Neutral Citation Number: [2022] EWHC 3228 (Ch)

Claim No: CR-2022-003123

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 15 December 2022

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

STEPHEN HUNT **(as Provisional Liquidator of Black Capital)**	**Applicant**
- and -	
(1) SARJU PATEL **(2) RAVNEET UBHI**	**Respondents**

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CHRISTOPHER BROCKMAN (instructed by Devonshires LLP) appeared for the **Applicant**
DAN McCOURT FRITZ (instructed by Thursfields Solicitors) appeared for the **Second Respondent**

The First Respondent did not appear and was not represented

Hearing date: 24 November 2022

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 15 December at 9:30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The issue I need to deal with in this judgment is whether to continue freezing orders against the respondents, Mr Patel and Mr Ubhi obtained by the applicant, Mr Hunt in his capacity as provisional liquidator of an alleged partnership known as Black Capital on 15 September 2022.

2. The essential facts leading up to the grant of the freezing orders are set out in [3-15] of the judgment of Mellor J dated 15 September 2022 in which he explained his reasons for appointing Mr Hunt as the provisional liquidator of Black Capital and granting the freezing orders. I will however briefly summarise the background.

3. Black Capital is an investment business said to be a partnership between the two respondents, Mr Patel and Mr Ubhi. Between 2018-2021, nine individuals and entities related to a Mr John Mitchell (the "Petitioners") invested a total of approximately £13m through Black Capital. They were promised returns of up to 55% with their risk limited to losing only 10% of their capital.

4. In late 2021, the Petitioners became concerned about their investments after notifying Black Capital of their wish to withdraw funds. Mr Patel and Mr Ubhi claimed to be taking steps to liquidate the investments made by the Petitioners, giving various reasons for the delay.

5. These concerns became more serious in July 2022 following a meeting between two of Mr Mitchell's daughters and Mr Patel/Mr Ubhi at which it was revealed that HMRC were claiming VAT of £3.7m from a company called DKA Resourcing to which (on the instructions of Mr Patel and Mr Ubhi) the Petitioners had paid some of the funds which they had invested with Black Capital. This was further exacerbated in early August 2022 when a business known as Mt Cook, a broker used by Black Capital, notified investors that Mr Patel had incurred significant losses in his trading on their behalf.

6. Mr Ubhi wrote to investors in the middle of August 2022 to tell them that Mr Patel had been removed as a director of an associated entity, Black Capital Partners Limited and

that an independent consultant, Serity Services Limited had been appointed to conduct an audit of the position.

7. In the light of these concerns, the Petitioners issued a winding up petition pursuant to Article 7 of the Insolvent Partnerships Order 1994 on 14 September 2022. On the same date, they made a without notice application for the appointment of Mr Hunt as the provisional liquidator of Black Capital and for freezing orders against Mr Patel and Mr Ubhi. These applications were granted by Mellor J following a hearing on 15 September 2022.

8. Mr Hunt issued an application on notice to the respondents on 20 September 2022 for a continuation of the freezing orders against Mr Patel and Mr Ubhi. By agreement between the parties, the hearing of that application was deferred until the hearing before me on 24 November 2022.

9. Subsequently, on 28 September 2022, the Petitioners issued bankruptcy petitions against Mr Patel and Mr Ubhi. These petitions were served on them together with statutory demands on 3 October 2022. Mr Ubhi applied to set aside the statutory demand on 8 October 2022.

10. The winding up petition against Black Capital, the bankruptcy petitions against Mr Ubhi and Mr Patel and Mr Ubhi's application to set aside the statutory demand were considered at a hearing before Deputy ICC Judge Raquel Agnello KC on 26 October and 4 November 2022.

11. The Judge handed down her judgment on 17 November 2022 and made an order dismissing the winding up petition against Black Capital and the bankruptcy petition against Mr Ubhi as well as setting aside the statutory demand against Mr Ubhi. The reason for setting aside the statutory demand was that Mr Ubhi had substantial grounds for disputing the debt on the basis that he had a realistic prospect of establishing that he was not a partner of Black Capital.

12. Also on 17 November 2022, Mr Ubhi made an application for the freezing order to be amended to remove the limit on the cross-undertaking as to damages given by Mr Hunt and to impose personal liability on Mr Hunt under that cross-undertaking.

13. As far as this application is concerned, Mr Brockman (appearing for Mr Hunt) invited the Court to continue the freezing order on the basis of the existing, limited cross-undertaking as to damages. If the Court does not consider this to be adequate, he accepts that the freezing order should be discharged as his client is not willing to offer an unlimited cross-undertaking as to damages in respect of which he would be personally liable.

14. Should the Court decide to continue the freezing order, Mr Hunt has agreed two small amendments with Mr Ubhi. The first is to allow an increase in living expenses from £2,000 a week to £2,500 a week. The second is to permit the sale of a Lamborghini car in order to fund legal expenses.

15. At the hearing on 24 November 2022, the Court also needed to consider an application made by the Petitioners on 22 November 2022 for an order or declaration either that Mr Hunt's appointment as provisional liquidator should continue until the determination of a proposed appeal by the Petitioners against the order of Deputy ICC Judge Agnello KC made on 17 November 2022 or that Mr Hunt be reappointed as provisional liquidator until any such appeal is determined.

