Neutral Citation Number: [2018] EWHC 3466 (Ch)

Claim No: BL-2018-00202

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

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

Date: 19/12/2018

**Before**:

**HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

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| **VESTEY FOODS UK LIMITED** | **Claimant** |
| **- and -** | |
| **(1) ADAM COX** | |
| **(2) WILLIAM COOPER** | |
| **(3) STELLER PACKING LIMITED** | |
| **(4) STELLER HOLDINGS LIMITED** | |
| **(5) ANDREW WILLS** | |
| **(6) CARL HUMPHREY** | **Defendants** |

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**Thomas Braithwaite** (instructed by **Stevens & Bolton LLP**) for the Claimant
**Matthew Sheridan** (instructed by **Mayer Brown International LLP**) for the First Defendant

Hearing date: 26 November 2018

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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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HIS HONOUR JUDGE KLEIN

## His Honour Judge Klein:

1. On 26 November 2018, I heard four applications; namely:

   i) An application, by the Claimant ("Vestey"), by a notice issued on 17 October 2018, to continue the injunction ("the Injunction") made by Nugee J at a without notice hearing the previous day. The application was initially listed to be heard on, and the Injunction's return date was fixed for, 24 October 2018, when Nugee J continued the Injunction (subject to a number of minor variations which are not relevant), with the intention that the further continuation of the Injunction, the application and the First Defendant's ("Mr Cox's") cross-applications could be substantively considered together at a longer hearing;

   ii) A cross-application by Mr Cox, by a notice issued on 19 November 2018 (a partial draft of which, at least, had been produced by 23 October 2018), to discharge the Injunction against him, principally on the ground that, at the without notice hearing on 16 October 2018 ("the October hearing"), Vestey had failed in its fair presentation obligation; there being, Mr Cox contended, material non-disclosures by Vestey on that occasion;

   iii) A cross-application by Mr Cox, by the same notice, alternatively for a variation of the exceptions to the Injunction under which he is allowed to spend £2,500 a week towards his ordinary living expenses and otherwise to deal with his assets in the ordinary and proper course of business. At the hearing, the parties agreed how the Injunction should be varied in the event that I decide that the Injunction should continue;

   iv) A further application by Vestey, by a notice issued on 21 November 2018, for an order against the Fourth Defendant ("Holdings") and National Westminster Bank plc ("the bank"), to obtain copy bank statements relating to the accounts Holdings has with the bank. For the reasons I gave in an extempore judgment, I made an order on this further application at the hearing.

   The issues which remain to be resolved on the applications are, therefore, (i) whether the Injunction should be continued on its merits if Vestey did not breach its fair presentation obligation at the October hearing, (ii) whether Vestey breached its fair presentation obligation at the October hearing and (iii) what should be the consequence of such a breach. Matthew Sheridan, who represented Mr Cox, accepted that, if I conclude that the Injunction should not be continued on its merits in any event, although whether or not Vestey breached its fair presentation obligation might be relevant, that relevance only relates to costs issues. I propose, therefore, to consider whether or not each injunction made at the October hearing should be continued on its merits, on the assumption that Vestey did not breach its fair presentation obligation, before I consider, in each case, Mr Cox's case on material non-disclosure.

Background

2. I take the background to the dispute between Vestey and Mr Cox from the Particulars of Claim. At the time of the hearing before me, Mr Cox had not filed his Defence, so that it is proper for me to proceed on the basis that, save to the extent that Mr Cox

admitted the allegations against him in his evidence for the applications before me, he disputes those allegations (as he broadly did in his evidence).

3. Vestey's ambient food division specialises in the production of army ration packs; supplying them to the Ministry of Defence since about 2008 and to the United Nations since 2017.

4. Between 2010 and 11 September 2014 (when his employment with Vestey was terminated), Mr Cox was in charge of Vestey's ambient food division. He attended board meetings and held the title "Deputy CEO".

5. The Third Defendant ("Packing") is a subsidiary of Holdings.

6. The Sixth Defendant ("Mr Humphrey") was Packing's and Holding's managing director from 17 February 2017.

7. Between about February 2011 and September 2018, Packing packed army ration packs for Vestey which Vestey then supplied to the Ministry of Defence.

8. Until September 2014, Mr Cox owed Vestey, it contends, a number of duties, including a duty of fidelity and fiduciary duties.

9. Vestey contends that Mr Cox is the beneficial owner of shares in Holdings, registered in the name of a nominee. Mr Cox admits that he is the beneficial owner of shares, registered in the name of a nominee, he suggested in Packing, although he may mean Holdings. Nothing turns on whether he is the beneficial owner of shares in Packing rather than in Holdings. By the time of the hearing, Mr Cox had not said who is his nominee. Vestey's case may be that it is an individual (Helen Rance) who has lived in the same house as Mr Cox's brother or Mycroft Appleby (as Thomas Braithwaite (who also represented Vestey before me) may have suggested in his skeleton argument for the October hearing), but nothing turns on which of these two individuals might be Mr Cox's nominee. There is a dispute about when Mr Cox became a beneficial owner of the shares. He contends that this happened after his employment with Vestey was terminated (but he did not say how long after the termination this happened). An annual return, filed at Companies House on 21 March 2017, shows that Ms Rance has been a registered shareholder of Holdings, apparently since March 2014. Annual returns for previous years had showed that International Controlled Atmosphere Ltd. ("ICA") was an equal shareholder in Holdings with Mr Appleby (who Vestey contends is a longstanding acquaintance of Mr Cox and who apparently continues to be registered as a shareholder). ICA went into administration on 21 March 2017.

10. Vestey contends that, in breach of duty, Mr Cox allowed Packing to make profits at its expense and caused it to suffer loss and damage.

11. Vestey contends, first, that, in about October 2010, Mr Cox, who was then employed by Vestey, on its behalf agreed an excessive price with Packing for packing army ration packs (or it contends, perhaps, that Mr Cox agreed too low a packing price with the Ministry of Defence). Vestey contends that, thereby, it has suffered a loss of £2.3 million.

12. Vestey contends, secondly, that, in about July 2011, Mr Cox, who was then still employed by Vestey, on its behalf agreed to pay Packing an additional £2 per week per pallet for the storage of materials (over and above what Vestey had already contracted to pay) for which there was no justification and which was an excessive amount in any event. Vestey contends that, thereby, it has suffered a loss of £1.2 million.

13. Vestey also contends, first, that Mr Cox dishonestly assisted the Second Defendant ("Mr Cooper") to breach Mr Cooper's own duties to Vestey in relation to its business with the United Nations; Mr Cooper effectively having taken over Mr Cox's role at Vestey on the termination of Mr Cox's employment with it. Vestey alleges that Mr Cooper wrongfully continued to permit the payment of the allegedly excessive packing prices and unjustified storage charges to which I have referred and that he wrongfully agreed with Packing an excessive packing price for army ration packs to be supplied to the United Nations (or, perhaps, that he wrongfully agreed too low a packing price with the United Nations).

14. Vestey also contends, secondly, that Mr Cox has breached a term of the settlement agreement they entered into on the termination of Mr Cox's employment with Vestey and that he made a material representation. Vestey seeks to recover back the sum of £70,450 paid to Mr Cox under the settlement agreement.

15. Vestey also contends, thirdly, that, to the extent that Mr Cox has received sums paid by Vestey to Packing, or the traceable proceeds of those sums, he is liable to account for them and/or he holds them on constructive trust for it.

