Neutral Citation Number: [2020] EWHC 980 (Comm)

Case No: CL-2020-000164

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2020

Before :

MR JUSTICE JACOBS

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Between :

(1) MOTOROLA SOLUTIONS, INC. **(2) MOTOROLA SOLUTIONS MALAYSIA SDN, BHD**	**Claimants**
- and -	
(1) HYTERA COMMUNICATIONS CORPORATION LTD. **(2) HYTERA AMERICA, INC.** **(3) HYTERA COMMUNICATIONS AMERICA (WEST), INC.**	**Defendants**

On an application
Between :

(1) MOTOROLA SOLUTIONS, INC. **(2) MOTOROLA SOLUTIONS MALAYSIA SDN, BHD.**	**Applicants**
-and-	
(1) HYTERA COMMUNICATIONS CORPORATION LTD. **(2) HYTERA AMERICA, INC** **(3) HYTERA COMMUNICATIONS AMERICA (WEST), INC.** **(4) PROJECT SHORTWAY LIMITED** **(5) SEPURA LIMITED**	**Respondents**

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Thomas K. Sprange QC and Gayatri Sarathy (instructed by **King & Spalding LLP**) for the **Applicant**

Stephen Rubin QC and Alexander Milner (instructed by **Steptoe & Johnson UK LLP**) for the **First to Fourth Respondent.**
Paul Downes QC (instructed by **Eversheds Sutherland LLP**) for the **Fifth Respondent.**

Hearing dates: 7th April 2020.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JACOBS

Mr. Justice Jacobs :

A: Introduction

1. The Claimants ("Motorola") apply, against five Respondents, for a domestic freezing order and orders for the provision of information about their assets. Three of these Respondents – (1) Hytera Communications Corporation Ltd., (2) Hytera America, Inc. and (3) Hytera Communications America (West) Inc. – are companies against which Motorola has recently obtained a substantial judgment in proceedings in the USA. I shall refer to these Respondents collectively as "Hytera", and to the first Respondent as "Hytera China".

2. Hytera China is the main company in a large multinational group. It has shareholdings in various subsidiaries. Its assets include shareholdings held, indirectly via other companies, in two English subsidiaries: Project Shortway Limited ("Shortway") and Sepura Limited ("Sepura"). There are two other companies in the ownership chain between Hytera China and the two English companies, namely Hytera Communications (Hong Kong) Co. Ltd. ("Hytera Hong Kong") and Project Shortway (Jersey) Ltd. ("Shortway Jersey"). There is therefore a complete chain comprising 100% shareholdings from Hytera China to Sepura via (i) Hytera Hong Kong, (ii) Shortway Jersey, and (iii) Shortway. Sepura in turn owns, directly or indirectly, 20 further subsidiaries. Hytera China also owns a direct 100% shareholding in another English subsidiary, Hytera Communications UK Ltd. ("Hytera UK"). Both Hytera UK and Sepura actively carry out business in the telecommunications sector. The business of Sepura (2018 revenue of EUR 93 million) is more substantial than that of Hytera UK (2018 revenue of £ 10.2 million).

3. Both Shortway and Sepura are additional Respondents to the present application. This arises from the fact that both companies are English companies, and accordingly there is no dispute that the 100% shareholdings in those companies are assets within the jurisdiction which would in principle come within the scope of a domestic freezing order. Neither Shortway nor Sepura was party to the US Proceedings which have given rise to the judgment against Hytera. The Claimants therefore have no substantive cause of action against either of these companies, but claim relief (in the form of a domestic freezing order and an order to provide information) on what is sometimes known as the *Chabra* basis following the decision in *TSB Private Bank v Chabra* [1992] 1 WLR 231.

4. The application is made pursuant to CPR 25.4 (1) and the Civil Jurisdiction and Judgments Act 1982 ("CJJA 1982") s.25. It was issued on 19 March 2020 after Hytera had refused to provide undertakings, equivalent to the orders now sought, in response to a request made by Motorola's solicitors (King & Spalding) on 16 March 2020. The application was made on notice to the various Respondents, who were served with Motorola's evidence in support of the application on 19 March 2020. On 24 March 2020, I ordered that the hearing of Motorola's application should be expedited so as to be heard on 7 April 2020. The parties thereafter agreed on a timetable for the provision of further evidence and skeleton arguments. The evidential timetable was significantly shortened from that which would usually apply in the case of a 1-day application. On 1 April 2020, evidence on behalf of the Respondents was served, and responsive evidence was served by Motorola on 2 and 3 April 2020.

5. Shortly before the hearing, which took place by video on 7 April 2020, Sepura conditionally agreed to provide certain undertakings, and these were acceptable to Motorola. The condition was that relief in the form of a freezing order was granted in favour of Motorola in respect of any of the three Hytera respondents. This meant that Mr. Downes QC, who was instructed on behalf of Sepura, did not need to make any detailed submissions at the hearing. I therefore heard oral submissions from Mr. Sprange QC on behalf of Motorola and Mr. Rubin QC on behalf of Hytera and Shortway.

6. At the conclusion of the hearing, I indicated to the parties that I would provide my decision, if possible, during the course of the week, with full reasons to follow. I did so on Thursday 9 April 2020 in a written document which set out my conclusions and brief reasons. I invited the parties to agree an order which was to remain in place pending a further hearing to be held after my full reasons became available, at which point any appropriate amendments to the order could be made in the light of my full judgment. The parties thereafter reached substantial agreement, and the order was sealed on Tuesday 14 April 2020.

B: Factual background

7. The application is in support of proceedings brought by Motorola against Hytera in the US District Court for the Northern District of Illinois, Eastern Division (the "Illinois Court") (the "US Proceedings").

8. Motorola is a leading developer and manufacturer of two-way digital radio products and provides proprietary digital radio technology and features under the brand name "MotoTRBO". It is headquartered in Illinois in the United States. The 1st Claimant is incorporated in Delaware. The 2nd Claimant is incorporated in Malaysia.

9. Hytera China, the principal company in the group, is incorporated and headquartered in the People's Republic of China ("PRC"). Hytera China was founded in 1993 by its current chairman Chen Qingzhou ("Mr. Chen") in Shenzhen. It is listed on the Shenzhen Stock Exchange, and Mr. Chen has a majority stake of 51.65% of its shares. On the Claimants' evidence (which was not disputed in this regard) Mr. Chen also acts as the CEO of Hytera China. The balance of shares are held by institutional investors. From 1993 to 2001, Hytera served as a distributor for Motorola products. Since then, it has operated as a supplier of analogue and digital radio products.

10. The Second Defendant/Respondent is incorporated in Florida; and the Third Defendant/Respondent is incorporated in California.

11. On 14 March 2017, Motorola commenced proceedings in the Illinois Court against Hytera for theft of intellectual property in respect of its two-way Digital Mobile Radio ("DMR") product. The claims arose from serious allegations that Hytera infringed Motorola's copyright and misappropriated its confidential trade secrets to build competing DMR two-way radio products.

12. Motorola's case was that there had been an unlawful scheme which involved Hytera recruiting, in or around 2008, three of Motorola's senior engineers, namely: Gee Siong Kok, Samuel Chia and Yih Tzye Kok (the "Hytera Recruits"). It was alleged that these Hytera Recruits stole highly confidential and proprietary documents and source code

related to Motorola's digital radio and infrastructure products, which were subsequently used by Hytera in developing its current DMR two-way radio products. Each of the Hytera Recruits remained employed by Hytera for around 18 months after the commencement of the US Proceedings. On leaving Hytera in late 2018, each was then paid substantial sums of money as part of termination agreements; Mr. G.S. Kok received at least US$ 300,000, Mr. Chia at least US$ 330,000 and Mr. Y.T. Kok at least US$ 184,000. Motorola adduced expert evidence in the US Proceedings to the effect that such payments were "completely atypical" in the context of employees who are fired for stealing a competitor's confidential and proprietary information. The termination agreements also contained provisions which prevented the Hytera Recruits from disclosing information about ongoing litigation or other information that may cause loss to Hytera.

13. During the US Proceedings, Hytera made admissions including that: four Motorola former employees came to Hytera with confidential information; Hytera was currently in possession of nearly all of 71 documents representative of trade secrets; the Hytera Recruits had stolen "a huge amount of documents"; and that a good portion of Motorola's code was in the possession of two of the Hytera Recruits.

14. Each of the Hytera Recruits invoked their right not to incriminate themselves under the Fifth Amendment to the US Constitution and therefore refused to give evidence on critical issues which were detrimental to Hytera.

15. Because this was a U.S. jury trial rather than a "bench" trial, there is no detailed judgment setting out the decision-maker's findings of fact. The jury were, however, given very detailed written jury instructions. These identified the legal principles and tests which they needed to apply when considering their verdict.

16. On 14 February 2020, the jury returned a verdict in the Illinois Court in favour of Motorola in respect of its claims against Hytera for trade secret misappropriation and for copyright infringement. The jury awarded the sum of US$345,761,156 in compensatory damages and US$418,800,000 in punitive damages. Plainly, these are very substantial awards, even in the context of a large company such as Hytera China.

17. Following the verdict, Motorola sought from the Illinois Court a worldwide injunction preventing Hytera from further misappropriating Motorola's trade secrets and infringing copyright. Hytera has opposed the motion. The Illinois Court has not yet issued an order on that motion. The injunction requested from the Illinois Court would not freeze Hytera's assets for the purpose of satisfying the judgment debt.

18. On 5 March 2020, the Illinois Court entered judgment against Hytera in respect of the sum awarded by the jury. The US Judgment is subject to post-trial motions.