16. For reasons given at the hearing, I indicated that I would allow the application to be made (even though insufficient notice had been given) but determined that the effect of the order made by Mellor J on 15 September 2022 was that Mr Hunt remained in office until Judge Agnello had dealt with the consequential matters arising from her order which were adjourned to a date yet to be fixed.

17. The Petitioners' application in relation to the continued appointment or reappointment of Mr Hunt was adjourned to the consequentials hearing. I also agreed to extend time for making an application for permission to appeal against that decision until the handing down of this judgment. I have made an order to this effect agreed between the parties.

18. Mr Hunt has provided a further witness statement which he relies on in support of his application to continue the freezing orders. Mr Ubhi opposes the continuation of a freezing order against him both on the basis that, in the circumstances, a freezing order is not justified and also on the basis that, at the without notice hearing on 15 September 2022, there was a failure to give full and frank disclosure of all relevant matters.

19. Although Mr Patel was not represented, his solicitors wrote a letter which was copied to the Court stating that he supports any action by Mr Ubhi which would result in the freezing order being discharged or varied.

20. I should also note that, although the Petitioners are not a party to the freezing order application (which is made by Mr Hunt as provisional liquidator), they were represented at the hearing by Mr Daniel Lewis of Counsel given their application to continue Mr Hunt's appointment as provisional liquidator or for him to be reappointed. At the original without notice hearing on 15 September 2022, Mr Lewis had represented both the Petitioners and Mr Hunt and he was able to give some helpful insights into the way in which matters were presented to the Judge at that hearing.

Freezing orders – the law

21. In *Lakatamia Shipping Company Limited v Toshiko Morimoto* [2019] EWCA Civ 2203, Haddon-Cave LJ observed at [33] that "the basic legal principles for the grant of a WFO are well-known and uncontroversial and hardly need restating". He nonetheless referred to the three elements which need to be considered and which can be summarised as follows:-

    21.1 the applicant has a good arguable case;

    21.2 there is a real risk that judgment would go unsatisfied by reason of the disposal by the respondent of his assets;

    21.3 it would be just and convenient in all the circumstances to grant the order.

22. In relation to the risk of dissipation of assets, Haddon-Cave LJ also approved the summary of the key principles given by Popplewell J (with one small change) in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 at [86] as follows:

> "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

(5) …

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

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

23. Haddon-Cave LJ goes on to note at [36] that the risk of dissipation does not need to be established on the balance of probabilities. Instead, the applicant merely needs to show that there is a good arguable case that there is a danger of dissipation and at [38] that this required "a plausible evidential basis".

24. Where an application for a freezing order is made without notice, it is well-known that, in order to avoid procedural unfairness (and therefore to achieve compliance with human rights legislation), the applicant must give full and frank disclosure of all material facts and draw the Court's attention to significant factual, legal and procedural aspects of the case. The relevant principles were set out in detail by Carr J in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7]. It is not necessary to repeat those principles but it is worth emphasising the following:

    24.1 full disclosure must be accompanied by fair presentation. What this means is that, in the words of Popplewell J in *Fundo Soberano* at [52], "the evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided";

    24.2 the cause of action and the principal facts relied on should be identified;

    24.3 the applicant should make proper enquiries before making the application;

    24.4 the key question is whether the Court has been misled in any material respect.

25. With these principles in mind, I turn now to consider first whether there was a breach of the obligation to give full and frank disclosure and second, whether the freezing order should be continued.

Full and frank disclosure

26. Mr McCourt Fritz relies on a number of matters in support of his submission that there was a lack of full and frank disclosure at the hearing before Mellor J on 15 September 2022. I will address each in turn.

Failure to identify the principles applicable to any application for a freezing order

27. As Mr McCourt Fritz correctly points out, Mellor J was not referred to any authorities setting out the tests which he should apply in deciding whether to grant a freezing order

including, in particular, the requirement that solid evidence is required to establish a risk of dissipation and that the risk of dissipation must be established separately against each respondent.

28. Whilst, with hindsight, it would no doubt have been preferable for Mr Lewis to set out either in his skeleton argument or in his oral submissions the basic principles, it is in my view difficult to criticise his failure to do so where the principles are well-known and the hearing is before an experienced judge. As Haddon-Cave LJ noted in *Lakatamia* at [33], the basic principles "hardly need restating". I do not consider the failure to do so to be material.

29. Mr McCourt Fritz suggests that, as a result of this failure, Mellor J came to a conclusion (at [29]) in relation to the risk of dissipation which he would not otherwise have reached, basing his decision on a risk of trading through other entities in an attempt to rescue the situation. This conclusion was, says Mr McCourt Fritz, based on an email from Serity (the organisation engaged to carry out the independent audit) to Mr Mitchell noting that:

> "Steps have been taken on a purely goodwill basis by some of the stakeholders to try and ensure that any shortfall in principal amounts loaned to the business are recovered as quickly as possible from future deals from other unrelated companies generated from completely unrelated transactions."