16. Vestey also contends, finally, that the Defendants conspired to cause it loss by unlawful means. It contends that its loss is (i) the £2.3 million relating to the allegedly excessive packing prices, (ii) the £1.2 million relating to the allegedly unjustified storage charges, (iii) the £70,450 claimed in relation to Mr Cox's settlement agreement, (iv) £100,000 Vestey contends was wrongly authorised, by Mr Cooper, to be paid to Packing for "cost overruns" and (v) a sum equivalent to dividends Mr Cooper has received (£598,883) under a shareholder agreement which Vestey contends it would not have entered into but for alleged breaches of duty by Mr Cox and/or Mr Cooper.

17. As I have said, at the October hearing, immediately before the claim was issued, Vestey applied, without notice, and Nugee J made, the Injunction (which continues subject to minor variations).

18. In support of the without notice application for the Injunction, Vestey filed affidavits, including one from Neal Wakeham, its finance director.

19. Mr Wakeham explained as follows (amongst other matters):

    i) On 5 March 2018, Vestey's chief operating officer was informed by one of its employees that Mr Cox had been seen at Packing's premises. He asked Mr Cooper if Mr Cooper was aware that Mr Cox was at Packing's premises and Mr Cooper replied, apparently, that he was not aware of that;

ii) On 7 March 2018, Mr Cooper forwarded an email from Mr Humphrey (who, Vestey contends, as I have said, was Packing's managing director) which said that a company, Briarstone Ltd. (which is controlled by Mr Cox), had been engaged by Packing to act as a consultant, but not in relation to Packing's business with Vestey;

iii) On 19 March 2018, Mr Cooper received a short email from Mr Humphrey in response to Vestey's request for a meeting, suggesting a telephone call instead. In fact, on 16 March 2018, Mr Cooper had received an email from Mr Humphrey which suggested such a telephone call and sought to justify, at length, the appointment of Briarstone Ltd. (and, in effect, Mr Cox) as a consultant. Mr Cooper did not forward Mr Humphrey's 16 March 2018 email to Vestey's board and, on 19 March 2018, Vestey's chief operating officer asked Mr Cooper whether Mr Humphrey had responded to the meeting request, in response to which Mr Cooper replied that a response, on Packing's behalf, was being sent that day;

iv) On 28 March 2018, Vestey's board had a telephone conversation with Olivier Esselen, one of Holdings' shareholders, during which he told Vestey, according to Mr Wakeham, that Mr Cox was a consultant and not engaged in work for Vestey. He also told Vestey's board that he is based overseas and that Mr Cox is an old friend of his;

v) In June 2018, Thomas McNamee, an employee of Vestey, informed its chief operating officer that it was common knowledge amongst Packing's employees that Packing is Mr Cox's business;

vi) Between June and October 2018, he discovered emails, in Mr Cox's account on Vestey's computer server, which he regarded as supporting Vestey's allegations against Mr Cox. He accepted that "no attempt had been made to disguise [those] emails or to protect them from discovery in the event that…anyone at [Vestey] carried out a search of…Mr Cox's account. Nor was there any indication that [Mr Cox] had made any attempt to delete his email account on his departure from [Vestey] in 2014";

vii) Vestey (in particular, Mr Wakeham and Christopher O'Sullivan) conducted an interview with Mr Cooper on 5 October 2018 ("the Interview"), at which, Mr Wakeham explained, (i) Mr Cooper said, initially, that he first became aware of Mr Cox's presence at Packing's premises in December 2017 and then said that Mr Cox must have started to be involved with Packing in March 2017; (ii) Mr Cooper said that, because he did not like Mr Humphrey's 16 March 2018 email, he had asked Mr Humphrey to remove most of its content and then re-send it and (iii) Mr Cooper confirmed that he had not told Vestey's board what he knew about Mr Cox's dealings with and interest in Packing;

viii) He said that Mr Cox owns a house, which was bought, in June 2016, for £1.2 million, Mr Cox having sold his "previous home" for about £1.7 million and he contended that Mr Cox might have thereby made a profit. He also explained that, in 2014, Mr Cox held two bank accounts. He did not expressly address the risk of dissipation by Mr Cox, other than to say that "[Mr Cox appears] already to have used third parties to hide the true ownership of [his]

assets…and…it does appear that [Mr Esselen and Mr Appleby] may have assisted [Mr Cox] to disguise assets in their names in the past". Mr Wakeham did not identify what assets Mr Cox has used third parties to hide, although, considering the rest of the affidavit, it is reasonable to suppose he had Mr Cox's shareholding in Holdings in mind and he did not explain how Mr Esselen and/or Mr Appleby may have assisted Mr Cox "to disguise assets in their names", although this may be a reference too to the contention that Mr Appleby's shareholding in Holdings is (or may be) beneficially owned by Mr Cox.

20. Mr Wakeham exhibited to his affidavit Vestey's letter, dated 23 August 2018, to Packing, in which Vestey's chief operating officer said that:

    i) Vestey had "material issues" about Packing's charges;

    ii) he had found evidence of over-charging which was "a very serious matter and [was] also the subject of an on-going investigation". He made specific reference to the £2 per week storage charge to which I have already referred and which is central to Vestey's claim against Mr Cox;

    iii) "over a long period of time, [Packing] has invoiced, and Vestey has paid, significant additional costs over and above the per pack amount. These costs are under investigation…";

    iv) "these over-charges and attempted over-charges call into question all of the invoices submitted by [Packing] to Vestey".

21. Mr McNamee also made an affidavit in which:

    i) he said that he knows Mr Cox well;

    ii) he said that he observed Mr Cox working at Packing's premises virtually every day in June 2018;

    iii) he explained that he made clear to Mr Cooper, at Packing's premises, in June 2018 that he believed that Mr Cox was working there. He added that he told Mr Cooper that he had no "personal issues" with Mr Cox and that "seemed to relax" Mr Cooper.

22. In further support of the without notice application for the Injunction, Mr Braithwaite filed a skeleton argument ("the October skeleton argument"), as I have said. In it, at paragraph 47.2, he addressed the risk of dissipation, by Mr Cox, of his assets. Mr Braithwaite pointed out that, to make a Freezing Injunction, a court must be satisfied that there is "solid evidence of a real risk of dissipation". He pointed out too that Vestey did not know much about Mr Cox's assets, save that he owns a house. Mr Braithwaite contended as follows in support of Vestey's case that there was a real risk of dissipation by Mr Cox:

    i) Mr Cox's control of Packing was "disguised" behind Briarstone Ltd.'s consultancy agreement;

ii) Mr Cooper, Mr Humphrey and Mr Esselen and "others" have lied about Mr Cox's involvement in Packing;

iii) Those lies were "presumably at the behest of" Mr Cox;

iv) Packing's annual returns were anomalous because ICA's registered shareholding in Holdings was reduced to nil on the very day it went into administration;

v) Mr Cox was unlikely to have realised that Vestey had uncovered his interest in Packing until the Interview, when Mr Cooper also stated that Mr Cox is a shareholder, apparently in Packing;

vi) Mr Cox had displayed a "low standard of commercial morality".

Mr Braithwaite did not say, in the October skeleton argument, how Mr Cooper had lied about Mr Cox's involvement in Packing, who the "others" were who had lied or why it was appropriate to "presume" that lies had been told at Mr Cox's behest.