19. Pursuant to the US Federal Rule of Civil Procedure 62, execution of a judgment is automatically stayed for at least 30 days, which is due to expire on 6 April 2020. Hytera has taken the position that the stay on execution of the judgment has been extended a further 21 days pursuant to the Amended General Order 20-0012, issued on 16 March 2020 in response to the COVID-19 pandemic, and further extended by another 28 days pursuant to the Second Amended General Order issued on 30 March 2020, resulting in the stay remaining in place until 25 May 2020. Motorola cannot therefore presently

enforce the US Judgment. It was not, however, suggested that this is a reason why the present relief should not be granted.

20. Motorola now seeks a freezing order and ancillary relief in respect of Hytera's assets located in England and Wales in the sum of US$ 345,761,156 pending execution of the US Judgment. Motorola accepts that relief cannot be granted in respect of the separate and very substantial punitive damages element of its successful claim. As described above, relief is also sought pursuant to the *Chabra* jurisdiction on the basis that Shortway and Sepura hold valuable assets that would be available to satisfy the US Judgment against Hytera, the dissipation of which would impact negatively on the value of its shareholding and diminish the value of its assets.

C: Legal principles and the issues for resolution

21. By the time of the hearing, there was no dispute that Motorola satisfied the requirement that a claimant, applying for a freezing order, must show a good arguable case on the merits of its claim. Here, Motorola is applying for post-judgment relief, having established its substantive claim at a trial.

22. There was also no dispute that the ordinary requirement (in the case of a domestic freezing order) that a defendant should have assets within the jurisdiction was not satisfied in relation to the second and third Respondents. In those circumstances, Hytera submitted that relief against those defendants is not appropriate. I agree. Indeed, the application against those two Respondents was not pressed by Mr. Sprange on behalf of Motorola.

23. This meant that the principal issue for resolution, as between Motorola and Hytera China (and by extension Shortway), was whether Motorola had sufficiently demonstrated the crucial requirement, for a freezing order, that there was a risk of dissipation of assets. In that regard, although I was referred to a considerable volume of case-law, there was no substantial dispute that the applicable principles can be taken from the summary of Males J.in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [69]-[70]:

> "(a) The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with a defendant's assets. (b) That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient. (c) It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated. (d) The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held. (e) The nature, location and liquidity of the defendant's assets are important considerations. (f) Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant. (g) So too is the defendant's behaviour in response to the claim or anticipated claim."

24. As between Motorola and Shortway in relation to the *Chabra* jurisdiction, the issue identified in the Respondents' skeleton argument (in addition to whether there was a

real risk of dissipation) was whether there was a good arguable case for *Chabra* relief against Shortway. The legal principles relating to *Chabra* relief are set out in Section E below.

25. An important subsidiary issue concerned the width of any order for disclosure of assets, in the event that a freezing order was appropriate. The Claimants sought disclosure of assets on a worldwide basis. Hytera China and Shortway contended that any disclosure should be confined to assets within the jurisdiction. I address this in Section F below.

D: Risk of dissipation

The parties' arguments

26. Motorola's case focused principally on two matters.

27. First, Motorola relied upon statements made by Hytera's CFO, Nuo Xu, during settlement meetings held at the end of October and the beginning of November 2019 in the context of settlement discussions. Hytera's CEO, Mr. Chen, was present at one of those meetings (on 1 November 2019) and did not contradict what Mr. Xu was saying. Motorola's case is that the stated intention of Hytera, as communicated during those meetings, was to remove assets from jurisdictions which were likely to be amenable to enforcement of a judgment in favour of Motorola so as to frustrate the enforcement of an "unacceptable" judgment. Motorola was told that Hytera had already taken steps to move assets and cash from its overseas subsidiaries.

28. Motorola submitted that evidence of this nature was very unusual in the context of applications for freezing orders, since it is rare for a defendant to be so explicit as to his intentions. If this evidence were admitted, then Motorola submitted that there was an "open and shut" case for the existence of the real risk of dissipation.

29. Secondly, Motorola relied upon the nature of the proceedings in the United States, and the jury's determination. The case against Hytera involved the theft of trade secrets. Motorola submitted that this was one of the most insidious forms of corporate dishonesty as it involves taking advantage of a competitor's research and development costs, saving multimillions of dollars in the process and thereby gaining a huge advantage. It also involves high levels of planning and execution. This is what happened in the present case. Mr. Sprange submitted that although the theft had been carried out by the three Hytera Recruits, it was obvious (and there was a good arguable case to the effect) that those in charge of Hytera knew or would have known what was happening. Reliance was placed on the improbability of the three Hytera Recruits simply acting of their own volition. Hytera desperately needed to introduce digital products rather than the analogue products which it had previously produced. The Complaint in the Illinois proceedings had alleged that both Hytera and the recruits "knew the information they downloaded without permission was confidential, and knew that those documents were replete with Motorola's trade secrets". It was unrealistic to suppose that the three employees were simply rogue individuals acting without the knowledge of their superiors. Otherwise, they would have started up their own business. In this regard, reliance was also placed upon other aspects of the events relating to these employees. When the allegations were made by Motorola in the present proceedings, the recruits were not dismissed for some considerable time. There was no evidence as to when any investigation into their conduct had been commenced or carried out. And when

eventually Hytera did part company with them, they were paid significant sums and agreed to non-disclosure agreements.

30. Motorola also placed reliance on other matters, including the alleged continued sale by Hytera of products which contain Motorola's code; breach of an order of the Mannheim court made in proceedings in Germany relating to patent infringement; and Hytera's unwillingness to offer undertakings not to act in the way in which (on Motorola's case) Mr. Xu had threatened in October/ November 2019 to act.

31. On behalf of Hytera (and Shortway), it was submitted that Motorola had not demonstrated a risk of dissipation sufficient to justify the grant of a freezing order. The evidence as to what was said at the without prejudice meetings in October/ November 2019 was inadmissible. There was no basis for contending that the exception for "unambiguous impropriety" applied.

32. In any event, even if that evidence were to be admitted, that would not be the end of the matter in terms of the existence of a risk of dissipation. Given the dispute as to what was said by Mr Xu, the Court could only proceed on the basis that he <u>might</u> have threatened to remove assets from the jurisdiction, but equally might not have done. The mere possibility that Mr Xu <u>might</u> have made such a threat some 5 months ago cannot by itself outweigh the multitude of other factors identified which point strongly away from the existence of a real risk of dissipation.

33. Those principal factors were:

a) Hytera was a very substantial, well-established and reputable company. Its reputation is such that Sepura, its wholly owned subsidiary, is entrusted by the UK government with critical public infrastructure contracts.

b) There has been inordinate delay in bringing the present application. The present application has been made more than 3 years after the start of the substantive proceedings in Illinois in March 2017. Proceedings were not brought until nearly 5 months after the settlement meetings in October/November 2019.

c) The present application has been made on notice to the various Respondents. That was inherently and fatally inconsistent with the case that Motorola seeks to make on risk of dissipation.

d) There is no evidence that Hytera has in fact moved or disposed of any of its assets, either in England or elsewhere in the world, since the US Proceedings began.

e) Motorola has a large asset base against which to enforce. Enforcement could take place in China, as confirmed by evidence from Hytera's Chinese law expert. No attempt had been made to enforce or obtain relief against Hytera Hong Kong.

34. As far as concerns the US Proceedings, and Motorola's success in those proceedings: whilst this was a good and strong 'win' for Motorola, it did not demonstrate a risk of

dissipation. There had been wrongdoing, but this had been committed by three engineers, all of whom had been dismissed. Motorola had not provided evidence that any member of Hytera's current senior management had any knowledge of or involvement in the wrongful conduct of the three engineers. There was no factual or logical connection between the misappropriation of documents or source code by the three Hytera engineers, on the one hand, and any decision by Hytera's senior management as to whether to transfer or dispose of assets in response to a subsequent judgment. The fact that the US jury awarded exemplary damages does not support an inference that Hytera's management acted dishonestly. The jury directions showed that there were a number of grounds on which exemplary damages may be awarded under the applicable law, not all of which require complicity on behalf of the employer, and none of which necessarily entails any dishonesty on the part of a company's senior management. The case-law in the context of risk of dissipation showed it was only "sometimes" possible to infer a real risk of dissipation from the fact of wrongdoing. In deciding whether such a risk exists the Court must scrutinise with care whether the wrongdoing in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted. In the present case, that conclusion could not be reached.

Discussion: overview

35. In my judgment, a critical issue on this application concerns the admissibility of the evidence concerning the October/November 2019 meetings. If that evidence is admitted (and I describe in more detail below the detail of that evidence), then I think that it would be strange to come to any conclusion other than that Motorola has demonstrated a real risk that a judgment against Hytera may not be satisfied as a result of unjustified dealing with Hytera's assets. The relevant statements were made at what were quite clearly very important meetings in the context of very significant litigation against Hytera. They were made, or not contradicted, by Hytera's most senior management on two occasions. On the first occasion, it was the CFO of Hytera, Mr. Xu, who was speaking. On the second occasion, Mr. Xu spoke in the presence of Hytera's CEO, Mr. Chen. The statements addressed specifically what would happen in the event of an "unacceptable" outcome to the US litigation; something which, as a result of the recent jury verdict and judgment, has now transpired. Whatever was said, there can be little doubt that it was intended to be taken seriously.

