Neutral Citation Number: [2022] EWHC 612 (Ch)

Case No: CR-2021-001845

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

Date: 18 March 2022

**Before** :

**Jonathan Hilliard QC sitting as Deputy Judge of the High Court**

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**Between :**

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| **Mr Rakesh Kumar** | **Petitioner** |
| **- and -** | |
| **(1) Mr Nitin Sharma** | |
| **(2) Mrs Rashmi Sharma** | |
| **(3) Saka Maka 2 Ltd** | **Respondents** |

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**Hossein Sharafi (instructed by Raffles Haig Solicitors) for the Petitioner**
**Edmund Walters (instructed by Exons) for the First Respondent**
**Hearing date: 12 February 2022**

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# APPROVED JUDGMENT

**JONATHAN HILLIARD QC sitting as a Deputy Judge of the High Court:**

## Introduction

1. This is my judgment on the return date of an application for a freezing order (the **Application**) brought by the applicant, Mr Rakesh Kumar (**Mr Kumar**), against the First Respondent Mr Nitin Sharma (**Mr Sharma**). Mr Kumar was granted a freezing order on 8 October 2021 by Michael Green J and it was continued by order of Fancourt J of 22 October 2021 so as to allow Mr Sharma more time to file evidence and Mr Kumar to serve evidence in reply.

2. Mr Kumar issued on 7 October 2021 an unfair prejudice petition against Mr Sharma, his wife and a company called Saka Maka 2 Limited (the **Second Company**) under section 994 of the Companies Act 2006, seeking an order that Mr Sharma buy out what Mr Kumar contends is his 50% shareholding (the **Unfair Prejudice Petition**). The freezing order is sought in relation to the Unfair Prejudice Petition. Mr Kumar has also issued, on 10 September 2021, a petition to wind up a company called Sharma and Sons Limited (the **First Company**), of which he and Mr Sharma are each 50% shareholders, on the ground that it would be just and equitable to do so (the **Winding Up Petition**).

3. Mr Sharma contends that none of the main requirements for a freezing order are satisfied here: (1) Mr Kumar does not have a good arguable case; (2) there is not a real risk of a future judgment going unsatisfied through unjustified dissipation of assets; (3) there has been a failure of full and frank disclosure and failure to present the without notice application fairly, such that the freezing order should not be continued; (4) it would not be just and convenient to grant the freezing order; (5) failing that, the maximum amount of the assets frozen should be set at £10,000 rather than the £60,000 ordered by Michael Green J and continued by Fancourt J; and (6) in any event, the freezing order should not extend to the joint account that Mr Sharma holds with Mrs Sharma.

4. In my judgment, for the reasons set out below, the freezing order should be continued, but with a maximum amount of £35,000. Given the low maximum amount, and the absence of evidence before me about whether the value of Mr Sharma's interest in the matrimonial home is sufficient to cover this sum, I am also minded to order that details of the value of the interest are provided by Mr Sharma on affidavit, and return to this at the end of my judgment.

## The evidence before me

5. I have the following evidence before me: (1) two affidavits from Mr Kumar, the first of which is dated 7 October 2021 and was available to Michael Green J at the 8 October 2021 without notice hearing, and the second dated 10 November 2021; (2) two affidavits from Mr Sharma, the first dated 14 October 2021 comprising an affidavit of assets pursuant to the 8 October 2021 order and the second dated 2 February 2022; (3) a 7 February 2022 affidavit from Kailash Sabapathy of Mr Kumar's solicitors; and (4) the material from the original without notice hearing before Michael Green J, the material relevant to the 22 October 2021 continuation order and a clip of correspondence.

6. Mr Sharma's 2 February 2022 affidavit was put in late. The deadline for it under the 22 October 2021 order was 12 November 2021 but I understand that it was served on 3 February 2022. Mr Kumar's solicitors ultimately indicated in correspondence that they would not object to it if it was put in by the end of January 2022. Mr Kumar indicated before me through the skeleton of his Counsel, Mr Sharafi, that he did not object to relief from sanctions being granted but asked the Court to draw adverse inferences from Mr Sharma's serious delay in setting out his case.

7. Mr Walters, who appeared for Mr Sharma, put forward orally a number of reasons for the delay, including that his solicitors were instructed in late October, it took considerable time to get on top of the freezing injunction, Unfair Prejudice Petition and Winding Up Petition, there was then a hearing on the Winding Up Petition on 17 December 2021 followed by the winter break, and the defence to the Winding Up Petition was filed on 28 January 2022.

8. The breach was significant, because the witness evidence was over a month and a half late. However, I grant relief from sanctions, for the following reasons: (1) I consider that there was a good reason for the delay, (2) in my judgment it is important that Mr Sharma's evidence is admitted to enable the case for the continuation of the freezing order to be properly evaluated, and (3) Mr Kumar does not oppose the application. Given Mr Walters' oral explanations, I do not draw adverse inferences from the time that it has taken Mr Sharma to set out his case.

## Background to the Application

9. While Mr Kumar and Mr Sharma have made a significant number of factual allegations and counter-allegations against each other before me, my role is not to conduct a mini-trial. Therefore, I shall focus on what I consider to be the key facts not in dispute that are necessary to understand and evaluate the arguments before me in relation to the Second Company. I shall return to certain elements of this later in analysing the five matters between the parties.

10. The disputes between Mr Kumar and Mr Sharma concern two restaurants named Saka Maka. The first (**Saka Maka 1**), located at 171 Brockley Road, London, SE4 2RW, was operated through the First Company. The second (**Saka Maka 2**) was located at 226 Hither Green Lane, London SE13 6RT and operated through Saka Maka 2 Ltd, the Third Respondent (the Second Company). I shall call the second restaurant **Saka Maka 2**.

11. In 2019, Mr Kumar paid various sums to a Mr Sohan Pal Singh, who had previously been involved in the Brockley Road business. As a result, it was accepted by Mr Sharma that Mr Kumar would be an equal shareholder in the First Company. A confirmation statement was lodged at Companies House on or around 3 March 2020 stating that Mr Kumar was a 50% shareholder in the First Company.

12. The Second Company was incorporated in July 2020. The First Company lent £50,000 to assist in the purchase of a lease of the new site. While all the shares were held by Mr Kumar on incorporation, it is common ground that he was not

intended to hold all the shares for himself. I shall come in a moment to what the dispute is over the shareholdings in the Second Company. Saka Maka 2 opened in December 2020.

13. That month, Mr Kumar and Mr Sharma decided to end their business relationship. It was agreed at that point that Mr Kumar would own Saka Maka 1 and that Mr Sharma would own Saka Maka 2. Mr Kumar contends that he and Mr Sharma failed to agree terms for how they would achieve this. Mr Sharma resigned as director of the First Company and Mr Kumar was appointed a director.