23. Mr Braithwaite pointed out, further, in the October skeleton argument that compliance with a proprietary injunction (to restrain Mr Cox dealing with the traceable proceeds of sums paid by Vestey to Packing) might be difficult and that it was not clear whether Mr Cox had received any sums from Packing before 2017. Nevertheless, Mr Braithwaite suggested that Vestey had a "proper entitlement" to a proprietary injunction (which, he said, might, in practice cover the same ground as a Freezing Injunction).

24. By the Injunction (so far as it relates to Mr Cox), amongst other orders:

i) Nugee J ordered that Mr Cox must not remove from England or Wales or in any way dispose of, deal with or diminish the value of any of his assets in England and Wales up to a value of £3.5 million ("the Freezing Injunction");

ii) Nugee J ordered that Mr Cox must not remove from England Wales or otherwise dispose of or deal with "any and all monies paid by [Vestey] to [Packing] between 12 August 2010 and 26 September 2018" or "any monies or other asset that [Mr Cox] knows or believes to have been derived from [those monies so paid]" ("the Proprietary Injunction");

iii) Nugee J ordered that, within 48 hours of service, Mr Cox had to inform Vestey's solicitors, to the best of his ability, about all his assets in England and Wales exceeding £5,000 in value.

25. The October hearing lasted about 2 hours. During the course of the hearing, amongst other matters:

i) Nugee J indicated, at the outset, that he had read, in particular, the October skeleton argument and the affidavits in support of the without notice application and he added:

> "…although I have some idea obviously of what it's about, I have not taken on board the details";

ii) Mr Braithwaite informed the Judge that, on 27 September 2018, Mr Cox was appointed (or, perhaps, recorded at Companies House) as a director of Packing;

iii) The Judge raised with Mr Braithwaite the formulation of the Proprietary Injunction; pointing out that the assets caught by it might be difficult to identify (as Mr Braithwaite had pointed out in the October skeleton argument). Mr Braithwaite responded:

> "I fully recognise that point, my Lord, and so one would hope that the information provisions are going to allow for the identification of anything (inaudible) but in the meantime my clients would have some entitlement, in my submission."

The Judge then proposed the formula for the Proprietary Injunction;

iv) At the end of the hearing, the Judge made the Injunction and said:

> "…I will say for the sake of the transcript that I am satisfied that there is a good arguable case against the respondents for the reasons which have been discussed and I am satisfied in the circumstances that there is a risk of dissipation and there is sufficient solid evidence for that…";

v) The Judge was not addressed at all orally about the risk of dissipation by Mr Cox.

26. Mr Cox has prepared a list of his assets exceeding £5,000 in value. According to that list, his principal assets, which are all in England and Wales, to which recourse might be likely to be made to satisfy any substantial judgment against him are:

i) his home ("Rock Hill House"), which is charged to the bank. The amount which the bank is owed is said to be about £316,000;

ii) a personal pension fund of about £821,000;

iii) investments of about £109,000;

iv) personal bank accounts with credit balances of about £68,000;

v) a legacy from his father's estate, probably of £50,000.

It was not suggested, at the hearing before me, that Mr Cox's list was inaccurate or incomplete.

27. In a supporting affidavit, Mr Cox said that:

i) he lives at Rock Hill House with his partner and their three year old daughter;

ii) as Mr Wakeham said, he bought Rock Hill House for £1.2 million. Of the profit he made on the sale of his previous home, about £535,000, £100,000

was spent on moving costs, about £300,000 was used to partially reduce his mortgage liability and about £20,000 was invested in an ISA and to buy a family car. He did not say what has happened to the balance of about £115,000;

iii) he drew down capital from his pension fund when he was fifty five years old which he has used or is otherwise earmarked (and held in one of his bank accounts) to partly pay for building work at Rock Hill House, to the extent that it is not going to be used to pay his legal fees in the claim brought against him by Vestey;

iv) his financial advisor has advised him that there would be significant tax implications if he draws down further sums from his pension fund (although that advice is not exhibited);

v) the building work at Rock Hill House is ongoing, so a sale of it now would probably be financially unattractive;

vi) he has no assets outside England or Wales;

vii) he has to attend quarterly health checks at St Thomas' Hospital;

viii) apparently, he is unemployed, Packing having gone into administration (although, in a later witness statement, he suggests that he is without employment because the purchaser, from the administrators, of Packing has indicated that it will not employ him, Vestey having apparently indicated that it will not do business with Packing if Mr Cox is "working within it").

Risk of dissipation

28. Mr Cox accepted, for the purpose of the applications before me, that Vestey has a good arguable case. Although the parties recognised that, in relation to whether the Freezing Injunction should be continued on its merits, the broad question I need to decide is whether it is just and convenient for the Freezing Injunction to be continued (see per Gloster LJ in *Holyoake v. Candy* [2018] Ch 297, at [34]), in practice the dispute between Vestey and Mr Cox about whether the Freezing Injunction should be continued turns principally on whether there is sufficient evidence of a sufficient risk of dissipation by Mr Cox to justify the Freezing Injunction's continuation; although Mr Cox also argued that it would not be just and convenient for the Freezing Injunction to be continued because, he contended, that would make it more difficult for him to find new employment and that might do him reputational harm. He adduced no evidence to support these further arguments.

29. What a claimant has to establish, in order for the court to be satisfied that there is a sufficient risk of dissipation, was explained by Flaux J in *Congentra v Sixteen Thirteen Marine SA (The "Nicolas M")* [2008] 2 Lloyd's Reports 602 at [49], as follows:

> "The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant

> has shown a sufficient "risk of dissipation" is that the claimant will satisfy that burden if it can show that:
>
> (i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business: *The Niedersachsen* [1983] 2 Lloyd's Rep 600 per Mustill J as interpreted by Christopher Clarke J in *TTMI v. ASM Shipping* [2006] 1 Lloyd's Rep 401 at 406 (paragraphs 24-27); or
>
> (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes: *Stronghold Insurance v. Overseas Union* [1996] LRLR 13 at 18-19 per Potter J and *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 at 153 (paragraphs 142-146) where the Court of Appeal was applying the same principle in the context of disclosure of assets by the defendant."

30. In *Holyoake*, Gloster LJ explained, at [59]:

> "…An applicant must show a risk of dissipation as opposed to it merely being possible (without more) that the claimant could dissipate in that way: (a) In *Mediterranean Feeders LP v Bernd Meyering Schiffahrts* (unreported) 5 June 1997 the Court of Appeal approved Tuckey J's rejection of the proposition that a freezing order was appropriate where there might be a temptation to dissipate assets – but no evidence whatsoever that the claimant to the application would yield to it. Evans LJ said:
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> > "Given the nature of the Mareva jurisdiction and given the fact that it is not, as the judge says: "a means of obtaining advance security for a claim", it is inevitable that before the court can be satisfied that there is a risk of dissipation, in the sense in which that term has been used, the court must consider whether there is any evidence that in the particular case the asset will be dissipated rather than otherwise. If there is no such evidence then, in my view, it would be wrong for the injunction to be granted."

31. As to the quality of the evidence which the claimant must deploy in order to satisfy the court that there is a sufficient risk of dissipation in any particular case, Males J said, in *National Bank Trust v. Yurov* [2016] EWHC 1913 (Comm), at [70]:

> "…the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

> 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 the defendant's assets.
>
> b. That risk can only be demonstrated with **solid evidence; mere inference or generalised assertion is not sufficient**.
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> 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**.
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> 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" (emphasis added).