36. Conversely, if those statements cannot be relied upon, the evidence as to a real risk of dissipation is in my view less clear. Motorola's strongest argument in that regard is its case that the serious dishonesty of the Hytera Recruits, in stealing Motorola trade secrets and then utilising them, must have been known to the senior management of Hytera (i.e. those in practical control of the business). If those individuals were prepared to countenance the theft of trade secrets established in the Illinois trial, they would similarly be prepared unjustifiably to dissipate assets. However, I did not consider that, taken on its own, this conduct would on its own justify the conclusion that there was a real risk of dissipation of assets, bearing in mind other factors in the case. In particular, there is evidence that the Hytera group is a substantial multi-national company, with subsidiaries in many 'respectable' jurisdictions. One of its subsidiaries, Sepura, has been entrusted by the UK government with important contracts. It is also relevant that these proceedings were commenced some years ago, and that there has been no attempt

by Motorola in the intervening years to seek relief in this jurisdiction on the basis of a risk of dissipation.

37. However, if the statements made at the meetings can be relied upon, then some of the other matters relied upon by Motorola, in particular its case as to the involvement of senior management in the theft of trade secrets, may add weight and context to the case of risk of dissipation based on the statements. I therefore start by considering the October/November 2019 meetings.

The statements allegedly made at the October/November 2019 meetings

38. On behalf of Motorola, evidence was given by Mr. James Niewiara, a senior lawyer within Motorola. He is the Corporate Vice President, Lead Commercial Counsel for Americas Region and Head of Litigation & Antitrust Compliance. His material evidence in his first witness statement was as follows.

> [22]. Hytera's CFO, Nuo Xu, provided a presentation on 29 October 2019 during negotiations related to the US Proceedings. I was personally in attendance for this presentation during which Mr. Xu covered what would happen if the trial resulted in a jury verdict that was "unacceptable" to Hytera.
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> [23]. Nuo Xu presented two options (1) appeal or (2) "retreat" to China. A copy of a picture of Mr. Xu's presentation board is exhibited at JN-1/Tab 2.
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> [24]. As part of Hytera's "Retreat to China" plan, Nuo Xu said that Hytera would do at least the following:
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> [24.1] Undercapitalize subsidiaries operating outside of China to keep on hand the minimum cash to operate their business. He gave an example of a U.K. subsidiary that now has $25M in cash, but Hytera would reduce that cash holding to $5 million.
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> [24.2] Revise Hytera's "Treasury policies" to frustrate enforcement of any judgment in favour of Motorola. For example, Hytera would shorten customer payment / credit terms to make payment due to Hytera in a shorter time frame that the collection process in that country would take. Mr. Xu also stated that Hytera would change the entities to be paid in its contracts to further frustrate collection by making payment due directly to a Chinese entity rather than local entities.
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> [24.3] Move assets out of countries where collection is easier. Notably, Mr. Xu stated that Hytera already had taken steps to move assets out of Motorola's anticipated reach and to reduce holdings in various countries.
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> [24.4] To the extent Motorola engaged in collection actions, he stated that Hytera would further retreat to operate primarily in China, Russia, and Africa (which he described as the "*murky*"

> countries) and said in effect, "*good luck collecting in those places*." A nearly identical presentation and statements were also made by Mr. Xu on 1 November 2019, where Hytera's CEO Qingzhou Chen was present, which Mr. Chen did not contradict. Urgent relief is necessary because I witnessed Hytera make explicit threats to move cash from its UK subsidiaries and claim that it already has begun this process.

39. Hytera's response to this evidence was contained in a "Confidential Annex" to the witness statement of Mr. Gordienko, who is the partner at Steptoe & Johnson with responsibility for the case. His evidence was based on information given to him by three individuals present at the meeting: (i) Mr. Xu, (ii) Ms. Li (an in-house counsel for Hytera) and (iii) Mr. Tucker, an external IP litigation lawyer who represented Hytera at the relevant time. These individuals did not themselves provide witness statements or Affidavits responsive to Mr. Niewiara. I was told that this was because there were limits to the evidence that could be provided within the expedited timetable which preceded a hearing which came on at very short notice.

40. On the basis of this evidence, Hytera disputed Mr. Niewiara's account. There was no dispute as to the use of the chart showing the "retreat" as a consequence of an "unacceptable" outcome to the trial. However, Hytera said that Mr. Niewiara's recollection was not accurate or misinterpreted what Motorola were being told. In summary, the evidence was that: (1) Mr. Xu did not threaten to repatriate assets to China in an attempt to prevent enforcement over those assets; (2) Mr. Xu explained that if there was enforcement of any judgment over Hytera's western assets, then the commercial reality would force Hytera to exit from the western markets; and (3) the idea that Hytera would "retreat" to its key profitable markets of China, Russia and Africa, etc, was not a threat of dissipation but merely a commercial response to Motorola's (so far successful) attempts to control the US market.

41. In response, Mr. Niewiara swore a second Affidavit with a confidential annex. He repeated that the statements about moving assets to jurisdictions where enforcement would be difficult for Motorola were made at more than one meeting. He said that, in his view, Mr. Xu's comments were intended to pressure Motorola into accepting what Motorola considered to be Hytera's unacceptably low settlement offer, by intimating that Motorola would never collect even a fraction of any final judgment of the Illinois Court because of the actions that Hytera had already begun to take, and would continue to take, to move its assets into jurisdictions where enforcement would be difficult. He said that Mr. Xu explicitly threatened to repatriate assets to the PRC to prevent enforcement by Motorola. He recalled Mr. Xu describing the PRC, Russia and Africa as "murky" countries where Motorola would struggle to enforce a judgment. This evidence therefore substantially repeated the evidence which Mr. Niewiara had given in his first Affidavit.

Discussion: the principles to be applied.

42. There was no dispute that the issue as to the admissibility of these statements was to be decided by application of principles of the law applied by the *lex fori*, i.e. English law. There was also no dispute that the statements relied upon were made in the context of meetings which an English court would regard as being covered by the privilege that applies to "without prejudice" communications. However, it was also common ground

that, under English law, there is an "unambiguous impropriety" exception which has the effect of permitting a party to rely upon what has been said in the course of "without prejudice" discussions aimed at settling an underlying dispute.

43. The scope of that exception has been considered in a large number of cases, frequently in the context of an argument that statements made in without prejudice discussions amount to admissions which establish the falsity of a case which a party intends to advance at trial. The authorities were reviewed in detail in two judgments of the Court of Appeal in 2003: the judgment of Rix LJ in *Savings & Investment Bank v Fincken* [2003] EWCA Civ 1630, which built upon the judgment of Gibson LJ in *Berry Trade v Moussavi* [2003] EWCA Civ 715. The most recent Court of Appeal case to which I was referred was *Ferster v Ferster* [2016] EWCA Civ 717.

44. The authorities show that the exception is a narrow one which is to be applied only in the clearest cases of abuse of a privileged occasion: see e.g. *Moussavi* at [36]. The decision in *Fincken* illustrates the strength of the public policy reasons which underlie the general principle that evidence of without prejudice discussions should not be tendered in evidence, and the narrowness of the "unambiguous impropriety" exception. *Moussavi* concerned an admission made by the defendant at a without prejudice meeting: he was alleged to have admitted that he owned shares in a company which he had not disclosed in a previously sworn affidavit of means. The affidavit was central to the proceedings, in which the claimant sought to set aside a settlement deed on the grounds that the defendant had fraudulently or negligently misrepresented his assets in that affidavit. The defendant had warranted in the settlement deed that all of his assets worth £ 5,000 or more had been disclosed in the affidavit of means. The argument arose, prior to trial, in the context of an application by the claimant to amend its pleadings.

45. The Court of Appeal held that it was not permissible for the claimant to adduce evidence of what had been said at the without prejudice meeting. A striking feature of the case was that, at least on the evidence then before the court, there was no challenge to the claimant's evidence as to what had been said at the without prejudice meeting as to the ownership of the shares. The defendant was not therefore in a position to challenge the finding that the judge had made (on the interlocutory application) that there had been an unambiguous admission as to the ownership of the shares: see paragraph [54]. Rix LJ drew a distinction, however, between an "unequivocal admission" and an "unequivocal or unambiguous impropriety": see [56]. In other words, it did not follow from the fact that an unequivocal admission had been made that there was an unequivocal or unambiguous impropriety which permitted evidence to be given about that admission and what was said at the meeting. The Court of Appeal said that a substantial case was to be made that the courts should not pass by "such proof of perjury with indifference", and that it was distasteful for the court to avert its eyes from an admission which appeared to incriminate the defendant in lying in a sworn document. However, the public policy in favour of the protection of the privilege "holds sway – unless the privilege is itself abused on the occasion of its exercise." There was no abuse of the privilege in the circumstances of the case, even if the defendant's revelation of the truth at the without prejudice meeting was inconsistent with his affidavit of means. The essential reasoning is captured in paragraph [57] as follows:

> "It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection

> of the privilege … It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."

46. In the more recent Court of Appeal decision, *Ferster v Ferster* [2016] EWCA Civ 717, Floyd LJ applied the approach in *Fincken.* He said:

> "[11] … the critical question is whether the privileged occasion is itself abused. Although the test remains that of unambiguous impropriety, it may be easier to show that there is an unambiguous impropriety where there is an improper threat than where there is simply an unambiguous admission of the truth.
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> …
>
> [23] In the end … what is involved here is an evaluation of whether the threats unambiguously exceeded what was "permissible in settlement of hard fought commercial litigation" (*Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm) at [132] per Flaux J."

47. In *Ferster*, the impropriety concerned threats made in an e-mail sent in the context of mediation settlement discussions. There was a threat of criminal action, not limited to contempt proceedings, and to give immediate publicity to allegations of extreme severity against the other party. The Court of Appeal held that these threats did "unambiguously exceed what was proper". In the *Boreh v Djibouti* case (referred to in Floyd LJ's judgment), there were threats which had been made orally, but which were secretly recorded by the party against whom they were made. The threats were to continue and expand a campaign against Mr. Boreh through the use of terrorist charges made on behalf of Djibouti. Flaux J described this (at [132]) as "improper commercial pressure" and "unambiguous impropriety given the nature of the threats." His judgment contains (at [133] – [138]) lengthy extracts from the recording of the meeting and a subsequent telephone conversation. The extracts were from different parts of the meeting and the call.