14. There was a meeting on 10 March 2021 at the Hither Green premises in the presence of Mr Singh. The meeting is important to Mr Kumar and Mr Sharma's cases, and there are competing accounts of what was agreed at it. Mr Kumar says it was agreed that he and Mr Sharma would continue as 50% shareholders of both the First and Second Company. Mr Sharma states that it was agreed that while they would each continue as 50% shareholders of the First Company, Mr Sharma would have a 100% shareholding in the Second Company. It is common ground that the £50,000 would be paid back to the First Company.

15. The next day, 11 March 2021, Mr Sharma e-mailed the accountant of the businesses, Mr Yadu Aryal of Kanti & Co Limited, copying in Mr Kumar, stating among other things that Mr Kumar would stay as 50% shareholder of the Second Company:

> "Please do make the following changes in Saka Maka 2 ltd:
>
> Rakesh Kumar resign from the director
>
> Nitin sharma is the director from 11/3/2021
>
> Rakesh Kumar still stay as a shareholder of 50 percent.
>
> Please make the changes…"

16. On 17 March 2021, there was a WhatsApp exchange between Mr Sharma and Mr Kumar. Mr Sharma stated:

> "Taking off your name from the company house Saka Maka 2 ltd
>
> As I can't open a business account
>
> Once account is open it will be the same".

Mr Kumar responded: "Please do the same for the Brockley as well so I can also open business ac or transfer Santander ac to my name". Mr Sharma states that he was referring in the 17 March WhatsApp to Mr Kumar no longer being a *shareholder* of the Second Company. Mr Kumar says he took it as a reference to him no longer being a *director* of that Company.

17. Mr Sharma also sent Mr Aryal a WhatsApp the same day, not copied to Mr Kumar, stating:

> "Hi Yadu g
>
> As discussed
>
> Please make the following changes for saka Maka 2 ltd
>
> Director- Nitin Sharma
>
> Share hold- 100 share holder
>
> By Nitin Sharma
>
> Please make the changes"

On the same day, a confirmation statement was filed at Companies House stating that Mr Sharma was now the sole shareholder in the Second Company.

18. On or by 24 May 2021, Mr Kumar had made a number of enquiries with Mr Aryal, and Mr Aryal had forwarded Mr Kumar the 17 March 2021 WhatsApp from Mr Sharma, stating:

> "Please see the txt message send by Nitin ji on 17th March. I hope this is enough and suffcient evidence. Please have good communication within yourself. Any Mis understanding will be removed on time. OK"

Also on that day, Mr Sharma sent an e-mail to Mr Aryal, copied to Mr Kumar, reconfirming that among other things he was 100% shareholder of the Second Company. Mr Kumar contends that it was only on 24 May that he found out that Mr Sharma had sought to make himself the sole shareholder. Mr Aryal sent an e-mail to the parties on 24 May, and Mr Sharma responded on 27 May, stating that Mr Kumar did not have a role in the Second Company.

19. Mr Kumar did not take steps to respond to this at that point.

20. On 30 June 2021, there was a meeting between Mr Kumar and Mr Sharma at the offices of Rivington solicitors in the presence of a solicitor from that firm, Mr Sushil Gaikwad. The origin of this was that Mr Kumar had approached Mr Gaikwad. At the meeting, it was agreed to dissolve the First Company. This meeting and the events after it were relied on heavily by Mr Sharma before me. While it is pleaded in the Winding Up Petition, this 30 June meeting was not mentioned in Mr Kumar's first affidavit dated 7 October 2021.

21. On 2 July 2021, Mr Sharma e-mailed Mr Kumar and Mr Gaikwad setting out various elements that he said were discussed at the meeting, principally the steps to be taken towards dissolution of the First Company. He referred among things to the Second Company as "*my company*" and to an agreement that Mr Kumar would stop trading as Saka Maka from 9 July. Mr Kumar responded by 3 July 2021 e-mail stating that the last day trading as Saka Maka would be 8 July. He sent a further e-mail the same day stating that he wanted to make sure that certain financial matters relating to the First Company were concluded by 7 July. On 6 July, Mr Kumar e-mailed to say that the 8 July date was not feasible,

because there was a minimum period which the Council required to register to before a restaurant business could commence.

22. By an 8 July 2021 e-mail, Mr Kumar complained that his 50% shareholding in respect of the First Company had not been registered, saying that this was unprofessional and unethical. He went on to state that this was exactly the same as what happened in respect of the Second Company, where he was initially 100% shareholder but where Mr Sharma had asked their accountant to change the directorship and shareholding without his prior approval or written confirmation, which he suggested was evidence of an inappropriate way of doing things.

23. On 9 July 2021, Mr Kumar e-mailed saying that among other things he was fearful for his and his family's safety, would take the matter to the police and would seek legal advice.

24. Mr Kumar sought legal advice from Raffles Haig solicitors. They wrote to Mr Sharma on 21 July 2021, stating, among other things, that Mr Kumar and Mr Sharma were the only shareholders of the First and Second Companies, and that it had been agreed that both parties would terminate their business relationship so that Mr Sharma would have total control of the Second Company and Mr Kumar total control of the First Company. Following correspondence with Mr Sharma's then solicitors Parker Arrenberg solicitors, Raffles Haig wrote another substantive letter on 9 August 2021. Among other things that letter stated that Mr Kumar would seek to rectify the Second Company's share register to have himself registered 50% shareholder.

25. On 29 August 2021, Mr Kumar made filings at Companies House changing the Second Company's registered office to the premises of the First Company. He added himself as a person with significant control and removed Mr Sharma as a person with significant control. He accepts in his first affidavit that he should not have made the change in relation to the registered office and the position was corrected on 8 September 2021.

26. On 13 September 2021, Mr Kumar's solicitors sent a letter before action to Mr Sharma stating that Mr Kumar had applied to wind up the First Company and intended to present an unfair prejudice petition for the Second Company unless Mr Sharma agreed to buy Mr Kumar's shares in the Second Company at a fair value. The letter enclosed the Winding Up Petition.

27. Mr Sharma responded to the 13 September letter by a 20 September e-mail, setting out a significant number of points in response, including claiming that all shares were transferred with Mr Kumar's verbal agreement.

28. On 21 to 22 September, Mr Sharma caused three payments to be made totalling £25,000 from the bank account of the First Company, which he controlled, to himself. The reference on the bank statement for the payments was "dividend 2020-2021". He e-mailed Mr Kumar on 23 September informing him that he had taken the dividend.