30. Mr McCourt Fritz points out the email refers to *unrelated* transactions and companies. However, Mr Lewis made two points in relation to this. The first is that the Judge was taken to two letters written by Mr Ubhi himself, one before the communication from Serity and one after, both of which stated that Mr Ubhi's intention was "to continue to work on the current pipeline of transactions". The second point was that the Judge was taken to evidence which clearly showed that funds invested by the Petitioners through Black Capital had, at the request of Black Capital, been paid to apparently unrelated companies such as DKA Resourcing and DKA Accounting.

31. In these circumstances, I am satisfied that the Judge's conclusions in relation to the risk of Mr Ubhi continuing to trade and the further mixing of monies (referred to by the Judge at [27] of his judgment) was reached on the basis of solid evidence and that the Court was not misled in this respect.

32. As far as treating Mr Patel and Mr Ubhi separately, it is clear from the transcript of the hearing that, on a number of occasions, Mr Lewis referred to the need to consider Mr Ubhi separately to Mr Patel. Mr Lewis for example accepted that Mr Ubhi was not the person with responsibility for the investments and that, unlike Mr Patel, he had not disappeared. On the contrary, he had contacted Mr Mitchell to invite him to a meeting.

33. Mr Lewis also accepted that any order against Mr Ubhi should be on the basis that he was not dishonest and that Mr Patel's actions may well have come as much of a shock to Mr Ubhi as it did to the Petitioners. I therefore reject the suggestion that the failure to set out the principles applicable to freezing orders resulted in the Judge treating Mr Patel and Mr Ubhi in the same way.

34. Mr McCourt Fritz notes that there was little or no evidence that Mr Ubhi had access to the trading accounts in which the funds of the investors were held. I accept that this is the case and, indeed, it was referred to by Mr Lewis in his skeleton argument and his submissions. However, there was still documentary evidence which indicated that Mr Ubhi intended to continue to trade and that, as a result of the money belonging to investors being mixed with funds held by other entities, there was a risk that this trading might be conducted using money which had derived from the investors.

35. Mr McCourt Fritz also suggests that Mr Hunt should have made further enquiries before applying for the freezing order. However, Mr Hunt had the copies of the letters signed by Mr Ubhi indicating that he intended to continue to trade as well as clear evidence that funds invested by the petitioners had been transferred to apparently unrelated companies. Short of asking Mr Ubhi (which would have defeated the object of the without notice application), it is difficult to see what further enquiries he could have made.

36. There is one area which Mr McCourt Fritz draws attention to where I would accept that there may have been a risk of the Court being misled as to the principles to be applied. In his skeleton argument, Mr Lewis suggested that the risk of dissipation was satisfied on the basis of "the preservation of assets to justify the [appointment of a provisional liquidator] being the corollary of the risk of dissipation to satisfy the FO application.". In effect, he was suggesting that the material which showed that there was a need to

appoint a provisional liquidator to safeguard the assets of the partnership justified the conclusion that there was a risk of Mr Patel and/or Mr Ubhi dissipating their assets.

37. In relation to this, Mr McCourt Fritz submits that the test is not the same. In support of this, he refers to the decision of the Court of Appeal in *HMRC v Rochdale Drinks Distributors Limited* [2011] EWCA Civ 1116 in which Rimer LJ notes at [99] that the usual basis for the appointment of a provisional liquidator is:

> "…a risk of jeopardy to the company's assets, namely the risk of their dissipation before the winding up order is made, with the consequence that their collection and rateable distribution between the company's creditors will be frustrated. Such risk does not refer to (or only to) "dissipation" in the sense in which that word is ordinarily used in the context of freezing orders, that is a deliberate making away with the assets so as to frustrate the enforcement of a future judgment; it includes any serious risk that the assets may not continue to be available to the company."

38. However, whilst it may be true that the test for the preservation of assets justifying the appointment of a provisional liquidator is wider than the concept of dissipation for the purpose of freezing orders, Mr McCourt Fritz did not suggest that, if based on solid evidence, Mellor J's conclusion that the risk of Mr Ubhi continuing to trade with assets which may have derived from the partnership as a result of mixing of funds would not constitute a risk of dissipation justifying the freezing order. Instead, his complaint was that the conclusion was not reached on the basis of solid evidence.

39. As I have mentioned, Haddon LJ explained in *Lakatamia* that the purpose of a freezing order is to restrain a respondent from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. It is not intended to constrain an individual from conducting his personal affairs in the way which he has always conducted them, providing of course that such conduct is legitimate.

40. It might perhaps be said that continuing to trade using assets deriving from Black Capital does not, on this basis, give rise to a risk of unjustified dissipation as it is simply continuing to carry on business. However, where it is thought that the conduct of the

business in question is the very cause of the losses complained of this does in my view satisfy the test.

41. It is clear from the context that both Haddon-Cave LJ and Popplewell J (whose words he was quoting) were referring to an individual or a company carrying on business which was both legitimate and which was unconnected with the wrongdoing complained of. Looking at the overall picture, I do not therefore consider that Mellor J, in concluding that the possibility that Mr Ubhi would continue to trade using assets deriving from investors with the result that there might be further mixing of funds constituted a risk of dissipation by Mr Ubhi, was misled in any material respect as a result of the lack of clarity on this point in Mr Lewis' skeleton.