32. A case which Males J had in mind when formulating these propositions (see *Yurov*, at [69]), in particular proposition (c) it seems to me, was *Thane Investments Ltd. v. Tomlinson* [2003] EWCA Civ 1272. In *VTB Capital plc v. Nutritek International Corpn.* [2012] Lloyd's Rep 313 (to which I drew the parties' attention at the hearing), the Court of Appeal explained the relevant part of the decision in *Thane* thus, at [176]-[178]:

> "As regards the significance of evidence of dishonesty, the judge referred at paragraph 229 to what he called a salutary warning by Peter Gibson LJ in *Thane Investments Ltd. v. Tomlinson* [2003] EWCA Civ 1272, from which he quoted from paragraph 28. The relevant passage is as follows:
>
> > "Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted."

We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. That is supported by two earlier Court of Appeal decisions, not cited in *Thane Investments*. These are *Norwich Union v. Eden* (25 January 1996 unreported) and *Grupo Torras SA v. Al-Sabah* (21 March 1997 unreported). Both of them were cited by Flaux J in his judgment in *Madoff Securities International Ltd v. Raven* [2011] EWHC 3102 (Comm). Those decisions are not inconsistent with what Peter Gibson LJ said in *Thane Investments v. Tomlinson*, but they put it into context, and their context is a good deal closer to that of the present case. We will quote from paragraph 163 to the beginning of paragraph 167 of Flaux J's judgment.

> "In this context, and entirely properly, Mr Weekes referred me to the decision of the Court of Appeal in *Thane Investments v. Tomlinson* [2003] EWCA Civ 1272 where Peter Gibson LJ at [28] deprecates the tendency to infer a risk of dissipation from the fact that allegations of dishonesty are made against the defendant. However, Mr Weekes submitted that *Thane Investments* was a case which must be approached with caution, as it was an ex tempore judgment given where the defendant was unrepresented, so that the case was not perhaps as fully argued as it might have been. In particular, two earlier relevant decisions of the Court of Appeal do not appear to have been cited to the Court of Appeal. [The Judge then referred to *Norwich Union* and *Grupo Torres*]
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> …Mr Weekes…submitted that in the light of those earlier authorities, the way in which *Thane Investments* should be read is correctly set out by Patten J in *Jarvis Field Press v. Chelton* [2003] EWHC 2674(Ch), where having cited the relevant passage from the judgment of Peter Gibson LJ, the learned judge says at [10]:
>
> > "The relevance of that passage, of course, is to the submission made by Mr Lord, on behalf of the claimants on this application, that I should infer from the apparent dishonesty of Mrs Chelton, together with the recent change of circumstances, a real likelihood and risk of dissipation. I have no difficulty in accepting the general principle, emphasised by Peter Gibson LJ, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a freezing order. It is

> necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As Peter Gibson LJ made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care."
>
> I agree with that analysis of the approach which the court should adopt when considering whether to grant a freezing injunction, in a case where there are allegations of fraud or deliberate misconduct against a defendant."
>
> We agree with those observations by Flaux J…"

It is right though that I note that, in *VTB*, the Court of Appeal did say, at [174], that the use of a particular corporate structure to facilitate alleged wrongdoing (in that case, the court referred to a "web of offshore companies") could be taken into account in support of a freezing injunction.

33. Before me, Mr Braithwaite relied on the matters (i) raised in the evidence filed for or (ii) addressed in submissions made in connection with or at the October hearing. He relied on the following matters, in particular:

    i) Mr Cox's shareholding in Holdings is in the name of a nominee;

    ii) There is, he said, a "distinctly likely possibility" that Mr Humphrey and Mr Esselen lied for Mr Cox.

34. Mr Braithwaite also contended as follows, in support of his submission that there is a sufficient risk of dissipation by Mr Cox.

35. He contended, first, that Mr Cox has not satisfactorily responded to the points made in para.47.2 of the October skeleton argument.

36. In para.32 of his skeleton argument for the hearing before me, Mr Braithwaite also contended, secondly:

> "Furthermore, the financial evidence disclosed by Mr Cox and [Packing] since the ex parte hearing indicates that Mr Cox has engaged in unorthodox financial dealings with [Packing] and [Holdings]. These dealings are not consistent with being a mere consultant...For example, Mr Cox has allowed his company, Briarstone, to be used to provide what might be described as off-balance sheet banking facilities to [Packing] – with the

> result that money has passed in and out of Briarstone in a very short period of time for no obvious good reason…Co-incidentally (or not), these payments occurred at the same time that SPL's ultimate parent (ICA) was facing insolvency. Mr Cox has offered no explanation for this. Similarly, Mr Cox has received monies apparently from Mr Esselen (a co-shareholder) that have passed through [Holdings]: again, not an orthodox use of a non-trading holding company…."

Mr Braithwaite suggested that the purpose of the "banking facilities" was to keep ICA's assets out of its administrators' hands.

37. In response, Mr Sheridan explained that the first time this allegation was made was in Mr Braithwaite's skeleton argument for the hearing before me. The documents said to support Mr Braithwaite's contention had been supplied to Mr Sheridan's solicitors two working days before the hearing and were referred to in Vestey's solicitor's witness statement dated 21 November 2018, but in both cases without any explanation of their relevance.

38. Mr Braithwaite pointed out, thirdly, that two individuals, Mr Esselen and Mr Appleby, who are apparently close to Mr Cox, are apparently resident outside England and Wales. I did not understand it to be disputed that both gentlemen are resident outside England and Wales. Nor did I understand it to be disputed that Mr Appleby is resident in the Middle East. It may be that Mr Esselen is resident in the Democratic Republic of Congo, although nothing turns on this. Most favourably to Vestey, it may also be noted, in this context, that Vestey contends that Mr Esselen lied about Mr Cox's involvement in Packing and that Mr Appleby may be or may have been Mr Cox's nominee for his shareholding in Holdings.

39. Mr Braithwaite also made the following submissions.

40. He pointed out, fourthly, that, depending on the terms of Mr Cox's financial arrangements with the bank, Mr Cox might be able to increase the borrowing secured by the charge on Rock Hill House without that ever becoming obvious to an outsider.

41. He pointed out, fifthly, that there is no evidence to support Mr Cox's contention that he would suffer tax consequences if he withdrew capital from his pension savings now.

42. He asserted, sixthly, that:

    i) until August 2018, Mr Cox could reasonably have concluded that Vestey was satisfied with the explanations given to it by Mr Humphrey and Mr Esselen, in March 2018, about Mr Cox's involvement in Packing, particularly because Mr Cooper remained in his senior post in Vestey during this time;

    ii) Mr Cox does not suggest that he had been tipped off about Vestey's interest in his business affairs before August 2018.

43. Having considered all the evidence and the parties' submissions as a whole, and weighing up the competing factors, I am not satisfied that there is solid evidence of a real risk of dissipation by Mr Cox.

44. Mr Braithwaite's complaint that Mr Cox has displayed a "low standard of commercial morality" (see para.22(vi) above) ought not to be given any weight. The commercial immorality about which Vestey complains is, at its heart, as I have sought to explain, apparently a complaint that Mr Cox has facilitated (or engineered) overcharging, by Packing, of Vestey. It is not appropriate, in my view, to infer, from a claim for overcharging, that there is a risk of Mr Cox dissipating his assets.

45. Mr Braithwaite's complaint that Mr Cox's shareholding in Holdings is registered in the name of a nominee (see paras.22(i), 33(i) above) requires more detailed consideration.

