Neutral Citation Number: [2024] EWHC 2518 (Ch)

Case No: BL-2024-000023

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

Rolls Building
Fetter Lane
London, EC4A 1NL

04/10/2024

Before :

THE CHANCELLOR OF THE HIGH COURT

- -

Between :

MARCO PIACQUADIO AND DANE O'HARA (AS JOINT LIQUIDATORS OF SMITH & PARTNER LTD (IN LIQUIDATION)	**Applicants**
- and -	
(1) LUKE SPARKES **(2) ZENO FINE ART LTD** **(3) CALLUM AHEARNE**	**Respondents**

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Clara Johnson (instructed by **Francis Wilks & Jones**) for the **Applicants**
Robert Levy KC and Adrian Pay (instructed by **Ingram Winter Green LLP**) for the **First Respondent**
The Second Respondent appeared in person acting through its director, the First Respondent

Hearing dates: 2 to 4 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 4 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Sir Julian Flaux C :

Introduction

1. This is the judgment following the hearing of an application by the applicant liquidators of Smith & Partner Ltd ("the company") to continue freezing orders made ex parte by Michael Green J on 11 January 2024 against the respondents. The first respondent was the former director and shareholder of the company, which was wound up on 18 July 2023. The second respondent is a company of which the first respondent is the sole director and shareholder. The third respondent is alleged by the applicants to have been a former de facto director or senior employee of the company. The injunctions granted by the judge included a proprietary injunction against the first and third respondents in respect of monies paid to them in breach of fiduciary duty.

2. The freezing orders against the first and second respondents were continued by consent by Richards J on 25 January 2024. At that hearing, directions were agreed for the listing of an inter partes hearing to determine whether the orders should continue. That inter partes hearing took place before me on 2 to 4 July 2024. At that hearing, counsel represented the first respondent. The second respondent was not represented separately and simply adopted counsel's submissions on its behalf. The third respondent took no part in the hearing, no longer challenging the freezing order made against him.

3. The applicants issued proceedings on 16 January 2024 bringing claims against all three respondents under section 213 of the Insolvency Act 1986 ("the Act") for fraudulent trading and against the first and third respondents under section 212 of the Act for misappropriation and fraudulent breach of duty. The applicants' case is that the company was engaged in a fraudulent art investment scheme pursuant to which investors were induced to purchase "limited edition" fine art prints on the basis that the company would act as a broker and advise upon and assist the investors to sell the prints on the secondary market (that is resale through an auction house, dealer or gallery). The company held itself out as being an expert in both the art market and finance and investment. The prints were not resold and investors suffered significant losses. Over a thousand investors invested in the scheme. As at 15 May 2024, the applicants had received proofs of debt from 216 investors totalling £9,099,570. In the proceedings, the applicants claim equitable compensation of some £13.8 million and assert proprietary claims in respect of some £5.9 million which the first respondent and another of his companies Sparkes Power received from the company in breach of fiduciary duty.

4. The first respondent resists the continuation of the freezing order "root and branch" contending that (i) the applicants do not have a "good arguable case" on the merits; (ii) the applicants cannot show a risk of dissipation and (iii) the applicants failed to give full and frank disclosure and misled the judge at the ex parte hearing. Given the extent of that challenge, which has led to the Court being inundated with some seven thousand documents in more than twenty lever arch files, I consider that it is important at the outset of this judgment to set out the legal principles applicable to the grant and continuation of freezing orders at an interlocutory stage of proceedings.

Applicable legal principles

5. The three criteria which need to be satisfied by a claimant for the grant of a freezing order are (1) that the claimant has a good arguable case on the merits; (2) that there is a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets; and (3) that it would be just and convenient in all the circumstances to grant the freezing order: see *Unitel SA v dos Santos* [2023] EWHC 3231 (Comm) at [25] per Bright J.

6. The test which has to be satisfied to establish a good arguable case on the merits was laid down by Mustill J in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH ("The Niedersachsen")* [1983] 2 Lloyd's Rep 600 at 605, as:

> "… one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

7. That test has been consistently applied by judges of the Commercial Court and other Courts over a period of forty years, most recently by Bright J in *Unitel* and Butcher J in *Magomedov v TGP Group Holdings* [2023] EWHC 3134 (Comm). There have been recent decisions at first instance which have preferred the three-limb test in *Brownlie v Four Seasons Holdings* [2017] UKSC 80 applicable to jurisdictional challenges. However, as I indicated at the hearing, the Court of Appeal has recently heard the appeal in *Unitel*. The judgments on that appeal ([2024] EWCA Civ 1109) have confirmed that the correct test is that laid down in *The Niedersachsen*: see [96] to [112] of my judgment.

8. Given that the test sets a relatively low threshold on the merits, it is important that interlocutory applications such as this to continue a freezing injunction do not become a mini trial. This was a point which was cogently made by Butcher J in *Magomedov* at [27]-[28]:

> "27. There appear to me to be good reasons why the three-fold test applied in those cases should not be applied in the context of freezing orders. That test, at least as to the first two limbs, involves a relative assessment of the parties' positions. The making of such a relative assessment is liable to draw the parties and the court into the conduct of 'mini trials'. A relative assessment encourages the parties to bring forward at this early stage, every piece of evidence which might suggest that they have the better of the argument. This is likely to lead to more of the court's resources being absorbed in interlocutory hearings brought on, very often, on an urgent basis. This is deprecated in the authorities, and would place an even greater burden on the court, where the number and scale of urgent applications is already causing strains. Moreover, to apply such a test in the context of freezing orders would widen, without apparent reason, the gap between the merits test to be applied in relation to interlocutory applications for proprietary injunctions, which is the *American Cyanamid* test of a serious issue to be tried (see, for example *Haque v Hussain* [2020] EWHC 2739 (Ch), and *Gee on Commercial Injunctions* (7th ed), 2-022, 12-027), and that applicable to applications for freezing orders.

> 28. Further, I apprehend that to adopt a test which involves a relative assessment of the parties' positions, at least at the first two stages is to put the merits bar too high to serve the interests of justice. In the type of cases in which freezing orders are very often sought, including cases of alleged fraud, dishonesty, bad faith and the like, it may be difficult for an applicant to demonstrate, at an early stage and prior to disclosure, that it has the better of the argument on the merits. While I fully recognise that the gravity of a freezing order requires a merits test markedly higher than simple arguability, I consider that there is a danger that the adoption of the *Brownlie* test in relation of freezing orders may deny to victims of wrongdoing the interim protection which the freezing jurisdiction is designed to provide."

9. However, as I have already indicated, with the thousands of documents before the Court and three days of submissions, the hearing did become like a mini trial with the first respondent in particular seeking to argue every point and to pursue issues which clearly can only be resolved at trial.

10. The law on the risk of dissipation was set out by Popplewell J (as he then was) in *Fundo Soberano De Angola v dos Santos* [2018] EWHC 2199 (Comm) at [86]:

> "The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; *Holyoake v Candy* [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and *Petroceltic Resources v Archer* [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:
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> (1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
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> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
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> (3) The risk of dissipation must be established separately against each respondent.
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> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
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> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

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

(7) Each case is fact specific and relevant factors must be looked at cumulatively."

11. This summary of the law was approved by the Court of Appeal in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 at [34] per Haddon-Cave LJ with a small adjustment to (4) to say that it is not necessary to show that assets are "likely" to be dissipated, only that they "may be" dissipated. At [36] Haddon-Cave LJ confirmed that the Court only needs to be satisfied to the "good arguable case" standard that there is a risk of dissipation.

12. Haddon-Cave LJ also said at [51]:

> "Where the claimant establishes a "good arguable case" that the respondent engaged in wrongdoing against the applicant *relevant to the issue of dissipation*, that holding will point powerfully in favour of a risk of dissipation. In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence."

13. In relation to full and frank disclosure the relevant principles were summarised by Carr J (as she then was) in *Tugushev v Orlov & Ors* [2019] EWHC 2031 (Comm) at [7]:

> "The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
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> i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to

evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is

substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.

(See in particular *Memory Corporation plc and another v Sidhu and another (No 2)* [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)"

The submissions of the applicants

14. I propose to set out in turn the parties' submissions on the three issues on which the first and second respondents resist the continuation of the freezing order, beginning with the submissions of Ms Clara Johnson for the applicants in support of their application to continue the freezing order.

(1) Good arguable case

15. Ms Johnson raised what she described as the six best points on good arguable case. The first concerned what the company did, in relation to which there is a dispute. The

applicants contend that the company gave investment advice and acted as a broker, whereas the first respondent claims that the company was just a retailer. She submitted that the first respondent's case was contradicted by the company's brochures.

16. There were several forms of brochure before the Court. In all it was said that the company would *"manage your entire portfolio"* and offered *"access to wealth management facilities"*. The brochures made repeated reference to *"client returns"* and *"investment goals"* and said that clients would be assigned *"an adviser"* and *"a personal broker"* or *"dedicated broker"* or *"expert art broker"*. The company offered to provide *"personalized investment plans"* on the basis that it had *"expertise in finance and investment"*. The brochures also promised that an investor would be informed of the best time to sell their artwork based on the *"market landscape we've been diligently following on your behalf"* and that artwork would be marketed *"under our network of private auctioneers and collectors"* or *"extensive network of art world connections"*. It was explained that *"our unique strategies"* could bring a return potential of 64.6% in 12 months.

17. The brochures explained that the company was an intermediary not a seller:

> "The majority of sellers in the art market are not individual artists. Auction houses and galleries account for the bulk of the pieces sold as they have the reputations and contact networks among suitable buyers to make the effort economically feasible…Lastly, there are a host of intermediaries connecting buyers to sellers. These include banks, financial services companies, art consultants and organisations such as ourselves."

18. Investors were paired with "wealth managers" and this was confirmed by three of the investors who have provided statements and a document produced in relation to an employee called Michael Reis described him as "Senior Wealth Manager". Paragraph 16 of Ms Johnson's skeleton argument contains a summary of the evidence of investors as to what the service was which they understood the company was providing:

> (a) "The Company was an expert in the field and I could rely on its advice and guidance as to what to buy and when to buy it. In addition, it would manage my investment portfolio and ensure I had the right spread and variety of art in my portfolio to make it enticing to potential buyers" (Salway).
>
> (b) "…they would advise me on potential investments and that once I made a purchase, they would continue to advise me to ensure that I had the best chance of making a handsome profit" (Parel).
>
> (c) "…the majority of telephone conversations I had with the Company would consist of them citing an artist, presenting the art print, stating that it was a great investment and advising on the projected return including making some promises in terms of events which would lead to the value of the art print increasing" (Remillard).
>
> (d) "…my art investment portfolio was dealt with by Michael Reis ("Mr Reis"). Mr Grant and Mr Reis presented themselves at (sic) wealth managers and promised me knowledge in what they were

selling i.e. knowledge about the art market and would provide guidance along the way, including when it was the right time to buy and sell" (Petrov).

(e) "The Company presented themselves to be experts in art investment. I understood they would manage an investor's entire portfolio, suggest art to buy and sell and suggest the best time to buy and sell based on the value at the time, all with a view to helping investors make money" (Mishra).

19. The brochures also recommended that investors dealt with a company which was a member of the Fine Art Trade Guild, said to be regulators of the Limited Edition Print market. At least one of the brochures stated that the company was regulated by the Guild and described itself as a "Proud Member".

20. Under "What are the costs?" the brochure stated that the company "charges an upfront fee of 2% on the sale of the art piece and a charge of 5% on the profit only."

21. Ms Johnson also referred to what the first respondent said was a "sales script" for staff to make a pitch towards potential investors which followed the same line as the brochure. She submitted that the brochures and sales script supported the applicants' case that the company was providing investment advice on behalf of individuals for the purpose of making them a profit.