48. The present case too involves an allegation that improper threats were made at a without prejudice meeting, and that therefore the privilege was being abused. It is not a case, such as *Fincken* or *Moussavi*, which involved admissions of fact or alleged inconsistencies with a factual case that a party intended to advance at trial. The fact that the present case involves threats is important because, as Floyd LJ said, it may be easier to show that there is an unambiguous impropriety where there is an improper threat than where there is simply an unambiguous admission of the truth.

49. The nature of the alleged threat in the present case is a threat to deal with assets in order to frustrate a judgment. The impropriety of such a threat, if made, is in my view established by the decision of the Court of Appeal in *Dora v Simper* (15 March 1999). The claimant alleged that, in the context of a without prejudice meeting to discuss

settlement of an earlier set of proceedings, he had been told by one of the defendants the following:

> "… that if he succeeded in obtaining judgment against them, they would have no hesitation in transferring the business of Playsafe to a new company, so as to render any judgment obtained by him effectively unenforceable. It was made very clear by both of these gentlemen that they were determined that John Dora should not be in a position to enforce any judgment which he obtained, as the debtor company would by then have no assets. They were both very open about their intentions in this respect."

50. The action did not settle, and the claimant subsequently succeeded at trial. He then sought to begin further proceedings alleging the transfer of assets at an undervalue and damages for conspiracy. He wished to rely upon the evidence of the without prejudice meeting in the context of a forthcoming interlocutory application by the defendant to (i) strike out the proceedings and (ii) to set aside a freezing order which the claimant had obtained. The Court of Appeal, reversing the judge, held that the claimant was entitled to do so.

51. In my judgment, the case is important and relevant in the present context for two reasons.

52. First, the Court considered that the facts of the case, as alleged by the claimant, came within the concept of "unambiguous impropriety". The submission of counsel was that the statements made were at least capable of being understood as a threat of impropriety, in that it was a threat to put the assets of the company and the two directors beyond the reach of a court's judgment by improper means. Aldous LJ accepted that submission. He said:

> "The evidence alleges that these gentlemen would make sure that the judgment, which might be obtained by Mr Dora, would not be satisfied due to the action they would take, resulting in the company's assets being transferred out of reach of the order of the court.
>
> I also take into account the affidavits of Mr Stenning and Mr Simper which state that these statements were never made. They may turn out to be right, but they do not suggest that what is alleged to be said was not improper or that something like that alleged was said, but that it was taken out of context. For that reason, I believe that this case is an exception to the without prejudice rule."

53. Otton LJ said:

> "The words allegedly used, given their ordinary and proper meaning, amount to an unequivocal implication that the assets of the company would be placed outside the reach of the court by improper means. The words can only have been uttered with the intention or in an attempt to deter the plaintiff from pursuing his rights. Moreover, the words complained of were in themselves capable of amounting to an overt act in furtherance of a conspiracy between the first and second defendants to deter the plaintiff from pursuing his action

> through the court process and to deprive him of his just desserts should he persist and win. They went well beyond the colourful or exaggerated language test."

54. The case is therefore authority for the proposition that a threat, to remove assets so as to deprive a successful claimant of the fruits of a judgment, does come within the concept of "unambiguous impropriety", at least if the clear implication of the threat is that this will be accomplished by improper means. The case is described in *Hollander: Documentary Evidence,* 13th edition para 20-32 as being "close to the line", and different to the usual cases involving blackmail or threats of perjury:

> "There is no reason why unambiguous impropriety should be limited to blackmail or threats of perjury. But in practice the vast majority of cases involve one or the other. These cases are, to an extent, fact specific.
>
> Close to the line was the disputed conversation to the effect that, if the claimants succeeded, the defendants would put the assets of the company outside their reach, which was said to be a threat to put the assets beyond the reach of the court by improper means."

55. In my view, it is self-evident that a threat of this nature, if made, unambiguously exceeds what is permissible in the settlement of hard fought commercial litigation. The court's jurisdiction to grant freezing orders, which have been equated in the litigation context to nuclear weapons, reflects the seriousness with which the court views the unjustified removal of assets in order to frustrate judgments. It would therefore be surprising if the court were to regard threats to do so as falling within the bounds of what is permissible, even in hard-fought commercial litigation. I am therefore doubtful whether they are "close to the line", but in any event such threats are clearly on the wrong side of that line.

56. The second important aspect of *Dora* is that the approach of the Court of Appeal was to consider whether the evidence as to what was said at the meeting, if true, would be capable of amounting to an unambiguous impropriety. Aldous LJ said:

> "In my view the court should at this stage decide whether the statements would, if proved, form the basis for establishing unambiguous impropriety. It is for the judge who hears the matter to decide whether they do."

57. Otton LJ said that he could not

> "… share the judge's view that the defendants did not display an unambiguous impropriety. The words <u>allegedly</u> used, given their ordinary and proper meaning [etc] …" (emphasis supplied).

58. The Court did not therefore engage in an evaluation of that evidence in order to see whether it met a heightened evidential standard of proof so as to engage the unambiguous impropriety exception. The case is therefore contrary to Mr. Rubin's

submission that there needed to be a "high degree of certainty before you could let it in", and also his submission that I should proceed on the basis that Mr. Xu might not have made the threat. In *Dora*, the court acknowledged that it might turn out that the statements were never made, but this did not mean that the evidence was inadmissible. Aldous LJ said:

> "I also take into account the affidavits of Mr Stenning and Mr Simper which state that these statements were never made. <u>They may turn out to be right</u>, but they do not suggest that what is alleged to be said was not improper or that something like that alleged was said, but that it was taken out of context. For that reason, I believe that this case is an exception to the without prejudice rule." (Emphasis supplied)

59. In the subsequent case of *Moussavi,* Gibson LJ said that this particular passage was of "doubtful cogency":

> "it is hard to see why significance can be attached to the fact that the directors did not make the suggestions referred to by Aldous LJ. Why should they, when they had denied making the statements at all? All that could be said was that Mr. Forsyth's evidence, if correct, established unambiguous impropriety."

60. Mr. Rubin understandably relied upon this passage in order to seek to undermine the authority of *Dora* on this issue. However, *Moussavi* did not decide that the Court of Appeal in *Dora* had taken the wrong approach. Rather, the court in *Moussavi* held that *Dora* was distinguishable on its facts, and that it did not accept that the approach was one "to be applied in the present case" (paragraph [42]). The court did not need to decide, and did not decide, whether the fact that the defendant denied making the statements made at the without prejudice meeting was "itself destructive of the Claimants' submission of unambiguous impropriety": (paragraph [54]).

61. In these circumstances, there is no conflict between the two decisions and I consider that *Dora* is still good law, and that I am bound to follow it. Moreover, it does seem to me that there is cogency in the approach of Aldous LJ. A party may seek to argue that a statement allegedly made would not, even if made, amount to unambiguous impropriety; either because the words of the statement themselves, or the context in which they were made, did not unambiguously carry the implied threat relied upon. If so, then the court would need to consider that argument. In *Dora*, it was therefore significant, in my view, that the defendants did not make either of these suggestions. Their case was that the statements had not been made at all. The Court's approach was, as I have said, to consider whether, if made, those statements would amount to unambiguous impropriety. The Court considered that the nature of the threat (if made) was that they would.

62. I do not myself consider that the approach of the Court of Appeal in *Dora* is inconsistent with the narrowness of the "unambiguous impropriety" exception, as Mr. Rubin in substance argued. The case-law indicates that the purpose of the exception is to prevent abuse of the privilege. The fact that a party denies making the threat may give rise to a factual question which the court may need to resolve. But a denial cannot in itself mean that there was no abuse of the without prejudice privilege so as to render the exception inapplicable. If the threat in *Ferster* had been made orally, but denied, it would in my

view still be (if proved) unambiguously improper. The same applies to the threats made orally in *Boreh*. It was the nature of the threat in *Boreh* which was unambiguously improper and outside what was permissible in hard-fought litigation. The threat would still have been unambiguously improper if there was no recording and the maker (Mr. Everett-Heath) had denied making it.

63. Nor in my view does the "unambiguous impropriety" exception require a different standard of proof of such impropriety from that which a court would normally apply either at the interlocutory stage or subsequently. To do so would facilitate the abuse of the without prejudice privilege which the exception to the ordinary rule is designed to prevent.

64. I also consider that, irrespective of authority, there is much to be said for a court taking the approach, at an interlocutory stage, which was taken by the Court of Appeal in *Dora.* There are necessarily limits to the conclusions that a court can reach on evidence for interlocutory hearings, and it is difficult to see how or why a court can, on an interlocutory application, reach a conclusion that there needed to be a "high degree of certainty" before the evidence can be admitted. The court should of course examine whether there is a sufficient evidential basis for the case which is advanced as to what was said at the without prejudice meeting. Motorola submitted that the applicable test was whether there was a "good arguable case", which is of course a test commonly applied in different contexts at an interlocutory stage. The central concept of this test is that it requires a "plausible evidential basis" for the factual assertion relied upon: see e.g. *Lakatamia Shipping Co. Ltd. v Morimoto* [2019] EWCA Civ 2203 para [38]. In *Tata Consultancy Services Ltd. v Sengar* [2014] EWHC 2304 (QB), Mr. Simon Picken QC applied the test of whether there was an arguable allegation of impropriety, and not whether the allegation had been made out. He did not have the benefit of full argument on the point, but his instinctive view is consistent with the approach taken in *Dora* and the usual approach of the court in many interlocutory applications.