46. I agree with Mr Braithwaite that, on the available evidence, it is appropriate to infer, for the purpose of the applications before me, that the reason that Mr Cox's shareholding in Holdings has been in the name of a nominee has been to hide the fact that he has been involved in Packing's business. I have come to this conclusion because:

    i) it is probable, on the evidence, that Ms Rance or Mr Appleby have been Mr Cox's nominee. There is no evidence that Ms Rance or Mr Appleby have had any active involvement at all in Packing's business. The only connection Ms Rance apparently has with Mr Cox is an indirect one; namely, that she has lived with his brother, who himself apparently has no connection with Packing's business. On the available evidence, if Mr Appleby is Mr Cox's nominee, he is likely to be so because he is Mr Cox's friend or acquaintance. I am not aware of any commercial reason for either Ms Rance or Mr Appleby being Mr Cox's nominee;

    ii) Mr Humphrey did not tell Vestey the whole truth about Mr Cox's involvement with Packing in his 7 March 2018 email. Mr Cooper arranged for the full contents of Mr Humphrey's 16 March 2018 email to be kept from Vestey's board. Mr Esselen apparently did not tell Vestey's board the whole truth about Mr Cox's involvement with Packing in his 28 March 2018 conversation (see para.22(ii) above). Mr Cooper did not, at least initially, tell the whole truth about Mr Cox's involvement with Packing at the Interview. On the evidence, it is reasonable to infer that these individuals acted as they did to hide Mr Cox's full involvement with Packing and it is appropriate to conclude that the holding of Mr Cox's shares by a nominee was part and parcel of that approach.

47. Although these matters are to be weighed in Vestey's favour, they are counterbalanced by the following matters:

    i) Even assuming that the holding of Mr Cox's shares in Holdings by a nominee was arranged to hide his involvement with Packing, it does not follow that Mr Cox is likely to dissipate his assets, in particular by hiding them. To my mind, someone can try to hide his involvement in a business for no good (or for bad) reasons and still have no inclination to dissipate his assets when that involvement is discovered;

ii) In March 2018, Vestey was interested in Mr Cox's involvement with Packing. In June 2018, Mr Cooper was aware that Mr McNamee had discovered Mr Cox's presence at Packing's premises. Mr Cooper was apparently anxious about this discovery and, on Vestey's case, is likely, in my view, to have mentioned this to Mr Cox. It is likely too that, if Mr McNamee saw Mr Cox at Packing's premises, Mr Cox saw Mr McNamee (who he apparently knew well) there. The 23 August 2018 letter from Vestey's chief operating officer made clear that Vestey was concerned about over-charging and that it was carrying out a wide investigation. None of these matters apparently caused Mr Cox to change his behaviour. In particular, none of these matters apparently caused Mr Cox to become less visible at Packing's premises. Indeed, before the Interview, Mr Cox was appointed a director of Packing. Contrary to what I believe Mr Braithwaite contended (see para.22(v) above), these facts point to Mr Cox having been aware of Vestey's interest in him before the Interview (even if Mr Cox did not positively suggest this in his evidence). That Mr Cox did not change his behaviour from March 2018, so as to become less visible at Packing's Premises, and that he was openly appointed a director of Packing in September 2017 tend to suggest that he is not someone who is likely to dissipate his assets;

iii) Mr Cox did not apparently try to conceal or delete relevant emails on Vestey's computer server.

I do not think that Packing's annual returns to the Registrar of Companies (see para.22(iv) above) alters these conclusions or the weight to be attached to Mr Braithwaite's complaint about Mr Cox's shareholding in Holdings.

48. Because there is no evidence which suggests, or from which it can be inferred, that anyone lied to Vestey on Mr Cox's instructions, I place no weight on this contention (see para.22(iii) above).

49. It should not count against Mr Cox that he has not explained the transfers of money to which Mr Braithwaite referred in para.32 of his skeleton argument for the hearing before me (see para.35 above) or (save to the extent I have set out above) that he has, Mr Braithwaite contended, not satisfactorily responded to the points made in para.47.2 of the October skeleton argument. I take this view because it appears that Mr Cox had no proper notice of the point Mr Braithwaite made in para.32 of his skeleton argument and because any other approach, in this case, would be to impermissibly shift the burden of the application on to Mr Cox.

50. In *Holyoake*, Gloster LJ said, at [50]-[53]:

> "…it is critical to remember that the burden is on the applicant to satisfy the threshold. The court will of course decide on the basis of all the evidence before it. However, in practice, if an applicant has not adduced sufficient evidence, the application will fail. The claimant's [in this case, the respondent's] evidence will be immaterial – unless, unusually, it lent support to the application.

> Second, it follows that, unless an applicant has raised a prima facie case to support a freezing order, the claimant is not obliged to provide any explanation or answer any questions posed – and nor can a purported failure to do so be held against the claimant. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the claimant will be expected to provide an explanation. Then, in appropriate circumstances, the lack of a satisfactory explanation may give rise to an adverse inference.
>
> …In *Flightwise Travel Service Ltd. v. Gill* [2003] EWHC 3082 (Ch) at [32], The Times, 5 December 2003, Neuberger J made the same point:
>
> > "Finally, because the point has been raised, it really should go without saying that it is for the applicant to make out his case to support a freezing order, namely an appropriately strong case against the respondent concerned, and that there is a real risk of dissipation by the respondent. It is not for the respondent to show that a freezing order ought not [to] be granted.""

51. I have also concluded that the following matters point away from a risk of dissipation.

52. Mr Cox does not apparently have any assets outside England or Wales. His only connection overseas is his friendship (or acquaintance) with Mr Esselen and Mr Appleby.

53. Mr Cox's most valuable assets are Rock Hill House and his pension fund. I do not think that it is likely that Mr Cox will sell Rock Hill House in the near future, because building work is going on and so the property is not likely to be attractive to purchasers. Even if he does sell Rock Hill House it is unlikely that all the net sale proceeds would be available for dissipation. Mr Cox lives at the property with his partner and their young daughter. There is no evidence that Mr Cox's partner or daughter have any overseas connections. It is likely, therefore, that part or all of the net sale proceeds would be used to provide a new home, in the United Kingdom, for the whole family.

54. I recognise that, following a sale of Rock Hill House, Mr Cox might have ready money. The approach to be taken to such money ought to be the same as the approach which it is appropriate to take in relation to Mr Cox's investments, credit balances in his bank accounts and his pecuniary legacy to which I have already referred.

55. I recognise, as Mr Braithwaite suggested (see para.41 above), that Mr Cox might be able to re-mortgage Rock Hill House and thereby obtain ready money. However, such borrowing will need to be repaid, together with any interest, possibly by regular payments. Mr Cox has passed his fifty fifth birthday. He is apparently without employment (although I do bear in mind, in Vestey's favour, that Mr Cox has apparently given alternative explanations for his unemployment). On Vestey's case, the business in which he is intimately interested, Packing, is in administration. Also, Mr Cox has a young daughter to maintain. Mr Braithwaite did not explain how such

borrowing would or might be discharged. In these circumstances, I think that it is unlikely that Mr Cox will re-mortgage Rock Hill House and then dissipate the money thereby raised.

56. I accept that there is no evidence to support (or contradict) Mr Cox's contention that there will or may be adverse tax implications if he releases sums from his pension fund. The issue I need to consider is how likely it is that, if he does release sums, they will be dissipated by him.