29. On 23 September, a confirmation statement was filed at Companies House for the Second Company showing Mr and *Mrs Sharma* now each to be 50% shareholders of the Second Company.

30. Mr Kumar states that his lawyers discovered the 23 September confirmation statement the next day, that this gave rise to a concern that Mr Sharma was dissipating his assets, and that therefore he decided to apply for a freezing injunction.

31. On 7 October, Mr Kumar applied without notice for a freezing order, which was granted on 8 October.

32. On 14 October, Mr Sharma provided a statement of assets by affidavit.

33. The freezing order was continued on 22 October 2021.

34. In November 2021, Mr Kumar took steps to remove references at Companies House to Mr Sharma being a director. He states that he did this because Mr Sharma's purported appointment in August 2021 was not valid.

35. On 28 January 2022, Mr Sharma lodged points of defence to the winding up petition in relation to the First Company, supported by a witness statement of the same date. That defence was primarily based on an alleged breach of the agreement that Mr Sharma contended was reached at the 30 June 2021 meeting.

36. On 2 February, Mr Sharma swore his second affidavit, and Mr Kailash Sabapathy swore his on 7 February 2022.

## Test for granting a freezing order

37. There is no dispute before me about the basic test that I should apply to determine whether to continue the freezing order but given the reliance placed on the recent Privy Council decision in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UK PC 24 I will briefly deal with the position.

38. Mr Sharafi, who appeared before me for Mr Kumar as he did before Michael Green J, contended that the correct test was that set out by Lord Leggatt for the majority in the Privy Council in *Broad Idea* at paragraph 101 of his judgment. That test is that (1) there is a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court; (2) the respondent holds assets against which such a judgment could be enforced; and (3) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied. Mr Sharafi accepted that it also had to be just and convenient within the terms of section 37(1) of the Senior Courts Act 1981 to make the order sought, as Lord Leggatt made clear at the start of paragraph 101 of his judgment.

39. In his skeleton, Mr Walters put the overall test for a freezing order by reference to paragraph 3-002 of Gee, *Commercial Injunctions*, 7th ed (2020), as that a

claimant must show that (1) they have a good arguable case on the merits against the defendants; (2) there is a real risk that the judgment will go unsatisfied by reason of the unjustified disposal by the then defendant of his assets, unless he is restrained by court order from disposing of them; and (3) it is just and appropriate as a matter of discretion to grant the injunction.

40. Therefore, it was common ground, and I accept, that what is required is in bare summary, (i) a good arguable case, (ii) a real risk that the judgment will go unsatisfied by reason of an unjustified disposal by the defendant of his assets, and (iii) that it is just and convenient to grant the injunction. It was not disputed that there are assets in the jurisdiction against which a judgment could be enforced, so I do not need to deal further with that, and equally it was not disputed that the burden is on Mr Kumar to make out the case for continuation of the freezing order.

41. That leaves the question of what the good arguable case must relate to. The formulation of the good arguable case limb in *Broad Idea* is in broader terms than in Gee, because the formulation of limb (1) by Lord Leggatt does not require the grant of a freezing injunction to be linked to the existence of a cause of action, as he emphasised in paragraph 90 of his judgment. Therefore, there is a broader formulation of what the good arguable case must relate to. That is capable of being of relevance in the present case, because the substantive proceedings relate to an unfair prejudice petition under section 994 of the Companies Act 2006, rather than an ordinary cause of action.

10. However, I did not detect any intended difference between Counsel in the tests that they submitted that I should apply. While stating that the passage in question was obiter, Mr Walters expressly relied elsewhere in his skeleton on Lord Leggatt's formulation of the good arguable case test in *Broad Idea*. Further, as I shall come onto in a moment, Mr Walters did not contest the ability in principle to grant a freezing injunction against an individual where an unfair prejudice petition had been brought seeking a share buyout order against that individual. Therefore, I shall deal below with precisely how the good arguable case test applies in the present case.

## The good arguable case requirement

42. Mr Walters submitted by reference to Gee that (1) the good arguable case test is more demanding than the test ordinarily applicable to injunction cases that there is a serious question to be tried, and requires a case that is more than barely capable of serious argument; and (2) the assessment of whether the test is met on given facts will include assessing the apparent plausibility of statements in affidavits (paragraphs 12-032 and 12-033 respectively).

43. These points were not contested by Mr Sharafi. I accept those submissions, and add, given their relevance to the present case, that: (3) the Court must not try to resolve conflicts of evidence on affidavit; (4) nevertheless, the Court will take into account the apparent strength or weakness of the respective cases to decide whether the threshold is met, and this will include assessing the apparent plausibility of statements made in witness evidence; and (5) although a good arguable case remains the minimum requirement, the judge's view of the merits

of the claimant's case and his chances of ultimate success are important factors in the exercise of his discretion (Gee at paragraph 12-033).

44. Mr Sharafi dealt in his skeleton with two possible objections of principle to the good arguable case test being met, namely that no freezing order could be granted against an individual in aid of an unfair prejudice petition and that- irrespective of what the understanding or agreement between Mr Kumar and Mr Sharma was- Mr Kumar was not a shareholder of the Second Company and therefore had no standing to bring an unfair prejudice petition.

45. Taking first the ability to grant a freezing order against an individual in support of a share buyout order that is sought in an unfair prejudice petition, I did not take Mr Walters to dispute that this was possible.

46. In my judgment, Mr Walters was right not to contest this. Mr Sharafi properly drew my attention in his skeleton to the decision of Pumfrey J in *Re Premier Electronics GB Ltd* [2002] BCC 911 at 914 that an unfair prejudice petition was not a claim in relation to which a cause of action could arise of the kind sufficient to ground a freezing injunction against an individual. He distinguished such a situation from the example of a claim by the company itself in relation to misfeasance by directors. However, in *Palmer v Lovelight* (unreported, 16 August 2017), Warren J continued a freezing injunction in respect of an individual against whom a share buyout order was sought in unfair prejudice proceedings.

47. It does not appear that Warren J was referred to *Re Premier Electronics*. Nevertheless, I consider that the approach in *Palmer* is to be preferred. While the relief sought is not a money judgment, a petitioner seeking a share buyout order seeks an order requiring another individual to pay him money. Therefore, the freezing order is in aid of domestic proceedings that will if successful result in an order of the payment of money. I cannot see any reason of principle for distinguishing for the purposes of the freezing order jurisdiction between a traditional private law money claim and a claim that seeks to invoke the Court's statutory jurisdiction under section 994 of the Companies Act 2006. On the contrary, in both cases the purpose of the freezing injunction jurisdiction is- to use the words of Lord Leggatt in *Broad Idea* at paragraph 85- to facilitate the enforcement of a judgment for the payment of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment. Following *Broad Idea*, I consider that the Court should be particularly reluctant to attribute significance to formal distinctions between different types of legal proceedings that can result in an order for the payment of money.