22. Her second point on good arguable case was that there were no genuine sales of investors' prints on the secondary market but all "sales" were "buy backs" by the company. If an investor were pressing the company to sell their prints, the company would buy them back at an increased price. Accordingly, there was no genuine profit for the investors because there was no genuine increase in the market value. She submitted that the first respondent accepted that there had been no sales in the secondary market and his own evidence was that the representation in the brochure of a potential profit of 64.6% was based on one transaction involving the purchase of a Steven Dews print for £360. The investor made a "sales request" and the company acquired the print back from the investor for £650. There is simply no evidence of the company having a network of *"private auctioneers and collectors"* as described in the brochures.

23. Investors were told that, in order to improve the chances of their portfolios being sold at auction, they needed to acquire further prints. In particular they were told about an auction in Dubai and were told by sales staff that their portfolios were going to be sold at the Dubai auction. Ms Johnson submitted that this was a complete fiction. No attempt was ever made to sell investors' prints at auction, which is not disputed by the first respondent.

24. Ms Johnson submitted that the obvious difficulty with "buy backs" is that they do not reflect a genuine resale. The prices were not based on market value but on the company offering a sum higher than the investor had originally paid to mislead them into thinking that they had made a profit and to encourage further investment. She noted that the first respondent relies on the prices at which "competitors" were selling the same or similar prints as demonstrating that the prices paid by investors reflected market value, but she submitted this argument was misplaced since the "competitors" were retailers operating in the primary market, whereas the company, by marketing itself as a broker, should have

been operating in the secondary market, where, as both experts agree, the true resale value of a print is based on past auction results.

25. The applicants' third point on good arguable case was that investors were misled as to how the company made a profit. The representation in the brochure was that it only made its profit from charging 2% on each sale and 5% on the profit of any resale. Although the first respondent denies this, it is clear from the brochure, from the evidence of the investors and from the evidence of the third respondent, which is that the first respondent told the sales team and managers including him, to tell investors that the company would only make money when the prints were sold.

26. However, Ms Johnson submitted that the company in fact made a profit by way of a significant mark up on the wholesale price of prints it acquired from its suppliers, Rosenstiels and the second respondent. Originally it acquired prints only from Rosenstiels, but the first respondent set up the second respondent in 2021, after which the vast majority of the prints were supplied by the second respondent. This meant that the company could not act impartially or without a conflict of interest in advising investors.

27. The first respondent says that the company made a profit by charging 100% mark up on the wholesale price which he claims is standard in the industry. However, the reality is that the difference between the price paid by the company and the price at which it sold to investors was far more than 100%, on average 495%. In any event, even if the first respondent were right, there is no evidence that the investors were told that the company and the second respondent stood to benefit in this way from the sale of the prints. Ms Johnson submitted that whatever the mark up, since the company was acting as a broker, in failing to disclose that it had an interest in the transaction itself, it was not acting honestly.

28. The fourth point on good arguable case was that the applicants' case is that the company was selling at grossly inflated prices. Apart from the extraordinary mark up, they relied on the expert evidence. Ms Johnson submitted that there was very little to distinguish the experts. They both agreed about the primary and secondary markets and that, for resale, the key measure to look at is past auction results. The respondents' expert was Charlie Scott of Art Advisory Group. In his report he said that MyArtBroker which specialises in the private sale of prints was a suitable source for value. In his assessment of resale value he looked at auction prices and prices of prints advertised for sale at galleries. In his conclusions, he said that the prices at which the company was selling were in line with what other retailers were selling for. The first respondent relies heavily on this, but Ms Johnson submitted that this was addressing the wrong point because investors were interested in the resale value, which involves looking at past auction prices.

29. The applicants' expert was Peter Greenway of Roseberys. He looked at past auction results. In relation to one of the artists, Stuart McAlpine Miller (who had a contract with the second respondent) he found one print, "Split Personality", sold for £5,500 which was sold below estimate, but nothing else. In relation to other artists, one print of Deborah Azzopardi's was sold for £36 in 2021 but none of the other prints sold by the company had come up on the secondary market at all. Only photographs of Miss Aniela's had come up, selling for no more than £75, with no prints of hers coming onto the secondary market at all. There were no records in the secondary market for Mr Controversial. For Steven Dews there were a number of prints sold with hammer prices between £6 and

£200, but from the editions sold by the company, records of only three were found. The Battle of Trafalgar sold once for £180 and once for £20. For Sidney Maurier there had been only three sales in the last two years at £150-£180. There was no record in the secondary market of the ones sold by the company.

30. Ms Johnson submitted that this evidence suggested that there was not a buoyant secondary market for the prints, with such sales as were made at very low prices apart from the one McAlpine Miller print. She submitted that when the experts inspect the prints they will need to be checked for authenticity and whether they are reproductions. They may be reproductions not authorised by the artist or their estate.

31. Ms Johnson returned to this point in her reply submissions, noting that Mr Greenway had recorded that some twenty prints were put up for sale at Dawsons Auctioneers and Rogers & Jones in July and August 2023 (after the company had ceased trading and gone into liquidation). Investors were concerned. Only one of the prints sold, which was the McAlpine Miller "Split Personality" referred to at [29] above. Ms Johnson said that some investors were trying to sell the prints on eBay for half the sum at which that print sold. She submitted that if this material had been before Michael Green J it would have demonstrated that there was not a highly liquid market over the relevant period as the first respondent claimed there was.

32. On this fourth point, the applicants also relied upon the inventory list from Mòbel-Transport AG ("Mòbel ") in Zurich, at whose warehouse a large number of the prints are being stored. The inventory list contained values for the artwork and the applicants' solicitors wrote to Mòbel asking how the value was calculated. In response Mòbel explained that they would receive an invoice from the second respondent for a number of prints which gave a total price or value. They would simply divide that overall figure by the number of prints and those were the figures that went into the inventory list as the value per print. The invoice I considered was described as Export Commercial Invoice dated 14 October 2022. It was for 216 prints in 34 boxes and tubes with a "total price" of £12,855 which, on the Mòbel approach, is just over £59.50 per print. Behind the invoice is a list of the investors and their prints comprising the 216, so that they could be stored under the investor's name.

33. Ms Johnson referred to the first respondent's assertion that the figure in the invoice was the reproduction costs, but, as she said, there is nothing in the invoice to indicate that that is the case nor is there any other evidence to support what he says.

34. The applicants also relied upon evidence from investors of enquiries made with auction houses which was to the effect that the value of the prints did not meet the minimum threshold for sale at auction. For example, a request made to Chiswick Auctions in relation to Steven Dews prints received the response: "the secondary market for Steven Dews prints is not very strong at the moment with individual prints selling at less than £100. Consequently these works would fall below our sale threshold." Three prints in relation to which Ms Parel approached Bonhams met with the response that they would be likely to fall beneath their minimum threshold of £500 per print. Mr Petrov spoke of conversations with third parties saying that the prints were not of sufficient value to go into auction and yet he had paid broadly £5,000 for her prints.

35. Ms Johnson noted that the first respondent relied on print outs from websites of "competitors" such as Acorn Gallery and Castle Fine Art, but unlike them the company

was not advertising prints for sale on a website as a retailer, but acting as a broker. The first respondent also relied on the recommended retail price ("RRP") on which the evidence is just from McAlpine Miller and Miss Aniela. It is set out in a list but does not form part of the contract between them and the second respondent. Ms Johnson submitted that RRP was there to preserve reputation. The company was free to sell to investors at whatever price it wanted to and did sell at more than RRP.

36. Overall on this fourth point, Ms Johnson submitted that the issue of value was one for trial.

37. The fifth point on good arguable case was the relevance of complaints made by investors to the company. There had been complaints since March 2018, including one in June 2020 by someone complaining about high pressure sales techniques. In August 2021 the company's bank account was frozen and it was subject to an investigation by Trading Standards. The first respondent attended an interview at Lewisham Police Station with the Economic Crime Unit in connection with the investigation. The first respondent contends that this prompted him to employ a compliance person whose role was to make follow up calls. The transcripts of those calls reveal that investors were asked three highly leading questions drafted by the first respondent which Ms Johnson submitted was utterly hopeless at revealing whether there had been mis-selling. This was just window dressing.

38. In about June 2022, things got worse as the company was expelled from the Fine Art Trade Guild because of too many complaints. The first respondent admits that this was the reason for the expulsion but claims that the complaints were made following the Mail on Sunday articles referred to below. However, this is not correct, as the expulsion and the complaints which led to it preceded the first article which was not published until December 2022.

39. Three articles by a journalist, Tony Hetherington, were published in the Mail on Sunday in December 2022, January 2023 and May 2023 which made allegations of mis-selling, including that the company had told investors that their art had rocketed in value, that their prints could be sold in auction but that to participate, they needed to invest further sums, but there were never any sales at auction, and that they had been given assurances that their prints could be sold in a short period of time at a profit, but when a sale was requested, sales staff were hard to get hold of and no sales materialised. There were further articles in June and July 2023 alleging that the company was a multi-million pound scam.

40. The first respondent contends that following the publication of the first article, he undertook a full review. He admits that there had been mis-selling by the sales team. He says he sacked two of them and had a disciplinary meeting with a third who had told an investor his prints would increase in value by 300%. As Ms Johnson submitted, at that stage, he clearly had knowledge of the wrongful sales practices. In February 2023 he decided to step away from the company and took the decision to hand it over to Michael Conway, a close friend. In his evidence the first respondent provides this explanation:

> "I estimate that I repurchased approximately £300,000 worth of art from the clients. But it became clear to me that S&P could not survive under my watch – because if I stayed in the company, I would have to sack a lot of the sales team in the repeat clients department, and then the company would not have any business."

41. In February 2023 he resigned as a director and transferred his shares in the company to Mr Conway pursuant to a share purchase agreement ("SPA") dated 28 February 2023. The consideration for the shares was £10. As part of the SPA, the first respondent and Mr Conway agreed that his outstanding director's loan and inter-company loans between the company and S&P Gallery Limited (a company wholly owned and controlled by the first respondent) and the second respondent would be written off on or before 28 February 2024. At the same time, the first respondent caused the second respondent to enter into two agreements: (i) an agreement for the supply of marketing services for a period of three years for £7,000 per month and (ii) an exclusive supply agreement for a period of five years. He admits that he knew the day after he left the company that Anthony James, a person he had fired for mis-selling had been rehired by the third respondent.

42. Ms Johnson submitted that, in the circumstances, the first respondent knew that (i) the company was engaged in mis-selling; (ii) the wrongdoers were still employed by the company and (iii) Mr James had been rehired. By entering the agreements the first respondent was ensuring that he and the second respondent continued to benefit from the company in the knowledge that they were supplying a company which was going to continue mis-selling. The second respondent received some £400,000 from the company after February 2023 and the first respondent had his director's loan written off. Ms Johnson submitted that this showed that, at the lowest, the first respondent did not care about mis-selling. His absence of concern showed that he knew about mis-selling all along.

43. The sixth point on good arguable case advanced by the applicants concerns the first respondent's knowledge of mis-selling. As Ms Johnson submitted, he admits that mis-selling was taking place and members of the public were being defrauded. The real issue is therefore his contemporaneous knowledge of it, which includes blind-eye knowledge, as set out in the decision of the Court of Appeal in *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614; [2020] Ch 129 at [59]-[61]. She submitted that this was a target for the applicants at trial, but they will meet it. The first respondent was the alter ego of the company, involved in all aspects of its business. In his Defence he says that there were one or two instances of staff going rogue, but as Ms Johnson said, there was evidence of complaints over a long period of time, not isolated incidents. She submitted that he knew the difference between the wholesale price paid by the company and the price at which prints were sold on to investors, so he knew about the significant mark up. He knew that, as a result of the brochure, the company was holding itself out as a broker and he also knew that any alleged re-sales were buy backs, so that the investors' profit was fictitious.

44. Ms Johnson submitted that, putting the matter into legal framework, the claim under section 213 of the Act was against all three respondents for carrying on the business of the company with intent to defraud the creditors. The sum frozen by the freezing order against the first respondent is referable to money he misappropriated from the company the bulk of which was paid out to him as dividends. The total he received was £5.9 million. A number of his corporate vehicles also received monies as did a number of his relatives and the third respondent. The second respondent was paid some £3.5 million.