57. So far as Mr Cox's ready money is concerned (including any sums released from a sale or re-mortgage of Rock Hill House and/or the release of sums from Mr Cox's pension fund), in order for that money to be dissipated, Mr Cox will, at the very least, have to deal with it in such a way as to make the enforcement of a judgment more difficult. Mr Braithwaite suggested that, for this purpose, Mr Cox might use Mr Esselen and/or Mr Appleby, who are resident overseas. Save for the suggestion that Mr Appleby may be Mr Cox's nominee, there is no evidence that Mr Cox has ever sought to transfer his assets overseas or otherwise to hide them with Mr Esselen or Mr Appleby. I do not think it is likely, on the evidence, that Mr Cox would use Mr Esselen or Mr Appleby for such purposes. As I have said, the evidence indicates that (i) Mr Cox is without employment, (ii) the business in which, on Vestey's case, he is intimately interested, Packing, is in administration, (iii) he is over fifty five years old, (iv) his connections are, in practice, in England and (v) he has a young daughter to maintain. He also apparently has legal fees to pay. In such circumstances, I think that it is unlikely that Mr Cox would so arrange his affairs as to make it any more difficult than it might otherwise be for him to have immediate access to his assets and, so, I think that it is unlikely that he will place any of his assets under Mr Esselen's or Mr Appleby's control.

58. Although I have borne in mind that Mr Cox has not explained what has become of about £115,000 from the sale of his former home, that sum ought to be treated in the same way as Mr Cox's ready money is.

59. Whilst I recognise that the nature of Mr Cox's assets means that it is possible for him to dissipate assets, it does not follow that it is probable (or that there is a real risk) that he will dissipate assets. Indeed, the other circumstances to which I have referred when considering his assets suggest that Mr Cox is unlikely to dissipate his assets, as I have said.

60. Mr Sheridan contended that Mr Cox has had a long time, since March 2018, to dissipate his assets but he has not done so. I do not place any weight on that contention. In truth, Mr Cox's conduct was being particularly scrutinised by Vestey from June 2018, and more so from August 2018. That is not a long period, before the October hearing, to dissipate assets.

61. For completeness, I should deal with a submission Mr Sheridan made at the hearing. He suggested that the court ought to take into account that, because Mr Cox's alleged breaches of duty have been going on for as long as 8 years, on Vestey's case, any sums Mr Cox received wrongfully from Packing are likely to have been dissipated. That may be right but the purpose of a freezing injunction is to prevent the illegitimate dissipation of a respondent's present assets. It may be that, in a particular case, a respondent's assets are so limited, because he has disposed of his major assets

over time (including those wrongfully received), so as to make it unjust to grant any freezing injunction at all but Mr Sheridan did not suggest that that was the case here. I attach no weight, therefore, to this point.

62. It follows, however, from what I have said, that I have concluded that the Freezing Injunction should not be continued.

63. Had I concluded that there was solid evidence of a real risk of dissipation by Mr Cox I would not have refused to order the Freezing Injunction's continuation, as a matter of discretion, because of Mr Cox's complaint that the Freezing Injunction's continuation makes it more difficult for him to find new employment and may do him reputational harm. Mr Cox put forward no evidence to support his contention that, following the going into administration of Packing, he has (or has had) any employment opportunities at all anywhere in the UK (or elsewhere) which might be (or might have been) lost because of the Freezing Injunction. Nor has he put forward any evidence to suggest that his reputation is particularly at harm from the Freezing Injunction. If his complaint is, in fact, no more than that someone subject to a freezing injunction is at risk of reputational harm and so such an injunction should not be made on that ground, then it is difficult to see how freezing injunctions might ever be granted. In any event, if I had been satisfied that there was solid evidence of a real risk of dissipation by Mr Cox, that would have outweighed the unsubstantiated complaints made by him that the continuation of the Freezing Injunction will damage his employment opportunities and may do him reputational harm and so, as I have said, I would not have refused to order the Freezing Injunction's continuation on those grounds. Nor would Mr Cox's health, which requires him to be in England four times a year, have caused me to refuse to order the Freezing Injunction's continuation if I had otherwise been minded to make that order.

<u>The fair presentation obligation – the Freezing Injunction</u>

64. Because I have already decided that the Freezing Injunction will not be continued and because whether there was material non-disclosure in relation to the without notice application is therefore relevant only to costs issues, according to Mr Sheridan, in this judgment I deal with whether there was material non-disclosure more briefly than I might otherwise have done, focusing on what I believe to be Mr Sheridan's principal complaint.

65. The nature of an applicant's obligation to give full and frank disclosure ("the fair presentation obligation") and the court's approach in this context was set out by Ralph Gibson LJ in *Brink's Mat Ltd. v. Elcombe* [1988] 1 WLR 1350, 1356-7, as follows:

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.
>
> (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 KB 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy MR, at p.504, citing *Dalglish v. Jarvie* (1850) 2 Mac & G 231, 238, and Browne-Wilkinson J in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] FSR 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in *Bank Mellat v. Nikpour* [1985] FSR 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson LJ in *Bank Mellat v. Nikpour*, at p.91, citing Warrington LJ in the *Kensington Income Tax Commissioners' case* [1917] 1 KB 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning MR in *Bank Mellat v. Nikpour* [1985] FSR 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which

justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> "when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant…a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell LJ in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings plc*, ante, pp.1343H–1344A."

66. In *Fundo Soberano de Angola v. Dos Santos* [2018] EWHC 2199 (Comm), Popplewell J explained, at [51]-[53]:

> "Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy**. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.**
>
> The second is that although the principle is often expressed in terms of a duty of disclosure, **the ultimate touchstone is whether the presentation of the application is fair in all material respects**: see Robert Walker LJ in *Memory Corporation v. Sidhu* (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in *Bank Mellat v. Nikpour* [1985] FSR 87, 92, Bingham J in *Siporex Trade v. Comdel Commodities* [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in *Marc Rich & Co. Holding v. Krasner* (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. **The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided**. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which

> the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.
>
> Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents (see CPR PD31A and *Hedrich v. Standard Bank London Ltd.* [2008] EWCA Civ 905)" (emphasis added).

67. The fair presentation obligation is particularly important on a without notice application for a freezing injunction (or for similar relief) because of the invasive nature of such an order (per Donaldson LJ in *Bank Mellat*, at p.92).

68. Mr Braithwaite pointed out that "the grant of freezing injunctions…is a staple feature of the work of the Chancery Division" (see para.16.25 of the Chancery Guide), so that all judges of the Chancery Division are likely to have experience, probably significant experience, of freezing injunction applications. Mr Braithwaite also said, correctly, that Nugee J is an experienced judge of the Chancery Division. It is reasonable to proceed, therefore, on the basis, as Mr Braithwaite suggested, that the Judge knew what are the factors a court has to consider before granting a freezing injunction (as the Judge in fact demonstrated in his short decision at the end of the October hearing).

69. I think that this somewhat misses the point though.

70. Whilst it is reasonable to proceed on the basis that judges of the Chancery Division are likely to have significant experience of freezing injunction applications, they have a significant workload. Without notice applications for freezing injunctions are likely

to be made with little advance notice to the court. For these reasons, the judge hearing the without notice application may have no or only insufficient pre-reading time. Even if the judge has had sufficient time to pre-read all the relevant papers, it is unlikely that he or she will have as good a grasp of the application as the applicant's advocate has.