48. Therefore, I need not go as far as considering whether Lord Leggatt's formulation of the good arguable case test at paragraph 101(i) of his judgment in *Broad Idea* forms a part of English law without any qualifications.

49. Turning to the question of Mr Kumar's standing, a feature of the present case, like in *Re I Fit Global Ltd* [2012] EWHC 2090 (Ch) decision of Roth J to which I was referred, is that there does not appear to have been an appreciation of the formalities for dealing with the shareholdings of a limited company. Therefore,

there was no register of members, and attempts to change the shareholders appear to have been effected through the filing of a confirmation statement at Companies House.

50. In those circumstances, one of the ways that Mr Sharafi put his primary case on standing was that in the absence of a register of members, Mr Kumar is a member of the Second Company under section 112(1) of the Companies Act 2006, by virtue of being the sole subscriber to the Second Company's memorandum of association. While Mr Sharafi dealt with in his skeleton in some detail with the different bases on which Mr Kumar might have standing to bring the unfair prejudice petition, and there was indication within Mr Sharma's second witness statement of a potential standing challenge, Mr Walters accepted that there is standing to bring an unfair prejudice petition by virtue of section 112(1). An alternative way of reaching the same conclusion, as Mr Sharafi submitted in his skeleton, would be that if there was an agreement that Mr Kumar should be a 50% shareholder, in the absence of a register of members this would be sufficient to make him a 50% shareholder through the reasoning in *I Fit* at [34]. Given the points above, I consider and proceed on the basis that Mr Kumar has standing to bring the Unfair Prejudice Petition.

51. Mr Walters directed his submissions to the prospects of such a petition succeeding on the evidence. He submitted that the evidence clearly demonstrates that the Unfair Prejudice Petition and the Winding Up Petition are wholly without merit, in particular because it shows that:

(1) Mr Kumar agreed to transfer his 50% shares in the Second Company to Mr Sharma;

(2) Mr Kumar made no investment of time, money or labour in the Second Company and its business at the Hither Green premises;

(3) there was a dissolution agreement- agreed on 30 June 2021- between the parties in relation to the First Company which has been breached by Mr Kumar; and

(4) Mr Kumar himself had demonstrated misconduct in relation to his dealings with the Companies, some of which he admits to, including unauthorised filings at Companies House, failing to perform his directors' duties in respect of the First Company, and threatening to go to the police.

These points are spread across points dealing with the First and Second Companies so I shall focus on those relating to the Second Company. Mr Walters also contended that even if there was a dishonest attempted transfer by Mr Sharma of Mr Kumar's shareholding in the Second Company, that is a single event insufficient to give rise to an unfair prejudice claim.

52. In my judgment, there is a good arguable case that the Unfair Prejudice Petition will succeed and a share buy-out order made.

53. The centre of the Unfair Prejudice Petition is the allegation that Mr Sharma dishonestly attempted to transfer 50% of the shareholding. Mr Kumar contends

that at the 10 March 2021 meeting it was agreed that they would continue as 50/50 shareholders, that this was confirmed by the 11 March 2021 e-mail and that Mr Sharma then sought to have Mr Kumar's 50% shareholding transferred to himself without Mr Kumar's consent. Mr Sharma's account is that what was agreed on 10 March 2021 was that he would be 100% shareholder of the Second Company and that the purported transfer on the 17 March 2021 was just reflecting that.

54. In my judgment, on the basis of the 11 March 2021 e-mail and what Mr Sharma says about it, Mr Kumar has a good arguable case, for the following reasons:

(1) The e-mail was sent the day after the meeting and states that Mr Kumar is to remain 50% shareholder of Company.

(2) Mr Sharma does not deal in his 2 February 2022 affidavit with the 11 March 2021 e-mail.

(3) When I asked at the hearing for Mr Sharma's submissions on the 11 March e-mail, Mr Walters submitted on instructions that the reason for the e-mail was that it was necessary first to change the directorship to Mr Sharma before the 50% shareholding could be transferred over to Mr Sharma. Therefore, he submitted, the 11 March 2021 e-mail sought the change of director to Mr Sharma, and then the second stage on 17 March was to change the shareholding. This explanation will need to be explored at trial. However, in my judgment, the fact that it does not find express support in the terms of either the 11 March e-mail or the 17 March WhatsApps and was not advanced until the hearing before me are points which count in favour of Mr Kumar's contentions as to the 10 March meeting.

(4) I also take into account Mr Kumar's evidence that he only discovered the purported transfer on 24 May 2021 when he called Mr Aryal to ask questions about the Second Company.

55. I have carefully considered the submissions made on Mr Sharma's behalf by Mr Walters in support of his contention that there is no good arguable case. In particular, he relied on the absence of objection raised by Mr Kumar to Mr Sharma about the transfer of the shareholding in the Second Company, whether (i) on receipt of the 17 March WhatsApp from Mr Sharma, (ii) on receipt of the 24 and 27 May 2021 e-mails from Mr Sharma, (iii) at the 30 June 2021 meeting, despite having approached Mr Gaikwad for legal assistance, or (iv) following receipt of Mr Sharma's 2 July 2021 e-mail, in Mr Kumar's e-mails prior to 8 July 2021. Further, Mr Walters pointed out that even after the 8 July 2021 e-mail from Mr Kumar, no formal claim was intimated until the 9 August 2021 letter from Raffles Haig solicitors, which suggested that Mr Kumar would seek rectification of the register, and no unfair prejudice petition intimated until the 13 September 2021 letter from the same firm. The punchline of his submission was that this showed that from December 2020 the parties had been in agreement that Mr Sharma should own the Second Company, and that the reason for the absence of objection on Mr Kumar's part at the junctures listed above to Mr Sharma transferring Mr Kumar's 50% shareholding to himself was that this reflected the parties' agreement. Mr Walters sought to fortify this by

contrasting Mr Kumar's silence in relation to the Second Company with the discussion between the parties at the 30 June 2021 meeting and continued in e-mail correspondence after that meeting as to the running of the First Company, and by relying on Mr Sharma's agreement to repay the £50,000 loan as being part of an agreement that Mr Sharma should be 100% shareholder of the Second Company.