45. Ms Johnson submitted that the dividends paid out to the first respondent were unlawful and paid in breach of duty because, to his knowledge, they represented the proceeds of a fraudulent scheme. She also submitted that all the payments made to the respondents and third parties were in fraudulent breach of duty amounting to misappropriation of the

company's funds under section 212 of the Act. She submitted that the second respondent was set up to supply prints to the company, which was more than sufficient to establish knowing participation in a scheme to defraud creditors. Overall, she submitted that the applicants were comfortably within the *Niedersachsen* test.

(2) Risk of dissipation

46. Having referred to the relevant legal principles (which I have set out at [10] to [12] above), Ms Johnson submitted that there were a number of matters which demonstrate that there is a clear risk of dissipation. First was the nature of the case itself and the conduct of the first respondent. The evidence is that he perpetrated a massive art fraud of over a thousand investors and misappropriated the proceeds of the scheme for his own personal benefit.

47. Second was the first respondent's admission that he knew of the mis-selling and then caused the second respondent to enter into lucrative contracts with the company after his resignation and in the knowledge that staff responsible for the mis-selling had not all been sacked. Ms Johnson submitted that this was strong support for the applicants' case that the first respondent lacks all commercial probity.

48. The third and fourth matters relied upon as showing a risk of dissipation were the transfer by the first respondent of monies to entities in Dubai (Redshift 7 Limited) and Hong Kong/New Zealand (Pulsar Commodities Limited and MiMaii Limited) and the use of the offshore Pulsar Trust. Redshift was incorporated on 13 August 2020 and its share capital was owned by the first respondent. The existence of Redshift was disclosed in disclosure affidavits served by the first respondent pursuant to the order of the Court. The existence of overseas assets led to the freezing order being varied by order of Sir Anthony Mann dated 7 May 2024 to make it a worldwide freezing order. That order also required the first respondent to disclose his worldwide assets including what was said to be a BVI discretionary trust, but which it transpired, when further disclosure was given, was managed in Belize and called the Pulsar Trust, set up on 17 March 2021, of which the first respondent was the beneficiary. The property held by the Pulsar Trust was the share in Pulsar Commodities Ltd ("Pulsar").

49. On 20 May 2024, the first respondent served his eighth affidavit. This disclosed a "historical arrangement" whereby the first respondent's companies invoiced the company for *"sales/consultancy/marketing services"*. The Pulsar Trust was part of this arrangement as Pulsar invoiced the company for marketing services provided by the first respondent described as *"specific high end closing training, marketing and lead generation under the ambit of sales and consultancy"*. From November 2021 until about April 2022, Redshift invoiced the company for marketing services after which Pulsar invoiced the company. The first Pulsar invoice was in fact in February 2022, for *"additional marketing services for leads"* with payment of £60,000 to be made to an account with ASB Bank Limited in New Zealand in the name of a company called MiMaii Limited. The applicants have since discovered that some £321,307 was paid by the company to MiMaii between August 2021 and August 2023. Although they have sought an explanation from the respondents for these payments, none has been forthcoming.

50. A copy of a business plan for Pulsar dated 26 April 2021 was exhibited to the eighth affidavit in which the only "usual trading partner" identified was the company. Monthly

payments of £50,000 were said to be going to be received for marketing services and the estimated turnover for year 3 was given as £5 million.

51. In a tenth affidavit dated 27 June 2024, just before the hearing, the first respondent said that the reason for the set up between Pulsar, the Pulsar Trust and MiMaii was that he was looking for inheritance tax advice to minimise inheritance tax for his infant son if he died and that he came across a company called Turner Little on Google which gave such advice. The Trust was set up on their advice. He was unable to produce any email exchange but said advice was given primarily over the phone. He later says the setting up of Pulsar suited his plans for global expansion of the company.

52. Pulsar received £312,000 via New Zealand but the first respondent has provided no explanation for why it had to do so. He said this was for marketing services, but Ms Johnson submitted that this was scarcely credible given that, in his sixth affidavit dated 22 March 2024, he talks about an in-house marketing team and about the second respondent providing marketing services, with no mention of Redshift or Pulsar. This explanation becomes even more incredible in the light of answers to questions from the applicants given by his solicitors in a letter dated 18 October 2023. In answer to a question about GSP Consultants Ltd, they said that they were instructed that it was a company operated by Gabriel Sparkes, the first respondent's brother, which assisted the company with its marketing requirements. Sparkes Gds Limited was said to be another company operated by Gabriel Sparkes which performed the same function as GSP. Kadvice Limited was a company operated by the third respondent which also provided marketing advice. The first respondent's sister Natasha Sparkes also assisted with marketing requirements. Ms Johnson submitted that "marketing services" was a common theme to explain payments out to persons or entities connected with the first respondent, but there was no evidence or documentation for the services allegedly provided by any of these.

53. She submitted that the evidence in relation to the Pulsar Trust was vague and confused and lacked credibility. How one share in Pulsar would achieve inheritance tax benefits was unexplained. There was no evidence from Turner Little. She submitted that the inference was that this was all to disguise and put out of reach monies flowing to the benefit of Pulsar. This intention of concealing what was going on was well supported by the fact that neither Redshift nor Pulsar was mentioned in the first respondent's sixth affidavit.

54. The fifth matter relied upon by Ms Johnson as showing a risk of dissipation was the initial refusal of the first respondent to provide information about Redshift and the Trust. The information was only provided as a result of the order of Sir Anthony Mann. The sixth matter is that, after he had resigned as director of the company, the first respondent accessed the company's bank account and transferred £100,000 to himself. He asserts that Mr Conway agreed he could take the money which was in respect of art which he owned and which the third respondent was refusing to return. However Ms Johnson submitted that that had nothing to do with the company and reliance on Mr Conway having agreed does not assist the first respondent since, even if Mr Conway authorised the payment out to the first respondent, it was wrong for him to do so.

55. The seventh matter was that the first respondent has highly liquid assets in the form of stocks and shares with Hargreaves Lansdown and Vanguard (currently being used to pay his legal fees) and an unencumbered property in Sutton worth £2 million.

56. In relation to the proprietary injunction also granted against the respondent, Ms Johnson submitted that there must be a serious issue to be tried. So far as the balance of convenience is concerned, she relied upon the company's interest in preserving its property, given that the applicants act on behalf of hundreds of creditors. If there were no proprietary injunction, the assets may be spent on defending the litigation.

(3) Full and frank disclosure

57. The first respondent makes wide ranging allegations of the failure of the applicants and their advisers to give full and frank disclosure, as set out in his solicitors' letter of 16 April 2024. Ms Johnson made submissions about these allegations as part of her opening submissions. She referred to the judgment of Carr J in *Tugushev* set out at [13] above and emphasised in particular points (v), (vi), (vii), (viii) and (x).

58. She also referred to the judgment of Longmore LJ in *Kazakhstan Kagazy v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] where he adopted what was said by Toulson J in *Crown Resources AG v Vinogradsky* (15th June 2001):

> "… where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. … I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. … In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion."

59. She noted that in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [20] Males J had said that this was the correct approach in a case of any magnitude or complexity. He had also said at [19]:

> "It is important also not to allow a dispute about full and frank disclosure to turn into what is sometimes euphemistically described as a "mini" trial of the merits…unless both parties exercise restraint, there is a danger that applications for the grant or discharge of freezing orders may become unmanageable. Thus the claimant must disclose material facts, which will include making the court aware at the without notice stage of the issues which are likely to arise and the possible difficulties in its case, but need not extend to a detailed analysis of every possible point which may arise; and the defendant must identify with clarity (and if necessary restraint) the failures of which it complains, rather than adopting a scatter gun approach."

60. Males LJ had repeated this reasoning in *Derma Med Ltd v Ally* [2024] EWCA Civ 175 at [29] to [30], holding at [31]:

> "A further point which merits emphasis is that even when there has been a failure of full and frank disclosure, the interests of justice may sometimes require that a without notice order be continued and that a failure of disclosure be marked in some other way, for example by a suitable costs

order. A court needs to consider the range of options available to it in such an event."

61. Ms Johnson also submitted that, where there has been a failure to give full and frank disclosure in claims involving allegations of fraud against a defendant, it may be unjust to discharge the injunction on this ground. She relied upon what was said in *Gee on Injunctions* 7th edition at [9-022]:

> "where there is a clear prima facie case of a substantial fraud, innocent albeit careless non-disclosure may not result in the discharge of the ex parte relief. Whilst a penal jurisdiction is necessary in order to deter non-disclosure, when there is non-deliberate material non-disclosure which is not of central importance in a serious fraud case, courts have, in the exercise of their discretion, often been willing to continue the relief on the ground that the need to do substantive justice outweighs that consideration" [citing, amongst others, *Marc Rich & Co Holding GmbH v Krasner* [1999] EWCA Civ 581 and *Fitzgerald v Williams* [1996] QB 657]

62. Her overarching submission was that the letter of 16 April 2024 showed no sense of proportion or restraint and adopted the scatter-gun approach which the authorities just cited deprecate. The letter is 18 pages long and covers 12 different allegations. However, these largely turn on disputed facts which are for trial and on allegations of a failure to carry out enquiries. She submitted that the applicants were well aware of their duty at the *ex parte* hearing. The affidavit in support of the application contained a section on full and frank disclosure which ran to 26 paragraphs and counsel's skeleton also contained such a section.

63. Ms Johnson made submissions about each of the allegations. The first was an allegation of having given an inadequate time estimate to Michael Green J for the *ex parte* hearing and pre-reading of two hours which meant that there was no chance of the judge understanding the claim. She submitted that this was simply not non-disclosure. Likewise the second allegation of sweeping and unparticularised assertions in the applicants' affidavit was not a failure of full and frank disclosure. The first respondent contended that when the affidavit said what investors were told it was put at a high level of generality. However, Ms Johnson pointed out that, at the time of the affidavit, the applicants had attended a creditors' meeting at which thirty creditors expressed complaints and a creditors' committee of six creditors has been appointed. There is a WhatsApp group of ninety creditors.

64. The third allegation is that the applicants had not made reasonable enquiries prior to the application. Ms Johnson submitted that it was clear from the affidavit that the applicants had spent a number of months investigating the affairs of the company, which is why the application was not issued until January 2024. She submitted that, contrary to what was said in the letter, the applicants were not obliged to interview the first respondent and the judge was not misled about that. The letter alleges that the applicants placed undue and misplaced reliance on the Mòbel inventory list and did not enquire as to its true significance. However this was a disputed fact for trial and, in any event, the applicants drew the attention of the judge to the dispute in the affidavit of Mr Piacquadio and Ms Johnson's skeleton, pointing out that the first respondent may allege that the value of the prints in the second respondent's invoices represented the costs of printing (or something else) and did not reflect their market value. The judge's attention was specifically drawn

to this. Furthermore, there was not undue reliance on the Mòbel inventory list, since the applicants also relied upon the evidence from the auction houses and the evidence of the enormous mark up.

65. It is also alleged that the applicants failed to value the art, but the judge was aware of the basis upon which they were alleging inflated prices. He saw the website print outs from various "competitors" and Ms Johnson had told him that it looked as if the company was selling at similar prices, but that was irrelevant, as it was acting as a broker, so that comparison was between apples and pears.

66. The fourth allegation in the letter again concerned the value of the art, but Ms Johnson submitted that this was a disputed issue of fact and the judge had the evidence on mark up and saw the print outs. The fifth allegation concerned the fact that the applicants contend that the company was a broker rather than a retailer, but Ms Johnson submitted that this goes nowhere. Apart from anything else, the judge had the evidence from the brochures that the company was being represented as a broker. The letter alleged that it was crystal clear from the company's terms and conditions that the company was acting as principal and the investors would have known that. Ms Johnson submitted that there was not a clear picture from the investors as to whether they thought they were contracting with the company as principal and, in any event, this does not answer the question what service the investors thought they were getting.

67. It was also alleged that the applicants had failed to take the judge to parts of the brochure that talked about the investors doing their own research. Ms Johnson submitted that it was not clear what point the judge had missed by not being taken to these passages in the brochures. Ms Johnson had made clear to the judge that investors were told that the value of the art could go up and down and they were told to hold onto the art for years.