65. In these circumstances, I consider that I should follow the approach taken by the Court of Appeal in *Dora*. I will not therefore seek to resolve such disputes as exist as to what was said at the meeting. I consider that there is a plausible evidential basis for Motorola's case as to what was said at the meeting. That evidence is contained in the witness statements of a very senior lawyer of Motorola, and there is documentary evidence (in the form of a photograph of Mr. Xu's presentation on a flip chart) which shows that the consequence of an unacceptable judgment was 'retreat'. The question is therefore whether, if Motorola's evidence as to what was said was true, this is a case of unambiguous impropriety.

66. In reaching this conclusion as to the approach to be taken at the present interlocutory stage, I did not (contrary to the submissions of Mr. Rubin) consider that the decision in *Savings & Investment Bank v Fincken* was of any real assistance, let alone determinative. The court in that case was not concerned with the approach to be taken, at an interlocutory stage, where there was a dispute as to what was said at the without prejudice meeting in question. *Dora* was cited to the court, but not referred to in the judgment. The judgment was concerned with a case where there was in fact no challenge on the evidence, but nevertheless the public policy which protected without prejudice communications prevailed in the circumstances of the case; i.e. there would be no unambiguous impropriety because there was no abuse of the without prejudice privilege. In the present case, by contrast, the authority of *Dora* shows that threats in a

without prejudice meeting to remove assets by improper means so as to frustrate a judgment would (if made) be regarded as unambiguous impropriety; i.e. in such circumstances, the without prejudice privilege would be being abused. Moreover, I do not consider that the public policy considerations which led to the decision in *Fincken* should also lead to the conclusion that a heightened test is to be applied at an interlocutory stage, when a party seeks to put before the court evidence that the without prejudice privilege was abused.

Discussion: application to the facts

67. I consider that the statements alleged by Mr. Niewiara, if proved, would constitute unambiguous impropriety. Indeed, I do not consider that there is any significant difference of substance between the statements which were held admissible in *Dora* on the basis of the unambiguous impropriety exception, and the statements which were allegedly made in the present case.

68. Mr. Rubin submitted, relying on the decision of Briggs J. in *Bank of Tokyo Mitsubishi v Baskan Gida Sanayi Ve Pazarlama A.S. and others* [2009] EWHC 1276 (Ch) at [921] that it is not unlawful to move assets in order to try defeat the claims of creditors. It is true that this does or may not of itself attract the consequences of the criminal law, although it can lead to the availability of civil remedies. However, the decision in *Dora* shows that such deliberate conduct would be regarded as unambiguous impropriety, or at least that threats to do so (by improper means) would fall outside the scope of the protection of without prejudice privilege.

69. Although not relied upon in their own written submissions for the hearing, Hytera sought to rely upon certain points made by Mr. Downes QC in his skeleton argument on behalf of Sepura. The effect of these submissions was that the matters which were referred to by Mr. Xu (according to Mr. Niewiara's evidence) were a "country mile" away from the sort of "impropriety" that would be sufficient to go behind without prejudice privilege. Mr. Downes submitted, for example, that moving assets around, whilst still being beneficially owned by the same company in order to make enforcement more difficult is not necessarily improper. I did not think, however, that this submission was consistent with the approach taken in *Dora,* which was not addressed in Mr. Downes' submission. It may be that some aspects of what Mr. Xu was proposing might fall short of constituting "improper means". For example, at least viewed in the abstract, the undercapitalisation of a subsidiary might not in itself be improper means. But I could not see how, for example, it would be proper for there to be a change in the entities to be paid by customers in order to frustrate collection; i.e. by requiring customers to make payment to a Chinese entity rather than the entity (in a different jurisdiction) that had supplied the goods or service. In any event, I consider that the statements should be viewed as a whole. So viewed, they amounted to a threat to move assets away from jurisdictions where enforcement could be accomplished without undue difficulty into countries which were "murky", and to do so with a view to frustrating enforcement.

70. Nor in my view does it matter (as Mr. Rubin argued) that the threats were made during the course of lengthy meetings during which discussions may also have taken place which were within the ordinary and permissible bounds of without prejudice discussions. In *Boreh*, Flaux J. looked at particular passages within the transcript of the meeting and telephone call. Similarly, in the present case Motorola is focusing, and is

entitled to focus, upon the relevant part of the discussion at each of the meetings i.e. what was said by Mr. Xu in the context of explaining his diagram showing a "retreat" in the event of an "unacceptable" result in the trial, and then his similar statements at the second meeting.

71. Mr. Rubin submitted that there was scope for misunderstanding what was said at the meeting, bearing in mind that the participants were from different cultures and that the discussions were not scripted or recorded. This is in my view true, but it does not follow that Motorola does not have a good arguable case as to the making of the relevant threat. Mr. Niewiara has gone on Affidavit to describe what, on his case, was said. It does not seem to me that there is anything inherently implausible in his account. Indeed, it is clear from Mr. Xu's written presentation on the "flip chart", as well as Mr. Gordienko's evidence, that there was a discussion about a retreat, and that the PRC, Russia and Africa were referred to in that context. Furthermore, it is apparent from the evidence of Mr. Gordienko that there were discussions about the possible enforcement of a judgment:

> "[8 (b)] Ms Li also recalls that Mr. Hacker indicated that Motorola was "very good" at enforcing US judgments overseas and stated his belief that Sino-US relations at that time meant it would be possible to enforce the Judgment in China. Mr. Hacker believed that, even if Hytera had little money to meet any judgment debt, the Chinese government would not allow it to fail and would bail it out. Mr. Xu recalls he disagreed with this statement and explained this would not be the case.
>
> [8 (c)] Ms Li has informed me that Motorola believed at the time that it could enforce a judgment over assets in the United States, the United Kingdom, Germany and Canada with a value of around US$ 400 – 500 million.
>
> …
>
> [11] Ms Li informed me that Mr. Hacker used a flipchart to draw a diagram stating that more than half of Hytera's annual income is generated outside of China. Mr Hacker gave his opinion that a "retreat" by Hytera from its overseas markets would result in a 50% loss in the company's income and reiterated Motorola's intention to execute any judgment over Hytera's assets at any cost."

72. This is not therefore a case where Hytera contends that nothing was said which touched on the matters described in Mr. Niewiara's evidence. There are, of course, differences between the accounts of the participants. But for reasons already given, I am not in a position now to decide as to the competing versions of events.

73. Accordingly, I consider that the evidence as to what was said at the meeting is admissible on the present application.

Conclusion: risk of dissipation

74. For reasons already given (see paragraph [35] above), I consider that the statements made are not only admissible, but are very significant in the context of an argument as to whether there is a real risk of dissipation. I consider that they are in themselves

sufficient to give rise to the conclusion that there is a real risk of dissipation, particularly when seen in the context of the other matters to which I will refer. I do not accept that a threat of this kind is outweighed, as Mr. Rubin submitted, by a multitude of other factors which point strongly away from the existence of a real risk of dissipation.

75. The threat was not made in the abstract, but against the background of serious dishonesty on the part of, at least, the Hytera Recruits. Motorola's case in the US Proceedings was that the theft and subsequent use of its trade secrets had been directed by Hytera's senior management. The Complaint in those proceedings alleges, in paragraph 6, the surreptitious downloading and misappropriation by the recruits of 7,000 technical, marketing, sales and legal documents related to Motorola's digital radio and infrastructure products. Hytera thereby unlawfully obtained a "roadmap" about how to implement key features developed by Motorola over the course of many years. Paragraph 7 then goes on to allege that:

> "Hytera and the newly employed Hytera Employees knew that the information they downloaded without permission was confidential, and knew that those documents were replete with Motorola's trade secrets. Despite this knowledge, Hytera simply copied and used these critical trade secrets in its own competing products – products that bear the hallmarks of Motorola's innovation, product development, and technical and business strategies. Hytera's misappropriation was deliberate, wholesale and systematic – not only did Hytera take and then copy Motorola's technical trade secrets, it even copied the marketing, configurations, and product manuals related to the misappropriated features as well, leaving no doubt about its unlawful scheme."

76. I considered that Motorola's submissions went too far insofar as they contended that the decision of the jury in the US Proceedings contained expressly or implicitly findings of dishonesty against Hytera's senior management; i.e. against individuals other than the Hytera Recruits themselves. Since the US Proceedings did not culminate in a 'bench' trial with a reasoned judgment, there is no clear finding as to the knowledge or involvement of any particular senior individual within Hytera. I was taken carefully through the instructions to the jury in the Illinois case. In my view, there was nothing in those instructions which unequivocally required the jury to come to a conclusion as to the knowledge or involvement of individuals other than the recruits themselves. Since the recruits themselves occupied important and senior positions, their conduct alone was potentially sufficient to engage the liability of Hytera on the basis of, essentially, vicarious liability.

77. This point is illustrated by the jury instruction in relation to exemplary or punitive damages. In order to award such damages, the jury had to be satisfied that Motorola had proved by a preponderance of the evidence that Hytera's acts were "wilful and malicious"; i.e. if Hytera's conduct was malicious or in reckless disregard of Motorola's rights. Exemplary damages may be awarded against an employer because of an act of its employee:

> "… if, but only if you find:
>
> 1. The employer authorized the doing and the manner of the act; or
>
> …

3. The employee was employed in a managerial capacity and was acting in the scope of his or her employment; or
4. The employer or a manager of the employer ratified or approved the act"

78. However, although there is no clear finding as to the complicity of Hytera's senior management, Motorola in my view has, at the very least, a good arguable case that the senior management of Hytera was complicit in the theft and use of trade secrets. Whilst I was not referred to any direct evidence of such complicity, I considered that the circumstances as whole pointed with some strength to this conclusion. Those circumstances included: that the theft would have involved a significant degree of planning; the improbability of the three Hytera Recruits simply acting of their own volition in taking Motorola's trade secrets and then choosing to take them to Hytera and utilise them there for the benefit of Hytera; the fact that this occurred at a time when Hytera needed to introduce digital products rather than the analogue products which had previously been a significant part of its business; the absence of any explanation for the theft from the recruits themselves in the course of the Illinois proceedings; the absence of any explanation from Hytera's senior management; the "gagging", as Mr. Sprange described it, of the three recruits via non-disclosure agreements; the payment of significant sums to the three individuals on the termination of their employment, notwithstanding their serious wrongdoing; and the lengthy period of around 18 months between the time when Motorola's claim was commenced and the termination of the employment of the three recruits.

