substantial sums of money to fortify the injunction. It is noted that he is maintaining a sum of £100,000 in the account of his solicitors and that he has assets in a sum of £1,000,000 in the jurisdiction. Further consideration will be entertained of formal fortification of the cross-undertaking as to damages beyond the sum retained in the account of the solicitors. That type of interim arrangement would be typical of an order intended to be for a short time until a return day. It may not be sufficient until a trial, albeit that full consideration of this will depend upon further information being provided to the Court.

XIX Post-hearing correspondence 16 May 2024 to 22 May 2024

179. Since the conclusion of the hearing, there was an exchange of correspondence between 16 May 2024 and 22 May 2024 betweenthe parties in which it was alleged on behalf of Mr Crisp and Mrs Crisp that a debenture may have been entered into in breach of the articles of association of VHL. There was an explanation provided on behalf of Mr Garofalo, which then led to concerns about -a breach of the principle that company funds should not be spent on disputes between shareholders.

180. The concerns of Mr Crisp and Mrs Crisp have been addressed in detail by what is said to be a refutation of any allegations of wrongdoing or impropriety, particularly by a letter dated 21 May 2024 of Olephant Solicitors on behalf of Mr Garofalo. That has not elicited any detailed response, save that the position of Mr Crisp and Mrs Crisp has been reserved by an email dated 22 May 2024 stating *"Our clients intend to pursue this issue with Mr Garofalo and the company. However, having brought the matter to the attention of the Court, we do not propose to comment further at this stage in the context of Mr Garofalo's injunction application unless the Court considers it would be assisted by further submissions."* The Court understands this matter as not requiring any adjudication at this stage and will say no more at this stage. This leaves the parties free to pursue this issue at a further stage if they wish to do so. If that understanding is not a correct understanding of the correspondence, then this should be brought to the attention of the Court before the judgment is handed down formally. Without inviting the parties to open up something not currently before the Court, the Court seeks confirmation that its understanding is correct and that no action is required at this stage in respect of these matters.

XX Conclusion

181. The overall conclusion on this de novo consideration of the order is that the Petitioner has satisfied the Court that the change of management order is appropriate and that it should remain in force until trial or earlier order and will not be discharged. The other Ancillary Orders about delivery up and imaging and the like do not need any order to be made at this stage. They will be considered at trial, or before then, if there is any need for earlier consideration. The Court will consider by way of consequentials any issue of fortification of the cross-undertaking as to damages. The Court will also consider the future of the action and give directions for its progress.

182. It remains to thank Counsel and the legal teams for the presentation of the respective cases and for the ability and skill of their written and oral submissions.