68. The next allegation was that the applicants had failed to inform the judge that the first respondent had taken action against other employees engaged in mis-selling as well as Mr Schembri. The fact that the first respondent had appointed a compliance officer only emerged from his subsequent evidence after the *ex parte* hearing. The letter next complained about disclosure in relation to the proofs of debt in relation to which Ms Johnson submitted that too much correspondence had been generated on a non-point. The main complaint seems to be that the proofs of debt do not show the investors complaining of fraud. However Ms Johnson submitted that, just because the proofs of debt did not use the word fraud, did not mean that the investors were not advancing a case of fraud. She referred to a number of sample proofs of debt. Mr Petrov in the particulars of debt described: "purchase of art as investment, misrepresentation, inflated price". Other investors did allege fraud. Ms Conway alleged: "Fraudulent investment/missing artwork". Some investors had been lied to about the Dubai auction, but not others. However, a common component of all was that representations had been made in the brochure and they were led to believe that the company was acting as broker and in their best interests. Ms Johnson submitted that, if those facts are accepted at trial, all the investors have valid claims.

69. The respondents contend that half the transactions of which complaint is made were entered after the first respondent resigned, but Ms Johnson said that this was a non-point because the company continued to supply investors via the second respondent, which was the first respondent's company. The frozen sum in the injunction against him is also based on the money he received.

70. The next allegation in the letter is that there was no urgency or risk of dissipation which necessitated the application for the freezing order being made without notice. Ms Johnson pointed out that she had explained to Michael Green J why it had taken until January 2024 to make the application. He had asked and she had explained that the applicants had needed to get ATE insurance which was not confirmed until 8 January 2024.

71. There are then some allegations which Ms Johnson described as manifestly immaterial and I do not propose to address those specifically. The final and twelfth allegation is that the judge was told that the order being sought was all in standard form, but the standard form of freezing injunction does not include a proprietary injunction. The letter refers to *Vestey Foods UK Limited v Cox* [2018] EWHC 3466 (Ch) where criticism was made of such injunctions being sought in a wide form. It is said the present proprietary injunction could not have been wider, purporting to capture all payments made by the company to the first respondent. Ms Johnson pointed out that the judge was aware that the applicants were applying for a proprietary injunction and decided they could have it. The assets covered by it were the house in Sutton and the monies in Schedule D, that is all payments by the company to the first respondent directly and to his company Sparkes Power.

72. What happened after the *ex parte* hearing is that, before the return date, the first respondent's solicitors wrote raising various issues, but there was no suggestion that the proprietary injunction should be varied. The applicants then agreed that the first respondent could have £280,000 plus VAT for legal fees without having to be satisfied it came from non-proprietary assets, on the basis of an undertaking that he would replenish proprietary assets from non-proprietary assets. The proprietary injunction then continued by Richards J on 25 January 2024 was in exactly the same form as originally granted. The first respondent then served his fifth affidavit on 15 February 2024 to comply with the Court order to disclose the location of the monies.

73. Ms Johnson pointed out that the reliance on *Vestey* first emerged in the solicitor's letter of 16 April setting out all the full and frank disclosure points. It was a point identified by lawyers and not based on any prejudice. There was also no application to vary the order. She referred to the judgment of HHJ Klein in *Vestey* where, at [81], he had referred to various authorities saying that a proprietary injunction must be in clear and unambiguous terms. She submitted that this case was nowhere near that territory because each payment caught by the injunction was listed in Schedule D. At [84] HHJ Klein said it was not explained there how the particular sums might be in Mr Cox's hands, but that problem did not arise here.

74. Ms Johnson submitted that, even if there had been a failure of full and frank disclosure, the Court should not discharge the injunction. She referred to *Derma Med* where there was a complaint about the width of the definition of "confidential information" in the order and the Court held that there was a failure to give full and frank disclosure but declined to discharge the injunction. At [56]-[57] Males LJ said:

> "56. There is, moreover, considerable force in Mr Grant's point that once the problem was clearly explained, it was accepted by the claimants, and that the width of the injunction had caused no prejudice to the defendants in the meanwhile. Although Mr Solomon submitted that the width of the definition of 'Confidential Information' had infected other provisions of the order made by Mr Justice Constable because of the way that those other provisions referred to Confidential Information, that was a matter which, if it had caused

> any real as distinct from theoretical problem, could easily have been sorted out. The fact that it was only raised so late, in the defendants' skeleton argument for the return date hearing, suggests that it was something of an afterthought. Indeed, Dr Ally had indicated that he was prepared to offer suitable undertakings as to confidentiality, although he had never specified the terms in which he was prepared to do so and in the event no such undertakings were given.
>
> 57. Accordingly, while I would hold that this was a failure of full and frank disclosure, it was clearly not deliberate and was of relatively limited significance. A sense of proportion was needed."

75. She also referred to the passage in the judgment of Males J in *Yurov* at [77] to [87] dealing with the Court's discretion to decline to discharge an injunction even if there had been a failure of full and frank disclosure, emphasising [85]:

> "Finally it is necessary to consider the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets. In my judgment this injustice is a particularly powerful factor in the present case. This is a case where, as at present advised (I emphasise this qualification), and subject only to the issue of Russian law identified above, the bank appears to have a very strong case on the merits; it appears to have been the victim of a massive fraud from which the defendant has benefited to the tune of tens of millions of dollars and perhaps more; the defendant's conduct even on his own account has been dishonest; even on his account the conduct in question involved the movement of funds through a network of offshore companies with a view to disguising from the regulator the origin of the funds in question and the beneficial ownership of the companies concerned; the defendant appears to have received personally substantial funds which have not been accounted for in his disclosure of assets; and there is solid evidence of what appears to be an attempt to dissipate assets. It is hard to think of a stronger case for a freezing order."

76. She submitted that it was plainly not in the interests of justice for the injunction to be discharged if there was a good arguable case that fraud had been committed and that there had been a misappropriation of assets and if there was a risk of dissipation. Many of the factors identified by Males J in that paragraph were present here: there was a strong case of fraud and there were admissions of wrongdoing. If the injunction were discharged hundreds of investors would be left without a remedy. The company has no other assets.

77. As for the importance of the facts allegedly not disclosed, to the extent that they were facts in the true sense they were not important or nowhere near important enough to justify discharging the injunction. Any non-disclosure was innocent and inadvertent. It was clear that the way that the applicants had dealt with the matter gave careful consideration to whether there was compliance with the obligation of full and frank disclosure. The Court should continue the injunction.

The first respondent's submissions

(1) Full and frank disclosure

78. Mr Robert Levy KC began his submissions by dealing with the question of full and frank disclosure, although many of the points he made shaded into submissions on the merits. He submitted that the application before Michael Green J had been an object lesson in how not to run a heavy application for a freezing order with serious allegations of fraud and invasive relief sought where the order creates an immediate imbalance of power because it controls what the first respondent can do. There were aspects of the presentation which were so wanting that the order cannot stand. The judge was bounced into the hearing with an inadequate timetable. He had indicated that he had not read everything and Mr Levy KC suggested he may not even have read Mr Piacquadio's affidavit in support of the application. However, as Ms Johnson pointed out in reply, the judge had referred at the hearing to what he had seen in the affidavit about turnover, a clear indication that he had read it, as is also clear from other parts of the transcript.

79. In relation to *Tugushev,* Mr Levy KC submitted (iv) was of particular importance, the need for proper enquiries before making the application. He also emphasised (ii), (viii), (ix) and (x) that the Court adopts a penal approach and will discharge the order even if it would still have been made. He referred to various passages in *Gee on Injunctions*, noting that the judge had explained that he had not been able to read everything. The Court had been presented with 2,000 pages of documents and an original time estimate (including pre-reading) of 2 hours which subsequently because of alleged urgency (which he submitted did not amount to a row of beans) went down to 1 ½ to 1 ¾ hours. The estimate should have been at least 4 hours. To give the first respondent the protection he deserves in the interests of justice, the judge should have had a proper opportunity to consider the evidence in full, read it and digest it. The reading list and skeleton did not refer to important provisions in the terms and conditions nor was the judge invited to read the Amended Points of Claim.

80. He submitted that, as officers of the Court, the applicants had wide powers of investigation. They had failed to make even the most obvious enquiries and it was proper to infer that they had refrained from doing so because of fears it might undermine their suspicions. The applicants had made a positive decision not to interview the first respondent. Ms Johnson had said that this was disclosed in the affidavit and the judge knew, but *Tugushev* explains that, if it was a reasonable enquiry, everything material that the first respondent would have said should have been before the Court. It was not enough to say that he did not have any books and records. That was a blinkered approach.

81. The applicants might have been told things they did not want to hear such as that the second respondent had deals with well-established artists whose original works sell for as much as £120,000 and how the artists were pleased to work with the first respondent. The prints sold were processed by a high quality printer and had certificates of authenticity. There was a disparity between actual values and the Mòbel values. The applicants wanted to remain in ignorance of anything which got in the way of their case theory that the prints were worthless pieces of paper, such as the existence of the limited edition print market.

82. Mr Levy KC also pointed out that the applicants had not interviewed Mr Conway, even though half the claim in value relates to the period under his ownership. He submitted that it was highly likely that he would have told them how he valued the prints and that the Mòbel inventory list was not reflective of market value. The applicants had also made a positive decision not to contact any of the artists themselves. The journalist Tony

Hetherington had only contacted Miss Aniela but the applicants had not contacted her. They also made a poor decision not to instruct an art expert.

83. Two of the artists would have given important evidence. Mr Levy KC referred to the witness statement of Mr McAlpine Miller given to the respondents. He talked about having a Licence Agreement with the second respondent in relation to Harry Potter prints and how originals of his work sold for £125,000. He talked about the high quality of the work of the printer used, Darren Van der Merwe, and how he signed the certificates of authenticity personally. He had agreed prices with the first respondent and said his reputation would be damaged if the prints were sold too cheaply. There was a massive divergence between the prices his wife gave for the prints and the Mòbel prices which he said cannot be right.

84. The partner of Miss Aniela, Mr Lennard, had also provided a witness statement. He referred to having been looking for additional outlets for her work and having found the company with whom they had an exclusive contract. He said that there could be no justification for such low prices as the Mòbel prices for a genuine Miss Aniela print.

85. Mr Levy KC went through the expert report of Mr Scott. He placed particular emphasis on Mr Scott's opinion that the first respondent was likely to be right that the Mòbel values were reproduction values. He noted that the report had gone through various artists commenting on prices at which their works were sold. In relation to Mr McAlpine Miller he pointed out that a print "Split Personality" had sold at Dawsons Auctioneers in Maidenhead in 2023 for £5,500. This was a work distributed by the second respondent. He identified other comparable items on sale for £2,775. He also noted Miss Aniela's "Torn Tale" was being advertised at prices ranging from $3,000 to $8,000. Mr Levy said, by reference to the Scott report, that it was surprising the applicants had not instructed an expert at the time of the *ex parte* hearing, as had they done so their evidence could not have been that the prints were worth nothing.

86. In relation to the Greenway report which the applicants had now obtained, Mr Levy KC noted that one of the assumptions made was that there had been no inspection of the prints, but pointed out that a number of the prints were stored in south London and so could have been inspected. He also said Mr Greenway had not looked at the online market at all. Mr Levy KC also focused on Mr Greenway's conclusion that the company may have been selling reproduction prints and that there may have been forgeries, which he submitted was a frolic of Mr Greenway's own, since no case was being made that the prints were not genuine.

87. Mr Levy KC submitted that the applicants should also have approached Rosenthiels, a reputable business going for more than 100 years which had been the source of limited edition prints for some time. In an email of 1 September 2023 giving detailed answers to the applicants' questions, the first respondent had given them Rosenthiels' website. The respondents' solicitors had emailed Mr Roe, the chairman of Rosenthiels in March 2024 and he had said, amongst other things, that the mark up charged by those to whom they sold could be three times their sale price. The applicants' own expert Mr Greenway had said in his report: "When it comes to prints in both the primary and secondary markets, the markup of 100% from wholesale cost to RRP may not always apply". This was consistent with Mr Roe's evidence.