56. These points were well made, particularly why Mr Sharma would agree to pay back the £50,000 loan made by the First Company that had been used to fund the purchase of the lease of Saka Maka 2 if it was not agreed that he be or become 100% shareholder of the Second Company. However, in my judgment, while these are points that will have to be explored at trial, they do not cause the claim to fall below the good arguable case threshold, given Mr Kumar's evidence and contentions on the following points:

(1) Mr Kumar's evidence as to the 10 March meeting, the 11 March e-mail and Mr Sharma's explanation for the 11 March e-mail.

(2) Mr Kumar's evidence that he did not understand the 17 March WhatsApp to be referring to changing the shareholding, given that it did not say this expressly.

(3) Mr Kumar's evidence that he only discovered the transfer on 24 May 2021 on contacting Mr Aryal, and that Mr Kumar was surprised by it and stated that he had not agreed to such a transfer.

(4) Mr Kumar's evidence that the reason that he did not complain sooner about the purported transfer of his 50% shareholding in the Second Company to Mr Sharma was that he was confused and surprised, and thought there was nothing he could do about it. It was suggested by Mr Walters that this was a different account to his Winding Up Petition relating to the First Company. However, the difference between the Winding Up Petition and the affidavit in this respect is that Mr Kumar's affidavit adds in that he thought that he had been cheated out of the Second Company shares.

(5) Mr Sharafi's contention that Mr Kumar's priority in the dialogue on 30 June 2021 and in the e-mails that followed was to sort out the running of the Brockley premises because that was the restaurant he was running and deriving an income from, so that was the one that he focused on and therefore that the meeting and e-mails concerned. That was Mr Kumar's response to the argument that the fact that Mr Sharma could continue to use the Saka Maka name for the Hither Green Lane restaurant was premised on that restaurant and the company owning it being his, as was Mr Sharma's agreement to repay the £50,000 and the reference in the 2 July e-mail to the Second Company as "my company".

(6) Mr Kumar's account of the purported transfer in his 8 July 2021 e-mail and the subsequent correspondence from his solicitors from 21 July 2021 onwards.

57. As for Mr Walters' contention that Mr Kumar made no investment of time, money or labour in the Second Company, Mr Kumar denies this. Mr Kumar contends that he identified the premises that were purchased for the Second Company, together with Mr Sharma bought the initial equipment for the Second Company, and carried out leafleting for the restaurant. Further, I was provided with evidence in the form of a bank statement for the Second Company annexed to Mr Sharafi's skeleton that Mr Kumar made loans to the Second Company. The admission of this evidence was not opposed by Mr Sharma, but he produced later bank statements for the Second Company showing that the loans were repaid on 7 March 2021, and it was accepted by Mr Sharafi that the loans had been repaid on that date. While the loans were repaid, they were nonetheless loans that Mr Kumar made to the Second Company. In any event, while relevant to the question of what agreement was reached between Mr Sharma and Mr Kumar as to the shareholding of the Second Company, limited or even no investment on Mr Kumar's part does not itself automatically translate into an agreement that Mr Sharma would be 100% shareholder.

58. As to Mr Walters' submission about Mr Kumar's misconduct in relation to his dealing with the Companies, Mr Kumar should not have made the filings at Companies House in relation to the Second Company that he did in August 2021 and Mr Kumar accepts this. In my judgment, these are relevant to his overall credibility, but not at this interlocutory stage a knock-out blow to the Unfair Prejudice Petition or close to one. Allegations about Mr Kumar's recent performance of his duties as director in relation to the First Company fall into the same category. They are also one step further removed from the question in the Unfair Prejudice Petition of the correct characterisation of the understanding of the shareholding position in the Second Company and the assessment of Mr Sharma's conduct in seeking to transfer Mr Kumar's 50% shareholding in it to himself.

59. The final area of dispute on the question of whether there is a good arguable case was whether a dishonest attempted transfer of Mr Kumar's shares would be a sufficient event to ground an unfair prejudice claim. Both parties accepted that to make out an unfair prejudice claim, a petitioner must establish conduct of the company's affairs or an act or omission of the company, that prejudices their interests as a member unfairly.

60. Mr Sharafi contended that:

(1) the conduct complained of was conduct of the affairs of the Second Company, because Mr Sharma procured Mr Aryal to "register" Mr Kumar's shares in his name by way of a confirmation statement in his capacity as a director, and Mr Aryal confirmed that he "registered" the purported transfer because Mr Sharma was the nominated person who dealt with him and was like a managing director; and

(2) Mr Sharma's actions, in dishonestly carrying out the purported transfer, have prejudiced Mr Kumar's interests as a shareholder by causing him to justifiably lose confidence in the probity of Mr Sharma's management of the Second Company.

61. In relation to point (2), he relied on *Re Elgindata* [1991] BCLC 959 at 1004c-d for the proposition that conduct in the affairs of a company can be inherently prejudicial even if it does not cause loss and *Re Home & Office Fire Extinguishers Limited* [2012] EWHC 917 (Ch) at [57]-[66] and [71]-[72] for the same proposition, together with the proposition that on the right facts a single event can be sufficient to ground a successful unfair prejudice petition.

62. Mr Walters' contention was that the situation in *Re Home & Office Fire Extinguishers Limited*, where the single event was one of the shareholders attacking the other with a hammer, was a world away from the present facts, and that *Re Elgindata* showed that-while it was possible to have unfair prejudice without loss- it was in practice difficult to do so.

63. In my judgment, there is a good arguable case that Mr Kumar will make out his points (1) and (2) and establish an unfair prejudice claim. In relation to point (2), while it happened some time ago, a dishonest attempt by Mr Sharma to transfer Mr Kumar's entire shareholding to himself, compounded by asserting that Mr Kumar's account was untrue, would be capable in principle of constituting a significant single event that, as in *Re Home & Office Fire Extinguishers Limited*, affected the relationship between the parties sufficiently to put an end to the basis upon which the parties entered into their association with each other, so as to make it unfair that one should insist on the continuation of the association between them. Whether it was good enough on the facts, taking into account that the facts are less extreme than *Re Home & Office Fire Extinguishers Limited* and that Mr Kumar did not bring the unfair prejudice claim for some time after the conduct complained of, will need to be decided at the final hearing.

64. Drawing together the above strands, in my judgment, the good arguable case test is made out, but this is not a case where the claim sails high over that bar. There are hotly contested areas of factual dispute and both parties will have difficult points to contend with at trial.