Lack of dishonesty

42. Mr McCourt Fritz suggests that it was not made clear to the Judge that the decision whether or not to grant a freezing order should be made on the basis that Mr Ubhi was not dishonest nor what the impact of that should be on the Judge's assessment.

43. As I have already mentioned, in my view, the transcript makes it clear that Mr Lewis made it plain that he was not relying on any dishonesty and that, for the purpose of the freezing order application, there was no suggestion that Mr Ubhi had been dishonest. Mr McCourt Fritz suggests that this could have been made clearer. Possibly he may be right. In hindsight there is no doubt often more that could have been said but as a practical matter this is not always possible.

44. The question is whether the presentation was fair. In my view, in this case, it was. There is no suggestion in the judgment that the Judge reached his conclusions with any possible dishonesty in mind. Given the specific references during the hearing to the question of dishonesty, it is clear to me that the Judge was well aware that he was making his assessment on the basis that no dishonesty was alleged against Mr Ubhi.

Mr Ubhi's attempts to assist the investors

45. It is suggested by Mr McCourt Fritz that the significance of the fact that Mr Ubhi remained in contact with the Petitioners and had appointed Serity to undertake an audit to the question as to whether or not there was solid evidence of a real risk of dissipation

was not made clear to the Judge. However, both of these points were mentioned in Mr Lewis' skeleton argument under the heading "Full and Frank Disclosure". The transcript shows that this section of the skeleton was mentioned to the Judge by Mr Lewis during his submissions. It must therefore be inferred that Mellor J had these points in mind in weighing up the evidence before him and in concluding whether or not there was a real risk of dissipation.

Delay

46. Mr Mitchell first had concerns in late 2021. These concerns became much more significant in July 2022. Mr McCourt Fritz complains that Mr Lewis should have made it clear that the delay in applying for a freezing order until September 2022 might be a reason for refusing the application as any real risk of the respondents unjustifiably dissipating their assets would already have materialised (see *Holyoake v Candy* [2017] EWCA Civ 92 at [62]).

47. Again, a counsel of perfection might suggest that this is a point which should have been specifically explained to the Judge. However, the Judge was clearly well aware of the timeline as he recounted it in detail at [8-14] in his judgment. He noted the appointment of Serity to carry out an independent audit as well as Mr Mitchell's communication with Serity after they were appointed, observing that it was only when Serity replied on 9 September 2022, refusing to divulge any further information about the audit process that the winding up petition and the applications for the appointment of a provisional liquidator and the freezing order were made. It can, I think be inferred from this that neither the Judge nor Mr Hunt would have considered there to be any significant delay in applying for the freezing order.

48. In any event, Mr McCourt Fritz himself refers to the observation of Cockerill J in *Tugushev* at [50] that:

> "Where a defendant knows that he faces legal proceedings for a substantial period of time prior to the grant of the order, and does not take steps to dissipate his assets, that can be a powerful factor militating against any conclusion of a real risk of dissipation".

However, in this case, there was no indication of any proceedings against Mr Patel or Mr Ubhi prior to the presentation of the winding up petition. I do not therefore consider this to have given rise to any breach of the duty of full and frank disclosure.

No good arguable case

49. Mr Lewis' skeleton argument for the hearing on 15 September 2022 appears to proceed on a misunderstanding of the decision of Briggs J in *HMRC v Egleton* [2006] EWHC 2313 (Ch). In that case, a freezing order was sought by the creditor (HMRC) as opposed to the provisional liquidator. Briggs J concluded at [48-49] that it would normally be more appropriate for the provisional liquidator to apply for a freezing order. Nonetheless, he accepted at [15] that, where the application for the freezing order is made by the creditor, the presentation of the winding up petition by the creditor constituted a sufficient cause of action which could potentially justify the grant of a freezing order against a third party.

50. In this case however, it is not the Petitioners (as creditors of Black Capital) who are applying for the freezing order. It is Mr Hunt as provisional liquidator. The winding up petition cannot therefore form the basis of the relevant cause of action. This is however recognised to some extent in Mr Lewis' skeleton argument as he accepts that there must be a process available to a liquidator by which the third party might be obliged to contribute to the funds of the company (or in this case the partnership) and notes that the partners are obliged to contribute to the assets of the partnership in the event of a shortfall.

51. Whilst Mellor J, in relation to the freezing order application, concludes at [31] merely that "the usual requirements are plainly met", he must have based this on what Mr Lewis set out in his skeleton argument. There is therefore a cause of action identified (the ability of a liquidator of an insolvent partnership to enforce the obligation of the partners to make up a shortfall in the partnership assets) as well as the facts which support the contention that Mr Ubhi was a partner in Black Capital.

52. Whilst the skeleton argument was therefore misleading in some respects, it did not in my view have any material impact on the outcome.

Less intrusive remedies

53. Mr McCourt Fritz submits that Mr Lewis and Mr Hunt should have drawn the Judge's attention to the possibility of other remedies such as a notification injunction or a proprietary injunction. This is referred to at [45] by Gloster LJ in *Holyoake* in relation to a notification injunction. The Judge notes that "the intrusiveness of relief will be a highly relevant factor when considering the overall justice and convenience of granting the proposed injunction.". She does however go on to observe at [46] that "a court should not assume that a notification injunction is necessarily less onerous than a conventional freezing order."