71. In any event, the fair presentation obligation requires more than simply putting the material facts before the judge on paper or orally. If the obligation was limited in this way, the applicant could properly make a without notice application in a way which only took into account its own self-interest. As Popplewell J explained in *Fundo Soberano*, it is a matter of basic fairness (and the fair presentation obligation requires) that an applicant makes the without notice application "in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make". The applicant might take the view that an argument an absent party would make is a bad one, and the applicant can say so, but it is still under an obligation to draw that argument to the judge's attention, in effect on behalf of the absent party.

72. Implicit, at least, in what Mr Braithwaite submitted, is the suggestion that the Judge would have been critical of him had he made detailed submissions, at the October hearing, about the risk of dissipation by Mr Cox. Whether there is a sufficient risk of dissipation is a principal, if not, often, the central, issue on applications for freezing injunctions. To my mind, a fair and even-handed presentation, to a judge, of the evidence and contrary arguments on the issue is a fundamental part of the fair presentation obligation. In the general run of cases, a judge can expect and ought, in my view, to be addressed orally on the issue, if only so that the presentation of the application can be seen to have been fair and even-handed, burdensome though that might be for the applicant's advocate. The judge may stop the applicant's advocate, of course, and indicate that no further submissions on the issue are necessary, in which case it may be appropriate for the advocate to move on (although each case will depend on its particular facts). That is not what happened in this case. The October hearing lasted about 2 hours and there is no indication, from the transcript, that Nugee J did stop or would have stopped Mr Braithwaite addressing him about the risk of dissipation by Mr Cox.

73. There is a further response to Mr Braithwaite's point effectively that Nugee J did not need to be addressed orally about the risk of dissipation. At the outset of the October hearing, Nugee J indicated that he had "not taken on board the details". Where a judge gives such an indication, it is a risky course for an applicant to make no oral submissions on the risk of dissipation.

74. Because Nugee J was not addressed orally, at the October hearing, about the risk of dissipation, whether Vestey breached its fair presentation obligation at the October hearing depends entirely on the content of its affidavits and the October skeleton argument, considered against the background of Nugee J having read those documents but having indicated that he did not have the detail in mind.

75. I have come to the conclusion that how the risk of dissipation was presented in those documents did not satisfy the fair presentation obligation; for the following reasons in particular. As I have said, the risk of dissipation was expressly addressed only in para.47.2 of the October skeleton argument. In that paragraph, the following points,

which it was reasonable to anticipate Mr Cox would make, ought to have been, but were not, made:

i) Although Vestey calls into question Mr Cox's commercial morality, ultimately, the complaint against Mr Cox is that he participated, at least, in the overcharging, by Packing, of Vestey. Mr Cox would be likely to argue that no inference about the risk of dissipation can be made from that complaint;

ii) Although Vestey suggests that Mr Cox is unlikely to have realised that Vestey had uncovered his interest in Packing until after the Interview, on Vestey's case it is likely that Mr Cox appreciated that it was interested in his involvement in Packing from March 2018, possibly more so in June 2018 (because of Mr McNamee's evidence) and even more so in August 2018 (because of the 23 August 2018 letter to which I have referred). Mr Cox would be likely to argue that (i) there is no evidence that, during this time, he took any steps to change his behaviour; in particular, to change the frequency with which he visited Packing's premises or the way he did so and (ii) he was appointed a director of Packing by September 2018, so that (iii) there is an insufficient risk of dissipation in this case;

iii) Mr Cox would be likely to argue that the fact that he did not apparently try to delete or hide relevant emails on Vestey's computer server supports the contention that there is an insufficient risk of dissipation in this case;

iv) Mr Cox's most valuable asset apparently is Rock Hill House. Mr Cox would be likely to argue that it is an asset that it is not very easy to dispose of;

v) Because Vestey has stopped doing business with Packing, which business, previously, was substantial, any income stream for Mr Cox from Packing may very well have reduced in value, so that, Mr Cox would be likely to argue, any risk of dissipation of Mr Cox's remaining assets is reduced;

vi) The only asset which Mr Cox has apparently hidden is his shareholding in Holdings, which appears to be held by a nominee.

All (or almost all) of the facts which are the springboards for these points were covered elsewhere in the affidavits or in the October skeleton argument, but, absent any oral submissions on the risk of dissipation, in the particular circumstances of the October hearing that was not good enough.

76. Taking all I have said into account, I am afraid that I have concluded that the presentation of the without notice application was not fair in all material respects in this case.

77. The fair presentation obligation can place a heavy burden on an applicant and, in this case, having carefully considered the affidavits (which display a knowledge of the fair presentation obligation) and the October skeleton argument, all of which were detailed, and the transcript of the October hearing, I am satisfied that, although the obligation was breached in this case, the breach was not intentional.

<u>The Proprietary Injunction</u>

78. A court may refuse to make an injunction, as a matter of discretion, if it is not satisfied that the terms of the proposed injunction are sufficiently clear and unambiguous. This is because a respondent risks committal for a breach of an injunction and it is not fair to the respondent for it to be subject to the risk of committal where the injunction's terms are not sufficiently clear. Nor is it appropriate for a court to have to construe, on a committal application, whether particular conduct falls within or outside the injunction's terms. So, for example, in a case to which I was not taken at the hearing, *P.A. Thomas & Co. v. Mould* [1968] 2 QB 913, O'Connor J said, on a committal application for breach of an injunction to restrain the use of confidential information, at pp.922-3:

> "…if the plaintiffs, seeking to protect their "know-how", are anxious to enforce any injunction which may be granted to them by seeking the help of the court to punish a breach of it, it seems to me to be quite essential that they should make it absolutely clear what it is they are seeking to protect. It is all very well to say "This is confidential material". It may well be. But it seems to me that this is a typical example of a case such as those of the situation referred to by Plowman J in *Suhner & Co. AG v. Transradio Ltd.* and in *Technograph Printed Circuits Ltd. v. Chalwyn Ltd.*, where the judge pointed out that in considering whether interlocutory relief by way of injunction should be granted one of the considerations is what is to happen if there is a breach, and committal proceedings or punitive proceedings are sought on behalf of the plaintiff.
>
> …where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it. I see no such certainty in the present case and I am not prepared to give any relief to the plaintiffs on this motion: it must be dismissed."

(see also a case to which Mr Sheridan took me, *Lawrence (David) Ltd. v. Ashton* [1991] 1 All ER 385, per Balcombe LJ, at p.393).

79. That the clarity with which the proposed injunction can be formulated is a factor which the court can take into account in deciding whether or not to make any order is clear from two further cases.

80. In *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1, Lord Hoffmann explained, about the analogous case of specific performance, at pp.13-14:

> "…One such objection, which applies to orders to achieve a result and a fortiori to orders to carry on an activity, is imprecision in the terms of the order. If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic

> minefield which he has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced. So in *Wolverhampton Corporation v. Emmons*, Romer LJ said, at p.525, that the first condition for specific enforcement of a building contract was that:
>
> > "the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance."
>
> Similarly in *Morris v. Redland Bricks Ltd.* [1970] AC 652, 666, Lord Upjohn stated the following general principle for the grant of mandatory injunctions to carry out building works:
>
> > "the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions."
>
> Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account: see Spry, Equitable Remedies, 4th ed (1990), p.112. It is, however, a very important one…"

81. In *Tajik Aluminium Plant v. Ermatov* [2006] EWHC 7 (Ch), Etherton J had made a freezing injunction, a search order and a proprietary injunction on a without notice application, in circumstances where the claimant made the following allegations in its particulars of claim in due course:

> "From about mid-1996 to the end of 2004, TadAZ traded with various companies owned and controlled by or associated with Mr Nazarov (together "Nazarov Companies"). As pleaded more fully below, whether through his corrupt relationship with Mr Ermatov or otherwise, Mr Nazarov (acting in concert with Mr Ermatov) managed to exert such control over TadAZ that he was able to procure that TadAZ trade with Nazarov Companies upon terms that were manifestly disadvantageous to TadAZ and manifestly excessively advantageous to Mr Nazarov and Nazarov Companies. The trading was not conducted at arms' length and/or was not conducted upon the terms that commercial parties at arms' length would have traded with each other.