## Breach of the duty of fair presentation

65. Both parties agreed that the principles could be taken from the judgment of Popplewell J in *Fundo Soberano de Angol v Jose Filomeno dos Santos* [2018] EWHC 2199 (Comm). As Popplewell J explained at paragraph 52, while 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 aspects. Mr Walters placed particular stress in his submissions on paragraphs 50 and 52 of the judgment. Mindful of the guidance of the Court of Appeal in *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381, [2014] CLC 451 at [36] that allegations of full and frank disclosure should be dealt with as concisely as possible, I do not set these paragraphs out in full here. In relation to paragraph 52 specifically, Mr Walters contended, and I accept, that the fact that a point is buried in the material presented to the Judge is not itself sufficient to fulfil the duty if it is not specifically drawn to the Judge's attention.

66. Mr Walters devoted a substantial portion of his oral submissions to the presentation of the application before Michael Green J, particularly in the

affidavit evidence of Mr Kumar. He contended in his skeleton that there were significant number of failures in such presentation, which he developed orally. He devoted particular attention to the fact that the 30 June 2021 meeting and the e-mails that followed prior to 8 July 2021 were not specifically mentioned. I take each in turn by reference to the description of the point in Mr Walters' skeleton, but give them my own numbering.

*(i) The failure of Mr Kumar to mention in Mr Kumar's 7 October 2021 affidavit the 24 May 2021 e-mail from Mr Sharma to Mr Kumar*

67. Mr Walters contended that this alleged failure was material because the e-mail to Mr Aryal, copied to Mr Kumar, reconfirms that Mr Sharma has a 100% shareholding in the Second Company. I do not consider that there was a material failure. Mr Sharma appears to me to acknowledge in his evidence filed in relation to the Winding Up Petition that his 24 May 2021 e-mail was sent after Mr Kumar started making enquiries with Mr Aryal about why his name had been removed as shareholder. Therefore, I do not consider that the e-mail was one that needed to be drawn to the Judge's attention. In any case, Mr Kumar dealt in his 7 October 2021 affidavit with the 27 May 2021 e-mail from Mr Sharma to Mr Aryal, which is later in the same e-mail chain, and accepted that he remained silent on receipt of that e-mail. Mr Kumar stated that the e-mail said that he would have no more role in the Second Company. While phrased differently, that is to the same effect in the relevant respect as the 24 May 2021 e-mail. The Judge pre-read Mr Kumar's affidavit, and noted in his judgment that Mr Kumar did do not do anything at the time on discovering the transfer had taken place.

*(ii) The repeated use of the phrase "without the knowledge or consent" of Mr Kumar in Mr Kumar's 7 October 2021 affidavit is misleading, there was a failure to explain that the decisions between the parties were made by mutual agreement and that there was no process of seeking "consent" from each other*

68. The passages complained of in Mr Kumar's affidavit assert that the purported transfer by Mr Sharma of Mr Kumar's 50% shareholding in the Second Company to Mr Sharma was without his knowledge or consent. That is Mr Kumar's case and evidence as to how the purported transfer occurred. Mr Kumar explaining his case does not amount to a failure of full and frank disclosure.

*(iii) The failure of Mr Kumar to explain why he remained silent at least from 24 May 2021, in relation to the issue of Mr Sharma's 100% shareholding in the Second Company*

*(iv) The failure of Mr Kumar to properly explain why he remained silent about the e-mail on 27 May 2021, why he thought he had been successfully cheated out of his shares, and if that was so, why he remained silent about it*

69. I take these together. Mr Kumar did explain in his 7 October 2021 affidavit why he remained silent for a period after discovering the purported transfer of his shareholding, namely that he thought that he had been successfully cheated out of his shares. I have dealt above with the potential relevance of this silence to

whether a good arguable case exists, and the credibility of the reason given for it, but given that Mr Kumar explained in his affidavit his reason for it, there is no failure of full and frank disclosure in this regard. Mr Sharma's suggestion that Mr Kumar should have explained why he thought he had been successfully cheated out of his shares and if that was so why he remained silent about it, are in substance contentions as to the credibility of the evidence put forward by Mr Kumar rather than full and frank disclosure objections.

*(v) The failure to include any facts about and surrounding the dissolution agreement agreed on 30 June 2021 including Mr Kumar's visit to Rivington Solicitors to seek advice about separating the business, and the meeting at Rivington Solicitors, on 29 and 30 June 2021 respectively, and the associated e-mails that followed that meeting*

70. As I have explained above, Mr Walters focused on this head, and developed it in some detail in his oral submissions. He contended that the fact that Mr Kumar's account in his 7 October 2021 affidavit passes straight from his reaction to the 27 May 2021 e-mail on to Mr Kumar's e-mail of 8 July 2021 complaining about the purported transfer of his shares in the Second Company was a serious failure to make full and frank disclosure and a failure of fair presentation. His submission was that these matters were plainly material as Mr Kumar's case was that he thought that he had been successfully cheated out of his shares in the Second Company, but that such assertion was wholly undermined by the events of the end of June 2021 and the e-mails that followed. The reason for this, he contended was that, in summary: (i) Mr Kumar approaching Mr Gaikwad afforded him an obvious opportunity to raise any concerns about the Second Company, but no such concerns were raised at the 30 June 2021 meeting, (ii) nor were they raised in the e-mails that followed, and (iii) on the contrary, the focus was on the position of the First Company, and there was no concern expressed on the part of Mr Kumar about his position in respect of the Second Company. In my judgment, this is the strongest of the points made on non-disclosure.

71. Mr Sharafi's response to this argument was that (i) Mr Kumar made clear in his 7 October 2021 affidavit that on receiving Mr Sharma's 27 May 2021 e-mail, he did not raise objection about the purported transfer until 8 July 2021; (ii) the 30 June 2021 meeting and the e-mails that followed did indeed focus on the First Company, which was precisely why these details were not material to whether a freezing order should be granted in respect of a claim relating to the Second Company; (iii) for example, the 2 July 2021 e-mail was focusing on the striking off of the First Company and the steps that needed to be taken before that happened, such as the repayment of the £50,000 loan that it had made, and similarly the next e-mail, of 3 July 2021, was focusing on Saka Maka 1; and (iv) the 30 June 2021 meeting and e-mails that followed over the next week were pleaded in some detail in Mr Kumar's 10 September 2021 winding up petition for the First Company, because these events were considered to relate to that Company, and that was the reason why they were not included in the 7 October 2021 affidavit or otherwise in the presentation to the Judge at the 8 October 2021 hearing. Therefore, he argued that these documents and events were "background noise" relating to the First Company.