54. This was not a point on which the Judge was addressed. Mr Brockman notes that it would not have been feasible to obtain a proprietary injunction given Mr Hunt's state of knowledge (or lack of knowledge) of the assets held by the respondents at the date the without notice application was made. There seems little doubt that this must be right.

55. I accept that some criticism could be made of Mr Lewis and Mr Hunt for not canvassing the possibility of a notification injunction. However, in the overall context of the application, this does not in my view fall into the category of arguments which they might reasonably have anticipated that the Respondents would wish to make and so does not constitute a material non-disclosure. In this context, it is perhaps telling that in relation to the question as to whether or not the freezing order should be continued, Mr McCourt Fritz did not suggest that a notification injunction might be substituted in its place.

Inadequacy of cross-undertaking in damages

56. In his skeleton argument, Mr Lewis submitted that, as an officeholder, Mr Hunt should not be required to put up his own money and that the undertaking should be limited to the assets and the liquidation. In oral submissions, he suggested that this is the "usual" position.

57. Mr McCourt Fritz however submits that this is not the case, referring to the decision of the Court of Appeal in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 in which Lewison LJ noted at [68] that:

> "The default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages."

58. In the same paragraph, Lewison LJ accepts that there is a possible exception:

> "…where the applicant has no personal interest in the litigation and is bringing the action on behalf of others. One example is where litigation is being brought by liquidators on behalf of an insolvent company where there are no large creditors who can be expected to indemnify them and where it has proved impossible to obtain insurance against unlimited liability on the cross-undertaking: *In re DPR Futures Limited* [1989] 1 WLR 778."

59. In *Pugachev*, Lewison LJ also made it clear at [85] that the burden is on the applicant to show why they should not be required to give an unlimited cross-undertaking in damages.

60. Mr Brockman's response to this is that, except in circumstances where there is one main creditor who might be expected to stand behind the liquidator, it is indeed usual practice where a liquidator seeks a freezing order for any cross-undertaking in damages to be limited to the liquidation estate. Mr McCourt Fritz did not try and suggest that this was incorrect. His point was more that the issue should have been raised.

61. However, it is apparent that Mellor J considered the adequacy of the cross-undertaking in damages in deciding whether or not to grant the freezing order. The transcript of the hearing confirms that he had in mind the possibility that there may be no assets forming part of a liquidation estate which could satisfy the cross-undertaking. It was also made clear (although in the context of the appointment of the provisional liquidator) that the appointment of the provisional liquidator was for the benefit of the creditors as a whole and not just the Mitchell family and that, on this basis, the Mitchell family could not be expected to underwrite any liabilities.

62. Whilst a failure to refer to the default position explained in *Pugachev* and the need for the applicant to show why an unlimited cross-undertaking was not appropriate, the Judge clearly had these principles in mind and Mr Lewis did explain (on behalf of Mr Hunt) why an unlimited undertaking was not appropriate. There is nothing in the judgment or in the transcript which would indicate that the Judge was unduly influenced

by the suggestion that it was usual for a cross-undertaking given by a liquidator to be limited to the liquidation estate. In any event, in context, I do not consider that what Mr Lewis said was misleading.

Conclusion on full and frank disclosure

63. It will be apparent that, although there are some areas in which criticisms could be made of the way in which the application was presented, none of these are, in my view, either taken on their own or looked at cumulatively, sufficiently material to amount to a breach of the duty to provide full and frank disclosure.

64. It is always going to be the case that a respondent can pick holes in the way in which an application is presented and come up with additional points which the applicant could have drawn to the attention of the Judge. However, as Popplewell J made clear in *Fundo Soberano* at [52], what is important is whether the way in which the evidence and the argument is presented is, taken as a whole, misleading or unfairly one-sided. In my judgment, this is not the case in relation to the hearing on 15 September 2022.

65. I therefore turn now to consider whether the freezing order should be continued.

Continuation of the freezing order

Cause of action – good arguable case

66. Mr McCourt Fritz submits that the only cause of action relied on in relation to the without notice application was the existence of the winding up petition. As the winding up petition has been dismissed, he argues that there is no cause of action which would justify the granting of a freezing injunction against Mr Ubhi.

67. If he is wrong in this, Mr McCourt Fritz submits that, given that Deputy ICC Judge Agnello found that there were substantial grounds for disputing the debt which was the subject of the statutory demand on the basis that Mr Ubhi was not a partner of Black Capital, it cannot be said that there is a good arguable case.

68. In his application to continue the freezing orders and in his witness statements, Mr Hunt does not put forward any new cause of action against Mr Patel or Mr Ubhi. Neither does Mr Brockman do so in his skeleton argument which focuses, in this context,

primarily on the evidence supporting the proposition that Mr Ubhi was, contrary to his assertion, a partner in Black Capital. Whilst Mr Brockman does not say so in terms, this is of course consistent with the position taken by Mr Lewis in his skeleton argument for the hearing on 15 September 2022 in which he submitted that the partners are obliged to contribute to the assets of the partnership in the event of a shortfall.

69. Mr McCourt Fritz does not seriously take issue with this. His suggestion was more that this was a new cause of action which had not been properly pleaded or notified to Mr Ubhi and that it was unfair to expect him to respond to it when it had only been put forward at the hearing on 24 November 2022.