> Mr Nazarov was permitted by Mr Ermatov to take control of TadAZ and/or its trading operations and/or manipulate TadAZ and its contractual arrangements for the benefit of Mr Nazarov and Nazarov Companies' own benefit and/or to earn profits from dealings with TadAZ that were greater than they would have earned as ordinary commercial counterparties trading at arms' length and/or to earn profits from dealings with TadAZ that were greater than they would have earned if TadAZ had been operating exclusively for its own benefit.
>
> TadAZ's primary case is that in their conduct as aforesaid, Mr Nazarov and Mr Ermatov were acting dishonestly in that:
>
> (a) their relationship was tainted with the corruption detailed below; and/or
>
> (b) they knew that the manner in which Mr Nazarov and Nazarov Companies were trading with TadAZ was made possible by breaches of Mr Ermatov's duties to TadAZ aforesaid; and/or
>
> (c) they knew that the manner in which Mr Nazarov and Nazarov Companies were trading with TadAZ was made possible by breaches of Mr Nazarov's duties to TadAZ as set out below; and/or
>
> (d) they led to Mr Nazarov and Nazarov Companies making grossly disproportionate profits at TadAZ's expense."

Etherton J had granted a proprietary injunction in the following terms:

> "Until the Return Date or further order of the court, the Defendants must not dispose of or deal with or diminish the value of any assets which are, or which are assets derived from, any secret profits, bribes, secret commissions or other unlawful payments received by any of the Defendants as a result of or in connection with any dealings with and/or the supply of alumina to and/or aluminium produced by the Claimant."

When considering whether the proprietary injunction should be discharged, Blackburne J said, at [14]-[15]:

> "It is, of course, a general principle of injunction law and practice that the injunction must be expressed in unambiguous language so that the person against whom it is directed knows with precision what it is that he is required to do or not to do by the order. The injunction should not be granted in terms which necessitate an enquiry into what it requires if and when it comes to be enforced. In my judgment, paragraph 4.1 infringes this principle. It leaves for enquiry which payments are covered and which are not.

> If necessary I would therefore have discharged the proprietary injunction in its existing form…"

82. It is not clear to me that, in the Particulars of Claim, Vestey seeks a proprietary remedy in respect of any traceable proceeds, in Mr Cox's hands, of money it contends was wrongfully received by Packing, although Vestey is likely to argue that it does seek such a remedy by its claim, in the prayer, for:

> "…the right to [trace] the Vestey Monies or the proceeds thereof…into the hands of any third party, and for relief to allow recovery of the same."

83. In any event, I am not satisfied that the terms of the Proprietary Injunction are sufficiently clear and unambiguous. I have concluded, therefore, as a matter of discretion, that the Proprietary Injunction should not be continued against Mr Cox.

84. By the Proprietary Injunction, Mr Cox is restrained from dealing with sums paid by Vestey to Packing. It was not explained to me how such sums, rather than any traceable proceeds, might be in Mr Cox's hands. Nevertheless, Mr Cox is restrained from dealing with such sums paid by Vestey to Packing. Quite what this limb of the Proprietary Injunction is intended to restrain Mr Cox from doing is not clear to me and so, in my view, is not sufficiently clear and unambiguous so that Mr Cox knows the limits of what he may not do under this limb.

85. By the Proprietary Injunction, Mr Cox is also restrained from dealing with any money or other asset which he knows or believes has been derived from the sums paid by Vestey to Packing. How is Mr Cox supposed to judge whether an asset under his control is derived from such sums? Is he supposed to investigate whether the purchase price for that asset can be traced back, however indirectly, to a payment made by Vestey to Packing, perhaps 8 years ago (when the alleged overcharging began)? It is not clear, under this limb of the Proprietary Injunction, what, if any, investigations Mr Cox is required to carry out to inform his knowledge or belief.

86. A further point, not relating to the clarity of this second limb of the Proprietary Injunction, may be made. It is arguable, at least, that, in practice, the effect of this second limb of the Proprietary Injunction is to prevent Mr Cox dealing with any of his assets (without any exceptions for ordinary living expenses and the like) and it is difficult to see the justification for such a draconian order if the grounds for a freezing injunction are not made out.

87. Mr Braithwaite said that Vestey cannot frame the Proprietary Injunction more precisely because it does not have sufficient information yet to do so. That may be true and, if Vestey obtains further information, it may be that it can apply for a proprietary injunction in the future but I must consider whether, on the current state of affairs, the Proprietary Injunction should be continued and, for the reasons I have given, I have concluded that it should not be continued against Mr Cox.

88. Mr Braithwaite also said that Mr Cox has not given any example of how the Proprietary Injunction has been difficult to comply with in practice. I think Mr Braithwaite may himself have provided the response to this point when he said, in his skeleton argument for the hearing before me:

> "…having regard to Mr Cox's disclosed assets it seems that anything caught by the latter [(the Proprietary Injunction)] would in any event be caught by the former [(the Freezing Injunction)]."

Because the Proprietary Injunction is unlikely, in this case, to restrain any activity the Freezing Injunction does not also restrain, it is unlikely that there has been a particular instance when the Proprietary Injunction alone has given rise to difficulties.

The fair presentation obligation – the Proprietary Injunction

89. Because, in the case of the Proprietary Injunction too, whether Vestey complied with its fair presentation obligation in relation to the October hearing can, according to Mr Sheridan, only go to costs issues, having already concluded that the Proprietary Injunction should not be continued against Mr Cox, I will deal only briefly with the complaint that the without notice application for the Proprietary Injunction was not fairly presented.

90. Mr Sheridan argued that Vestey failed, on the without notice application, to draw to Nugee J's attention, fairly and even-handedly, the need to ensure that the terms of any proprietary injunction are clear and unambiguous. (Mr Sheridan also suggested that Vestey should also have made clear, on the without notice application, that it does not make a proprietary claim to particular assets against Mr Cox. As I have indicated, that suggestion is at least arguably wrong).

91. As I have indicated, Mr Braithwaite explained, in the October skeleton argument, that compliance with the proposed proprietary injunction might be difficult. Further, at the October hearing, Nugee J specifically drew attention to the difficulty of identifying the ambit of the proposed proprietary injunction, and the Judge made clear the need for precision in the injunction's formulation, which points Mr Braithwaite acknowledged. Taking these matters into account, I have concluded that Vestey's presentation of the application for the Proprietary Injunction was fair in relation to the need to ensure that the injunction's terms were clear and unambiguous.

Disposal

92. For the reasons I have already given, and as I have said, I have concluded that the Injunction should not be continued. Because, on the initial return date (24 October 2018), Nugee J continued the Injunction until further order, I will hear further from counsel about how effect is to be given to this judgment.