79. My conclusion in the previous paragraph is also supported by the evidence of Mr. Niewiara. He was one of the attorneys at Motorola responsible for the litigation against Hytera and who attended almost all of the trial. His evidence is that the senior management of Hytera was complicit in what occurred. His Affidavit describes how Hytera "embarked on an unlawful plot to surreptitiously take and copy Motorola's confidential and proprietary trade secrets", and that the three senior radio engineers (i.e. the Hytera Recruits) were recruited "to facilitate this plan".

80. Where dishonesty is alleged in the context of an application for a pre-trial freezing injunction, it is by definition the case that the dishonesty in question has yet to be proved. Nevertheless, the court is in principle willing to grant relief on the basis of as yet unproven allegations of dishonesty, provided that they are of sufficient strength and provided that they properly support the conclusion that there is a risk of dissipation of assets. In the present case, serious dishonesty on the part of the Hytera Recruits is in my view proven as a result of the admissions and then verdict of the Illinois trial. There is also, for reasons already given, a good arguable case that Hytera's senior management was complicit in dishonest conduct which in my view was very serious. When these matters are considered together with and in the context of subsequent threat made in the October/ November 2019 meetings, I have no doubt that Motorola has satisfied the need to show a real risk of dissipation, since they show the extent to which Hytera is prepared to go in order to gain a commercial advantage. As Mr. Sprange submitted, the threatened removal of assets so as to frustrate enforcement is the last chapter in the scheme which started with the theft of Motorola's trade secrets.

81. A number of other matters were relied upon by Motorola in support of its case. These included the history of proceedings in Germany in relation to Hytera GmbH, the alleged continued infringement of Motorola's patents by the use of the stolen trade secrets and

Hytera's unwillingness to offer undertakings. I did not consider, however, that these matters added materially to Motorola's case on the two principal matters on which Motorola was able to rely and which in my view establish the requisite real risk of dissipation.

82. Hytera advanced a number of other reasons which were said to negate the alleged risk of dissipation. I did not think that any of them were of any real weight when assessing whether there was a real risk of dissipation, or provided reasons why a freezing injunction should be refused as a matter of discretion.

83. First, Hytera relied upon the fact that it was a "very substantial, well established and reputable company". The evidence does certainly indicate that it is a well-established business, dating back to 1993 and now listed on the Shenzhen exchange. It enjoys substantial annual revenues in excess of US$ 1 billion. Set against these matters, however, is the evidence which gives rise to a good arguable case as to the complicity of Hytera's senior management in very serious wrongdoing in order to support and enhance Hytera's business. Furthermore, there is now a very large unsatisfied judgment against Hytera. The statements made at the October/November 2019 meetings do not indicate that this is the sort of judgment which Hytera could, or would be willing to, take within its ordinary stride. On the contrary, and indeed on both sides' accounts of what was said at those meetings, an 'unacceptable' judgment would be a game-changer as far as Hytera was concerned. Ultimately, the fact that Hytera is substantial, well established and may have previously enjoyed a good reputation does not in my view negate the seriousness of the threat made at those meetings, and which supports the existence of the relevant risk of dissipation.

84. Secondly, Hytera relies upon "inordinate delay" in bringing the application. The authorities in this area are summarised in various recent decisions of the Commercial Court, including most recently *ArcelorMittal USA LLC v Ruia and others* [2020] EWHC 740, paragraphs [262] – [263]. Delay of itself is not a bar to relief, but it is a discretionary factor which is to be weighed in the balance. Ultimately, the question is whether it is just and convenient to grant the WFO: see *Holyoake v Candy* [2016] EWCA Civ 92 at paragraph [34].

85. The application in the present case has been made promptly after Motorola succeeded in recovering very substantial damages after trial. It is therefore a prompt application for post-judgment relief. The evidence of Motorola did not explain why steps had not been taken to seek pre-judgment relief from the English court. This may be because the point about inordinate delay was not taken, at least at all clearly, in Mr. Gordienko's evidence on behalf of Hytera. However, an applicant is generally in a stronger position to advance a claim for a freezing order, particularly against a substantial company, in circumstances where a very large judgment has actually been obtained and has not been satisfied. An application in England for pre-judgment relief under s.25 would in my view have been problematic, if based simply or principally on the allegations of theft of trade secrets which were alleged in the US Proceedings. It is true that such an application could have been made, with greater force, following the threat made at the October/November 2019 meetings, and that the present application is therefore brought 5 months after that meeting. I do not, however, regard that as being significant or as a factor which means that relief should not be granted. In October/November 2019, Motorola did not know whether they would obtain judgment against Hytera, and if so whether it was of a size that would cause Hytera to need to make real efforts to

implement the steps which had been threatened. The landscape was therefore significantly altered once Motorola obtained a very large judgment which would obviously fall into the "unacceptable" category discussed at the meeting. The application was made promptly thereafter.

86. Thirdly, Hytera relies upon the fact that the present application was made on notice. In my view, this is not significant. As Flaux J. said in *Madoff Securities International Ltd v. Raven* [2011] EWHC 3102 (Comm), paragraph [152], it is not unusual for applications for freezing injunctions to be made inter partes or at least on some form of notice. In the present case, notice was given but this was coupled with an application for expedition. That application, which was resisted, was granted.

87. Fourth, Hytera relies upon the absence of evidence that Hytera has in fact moved or disposed of any of its assets, either in England or elsewhere in the world. It seems to me that there is some evidence to this effect, albeit non-specific: Mr. Niewiara's evidence is that he was told by Mr. Xu that Hytera already had taken steps to move assets out of Motorola's anticipated reach and to reduce holdings in various countries. It is true that Motorola has not identified any specific movements, for example from the UK companies. However this is not altogether surprising in circumstances where up-to-date accounts for the UK companies have yet to be filed, and more generally where evidence as to actual unjustified movements of assets may not be easy to obtain. In any event, it seems to me that this particular argument may (as can be seen from *Candy* at paragraph [62]) be a strong point, in negating the risk of dissipation, in certain factual contexts. But I do not consider that it has any real strength in a case where, as here (if Motorola's evidence is accepted) there is a relatively recent explicit threat to take steps to frustrate the enforcement of a judgment.

88. Fifth, Hytera contends that Motorola would be able to enforce a judgment against Hytera's "very large asset base outside the UK"; i.e. in China. Mr. Gordienko's witness statement refers to evidence from Mr. Ding Liang, a partner in DeHeng Law Offices in the PRC. Mr. Ding has confirmed that Chinese law does provide for the enforcement in the PRC of foreign judgments, including judgments of the US and UK courts. He has referred to "several recent examples" of cases where the PRC courts have enforced US money judgments, including a 2017 decision in Wuhan and an unpublished 2018 decision in Shanghai. It seems to me that this evidence goes no further than to show that it may be possible for Motorola to enforce in China; i.e. that enforcement is not impossible. It does not in my view establish that enforcement will be an easy or uncomplicated process. It falls far short of showing that there is a substantial recent track record of enforcement of US judgments in the PRC. Only two specific decisions are referred to, and the more recent one is unpublished. On the other side of this equation is the evidence as to what was said at the 2019 meetings concerning the "retreat" to China and other countries. As Mr. Downes pointed out in his written submissions, this evidence "emphasises that it is not possible (or at least very difficult to enforce) through China".

89. Overall, I did not consider that the evidence came anywhere near showing that enforcement in China was straightforward, so that there was no practical purpose in the "retreat" which was threatened at the meetings. The premise of that discussion, on Motorola's case as to what was said, was that settlement was desirable because enforcement in China or 'murky' countries would be difficult.

90. Finally, Hytera relied upon the fact that steps had not been taken to enforce against Hytera China's shares in Hytera Hong Kong. This was said to be a further sign that there was no genuine or well-founded concerns as to risk of dissipation by Hytera. I did not consider that there was any force in this argument. Hytera Hong Kong is a holding company whose assets comprise a shareholding in the chain which leads to Shortway and Sepura. Motorola has sought relief in relation to the underlying assets within the chain, as well as relief as against the owner of Hytera Hong Kong (i.e. Hytera China). Accordingly, positive steps have been taken in relation to the top and bottom of the chain. I do not see how any conclusion can be drawn, from the fact that proceedings have not also been taken in Hong Kong, that there is no genuine or well-founded concern as to dissipation of assets. I consider in the following section the question of the extent of the relief which has been sought in relation to those underlying assets within the chain.