70. However, for the reasons I have explained, I do not accept that this was a new cause of action but was, instead, the basis relied upon at the hearing before Mellor J. Whilst there were references to the winding up petition being the cause of action, this was clearly put forward on the basis of a misunderstanding of the decision in *Egleton* and in any event was said to be specifically in the context of a partner being liable to contribute to the assets of the partnership in the event of a shortfall.

71. On this basis, all that needs to be established is that there is a good arguable case that Mr Ubhi was a partner in Black Capital. Although Deputy ICC Judge Agnello concluded that there was a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital, this only means that Mr Ubhi has a reasonable (as opposed to fanciful) prospect of establishing this. It does not follow that there is not also a good arguable case that he was a partner.

72. There is clearly substantial evidence in support of Mr Ubhi being a partner of Black Capital including the following:

    72.1 he signed numerous agreements which stated that Black Capital was a partnership between Mr Patel and Mr Ubhi;

    72.2 he had access to the books and records of Black Capital;

    72.3 Mr Patel and Mr Ubhi received payments from Black Capital on a broadly equal basis;

72.4 Black Capital Partners Limited was owned equally by Mr Patel and Mr Ubhi, with both of them being directors of the company;

72.5 there are also other companies in which Mr Patel and Mr Ubhi had an equal interest and which were funded by payments from Black Capital or Black Capital Partners Limited.

73. Against this, Mr Ubhi has produced an agreement with Black Capital engaging him as an independent contractor as well as a subsequent employment agreement. Mr Ubhi himself denies being a partner at Black Capital.

74. Deputy ICC Judge Agnello's conclusion at [34] was that it is difficult to reconcile the existence of the two agreements with the evidence presented to her of Mr Ubhi being a partner. Despite finding that certain aspects of Mr Ubhi's evidence were "unsatisfactory and incredible", she did not feel able to ignore the documents which she relied on.

75. I would agree with this assessment. There is documentary evidence pointing both ways. However, based on the evidence identified by Mr Brockman, I have no doubt that there is a good arguable case that Mr Ubhi was a partner in Black Capital. It follows from this that there is in my view a good arguable cause of action against Mr Ubhi, being his liability to contribute to any shortfall in the assets of Black Capital.

Real risk of dissipation

76. Unlike the position at the without notice application where there was limited evidence available, on the basis of the information obtained by Mr Hunt as provisional liquidator of Black Capital, Mr Brockman submits that it is clear that Black Capital was operating a Ponzi scheme and invites the Court to draw inferences about the likelihood of Mr Ubhi's involvement given the good arguable case that he was a partner of the partnership and the evidence that he had access to the partnership documents and email records.

77. In summary, Mr Hunt's evidence as to his findings since his appointment is as follows:

77.1 he has only been able to access one trading account and so has not been able to trace any significant funds held by Black Capital for its investors. The money appears to have simply gone missing;

77.2 Mr Ubhi has refused to provide the administrator with log in details for the @blackcapitaluk email account or for the HelloSign document signing account which it is accepted contain records belonging to Black Capital;

77.3 neither Mr Patel nor Mr Ubhi have provided details enabling Mr Hunt to access any accounting records for Black Capital;

77.4 Mr Hunt has not been provided with a list of all of the investors in Black Capital although, based on the investment agreements he has located, he estimates that Black Capital has creditors who together are owed in the region of £35-50m;

77.5 out of the sums received by Black Capital from investors, only a small proportion has been paid to a trading account, with the majority of the funds either being returned to other investors, paid to Mr Patel and Mr Ubhi or used for their benefit (based on bank statements provided for the period between September 2018 – February 2019).

78. In support of his submission that the Court should infer a real risk of dissipation based on the evidence of wrongdoing, Mr Brockman refers to the decision of the Court of Appeal in Lakatamia. Having reviewed the authorities in some detail, Haddon-Cave LJ summarised the position at [51] as follows:

> "In my view, in the light of the authorities which I consider in detail below, the correct approach in law should be formulated in the following two propositions:
>
> (1) where the Court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant *relevant to the issue of dissipation*, that holding will point powerfully in favour of a risk of dissipation;

(2) in such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence."

79. In essence, what Mr Brockman says is that there is now strong evidence that Black Capital was operating a Ponzi scheme, that Mr Ubhi was a partner in Black Capital and that he had access to the books and records of the business and that it should be inferred from this that he was involved in fraud even if it was Mr Patel who had access to the trading accounts and was therefore much more involved in what was going on. He notes that it is not seriously disputed on behalf of Mr Ubhi that Black Capital was carrying on a Ponzi scheme. The suggestion is instead that Mr Ubhi was an innocent party.

80. In relation to Mr Ubhi's knowledge of money movements, Mr Brockman draws attention to the fact that bank statements for Black Capital Partners Limited were addressed to Mr Ubhi. He suggests that this is inconsistent with Mr Ubhi's witness statement which states that "BCPL's bank account was under the control of [Mr Patel] and so I had no control whatsoever of that money."