88. Mr Levy KC pointed out that, in the first respondent's email of 1 September 2023, he had given what Mr Levy KC described as an honest and full response as to how he valued the art which the applicants had not queried subsequently. None of this had been exhibited to the applicants' affidavit [which was not correct as the email was exhibited to the affidavit]. Mr Levy KC then took the Court to a number of prints which were valued by other galleries where the prices were similar to those being charged by the company, the impact of which he submitted was to shatter the applicants' worthless art point. At the very least it was incumbent on them to rethink that argument. What it did not show was a basis for going to the judge and saying the prints were sold at grossly inflated prices. He submitted that the case had not been presented to the judge on the basis that the company was a dodgy broker, but on the basis that the investors were being sold rubbish. In his judgment granting the injunction, the judge had accepted this saying: "So, it appears that, first of all, the prints which were sold to investors were actually of very low value, but they were sold to them at grossly inflated prices." If there had been a proper investigation by the applicants into the value of the prints before they made the application that conclusion could not have been reached. If the reality was that there had been a hard sale or mis-sale of prints at or around the market price, it was unlikely the applicants would have obtained a freezing injunction, let alone a proprietary injunction.

89. Mr Levy KC submitted that the applicants had the means of investigating value but never did so. They were fixated on the Mòbel inventory list but never asked the first respondent about it, although Mòbel had replied to them on 1 November 2023. In his sixth affidavit, the first respondent had explained that the Mòbel prices were not the values but: "the cost of reproduction of the print in the event that it is lost or destroyed. It was our practice, at S&P, to record the reproduction value on the item when sent to Moebel for storage. The idea for this came from the in-house master printer that we employed at the time – Darren van der Merwe. On Darren's suggestion, I then checked with our accountant, Aidan Hassan, and he confirmed that it was reasonable to put the reproduction cost on the item for the purposes of customs into Switzerland." Mr Levy KC said that if a print is lost it can be reproduced as part of a limited print run. If the applicants had asked, they would have discovered this.

90. He then turned to the allegation that there was a fraudulent investment scheme. Ms Johnson had explained it to the judge at the *ex parte* hearing in these terms:

> "But, in relation to the art fraud, the evidence, we say, demonstrates that the scheme worked in the following way. Investors were encouraged to buy prints which they were frequently told were limited editions, were in high demand and were going to increase in value over time. They were told that the company was an expert in buying and selling fine art and would advise upon and assist with the sale of the art or the prints to the secondary market. Investors were also told that, in order to protect the value of the prints, they needed to be stored in a specialist warehouse which the company would arrange, and the warehouse was based in Switzerland. And investors were told that the company would make its profit by charging 2 per cent on the sale to the investor and then a 5 per cent broker fee on any resale, although the 5 per cent broker fee would only be on the difference between the original sale price and the resale price. So only a small amount in each case. The investors were also told that the company was a member and of and regulated by the Fine Arts Guild."

91. Mr Levy KC submitted that this summary wrongly implied that the brochure had said that the company's only profit was these percentages but there was no such representation. The word "only" at the end of "What are the costs?" in the brochure before the Court at the *ex parte* hearing (referred to at [19] above) was in relation to the profit on the resale of 5%. This was not a representation that the only other money made by the company on the transactions was the 2% fee on the sale which would scarcely pay the bills. More worrying was that the judge was not taken to material demonstrating that the company was selling in its own right. Mr Levy KC referred to the passage in the brochure which described the company as "an organisation that specialises in buying and selling fine art."

92. In relation to the terms and conditions, the judge had been taken to clause 5.6.1: "We do not make any promise or guarantee that the products will be appropriate for your needs or desires" and clause 5.6.3: "We do not make any guarantee that we will be able to sell the products for you in the future if you ask us to. We do offer a resale service, but we will need to agree the terms of that specifically in the future if you wish to use this service and we agree to provide it". The judge had not been taken to clause 7.4. which said the price of the prints: "Includes a 2% broker fee, exclusive of VAT unless stipulated otherwise in the Order". It said "includes" not "is" and there was no representation as to the profit margin of the company on what it was selling. Mr Levy KC submitted that if this had been a brokerage or agency agreement, one would expect the language to be radically different. The judge was also not taken to clause 12.6 which provided: "Owning artwork carries with it a risk that it could decrease in value. We are not responsible, and shall have no liability for, any decrease in the Product(s)'s value. Any information given by us in relation to selling the Products is given as guidance only and you should obtain your own independent expert advice before selling any Product." Mr Levy KC also submitted that the judge had not been taken to the terms and conditions at all until after he had decided to grant the injunction.

93. Overall Mr Levy KC submitted that once the applicants' case on value had gone, there was no good arguable case when viewed through the lens of full and frank disclosure. It was very difficult to say that there was a good arguable case that the company was a broker rather than a principal once it was realised the judge should have been taken to the terms and conditions.

94. He accepted that some investors may have been mis-sold prints or subjected to pressure and may have felt forced to part with their money. When the first respondent learnt of this, he fired the staff in question. This was not the stuff of a freezing injunction. Mr Levy KC submitted that the claim had to be the subject of proper analysis at the *ex parte* stage but it had been presented as one where everyone necessarily had a claim and had suffered a total loss.

95. In relation to customers' claims and proofs of debt, Mr Levy KC said that Mr Piacquadio should have been more careful when he said he had received 197. The claim had been presented on the basis that every investor was the victim of fraud. The Amended Points of Claim at [97] alleged: "every investor was induced to invest in the Scheme as a result of fraudulent misrepresentations and thereby suffered an immediate loss because the value of the prints was significantly less than the price paid for them." The judge had been entitled to be given a proper analysis of the claims not based on the jaundiced views of the applicants as liquidators.

96. In relation to unauthorised mis-selling, the applicants knew from the Investigation Meeting Minutes which were exhibited to Mr Piacquadio's affidavit, that Mr Schembri had been disciplined. In those minutes it emerged that he had promised clients potential profits of 300% but when questioned he said that he had never promised a guarantee and never went above the current market prices. Whether this was true or not, it is impossible to reconcile with the first respondent having authorised mis-selling. The judge was not told that the first respondent had taken action against other staff. One investor, Mr Salway, knew that Mr Schembri had been dismissed for deceiving clients but carried on buying prints. Mr Levy KC submitted that it was an important point that the company had not hidden this. He also submitted that the applicants should have known that from 2021 the company employed a compliance person. Complaint was made about leading questions in the script for the follow-up calls, but if an investor was aggrieved, when asked the leading question about not having been given any guarantees, they were free to say: "yes I was".

97. Mr Levy KC made the point that a number of the proofs of debt talked about "missing art" but in fact the first respondent had corresponded with one of the applicants, Mr O'Hara and said they could come and get the art which was being stored in south London. This correspondence was referred to in [66] to [68] of Mr Piacquadio's affidavit.

98. In relation to failure to make full and frank disclosure about the proprietary injunction, Ms Johnson had said in her skeleton that the injunction sought was all in standard form and the judge was entitled to take what she said at face value. Mr Levy KC referred to the decision of the Court of Appeal in *Sidhu v Memory Corporation (No. 2)* [2000] 1 WLR 1443 where the importance of informing the Court that parts of a freezing injunction sought were not in standard form was emphasised. There is no standard form of proprietary injunction which the judge should have been informed. He should also have been taken to *Vestey*. Mr Levy KC submitted that courts should not make this type of order which reverses the burden of proof.

(2) Good arguable case

99. Mr Levy KC submitted that the primary way in which the applicants put their case was that everything which came into the company was the proceeds of fraud and everything which went out to the first respondent and others was in dishonest breach of directors' duties. If, as he submitted, there was no good arguable case of fraud, that fell away as did a case that the company operated an investment scheme which meant investors purchased items without value. In their written submissions the applicants do not really press that case. Their core argument seems to be that there was a misrepresentation that the company was only going to make 2% on sales and 5% on resales. The brochure and the terms and conditions blew that case out of the water.

100. The only other evidence on this before the judge was said by Mr Levy KC to be that of the investors Rhobe Parel and Paul Salway who provided the applicants with affidavits. Ms Parel does not say anything about a representation that the company would only make 2% on the sale and there was nothing in her statement to suggest she believed anything other than that she was buying from the company as seller. [29] suggests she read the terms and conditions and she was told the value of art purchased could decrease.

101. In an affidavit sworn in December 2023, Mr Salway describes a conversation with a member of the company's staff three years earlier in which he recollects being told a

number of things including that “the company would charge a small trade fee on an investor's purchase of an art print (2%) however the company would often waive this fee” and “the company would only make money when an art print from an investor's portfolio was sold. It would earn money via the broker fee, which was 5% of the profit made.” There was no minute or recording of this conversation and Mr Levy KC submitted that it stretched credibility that Mr Salway had so specific a recollection. Furthermore, he submitted that the first of these points was not an allegation that the company would only make 2%, which would be inconsistent with the brochure and the terms and conditions. The second point was also inconsistent with the terms and conditions and other points he recollected were similarly inconsistent.

102. The applicants put forward additional affidavits and witness statements before the Court at this hearing which Mr Levy KC submitted could only go to the regrant of the injunction if he was right about full and frank disclosure. Philip Remillard says at [13] of his affidavit:

> “I was told, on more than one occasion, that their model was a 2% commission on the transaction in order to pay basic expenses i.e. running costs, rent, heating etc and then 5% commission on the profit of the resale. I was specifically told that the only way the agent made money was on the resale commission. I frequently asked the Company to waive the 2% commission and they would agree.”

Mr Levy KC suggested that this was looking only at what the “agent” made not the company because if it were the company, it would be just enough to keep the lights on. This was a sophisticated investor and this evidence did not make good a case that the only money made by the company, if it was referring to the company rather than the “agent” was the 2%.

103. In his affidavit, Mr Martin Petrov said:

> “I specifically asked Mr Reis at the beginning, how he made money, and he answered that it was from the 2% trade fee that was applied each time an investor purchased art via the Company. I understood, later on, that employees also received a small base salary from the Company, bonuses and commission based on the sales they made.”

As with Mr Remillard, Mr Levy KC submitted that this was not saying the only way the company made money was the 2%. He noted that the applicants relied upon Mr Petrov because he says that he believed that he was buying from the company at a price reflective of the market. The other investor Ms Mishra does not say anything about the 2% fee.

104. Mr Levy KC referred to the representations in the marketing literature alleged in [24] of the Amended Points of Claim. The statement at (a): "Our unique strategies can bring a return potential of 64.6% in 12 months, with a market average of 10.85%." was one that none of the witnesses refer to and no-one could credibly believe that this return could be made in 12 months. The statement in (b) was true, in that the company did have industry contacts and special individual relationships, with Mr McAlpine Miller and Miss Aniela. Mr Levy KC also referred to the allegations of the respects in which the representations were false at [47]. He submitted that the pressurisation allegation at (c) was not one of false misrepresentation but of mis-selling. (d) referred to the company not having

insurance in place but the first respondent says there was insurance with Hiscox and in any event no-one says the representation about insurance was a decisive factor.

105. He submitted that the allegation in (e) was hopeless and the point about the Fine Art Guild at (f) was that the company had been a member but had been forced out. The customers did not say they relied on this.

106. In relation to [97] of the pleading (referred to at [93] above), he submitted that could not be right, even with 220 proofs of debt and was an example of over-pleading a fraud case without any apparent basis for it. There was a lack of analysis.

(3) Risk of dissipation

107. Mr Levy KC submitted by reference to the principles set out at [10] above that there had to be a real risk, but there was not. The house in Sutton was only in the first respondent's name and he had not put his partner on the title deeds. He had £640,000 under management with Hargreaves Lansdown in his own name and £478,000 in specific shares in his own name as well as £30,000 in indexed funds with Vanguard. This was the very opposite of putting assets out of reach by concealment or transfer. Ms Johnson's suggestion that this could also be instantly liquidated or transferred was fanciful. In relation to other financial assets which it was said could be withdrawn at the touch of a button, the fact is that they had not been. The company had gone into liquidation in June 2023, there had been extensive communications between the parties for months before the freezing order was made and he could have moved money out but had not. He had disclosed the existence of the property in Northern Cyprus. In relation to the £5.9 million he had had from the company, he had paid all the tax on this. There was solid evidence that, even when things were going to heat up, he kept millions of pounds in the jurisdiction in his own name.