E: Shortway and *Chabra* relief

Availability of relief in principle

91. It was common ground that the relevant principles concerning *Chabra* relief were as stated by Popplewell J in *PJSC Vseukrainskyi Aksionernyi Bank v. Maksimov* [2013] EWHC 422 (Comm) at [7] and quoted (with apparent approval) by the Court of Appeal in *Lakatamia Shipping Co v. Nobu Su* [2014] EWCA Civ 636 at [32]:

> "(1) The *Chabra* jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable upon his substantive claim (the CAD).
>
> (2) The test of "good reason to suppose" is to be equated with a good arguable case, that is to say one which is more than barely capable of serious argument, but yet not necessarily one which the Judge believes to have a better than 50% chance of success.
>
> (3) In such cases the jurisdiction will be exercised where it is just and convenient to do so. The jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive defendants and have not acted to frustrate the administration of justice.
>
> (4) A common example of assets falling within the *Chabra* jurisdiction is where there is good reason to suppose that the assets in the name of the NCAD are in truth the assets of the CAD. Such assets will be treated as in truth the assets of the CAD if they are held as nominee or trustee for the CAD as the ultimate beneficial owner.
>
> (5) Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the *Chabra* jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets

> in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary, but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD."

92. In view of the undertakings which had been agreed in relation to Sepura, the issue of *Chabra* relief arose only between the Claimants and Shortway. Shortway is an English company whose most recent set of audited accounts is dated 31 December 2018. Those accounts were signed by Mr. Xu (the same Mr. Xu who spoke at the 2019 meetings) on 7 March 2019. The accounts record that the principal activity of Shortway during that financial year was that of a holding company, and Mr. Sprange accepted that this was so: i.e. that Shortway was not carrying out day-to-day trading or business activities. The accounts identified a list of subsidiaries held directly and indirectly. There was one direct subsidiary, Sepura PLC. There were 20 indirect subsidiaries around the world, and these were listed.

93. The information in the Shortway accounts was consistent with the audited accounts of Sepura PLC for the same period. This listed the same 20 subsidiaries as being companies in respect of which Sepura "owns the entire issued share capital". The list showed that some of these subsidiaries were held directly, with the majority being held indirectly by Sepura. The Claimants' evidence for the hearing also included a structure chart which set out Sepura's ownership, both direct and indirect, of various subsidiaries. Consistent with Shortway's published accounts, the structure chart showed that Shortway itself had no subsidiaries other than Sepura itself.

94. The structure chart also showed the chain of ownership above Shortway. Shortway was owned, through two intermediate companies, by Hytera China. The two intermediate companies were, as described above, Hytera Hong Kong and Shortway Jersey, with 100% share ownerships down the chain from Hytera China to Sepura via Hytera Hong Kong, Shortway Jersey and Shortway itself.

95. Mr. Rubin submitted that a *Chabra* application against Shortway was "misconceived" as a concept. He said that this was not a case where it was said, or could properly be said, that Shortway's assets were held by Shortway as nominee or trustee for Hytera China. This was an ordinary case of parent and subsidiary which is common in the case of multinational companies. He said that the Chabra jurisdiction has arisen and is essentially directed at those who are the owners, or the equivalent of owners, through trustee or nominees or control arrangements which mean that it is appropriate to regard the assets in question as effectively beneficially owned by the cause of action defendant.

96. I accept that there is no evidence which indicates that the assets of Shortway were held as nominees or trustees for Hytera China. However, it does not follow that *Chabra* relief is unavailable in respect of the assets of Shortway. Popplewell J's fourth principle is that the case of a nominee or trustee for the cause of action defendant ("CAD") is a "common example" of assets falling within the *Chabra* jurisdiction. But it is clear from this passage, and also from the thorough discussion of the *Chabra* jurisdiction in *Gee: Commercial Injunctions* 6th Edition, paragraphs 13-002 – 13-012, that the jurisdiction is not confined to cases where the non-cause of action defendant ("NCAD") is a nominee or trustee for the CAD. Rather, as Popplewell J. said in his sixth principle, the ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD.

97. It is obviously the case that Motorola cannot simply execute its current judgment against the assets of Shortway, against whom there is no judgment or cause of action. However, there is clearly a route, as Mr. Sprange submitted, whereby such assets (or at least any surplus assets on a winding up) could in due course become available. As described in *Gee* paragraph 13-010:

> "If the defendant is a shareholder in a private company and were left free to deal with the assets of the company this could affect the value of his shareholding and could diminish the value of his assets. This may justify an order requiring prior notice of dealing with the company's assets or an injunction restraining dealings with the company's assets, albeit that the company is a third party. Where the defendant owns 100 per cent of a company beneficially it might be that those assets are held by the company as a nominee for him because they have been acquired using the defendant's money and there is a resulting trust. Each case is fact sensitive and may involve the drawing of negative inferences against the defendant and the third party. <u>Even if the company is not a nominee, the defendant has access to the company's assets through distributions made to him as a shareholder or through placing the company in liquidation. The same might be done after judgment by a receiver appointed over the shares in aid of enforcement of the judgment, and this route can be protected by a Mareva injunction</u>." (Emphasis supplied)

98. The potential availability of this route is also apparent from the judgment of the Court of Appeal in *Lakatamia*: see paragraph [37] of the judgment of Tomlinson LJ, (referring to the "shorthand" language of Burton J. quoted in paragraph [19]), and [52] (Rimer LJ). It is true that the appointment of receivers in the present case might be more complicated than in some cases, because there are two intermediary companies between Hytera China and Shortway. However, given that there is no dispute as to Hytera China's ultimate ownership (via a chain of shareholdings) of Shortway, there is no difficulty in principle in envisaging the possibility of a number of receivers being appointed along the chain in aid of enforcement of Motorola's judgment, with the consequence that ultimately Motorola would have access to Shortway's surplus assets.

99. I therefore consider (applying Popplewell J's first and second principles) that there is a good arguable case that assets of Shortway would be amenable to a process of

execution. Confirmation of the "in principle" availability of *Chabra* relief is, in my view, to be found in the agreement of Sepura to provide the agreed undertakings.

Risk of dissipation

100. The arguments advanced by Motorola on risk of dissipation did not distinguish between Hytera China and Shortway. Subject to two specific matters, which I address below, the Respondents did not suggest that there was a distinction to be drawn between the two companies, as far as that risk is concerned.

101. It seemed to me that, in principle, my conclusions as to risk of dissipation, as set out above, apply to both Hytera China and Shortway. Shortway is (indirectly) a wholly owned subsidiary of Hytera China. The statements made at the October/November 2019 meetings concerned the way in which subsidiaries and their assets would be dealt with. Those statements were made by Mr. Nuo Xu who is, according to recent publicly available information from Companies House, the sole active director of Shortway. The Companies House information also identifies Mr. Chen as the person with "significant control" of Shortway, as derived from his ownership of shares and right to appoint and remove directors. At the 1 November meeting, Mr. Chen was present and did not contradict what Mr. Xu was saying. Subject to the following two specific points identified on behalf of Shortway, there was no ground for distinguishing between Hytera China and Shortway as far as a risk of dissipation is concerned.

102. The two specific points arise from the fact that Shortway's assets comprise its shareholding in Sepura Ltd. Shortway submitted, first, that it was implausible to suggest that Shortway would dispose of its shares in Sepura, in view of the undertakings Sepura has given to the UK government in order to obtain the security clearances it requires to operate. In particular, Sepura has agreed to notify the government of "any change in the circumstances of the company which may have a bearing on its security status and its ability to carry out its classified contracts", including in particular any "change of ownership or control" or any acquisition by a "person who is not a full UK citizen." Secondly, Shortway submitted that, in any event, Shortway's shares in Sepura are currently pledged to the Import Export Bank of China as security for a loan. The shares therefore cannot presently be disposed of.

103. I consider that these matters mean that that there may be no real risk of an imminent disposal by Shortway of its shares in Sepura. But it does not follow that there is no risk of dissipation. The requirement for Sepura to notify the UK government of a proposed change of control does not preclude the implementation of such change by a transfer of shares. Similarly, whilst Shortway's shares may currently be pledged to a bank, there is nothing to stop the redemption of that pledge. I therefore do not consider that either of these matters leads to the conclusion that there is no real risk of dissipation of the relevant asset, namely Shortway's shares in Sepura.

Discretionary considerations

104. In its written submissions, Hytera and Shortway identified the relevant issues for determination, as far as concerns the *Chabra* aspect of the case, as being:

a) Whether there was a good arguable case that Shortway's assets either belong to Hytera or are amenable to enforcement of the judgment against it; and

b) Whether there is a real risk of dissipation in respect of Shortway.

The parties' arguments were largely focused on these issues. Little or no argument was therefore addressed to the question of how the court should exercise its discretion, in the event that these requirements were fulfilled, or as to the precise terms of the orders which Motorola sought.

105. Nevertheless, although I have decided both of these issues in favour of Motorola, I must still consider whether it is appropriate to grant *Chabra* relief and if so in what terms – bearing in mind that the jurisdiction is exceptional and should be exercised with caution.

106. I consider that the exercise of the court's discretion is potentially influenced by two matters: (i) the undertakings to be provided by Sepura, and (ii) the wording and extent of the freezing order against Hytera China and the disclosure to be provided by Hytera China.

107. *(1) The undertakings of Sepura.* I can deal with this briefly. It was not in fact suggested that the undertakings to be provided by Sepura affected the exercise of the court's discretion to grant *Chabra* relief against Shortway. I consider that they do not. For example, although Sepura has agreed to provide certain information to Motorola, that information will not necessarily include the entirety of Shortway's assets. The agreed undertakings will not therefore necessarily provide sufficient protection to Motorola. They do not therefore provide a reason why, in the exercise of the court's discretion, *Chabra* relief should not be granted against Shortway.

108. There remains a question, however, as to whether Motorola can obtain sufficient protection via orders which can be made against Hytera China; both in relation to the freezing of Hytera China's assets (which I address in this section) and the disclosure order to be made against Hytera China (addressed in section F below).