81. Mr Brockman also draws attention to the fact that Mr Hunt's investigations show that, based on a sample of bank statements for Black Capital Partners Limited between December 2019 – June 2020, it is clear that significant funds passed between Black Capital Partners Limited and Black Capital. He suggests that, given that the Black Capital Partners Limited bank statements were addressed to Mr Ubhi, Mr Ubhi must have known about this. The analysis of the bank statements also shows that the vast majority of the funds coming into Black Capital Partners Limited from clients was paid out to other clients and that none of the funds were transferred to any trading account.

82. Mr Brockman notes that the funds invested through Black Capital by the investors has apparently gone missing. Mr Hunt has not yet been able to trace any of it. In addition, significant funds have been paid both to Mr Ubhi and to Mr Patel. Mr Brockman submits that there is no need even to infer a real risk of dissipation on the part of Mr Ubhi given that there is evidence of actual dissipation of partnership assets and that Mr Ubhi was closely involved in the management of the partnership.

83. For his part, Mr McCourt Fritz emphasises the need to distinguish between Mr Patel and Mr Ubhi. He highlights the fact that there is no evidence that Mr Ubhi had any access to the investors' money. He also observes that there is no suggestion that Mr Ubhi has in fact tried to conceal or dissipate his assets and that, unlike in the case of Mr Patel, there is no criticism of Mr Ubhi's disclosure of his assets.

84. Mr McCourt Fritz notes that there is some criticism of Mr Ubhi for failing to give access to the email account and document system. However, he argues that this criticism is unfair in circumstances where it is said that those accounts contain confidential and privileged information, some of which does not relate to Black Capital. It is, he says, reasonable for Mr Ubhi to want to go through the information and only disclose the information which Mr Hunt, as provision liquidator of Black Capital, is entitled to.

85. As far as the suggested inferences are concerned, Mr McCourt Fritz submits that the allegations are mere assertions and that the evidence is insufficient to infer that there is a real risk of dissipation (referring in this context to the judgement of Patten LJ in Jarvis Field Press v Chelton [2003] EWHC 2674 (Ch) at [10]). He points in particular to the countervailing factors, including:

    85.1 Mr Ubhi's offer to try and restore the lost funds using other assets;

    85.2 the fact that Mr Ubhi kept in contact with the Mitchell family and, unlike Mr Patel, did not disappear;

    85.3 the fact that he organised an independent audit to try and find out what had happened to the investors' funds.

86. Despite these points, taking the evidence overall, I am satisfied that there is a good arguable case that, although Mr Ubhi may not have had access to the investors' funds, he was aware of and assisted in the Ponzi scheme. The evidence suggests that he had the administrator log in details for the email accounts used by Black Capital and for the document management system and was therefore able to access documents and correspondence relating to the activities of Black Capital. He attended meetings with the Mitchell family along with Mr Patel. He also had access to the bank statements for Black Capital Partners Limited which, the evidence shows, conducted its business on very similar lines to Black Capital.

87. I do not of course make any finding that there is in fact wrongdoing on the part of Mr Ubhi. It is not the function of the Court at this stage to conduct a mini trial or to make any findings in this respect. The only conclusion that I am reaching is that there is a good arguable case that Mr Ubhi was involved in the wrongdoing.

88. That wrongdoing is in my view directly relevant to the issue of dissipation given that the effect of the wrongdoing is, as Mr Brockman has pointed out, the dissipation of the funds invested in Black Capital by the Petitioners and by other investors. In my judgment, it can be inferred from this that there is a real risk of dissipation of Mr Ubhi's assets particularly in light of the evidence that both he and companies with which he is connected have received significant sums from Black Capital.

89. Although I appreciate that there is an explanation for Mr Ubhi not having provided access to the email and document accounts used by Black Capital, the fact that no assistance appears to have been provided and that this has significantly hindered Mr Hunt in his investigations only goes to support the conclusion that there is a real risk of dissipation of Mr Ubhi's assets.

90. I also accept that there is no evidence of actual dissipation by Mr Ubhi of his own assets and that there has been no criticism by Mr Hunt of Mr Ubhi's disclosure of his assets. However, Mr Ubhi has of course been subject to the freezing order since the commencement of the winding up. Given the nature of the apparent activities of Black capital and Mr Ubhi's alleged role in those activities there is in my view nonetheless a good arguable case that, if the freezing order is not continued, there is a real risk of dissipation of Mr Ubhi's assets

91. I should say that I am conscious that the alleged wrongdoing is not part of the cause of action which has been put forward against Mr Ubhi which relies simply on him being a partner in Black Capital and therefore liable to contribute to any shortfall in the partnership's assets. There is no requirement for wrongdoing in order to make good that cause of action.

92. However, in my view, as a matter of principle it should not make any difference whether the allegation of wrongdoing is a necessary ingredient of the cause of action against the Respondent as long as there is some connection. Indeed, Haddon-Cave LJ suggested

only that there should be a good arguable case that a respondent has engaged in wrongdoing and that the wrongdoing is relevant to the issue of dissipation.

93. In this case, the alleged wrongdoing (if proved) will have led directly to the shortfall in the assets of the partnership for which Mr Ubhi (if he is a partner) will be liable. There is therefore in my view a sufficient connection between the alleged wrongdoing and the claim against Mr Ubhi.