108. It was not enough to show a good arguable case of dishonesty. It had to be dishonesty which pointed to assets being dissipated. Quite apart from the fact that Mr Levy KC submitted that there was no dishonesty, but just evidence that sales staff exceeded what they were meant to say and that there were disgruntled investors, it would be very unusual for a dishonest person who was being investigated by his company's liquidator not to shift his assets pretty swiftly which the first respondent had not done.

109. As for the use of offshore structures, there were only two here and they only received a relatively small proportion of the monies which was explained. This has to be viewed in the context of other assets. The first respondent could have transferred those assets into offshore vehicles but had not done so.

110. The dissipation had to be unjustified. Here there was no threat of the first respondent changing the way he conducts his affairs. The applicants rely on the £100,000 he took out of the company after his departure but he had explained that this related to personal stock left in the company and Mr Conway permitted the payment. Overall Mr Levy KC submitted that there was no real risk of dissipation.

The applicants' reply submissions

111. Ms Johnson submitted that Mr Levy KC had placed great emphasis on the alleged failure to make reasonable enquiries and how if the applicants had done that, they would have

got the first respondent's explanation of the selling prices of the prints. It was the key plank of the first respondent's case that the company had not sold the prints at grossly inflated prices. However, as was apparent from the transcript of the *ex parte* hearing, the material given to the judge included the email from the first respondent of 1 September 2023, which at [5] had a detailed explanation of how he valued the art, which the judge read. With Rosenthiels the first respondent says the art was sold at their RRP. With the second respondent they considered past sale prices and reviewed RRPs from other galleries. Therefore the applicants had a lot of information from the first respondent which was put before the judge.

112. She submitted that what the applicants were interested in was the price at which the prints were sold to investors. They were buying to realise a profit by resale on the open market. The reference in the brochure to 10.85% market average came from Maddox Fine Art and was a compounded average return over a period of fifty years looking at actual prices achieved on actual sales. The discussion referring to selling in the market is talking about genuine resales. The model put forward was like a stockbroker saying there is a highly liquid market for the resale of these prints, but in truth that was not the case at all. There were no genuine resales, just buy backs so the company could sell more prints to the investors.

113. Reliance had also been placed by the first respondent on the artists themselves, it being said that the applicants should have spoken to them, in which case they would have been informed what the RRPs were. However Ms Johnson submitted that this was not addressing the right question. The views of the artists might be interesting but were not relevant to how the art was valued in the chain of sale and resale.

114. Mr Levy KC had referred several times to the applicants alleging that the prints were "worthless tat" but this was not how Ms Johnson put the case to the judge at the *ex parte* hearing. She had said:

> "the wider point is that the impression that was being created by the literature and what was being told to investors is that they were essentially acting as a broker, as an agent, and they made their money when they successfully sold a piece at profit; whereas what was really going on is that the company was acquiring prints for a fraction of the price that they were selling them to the investors for and that is where they were making such huge sums of money."

115. Front and centre of the applicants' case was the inflation of the wholesale price to the price at which the prints were sold to the investors. They were sold to the investors at grossly inflated sums which is the point Ms Johnson made slightly later in the transcript when she referred to the fact that the company had paid the second respondent £3.5 million for prints and Rosenthiels about £1.2 million, whereas the investors paid the company £21.2 million for that art. She said:

> "We rely on that as being a fairly weighty factor as showing that the company's revenue was based on this significant difference between those two, that investors were not aware that that is how the company was making its money and they were led to believe that the company was just providing an art investment service, advising on the value of art, advising when to sell it and would just make a broker's fee."

116. The judge was well aware as to what the applicants' case was. He said:

> "They were selling this to investors on the basis that they were specialists, they are not retailers, there were acting as a broker/agent whatever, to buy and sell pictures on behalf of their investors on which they expected them to make a sizeable profit… Not that they themselves would be making a profit on the resale; they will just be getting a commission?"

117. This was also how the applicants put their case at [29] of the Amended Points of Claim:

> "The Company sold the prints to investors at grossly inflated prices. The value of the prints purchased by investors was significantly lower than the prices the Company had paid for them."

118. In relation to Mr Levy KC's criticism of the applicants for failing to instruct an expert at the time of the *ex parte* hearing, Ms Johnson made the point that, if the applicants had instructed Roseberys sooner, they would have supported the applicants' case that there were no sales on the market and no genuine resales. Mr Levy KC had sought to suggest that, if the value of the art was low, this was as a result of the Mail on Sunday articles, but she submitted that was not right because it was clear from both experts that there were very few resales.

119. In relation to payments from the company to the second respondent, Ms Johnson noted that between June 2021 and May 2023, the company paid a net amount of £3.595 million to the second respondent. The figure of £21.2 million for the amount paid by investors to the company came from the turnover figures which were analysed by the applicants' office. In Mr Piacquadio's second affidavit he gives the percentage increase for each of the years 2020 to 2022, comparing the amount paid to Rosenthiels and the second respondent with the turnover: 777% in 2020, 647% in 2021 and 353% in 2022.

120. As already set out at [31] above, Ms Johnson returned to the expert evidence on the absence of resales and of a liquid secondary market. She also noted that the respondents' expert had been asked in the letter of instruction to provide a valuation of the prints sold by the company but had not done that, so there was no evidence of real market value. She drew attention to the evidence of Mr Roe of Rosenthiels as to the price at which they sold to the company:

> "The pricing on our website is our suggested retail price without VAT and we gave to Mr. Sparkes, not only the regular trade discount for a gallery of 50%, but indeed very substantial additional price reductions against quantities purchased and against undertakings to purchase complete Editions over a period of time on an exclusive basis."

She said that neither Rosenthiels nor people like Mr Lennard would have had any idea what the company was selling the prints on to the investors for.

121. Ms Johnson submitted that if a business tells its customers that it is only making its profit through commission where they are in a fiduciary or agency relationship and the business knows it is making a huge profit, that is *prima facie* fraud. She referred to the sales script drafted by the first respondent in which it was said: "I'm [sure] you've been waiting to ask, what are the costs? When it comes to charges there will be an initial fee of 2%; however we also charge 5% on the profit." She submitted that what is clear, when this is read with the brochure offering to act as a broker, is that the natural and obvious inference is that the charges the company made for the service it was offering was the 2 and 5%.

She submitted that other parts of this script gave the misleading impression that there was a proper liquid resale market.

122. Ms Johnson submitted that, in relation to the evidence from investors, Mr Levy KC had made various forensic points, but they were all for trial. The investors from whom evidence has been obtained all speak with one voice. They thought the company was acting as a broker and would sell their prints on their behalf in the market. She submitted that if one looks at the sales script the staff had to follow and the brochure, there was a good arguable case that the company was representing to the investors that it was something it was not. There is what she described as an "umbrella problem" of the company holding itself out to the public as doing what it was not in fact doing. She submitted that the applicants do not need to prove that all the investors knew that they had been defrauded. They may not discover that for a very long time. The long standing problem goes back to the first complaint in 2018, with the investigation by trading standards in 2021 and the expulsion from the Guild in 2022. The first respondent is the alter ego of the company and knows about the umbrella problem. He wrote the sales script.

123. Ms Johnson noted that much was made by Mr Levy KC of the terms and conditions, the argument being that, if the investors had looked at them, they would have realised that the company was acting as a principal actually selling the art. She submitted that it is far from clear that the investors would have realised from the terms and conditions that the company was acting as a retailer, added to which there were several versions of the terms and conditions.

124. She submitted that the Investigation Meeting Minutes of the disciplinary meeting with Mr Schembri was just window dressing. The first respondent's real views were reflected in the fact that the second respondent continued trading and one of the individuals sacked had been reinstated. In relation to the compliance calls, she said that we do not know what was said and we do not have all of them.

125. In relation to the risk of dissipation, she noted that much had been made by Mr Levy KC of the voluntary disclosure of overseas assets but that was not correct. In fact, the first respondent had disclosed the existence of the Cyprus property as a result of the order to provide information made by Michael Green J. When the fifth affidavit of the second respondent dealing with this was served, the applicants' solicitors wrote on 23 February 2024 asking if there were other overseas assets. The first respondents' solicitors only replied on 18 March 2024 disclosing more details about the property, together with the interests in the Pulsar Trust and Redshift. When the applicants' solicitors wrote on 2 April 2024 asking about £320,000 paid out of the company's bank account to Redshift, the response on 12 April 2024 was a refusal to answer and an invitation to the applicants to withdraw their request in relation to foreign assets.

126. The applicants' solicitors then wrote on 24 April 2024, noting the first respondent's refusal to give an undertaking not to dispose of his foreign assets and asking that he agree to a variation to the freezing order to cover the Redshift payments, failing which the applicants would issue an application to the Court. The response from the first respondent's solicitors said nothing about Redshift or the Pulsar Trust, so the applicants issued the application which was heard by Sir Anthony Mann on 7 May 2024. The order he made varied the injunction to extend it to the foreign assets and he also ordered the first respondent to give disclosure of all his foreign assets. It was only pursuant to that

order that the position in relation to the other foreign assets was explained. This hardly amounted to voluntary disclosure.

Discussion

(1) Good arguable case

127. In considering whether the applicants have satisfied the first criterion for a freezing injunction, a good arguable case on the merits, it is important to keep well in mind the low threshold which is set by the *Niedersachsen* test: what is required is a case: "which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success." Although Mr Levy KC was well aware from the discussion during the hearing that this was the test which the Court was likely to adopt, his submissions engaged in a full-scale forensic attack on many aspects of the applicants' case (although as set out below there were some critical aspects which he scarcely addressed) which amounted to precisely the sort of "mini trial" which all the authorities deprecate. A number of the points he made could not be resolved on an interlocutory application, but only at trial.

128. In my judgment, the case put forward by the applicants more than satisfies the *Niedersachsen* test of a good arguable case for a number of reasons. The first is that it is arguable that the impression given by the brochures and other marketing material is that the company was acting as a broker or intermediary rather than as a retailer of art and that the company would manage the investors' portfolios and provide advice on what to buy and when, as well as when to re-sell. This is clear from the references set out at [16] and [17] above and from the investors' evidence summarised at [18] above. Although there were references in the brochures to the company buying and selling art, that was arguably all in the context of the company doing so on behalf of investors rather than selling to the investors as principal.

129. I agree with Ms Johnson's submission about the "umbrella problem" that the company held itself out to the public as doing what it was not in fact doing. For the purposes of establishing a good arguable case to justify the continuation of the freezing injunction it is not necessary for the applicants to adduce evidence from each of the investors as to how they were misled. They have put forward evidence from a sufficient sample of investors to demonstrate an arguable case that investors generally were misled. This is otherwise an issue for trial.

130. I also agree with Ms Johnson that, although Mr Levy KC sought to make much of the terms and conditions and that they would have demonstrated that the company was acting as a retailer if the investors had read them, it is far from clear that that is what the investors would or should have appreciated from the terms and conditions, given what was represented in the brochures and sales script drafted by the first respondent. In any event, in my judgment the points about the terms and conditions are ones for trial and cannot be said to negative the existence of a good arguable case at this stage.

131. The second reason why there is a good arguable case leads on from the first and is that both the brochures and the information given to the investors, including the sales script, conveyed that the company only made a profit by way of a 2% fee on sales to the investors and a 5% profit on any resale. Mr Levy KC's attempt to explain away what various of the investors said they had been told and understood as recorded at [101] to [103] above

was unconvincing. It is apparent from the evidence before the Court that the investors were told that the company made its money only from the 2% commission or fee on sales and the 5% profit on any resale. What none of the investors was ever told was what was really happening, namely that the company was purchasing art at wholesale prices from Rosenthiels and the second respondent and selling on to the investors at inflated prices enabling it to achieve a colossal mark-up. The annual figures for the mark-up were 777% in 2020, 647% in 2021 and 353% in 2022.