109. *(2) The extent of the freezing order against Hytera China.* The purpose of the proposed freezing order is to seek to preserve the underlying assets of both Shortway and Sepura so as to be available for execution of Motorola's judgment. If this is the purpose, then it is obviously important that the wording of the freezing order should clearly accomplish this. It is also, of course, always essential that a defendant to a freezing order should know what can and cannot be done.

110. The current wording of the freezing order made on 14 April 2020 is as follows:

> 1. Until further order of the court, the Respondent must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of its assets which are in England and Wales up to the value of US $345,761,156.
>
> 2. Paragraph 2 applies to all the Respondent's assets whether or not they are in its own name, whether they are solely or jointly owned

and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent's assets include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions.

3. This prohibition includes the following assets in particular:

1) Shares held by the Respondent in Hytera Communications (UK) Limited.

2) Any money standing to the credit of any bank account (including the amount of any cheque drawn on such which has not been cleared).

111. It is not clear to me that this wording achieves the result which Motorola seeks to achieve. The process of execution contemplated by the Claimants' route to enforcement requires not simply that the assets of Sepura and Shortway remain available, but also that the ownership chain which leads from Hytera China to Shortway and Sepura remains intact. That ownership chain to Sepura's assets could, as it seems to me, be broken at one of the four points above Sepura: Project Shortway could dispose of its shares in Sepura (although, for reasons given, that is not an imminent risk); Shortway Jersey could dispose of its shares in Shortway; Hytera Hong Kong could dispose of its shareholding in Shortway Jersey; or Hytera China could dispose of its shareholding in the Hytera Hong Kong.

112. It is not clear to me that the current wording would prohibit, for example, a disposal by Hytera China of its shareholding in Hytera Hong Kong, even though that would have the effect of disposing of assets within the jurisdiction (e.g. the shares in Shortway and Sepura) currently in the ownership of companies within the Hytera group. The same applies to disposals by Hytera Hong Kong, Shortway Jersey and Shortway itself. Whether or not such disposals would be prohibited by the current form of the order was not addressed in detail during the course of argument, and is not a straightforward point. There may be arguments both ways, as shown by (i) the decision in *Lakatamia v Su* and (ii) the discussion in *Gee: Commercial Injunctions* paragraphs [19-009] –[19-102] and *FM Capital Partners v Marino* [2018] EWHC 2889 as to whether *Lakatamia* is consistent with or has been impliedly overruled by subsequent Supreme Court authority.

113. It seems to me, however, that this wording could be adapted so as to make it clear that Hytera China must not take any steps which have the effect of disposing or dealing with or diminishing the value of the shareholdings which are respectively held by Hytera China in Hytera Hong Kong, by Hytera Hong Kong in Shortway Jersey, by Shortway Jersey in Shortway, and by Shortway in Sepura. I did not understand Mr. Rubin to argue that the existence of intermediate companies would make it inappropriate to grant relief which sought to freeze Hytera China's indirectly held shareholding in Shortway. He

accepted (page 94 of the transcript) that the shares held in Shortway could in principle be frozen:

> "The only assets that this court can freeze on this application are English assets; and those are shares in Shortway. That's all it freezes, the shares in Shortway. There's no further relief sought or available"

114. I presently consider that if the wording is adapted, this may provide sufficient protection to Motorola, essentially for the reasons articulated in paragraphs [26], [31] and [43] of *Lakatamia* (and paragraph [80] of the judgment of Hildyard J. quoted in paragraph [34] of *Lakatamia).* If so, then it does not seem to me that *Chabra* relief against Shortway is necessary.

115. However, I am willing to hear further argument on this issue in the context of submissions as to the appropriate wording of the freezing order. If I am persuaded that appropriate wording of the freezing order vis a vis Hytera China cannot provide the necessary protection to Motorola, I am willing to review the question of whether *Chabra* relief should be granted in this case against Shortway, bearing in mind my conclusion that there is no reason in principle why it should not be granted.

F: Worldwide disclosure order

116. Motorola seeks a worldwide disclosure order against Hytera (i.e. the three Hytera defendants) as well as Shortway. The order sought requires disclosure by each Respondent of:

   a) All of the Respondent's bank accounts worldwide, whether in its own name or not and whether solely or jointly owned; and

   b) All of the Respondent's assets worldwide exceeding £10,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

117. The relief sought is unusual in that the freezing injunction sought by Motorola only concerns the assets of each Respondent within the jurisdiction, whereas the disclosure sought is on a worldwide basis.

118. The issue of whether a disclosure order can go beyond a freezing order was considered by Gloster J. in *JSC VTB Bank v. Skurikhin* ("Skurikhin") [2012] EWHC 3116 (Comm): see in particular paragraphs [22] – [27]. There is no doubt that it is in principle permissible for a court to grant a disclosure order which is wider in scope than a freezing order, particularly where post-judgment relief is sought: see the decision of Colman J. in *Gidrxslme Shipping Co. Ltd. v Tantomar-Transportes Maritimos LDA* [1995] 1 WLR 299, quoted in paragraph [21] of Gloster J's judgment.

119. However, the general principle is that it is normally not appropriate for a disclosure order to go beyond the ambit of the freezing order, at least in the context of a pre-trial freezing order, and also that a disclosure order should, in normal circumstances, only be made as an aid to the effective working of the freezing order: see *Skurikhin* paragraph [27 (i)]. It is also clear from the authorities that a cautious approach should be adopted by the court in relation to the grant of relief under s. 25 CJJA 1982 in the case of non-

residents with assets abroad: *Skurikhin* paragraph [24]. One reason for this is the need for a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the court (see paragraph [25]). It may well be that the need for this real connecting link explains why Motorola has confined its present application for a freezing order to Hytera China's assets within the jurisdiction.

120. In *Skurikhin*, Gloster J. was willing to make an order for disclosure which extended, within narrow limits, beyond Mr. Skurikhin's assets within the jurisdiction. This was because special circumstances existed which gave rise to a real nexus between the English jurisdiction and the subject-matter of the disclosure order: see paragraphs [27 (ii) – (iii)]. *Skurikhin* is however the only case, to which I was referred, in which the court has extended the disclosure order beyond the scope of a freezing order in the context of a s.25 case. Motorola relied upon a recent decision of Cockerill J. in *PJSC Tatneft v. Bogolyubov* [2018] 1 WLR 5705 paragraphs [74] – [87] in support of the proposition that an order under CPR 25.1(1)(g) need not be limited to the value or location of the freezing injunction. That general proposition is in my view established by the *Skurikhin* case. (The *Tatneft* case does not, in my view, address this particular issue). *Skurikhin* also shows, however, the limits on the s.25 jurisdiction in relation to defendants who are outside the jurisdiction and have little connection with England and Wales. Motorola did not submit that the approach and principles in *Skurikhin* were inapplicable in the context of the present application.

121. Against that background I do not consider it appropriate to grant a worldwide disclosure order against the three Hytera companies. Each of these companies is resident overseas (Hytera China in the PRC, and the other two companies in the United States). Orders for disclosure in support of enforcement are, in the first instance at least, a matter for the courts of the USA and China where these entities are incorporated: see *Credit Suisse Fides Trust SA v. Cuoghi* [1998] QB 818, 827. There is in my view no sufficient connecting link which renders it appropriate for this court to make the worldwide disclosure orders which are sought against these companies. If there is no sufficient connecting link to make a worldwide freezing order (which Motorola has not sought), then there is equally no sufficient link to make a general order for disclosure of Hytera's worldwide assets.

122. Furthermore, the evidence of Mr. Gordienko, based on information provided by his US colleagues, is that after the automatic stay expires (currently scheduled for April or May 2020), Motorola will be able to exercise its rights under Fed. R.Civ. Pro. 69 (a) (2) and pursue a full range of US discovery tools. That rule provides that:

> "[T]he judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person – including the judgment debtor – as provided in these rules or by the procedure of the state where the court is located …"

123. Accordingly, Hytera's evidence acknowledges and indeed asserts that Motorola will "be able promptly to take advantage of the broad US discovery procedures they used during the litigation, i.e. requests for production, interrogatories, requests for admissions, and depositions, to learn information about Hytera's assets … wherever located. Information can be obtained from judgment debtors and from third parties."

124. I consider that the availability of these rights, in the jurisdiction where the substantive proceedings have taken place, is a further reason why the English court should proceed with caution and, as a matter of discretion, refuse the relief sought. The decision of the Court of Appeal in *Motorola v Uzan* [2003] EWCA Civ 752 at [115] identifies a number of particular considerations which the English court should bear in mind when considering whether to make an order under s. 25. These include whether there is a "danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located". In the present case, the United States is the jurisdiction where two of the Hytera companies reside. It is also the jurisdiction where the underlying proceedings have taken place, and where steps can be taken in a few weeks' time (or more quickly if an application is made to lift the current stay) to obtain discovery from all the Hytera companies. Although Motorola has not yet taken steps or made any applications in order to obtain discovery, I consider that the danger or risk of inconsistent decisions or overlapping orders is such as to militate against the disclosure order now sought.

125. The position in relation to Shortway seems to me, however, to be somewhat different. Shortway is an English company. Its most recent accounts show that its assets comprise its shareholding in Sepura, and also the significant inter-company receivable in the sum of £ 62 million. Given my conclusion that the freezing order against Hytera China should cover the shareholdings down the chain so as to protect Motorola against a disposal or diminution of the value of the shareholding in Shortway (an English company), I presently consider that (applying the principles in *Skurikhin)* disclosure is appropriate in relation to Shortway's assets so as to enable the injunction to be effective. (Such disclosure need not extend to its 100% shareholding in Sepura, which has already been disclosed). Whether such disclosure should be provided by Hytera China, or Shortway, or both, is a matter which I will consider at the forthcoming hearing.