Balance of convenience

94. Mr McCourt Fritz did not suggest that the balance of convenience pointed against the continuation of the freezing orders for any reason other than the lack of a substantial cross-undertaking in damages. Given the nature of the alleged wrongdoing and the significant loss of funds, I have no doubt he was right not to do so.

95. I therefore need to consider whether the freezing orders should be continued despite the fact that the cross-undertaking in damages given by Mr Hunt is limited to the liquidation estate.

96. The evidence from Mr Hunt is that, as matters stand, there are potentially over 300 investors who between them are owed £30m-50m. However, he points out that, without access to the document system, it is impossible to trace all of the investors and that the true figure may be more than this.

97. The Petitioners say that, between them, they have invested a little over £13m and are owed approximately £18.5m. On any basis, this is a significant proportion of the amounts currently estimated by Mr Hunt to be due to the investors as a whole. However, I take into account the fact that there may well be more investors who come to light once Mr Hunt has access to the email and document accounts and that the total amount ultimately found to be due to investors may be higher than the current estimates.

98. This is not a case where there is a single investor who accounts for the vast majority of the funds said to be due from Black Capital. Instead, there are a large number of creditors and Mr Hunt is acting in the interests of all of them. It would not therefore in my view be appropriate to expect the Petitioners to stand behind any cross-undertaking

in damages. The likelihood is (even on the current figures) that they are in the minority both in terms of the number of creditors and the amount owed.

99. I was referred to the decision of Henderson J in *Franses v Al Assad* [2007] EWHC 2442 (Ch). In relation to the cross-undertaking in damages given by a liquidator, Henderson J accepted at [81] that it was appropriate for a cross-undertaking given by a liquidator to be limited to the net proceeds of the liquidation (referring to the decision of Millett J in *DPR Futures Limited* [1989] 1 WLR 778 at [785-787]). He made the point that the position may be different if the liquidator is being funded by a third party. However, it is not suggested on behalf of Mr Ubhi that this is the case.

100. Mr McCourt Fritz submits that, if the Court is minded to continue the freezing orders, Mr Hunt should be required to investigate the possibility of obtaining insurance to back up the cross-undertaking in damages. However, in circumstances where the assets which Mr Hunt has been able to identify are minimal and all the evidence suggests that there will be a significant shortfall, I do not consider that it will be proportionate to require Mr Hunt to incur the costs of carrying out this investigation.

101. Finally, I note that Mr McCourt Fritz did not suggest on behalf of Mr Ubhi that there were any specific losses that he was likely to suffer as a result of the freezing order. Mr Ubhi, in his evidence, asserts that he has already suffered significant loss and may suffer a very substantial loss in the future as a result of the freezing order. One specific example he gives is a potential deal involving a corporate bond and the building of 5,000 homes. However, as Mr Hunt points out in his own evidence, this appears to be a deal which is being explored through Black Capital Partners Limited (which is currently in administration) and not by Mr Ubhi personally.

102. Mr Ubhi also draws attention to a transaction involving a company called SpecialistMed where there appears to be an agreement that he will transfer his shares in the company to a third party in return for the repayment of his initial investment of £88,000. However, the correspondence from the third party indicates that the majority (and possibly all) of this initial investment was made by Mr Patel and not by Mr Ubhi.

103. Overall, I am satisfied that, in the circumstances, the balance of convenience lies in favour of continuing the freezing orders despite the fact that the cross-undertaking in damages is in this case of limited value. I am however conscious that no claim has yet

been made against the respondents and that, given the need for further investigations (which will depend on Mr Ubhi and Mr Patel making information available to Mr Hunt), it may be some time before any claim can be made. However, as Mr Brockman pointed out, if there is undue delay on the part of Mr Hunt, it is of course always open to the respondents to make an application for the freezing orders to be varied or discharged.

104. Although Mr McCourt Fritz criticised Mr Hunt and Mr Lewis for not canvassing with Mellor J the possibility of less intrusive relief (such as a proprietary injunction or a notification injunction), he did not suggest that, in determining whether the freezing order should be continued, any alternative should be considered.

105. I should briefly address the position of Mr Patel since, as Mr McCourt Fritz has been at pains to point out, each respondent must be considered separately. Based on the evidence, there is little doubt that, to the extent that Black Capital has operated a Ponzi scheme, Mr Patel has been more closely involved than Mr Ubhi given that it appears that he had primary access to the trading accounts and was, on any basis, operating the business either as sole trader (as Mr Ubhi alleges) or in partnership with Mr Ubhi.

106. I have no doubt that, based on this, there is a good arguable claim against Mr Patel and that there is a real risk of dissipation of his assets. There is nothing to suggest that the balance of convenience lies against the continuation of the freezing order against Mr Patel other than the fact that the cross-undertaking in damages is limited. For reasons I have already explained, I do not consider this to be reason not to continue the freezing order in this case.

107. The freezing order should therefore continue against both respondents until further order of the Court on its existing terms subject only to the amendments which have already been agreed in the case of Mr Ubhi. It follows from what I have said that Mr Ubhi's separate application to amend the terms of the cross-undertaking contained in the freezing order is dismissed.

108. For the avoidance of any doubt, the order continuing the freezing order on the terms I have set out takes effect from the date this judgment is handed down and the minute of order prepared by the parties should reflect this.

Approved Judgment