72. I also note that Mr Kumar does state in his affidavit, under the heading of Mr Sharma's lack of engagement, that since July 2021, Mr Sharma had taken a stance of ignoring his complaints. Mr Kumar goes on to explain that (i) in relation to his dispute with Mr Sharma in relation to the First Company, he sent Mr Sharma a number of e-mails asking him to restore Mr Kumar's access to the First Company's delivery apps and to give Mr Kumar control of the First Company's bank account, (ii) these e-mails were for the most part ignored, and (iii) responses that he did get, such as an e-mail from Mr Sharma on 10 July 2021, ignored his complaints and consisted of Mr Sharma instead making complaints against him.

73. The exhibited documents referred to in that paragraph of Mr Kumar's affidavit include a number of e-mails from 2 to 10 July 2021, and the 10 July 2021 e-mail referred to in (iii) above which states that Mr Kumar was in breach of his agreement on 3 July 2021 to ceasing to trade as Saka Maka after 8 July 2021. Therefore, Mr Kumar did mention, albeit in a different part of the affidavit to the one dealing with his reaction to discovering the purported transfer of his Second Company shares, that he had sent Mr Sharma a number of e-mails in relation to the First Company. That is not sufficient to discharge the duty of fair presentation, because they were not drawn to the attention of Michael Green J, but as I shall come onto, it does go to whether any failing was innocent or not.

74. In my judgment, the approach by Mr Kumar to Mr Gaikwad and the 30 June 2021 meeting should have been put before Michael Green J:

    (1) The approach by Mr Kumar to Mr Gaikwad and the 30 June 2021 meeting was a juncture at which Mr Kumar could have raised concerns over the transfer of his shares in the Second Company if he had such concerns.

    (2) Therefore, these details were capable of affecting the Court's perception of the credibility of Mr Kumar's explanation in his affidavit that he did not complain sooner because he thought that Mr Sharma had successfully cheated him out of the shares. In particular, approaching a solicitor like Mr Gaikwad was an opportunity for Mr Kumar to seek legal advice on how to deal with his concern.

75. It should also have been mentioned that the meeting led to the e-mail dialogue that followed over the next week or so, that Mr Kumar did not in those e-mails before 9 July complain about the transfer of the shares in the Second Company, and that this dialogue concerned in part separating Mr Kumar from the Saka Maka name by bringing to an end his ability to run the Brockley Road restaurant under that name.

76. However, while I do consider that those facts were material, I consider that the failure to mention them was at the least serious end of the spectrum:

    (1) Mr Kumar flagged up in his affidavit, which was pre-read by the Judge that there was a gap between the 27 May 2021 e-mail and his 8 July 2021 e-mail making clear that the transfer had occurred without his permission.

    (2) Mr Kumar gave an explanation for the delay.

(3) More broadly, it was clear that there was a significant period between Mr Kumar finding out about the purported transfer of shares in the Second Company and seeking the freezing orders. Consistent with that, the transcript of the 8 October 2021 hearing shows that the Judge was aware of this, and the note of judgment states that while Mr Kumar discovered the transfer in May 2021, "[h]owever, at the time he didn't do anything abut this".

(4) The 30 June 2021 meeting and the e-mails that follow do relate principally to the First Company, rather than the Second Company. Further, the focus of Mr Sharma's 20 September 2021 e-mail response to Raffles Haig's 13 September 2021 letter before action contended that the Second Company shares had been transferred with Mr Kumar's verbal agreement at the time, rather than focusing on the 30 June 2021 meeting and dialogue after it to make the argument.

(5) The decision not to put this before the Judge at the 8 October 2021 hearing was- as Mr Sharafi put to me orally- plainly an innocent one, because the meeting and e-mails were pleaded in the 10 September 2021 winding up petition in respect of the First Company, and a number of the e-mails were exhibited to Mr Kumar's affidavit. Consistent with this, Mr Kumar did state elsewhere in his affidavit, namely in the section on lack of engagement from Mr Sharma, that he had been sending Mr Sharma multiple e-mails in July 2021 about the First Company.

(6) Far from being a case of serial non-disclosure, serious efforts were made in both Mr Kumar's affidavit, in the skeleton and at the hearing to draw the Court's attention to matters and arguments which might run contrary to Mr Kumar's application. Mr Kumar included within his 7 October 2021 affidavit five items of full and frank disclosure, Mr Sharafi had specific sections of his skeleton for the 8 October 2021 hearing on the topic and made specific full and frank disclosure to the Judge at that hearing. Mr Sharafi asked at the 8 October 2021 hearing what the Judge had pre-read, and the Judge confirmed that he had read among things Mr Sharafi's skeleton and Mr Kumar's affidavit.

77. I have taken into account the submissions made to me on the consequences of failure to comply with the duty of fair presentation, including the extracts of Gee relied on and the statement at [9-022] of Gee that the jurisdiction to renew or re-grant the order should be exercised sparingly, by reference to the decision in *Arena Corp Ltd v Schroeder* [2003] EWHC 1089 (Ch), in which it was also held that the general rule should be to discharge and refuse to renew the order. For the reasons set out above, in my judgment, this was not an omission which would justify refusing to continue the freezing order.

*Lack of engagement*

78. An allied point that Mr Walters raised orally was that the suggestion by Mr Kumar that there had been a lack of engagement by Mr Sharma with Mr Kumar and his solicitors was incorrect, and- taking into account the 30 June 2021

meeting and the subsequent e-mails – should not have been made because there had been a dialogue between Mr Sharma and Mr Kumar.

79. However, Mr Kumar did explain in his 7 October 2021 affidavit that he sent multiple e-mails to Mr Sharma in July 2021 making requests in relation to the First Company and that while Mr Sharma mostly ignored them, responses he did get consisted of Mr Sharma making complaints against him. He then goes on in subsequent paragraphs to deal with the communications with Mr Sharma in late July, August and September 2021.

80. As set out above, I consider that the 30 June 2021 meeting should have been mentioned and that this led to e-mails over the week after that. In relation to the allegation of lack of engagement, in my judgment it should have been mentioned that the e-mails mentioned in July were in a chain that started with the 30 June 2021 meeting that Mr Sharma attended and Mr Sharma's e-mail of 2 July 2021 following it, so that to that extent at least Mr Sharma had been engaging. However, as in relation to head (v) above, I consider that the failure to mention them was at the least serious end of the spectrum:

    (1) The focus of the section is Mr Sharma ignoring Mr Kumar's complaints.

    (2) The question of whether the e-mails referred to in the paragraph were ignored or not responded to is not affected by the fact that there was an earlier meeting on 30 June 2021 before those e-mails.

    (3) Similarly, the question of whether Mr Sharma engaged with Mr Kumar in August and September, as dealt with later in that section of Mr Kumar's affidavit, is not affected by either of those things.

    (4) Any non-disclosure was plainly innocent for the reasons set out in relation to head (v) above and far from being an example of serial breaches of the duty of fair presentation, serious efforts were made to comply with that duty.