132. The first respondent had sought to argue that a mark-up of 100% was perfectly normal in the industry but the problem with that argument is that it might be acceptable if the investors had been told, which they were not, that the company was buying in wholesale and selling to them at a mark-up and, in any event, the actual mark-up was far more than 100%, an overall average of 495% which enabled the company to clear a turnover of £21.2 million in respect of art for which it had paid its suppliers £4.7 million. Mr Levy KC did not really deal with this issue of the colossal mark-up in his submissions and I agree with Ms Johnson that, given that the company was acting as a broker or intermediary, so that it was in a fiduciary relationship with the investors, informing the investors that it made its money from the 2% and 5% whilst not disclosing the colossal profit or mark-up it was making on its sales to the investors was arguably fraudulent.

133. It is also no answer for the first respondent to say, by reference to his expert's report, that the prices at which the company was selling to the investors were in line with the prices charged by "competitors". The "competitors" were retailers of prints, not brokers and in any event, as Ms Johnson submitted, since the company was arguably acting as a broker or intermediary, whatever the mark-up had been (and in reality it was far in excess of 100%) the company arguably failed to act honestly in not disclosing the extent of its own interest and the enormous profit it was making on its sales to investors because of the difference between the wholesale prices at which it bought in the prints and what it then charged the investors. Far from disclosing any of this, the company represented that the only profit made was on the 2% and 5%. In my judgment, Mr Levy KC's attempt (referred to at [91] above) to explain away that clear representation is not sustainable.

134. In my judgment, the applicants' case that the company was charging investors inflated prices is strongly supported by two other pieces of evidence. First is the Mòbel inventory list which shows prices for the prints being stored way below the prices at which the company had sold them to the investors. As Mòbel explained, they would receive an invoice from the second respondent for a number of prints being sent for storage which gave a total price or value and they would simply divide that figure by the number of prints to ascribe a value for each which went into their inventory list. From this, it is clear that Mòbel thought that the "total price" given represented the overall value of the prints being shipped to them.

135. The first respondent asserts that the figure in the second respondent's invoice was the costs of reproducing the prints if they were lost and destroyed, an explanation that was repeated in Mr Levy KC's submissions as set out at [89] above. In my judgment, the problem with that explanation is that there is absolutely nothing in the invoice sent to Mòbel to indicate that the "price" was no more than the costs of reproduction. If that had been the explanation, surely it would have been clearly stated on the invoices or, at the very least, the company or the second respondent would have provided that explanation to Mòbel, which would have led to them passing it on to the applicants' solicitors when they asked for an explanation of the figures in the Mòbel inventory list.

136. The second piece of evidence supporting the applicants' case on this issue is the enquiries made by various investors of auction houses (referred to at [34] above) to the effect that their prints did not meet the auction house's minimum threshold for sale at auction which was in the case of Chiswick Auctions as low as £100.

137. The first respondent relied upon evidence from the artists themselves, specifically Mr McAlpine Miller and Miss Aniela as to the RRP at which they sold their art. However, as Ms Johnson submitted, the RRP may well be set at a level to preserve the artist's reputation and, in any event, I agree with her that the RRP at which an artist might sell and the views of the artist as to value is not relevant if there is evidence, as there is, that the company was selling to investors at prices way above what the company had paid for the art.

138. The third reason why there is a good arguable case is that, contrary to what the investors were told in the brochures and sales script, there was no real secondary market for the prints and the company did not make any genuine resales of prints either at auction or by other means. Rather, the company simply bought back prints from any investor who was pressing for the company to sell its prints, at an increased price which the company fixed. There was therefore no genuine increase in market value. None of this was disclosed to the investors, but rather the company used the buy backs to seek to persuade investors to buy more prints. Investors were also encouraged to increase the size of their portfolio with the company to improve their chances of selling prints at a profit at auction, specifically at the auction in Dubai about which a number of investors were informed but which, as Ms Johnson said, seems to have been a complete fiction. The absence of any genuine sales in the secondary market arguably gives the lie to the representations in the brochures about profitable resale, let alone the representation of a potential profit of 64.6%, which it transpires was based on the buy back of one print. In my judgment, the applicants clearly have a good arguable case that the company acted dishonestly in making the representations it did about the possible resale of prints and in failing to inform investors that there was no real secondary market and that the company was simply buying back the prints itself, a course of conduct which arguably amounted to a fraudulent scheme. It is striking that this was another aspect of the applicants' case with which Mr Levy KC did not really deal in his submissions.

139. The next reason why the applicants have a good arguable case concerns the complaints made by investors about high pressure sales techniques and mis-selling. Complaints were first made in 2018 and led to the company's bank account being frozen, to an investigation by Trading Standards, to the first respondent being interviewed by police and then to the company being expelled from the Fine Art Trade Guild, all of which took place before the Mail on Sunday articles. The first respondent contended that there were a few rogue employees who were dismissed and that he had employed a compliance officer. However, whether there was mis-selling to the extent alleged and whether steps taken to counter it were effective or just window dressing are obviously issues for trial, and for the present it is only necessary to record that the applicants' case is sufficiently arguable to justify the freezing injunction.

140. The final reason why the applicants have a good arguable case concerns the first respondent's knowledge of the mis-selling and other wrongdoing. As Ms Johnson said, the first respondent admits that mis-selling was taking place and that investors were being defrauded, so the issue at trial will be the extent of his knowledge. I agree that, on the material before the Court, the applicants are likely to be able to establish that he had

knowledge of the mis-selling and of wrongdoing. He was on any view the alter ego of the company, involved in all aspects of its business. Although he tries to explain it all away as a few members of staff having gone rogue, there had been complaints over a considerable period of time and it seems inconceivable that he was not aware of the mis-selling that was taking place. Whilst three employees were dismissed, one of them was re-employed by Mr Conway, as the first respondent knew immediately after he left the company.

141. The first respondent must have been well aware of the wholesale prices the company was paying its suppliers (and for a considerable portion of the time the sole supplier was his own company the second respondent) and of the difference between those wholesale prices and the prices charged to the investors, so he must also have been aware of the colossal mark-up. After all, he benefitted from all that to the tune of £5.9 million in dividends and other payments from the company. He will also have been aware that the brochures held the company out as a broker or intermediary and that there were no genuine resales, only buy backs.

142. With that knowledge and having sold his shares in a company which had turnover in three years of £21.2 million to his friend Mr Conway for the nominal sum of £10 and had his director's loan written off, he arranged for the second respondent to enter into the two agreements referred to in [41] above, thereby ensuring that he and his other company, the second respondent, continued to benefit from the company even though he knew that mis-selling was likely to continue. The second respondent received a further £400,000 from the company between February 2023 and the company ceasing trading and going into liquidation in June 2023.

143. In the circumstances, I consider that the applicants have a good arguable case to way beyond the low threshold of the *Niedersachsen* test that, through the art investment scheme, the respondents carried on the business of the company with intent to defraud the creditors i.e. the investors, contrary to section 213 of the Act and that the payments made to the respondents and to third parties were a misappropriation of the proceeds of the scheme in fraudulent breach of duty contrary to section 212 of the Act.

(2) Risk of dissipation

144. It was emphasised on behalf of the first respondent that there had been correspondence between the applicants and the first respondent for some months before the applicants made their application for a freezing injunction in January 2024, during which period the first respondent could have transferred or dissipated his assets, but had not. Mr Levy KC submitted that there was no risk of dissipation since, even when things heated up in the sense that litigation was looking likely, the first respondent kept millions of pounds within the jurisdiction in his own name. There is some force in this argument, but against it have to be weighed a number of other factors which, contrary to Mr Levy KC's submissions, do point to there being a real risk of dissipation unless the freezing order is continued.

145. First is the nature of the case and the conduct of the first respondent. As I held in the last sub-section of the judgment, the applicants have a good arguable case against the first and second respondents that they carried on the business of the company with intent to defraud the investors through the art investment scheme and that they misappropriated the proceeds of the scheme, which the first respondent paid to himself or the second

respondent or related entities and individuals. As Popplewell J said at [86(4)] of *Fundo Soberano de Angola* cited at [9] above, a good arguable case of dishonesty is not enough to establish a real risk of dissipation. The dishonesty alleged must point to the conclusion that assets are likely to be dissipated, a requirement which Mr Levy KC emphasised in his submissions. However, in my judgment, the dishonesty of the first and second respondents alleged here of defrauding the investors and misappropriating the proceeds of the art investment scheme for their own benefit is a paradigm example of dishonesty which gives rise to a good arguable case that the assets will be misappropriated.

146. Second, by his own admission the first respondent knew that sales staff were mis-selling to investors and engaging in pressurising techniques, yet even after the first respondent had resigned as a director and ostensibly stepped away from the company, in the knowledge that Anthony James one of sales staff in question had been rehired by Mr Conway, the first respondent caused the second respondent to enter into lucrative contracts with the company from which he continued to benefit personally as set out at [41] above. I agree with Ms Johnson that this demonstrates a good arguable case that he lacks commercial probity.

147. Third, as Ms Johnson pointed out, there has arguably been other wrongdoing by the first respondent, specifically his having accessed the company's bank account after he had ceased to be a director and transferred £100,000 to his own account. He claims that this represented the value of art stock he had left in the company but the third respondent was refusing to return to him and that Mr Conway permitted him to take the funds. However, as Ms Johnson said, it is difficult to see what a disagreement with the third respondent had to do with the company and it was wrong for Mr Conway to have authorised the payment out of funds from the company's bank account.

148. Fourth is the first respondent's use of offshore structures, specifically Redshift in Dubai, Pulsar in Hong Kong and the Pulsar Trust. As Popplewell J said at [86(5)] of *Fundo Soberano de Angola*, the use of offshore structures does not itself equate to a risk of dissipation as it may be legitimate, but there are a number of aspects of their use here and how their existence emerged which are sufficiently suspicious to support the case that there is a risk of dissipation. Contrary to the first respondent's contention, the existence of these offshore structures to which money from the company was transferred was not voluntarily disclosed. Rather the full picture was only disclosed pursuant to the Court order of 7 May 2024 after an initial refusal to disclose details: see [48]-[49] and [125]-[126] above.

149. According to the first respondent's eighth affidavit served pursuant to that Court order, both Redshift and Pulsar were ostensibly being paid for "marketing services", but as Ms Johnson said this is scarcely credible given that the first respondent had said in a previous affidavit that the company had an in-house marketing team and that the second respondent provided marketing services. I agree that the explanation is even more incredible given his solicitors' previous explanation that companies operated by his brother, a company operated by the third respondent and his sister were also providing marketing advice: see [51] above. The company seems to have a veritable rash of marketing advisers on the first respondent's case. Also, he fails to explain why the £312,000 paid to Pulsar for these alleged "marketing services" was routed via the New Zealand bank account of MiMaii, a New Zealand company.

150. In his tenth affidavit served just before the present hearing (referred to at [51] above), the first respondent sought to explain away the structure of Pulsar, the Pulsar Trust and MiMaii as having been set up to minimise inheritance tax for his infant sum on the advice of Turner Little, a company he had identified over the internet. I agree with Ms Johnson that this lacks credibility. It is difficult to see how the one share in the Pulsar Trust could achieve inheritance tax benefits and there is no evidence from Turner Little. It is clearly arguable that these offshore structures, together with Redshift, were being used to disguise and put out of reach monies transferred to them by the company, which strongly supports the risk of dissipation.

151. Taking all these matters together, I consider that the applicants have shown that there is a real risk of dissipation of assets by the first and second respondents unless restrained by the freezing order.

(3) Full and frank disclosure

152. I agree with Ms Johnson that the first respondent's solicitors' 18 page letter of 16 April 2024 with some twelve categories of alleged failure by the applicants to make full and frank disclosure to Michael Green J at the *ex parte* hearing shows no sign of proportion or restraint and adopts the scatter-gun approach deprecated by the authorities set out at [13] and [58]-[60] above. To these I would add another recent judgment of the Court of Appeal in *Mex Group Worldwide Ltd v Ford and others* [2024] EWCA 959. In a judgment with which Males LJ and I agreed, Coulson LJ said at [126]-[128]:

> "126. I have criticised the way in which these issues were presented to the judge. Unhappily, that process has been replicated in the appeal documents. In this way, paragraphs 79 to 130 of the HK defendants' appeal skeleton argument dealt with full and frank disclosure. That section both responded to paragraphs 91 to 120 of the claimant's skeleton argument, and also went on to make further points about full and frank disclosure which the judge had not addressed in his judgment. In consequence, just as had happened below, the allegations in respect of full and frank disclosure on this appeal took as much, if not more, time as the substantive issues.
>
> 127. That is not a sensible or proportionate way in which to address this sort of allegation. It is almost always the position that, no matter how big the case or how complex the underlying issues, a defendant's case that the claimant failed to make full and frank disclosure at the *ex parte* hearing will stand or fall on no more than a handful of alleged failures. That is because, if the 'big ticket' allegations of failure are not established, or are established but found to be immaterial, then the less significant failures will not bridge the gap. It is the law of diminishing returns. In our view, this case is no different to the norm.
>
> 128. Accordingly, those preparing this sort of attack in the future should ensure that they concentrate their efforts on alleged failures of disclosure which are clear-cut and obviously important. Quality not quantity should be the watchword. The failure to follow that course, as happened both before the judge and again on appeal, means that there is a real risk that the best points become buried in an avalanche of trivia. I do not believe that the judge was best served by the presentation of the points in this way; indeed, I

> consider that proper assistance to this court only arrived on the third day of the appeal hearing, when Mr Kalfon put his submissions on full and frank disclosure into some semblance of order and importance."

153. Agreeing with this, Males LJ said at [112]:

> "I agree in particular with what Lord Justice Coulson has said at [126] to [128] below about the way the failure to disclose issue was presented by the respondents, both in the court below and in this court. I sought in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [14] and [15] to encourage a degree of restraint and a sense of proportion on the part of those seeking to set aside without notice orders on this ground, but it appears that the message has not got through. In this case we have been prepared to separate the wheat from the chaff, but I would suggest a different approach for the future. In future, if the court is presented with a long shopping list of alleged failures of disclosure, with no attempt made to identify the relatively few points which really matter, it should simply decline to consider the issue at all."

154. In the event, Mr Levy KC did not pursue in his oral submissions all the points set out in his solicitors' letter, although he still pursued points which, for reasons I will set out below, were not on a proper analysis, full and frank disclosure points at all. This is true of the very first point of all, the suggestion that the applicants gave the judge an unrealistically short timetable for pre-reading and the hearing. This is plainly not in itself a full and frank disclosure complaint at all. Obviously, if because the hearing is too short, the applicant for an injunction fails to disclose some material point to the judge then that failure is a failure to give full and frank disclosure. However, it is not the length of the hearing which is the failure to give full and frank disclosure. Furthermore, I agree with Ms Johnson that, despite the suggestion of Mr Levy KC to the contrary, it is clear from the transcript of the *ex parte* hearing that the judge had read Mr Piacquadio's affidavit in support of the application.

155. The allegation on which Mr Levy KC focused most was the one enumerated by Carr J at [7(iv)] of *Tugushev*, the need for an applicant to make all proper enquiries before making an application for an injunction. He criticised what he contended was a deliberate decision by the applicants not to interview the first respondent who would have given the applicants the explanation he now gives for the valuation of the prints and his explanation of the Möbel inventory list. Although Mr Levy KC made great play of this point, I do not consider it has any merit. As Ms Johnson pointed out, the applicants had sought information and documentation from the first respondent in their letter of 25 August 2023, including as to how the art was valued. He had responded in detail in an email of 1 September 2023 which included a detailed explanation at [5] of how he said the art was valued. That material was before the judge and he read it. Mr Levy KC's submission that the applicant's explanation of values in his email of 1 September 2023 had not been before the judge was simply incorrect. It formed part of the exhibit to Mr Piacquadio's affidavit in support of the application. Furthermore, the judge had asked Ms Johnson specifically if the first respondent had been interviewed and she explained that he had not, but drew the judge's attention to the explanation of valuation which the first respondent had given in the 1 September 2023 email. In these circumstances, it is difficult to see any basis for the allegation of non-disclosure in this regard.

156. It is correct that the first respondent's explanation of the prices or values in the Mӧbel inventory list, that they were reproduction costs, was not before the judge although the second respondents' invoices and the email of explanation from Mӧbel were and, as noted at [64] above, Ms Johnson did point out to the judge that the first respondent might allege that the value of the prints in the second respondent's invoices represented the costs of printing (or something else) and did not reflect their market value (which is not far off the explanation he now gives). I suppose that, if the applicants had interviewed the first respondent, he might have made the point about reproduction costs but at most, as I see it, that would have put the judge in the position in which the Court is now, that there is a dispute as to the significance of the Mӧbel inventory list which can only be resolved at trial. The non-disclosure to the Court at the *ex parte* hearing of the explanation now proffered by the first respondent could hardly be said to be material. In any event, as Ms Johnson pointed out, the applicants had not placed undue reliance on the Mӧbel inventory list before the judge, but relied also upon the evidence from the auction houses and the evidence of the enormous mark-up.

157. Mr Levy KC also criticises the applicants for not having interviewed Mr Conway or the artists Mr McAlpine Miller and Miss Aniela and for not having contacted Rosenthiels but, in my judgment, whilst the applicant for an injunction should make all proper, that is reasonable, enquiries before making an application, that does not require exhaustive enquiries as if the applicants were preparing the case for trial. In any event, the artists could not have given evidence about how the art was valued by the company in selling to the investors, but only their own RRP and, as Ms Johnson said, that may have been set to protect reputation.

158. At various points in his submissions, Mr Levy KC sought to criticise the applicants for putting forward a case that the prints sold by the company were "worthless tat" or words to that effect, saying that if the applicants had exhibited the evidence from other galleries and instructed an expert at the time of the *ex parte* hearing, they would have had to rethink their case on that point. However, as Ms Johnson pointed out, it was never the applicants' case that the prints were "worthless tat". Her case as presented to the judge was that the company was buying from Rosenthiels and the second respondent at wholesale prices but selling on to investors at grossly inflated prices, with an average mark-up over the whole period of 495%. Furthermore, on the basis that the company was acting as a broker or intermediary rather than a retailer, as to which I have held that the company has a good arguable case, the price charged by galleries and other retailers was not relevant to the applicants' case (as referred to at [115] to [117] above). It was a comparison of apples and pears.

159. Furthermore, if, as Mr Levy KC suggested they should have done, the applicants had instructed Roseberys before the *ex parte* hearing, they would simply have had an expert report which supported their case that there were no sales on the secondary market and no genuine resales: see the summary at [29] above.

160. In relation to the points which Mr Levy KC made about how the applicants should have taken the judge to other parts of the brochure and the terms and conditions, this was one of the areas where his submissions on full and frank disclosure shaded into his submissions on good arguable case. Since I have held that, notwithstanding his points on the brochure and the terms and conditions, the applicants have a good arguable case that misrepresentations were made to the investors, it is difficult to see how any alleged non-disclosure could be said to have been material. This is an area where what Toulson J said

(as quoted by Longmore LJ in *Kazakhstan Kagazy*) as set out at [58] above is entirely apt and sensible.

161. The overall point Mr Levy KC made (recorded at [93] above) that, if the judge had been taken to the terms and conditions, he would have concluded there was no good arguable case and that meant any case the applicants had on value had gone was somewhat hyperbolic and ultimately misconceived. As I have already said, notwithstanding the points about the terms and conditions, the applicants have a good arguable case both that misrepresentations were made to the investors and that the company sold to the investors at grossly inflated prices which in turns makes their case on breaches of sections 212 and 213 of the Act a good arguable case.

162. Mr Levy KC argued that the judge had been misled by Ms Johnson that the proprietary injunction was in standard form, which was not the case and that she should have referred the judge to *Vestey*. In my judgment this is another aspect of the case where a sense of proportion is required. What Ms Johnson said in her skeleton argument for the *ex* parte hearing at [71] was:

> "The draft Injunctions follow the standard form in the Chancery Guide, save that the orders against R1 and R3 include orders for the provision of information in relation to proprietary assets"

163. There were of course three freezing injunctions sought, one against each of the respondents. Furthermore, whilst the standard form of freezing order is set out at Appendix M to the Chancery Guide, there is no standard form of proprietary injunction. I have considerable doubts whether the judge was somehow misled into thinking there was and, in any event, Ms Johnson explained to him the reasons why a proprietary injunction was being sought and took him through the wording of the injunction in her oral submissions. Mr Levy KC complains that this was after the judge had decided to grant the injunction, but it is quite usual to discuss with the judge the wording of the injunction after the judge has decided to grant an injunction in principle, as I know from my own experience as a first instance judge.

164. As Ms Johnson explained to the judge, the proprietary injunction related to sums received by the respondents from the company in breach of fiduciary duty. Thus, the first respondent had received £5.9 million from the company. Some £21,000 was salary but the rest was recorded in the company's books as "dividends". She submitted that these were unlawful dividends, really just the proceeds of fraud. The second respondent received £3.5 million as the price the company paid for the prints supplied, so again she submitted those were the proceeds of fraud. So far as the proprietary injunction against the first respondent is concerned, this covered the property acquired by him, namely the house in Sutton and the monies paid away to him by the company, the £5.9 million which was set out in Schedule D to the order.

165. Ms Johnson had also explained in her skeleton argument and in her oral submissions why the applicants satisfied the requirements for a proprietary injunction: (i) that there is a serious issue to be tried on the merits; (ii) that the balance of convenience favours the grant of the injunction and (iii) that it is just and convenient to grant the injunction. In *Unitel* [2024] EWCA Civ 1109, the Court of Appeal equated "serious issue to be tried with "good arguable case": see my judgment at [106] and the judgment of Popplewell LJ at [122] to [131]. It follows that, if as I have found, the applicants have a good arguable

case on the merits, there is also a serious issue to be tried. Ms Johnson submitted before the judge that the other requirements for a proprietary injunction were clearly met, specifically that the balance of convenience was in favour of granting the injunction in light of the company's interest in preserving its property which had arguably been misappropriated by the respondents. The proprietary injunction is clearly required to protect the investors who are the creditors of the company.

166. Mr Levy KC complained about the very wide terms of the proprietary injunction but on the basis that it is arguable that the property in Schedule C and the monies in Schedule D are all the proceeds of fraud or purchased with the proceeds of fraud, it is appropriate that a proprietary injunction should have been granted in the terms it was. I can see no basis for criticising Ms Johnson for having failed to refer the judge to *Vestey*. I agree with her that the point made by the judge in that case that a proprietary injunction should be in clear and unambiguous terms was clearly satisfied in the present case.

167. I do not propose to address separately the other allegations of failure to give full and frank disclosure set out in the respondents' solicitors' letter of 16 April 2024 which Mr Levy KC did not address in his oral submissions, save to say that in my judgment the criticisms of the applicants are unwarranted.

168. Ultimately, as a number of authorities have emphasised, most recently *Mex Group*, there has to be a sense of proportion about these sort of allegations. If (which I have found there was not) there had been any failure to give full and frank disclosure, it was clearly inadvertent and innocent and the matters to which it related were not critical or particularly important in the overall context of what was arguably a substantial fraud on investors. Even if I had concluded that there had been a failure in any respect by the applicants to make full and frank disclosure at the *ex parte* hearing, this is one of those cases in which, for the reasons explained in the passage from the judgment of Males J in *Yurov* cited at [75] above, the interests of justice clearly require that the injunction granted by Michael Green J is continued and not discharged. Only by the continuation of the injunction can the interests of the investors (who, on any view, are innocent of any non-disclosure) be protected.

Conclusion

169. For all the reasons I have given, I am quite satisfied that the freezing order should be continued until trial or further order.