81. Therefore, I do not consider that this justifies refusing to continue the freezing orders.

*(vi) Mr Kumar's suggestion in his 7 October 2021 affidavit that Mr Sharma had made him an offer for Mr Kumar to be able to continue as a 50% shareholder of the Second Company if he paid £52,000*

82. Mr Walters submitted that Mr Kumar's statement in his 7 October 2021 affidavit that Mr Sharma had made him an "offer to continue as a 50% shareholder" in the Second Company for £52,000 on 3 March 2021 was not a fair presentation of the position, and this was relied on by Michael Green J in determining that the maximum amount of the freezing order should be £60,000. Mr Walters based his argument on the terms of the 3 March 2021 WhatsApp, which, he contended, stated that Mr Kumar could buy Mr Sharma's 50% shareholding in the *First Company* for £52,000. He states that this comprised £32,000 for leaving Saka Maka 1 and £20,000 for the goodwill that he had generated in Saka Maka 1.

83. Mr Kumar's evidence was before Michael Green J, and remains, that he understood this to be an offer that he could remain as 50% shareholder of the Second Company for £52,000.

84. The 3 March 2021 WhatsApp from Mr Sharma containing the breakdown of the offer states:

> "*32000 leaving Brockley*
>
> *And 20000 I set up this business*"

A number of the WhatsApps in the 3 March 2021 chain are not written in English, but no evidence of the translation was before me. There is reference to a 60/40 split in the earlier WhatsApps and 50/50 in the later ones.

85. Given that a freezing order application must not be allowed to turn into a mini-trial of the facts, generally speaking it is not appropriate to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, because the appropriate findings on such factual matters are reserved for the trial itself: *Kazakhstan Kagazy plc v Arip* at [36].

86. Therefore, here, it is not appropriate for me to make findings as to how this offer was taken by Mr Kumar unless they are truly so plain that they can be readily and summarily established. In my judgment, it is not so plain as to make it appropriate for me to make these findings. The reference to "leaving Brockley" in the 3 March 2021 WhatsApp relied on by Mr Sharma does read in isolation as if the figure is to compensate Mr Sharma for no longer having a role in relation to the Saka Maka 1 *restaurant.* However, (i) Mr Kumar noted in his evidence before Michael Green J that the offer was not based directly on the value of the Second Company, and this was put to the Judge, and (ii) Mr Sharafi took me to the chain of offers set out in the Winding Up Petition that Mr Kumar contends preceded the 3 March 2021 WhatsApp and bear on its meaning (albeit this passage in the petition refers to 40% rather than 50%, I assume because of the reference at the start of the 3 March WhatsApp chain to 60/40).

87. Therefore, in my judgment, the question is whether it should have been put to the Judge that *Mr Sharma might contend* the offer was an offer to buy Mr Sharma's shares in the First Company. I do not consider that it was necessary to put this to Michael Green J:

(1) It was not suggested to me that Mr Sharma raised this contention himself or through his solicitors in the correspondence in the lead up to the without notice application;

(2) The limitations of the offer as an indication of the value of the Second Company were put to Michael Green J, including that the £32,000 was stated to be for Mr Sharma leaving Saka Maka 1;

(3) The Judge considered that at least part of the offer related to the First Company, and that it was not a reflection of the value of the Second Company.

88. Therefore, although the meaning of the 3 March 2021 WhatsApp is far from clear, in my judgment there was not a failure of fair presentation in this respect.

89. Even if I had reached the opposite conclusion, I would not have discharged the order, for the following reasons: (i) Mr Kumar expressly noted in his 7 October 2021 affidavit by way of full and frank disclosure how the sum was calculated and that it was not based directly on the value of the Second Company; (ii) the skeleton expressly flagged this fact up and Mr Sharafi took the Judge to this in his oral presentation, so any failure was an innocent one; and (iii) the Judge was clear that the £52,000 was not a reflection of the value of the Second Company, and at least part of it was to do with the First Company.

90. However, I will return to the £52,000 figure later in the context of the quantum of any freezing order, because in my judgment very little weight indeed can be placed on it as a guide to the valuation of the Second Company.

*(vii) Mr Kumar did not disclose in his 7 October 2021 affidavit the extent of his unauthorised filings at Companies House on 29 August 2021*

91. I do not consider that there is anything in this point. Mr Kumar stated in his affidavit that on 29 August, he made a *number* of filings at Companies House, including one changing Saka Maka's registered office to the premises of Saka Maka 1, that he understands that it was wrong for him to do so and that he undid it by making new filings on 8 September 2021. Therefore, he explained that the filings were not limited to the change of registered office. Moreover, of the two other filings:

(1) One was to record that he was a 50% shareholder in the Second Company, which coheres with Mr Kumar's case about what shareholding he was meant to have. Therefore, I can understand why it was not thought important to mention it, in contrast to the change of registered office.

(2) The other was to register Mr Kumar as a person with significant control in place of Mr Sharma. Mr Walters submits that if Mr Sharma remained a 50% shareholder, he should not have been removed as a person with significant control because such persons normally have less than a 25% stake. However, even if that is right, it appears that the change was linked to the change of shareholding, and therefore again I can understand why it was thought less important to mention it specifically, for the reason in (1) above.

*(viii) Mr Kumar failed to disclose in his 7 October 2021 affidavit that there was an agreement that Mr Kumar would not be operating under the First Company from 9 July 2021 pursuant to the 30 June 2021 dissolution agreement, and that Mr Kumar had been trading under his own company, Chaska Maska Limited, using the Deliveroo and Just Eat platforms from 12 July 2021 at the latest*

92. I have dealt under head (v) above with whether the 30 June 2021 meeting and e-mails that followed over the next week should have been mentioned. I do not consider that the detail of the dialogue relating to the First Company was material. Rather the point was that this was a juncture at which Mr Kumar could have spoken up about his concerns over the purported transfer of his shareholding in the Second Company, and that instead the focus of the dialogue with Mr Sharma was on the First Company. Therefore, I do not consider that this is a separate head of non-disclosure.

*(ix) While acknowledging that Mr Sharma was repaying the £50,000 that had been borrowed from the First Company, there was a failure to refer to the fact that this was part of the agreement that Mr Sharma should own 100% of the Second Company*

93. As Mr Kumar does not accept that Mr Sharma should own 100% of the Second Company, there was not a failure of full and frank disclosure in failing to mention that the agreement to repay the £50,000 was part of an agreement that Mr Sharma should own 100% of the Second Company. There was no suggestion before me that this argument was raised by Mr Sharma in the correspondence before the without notice application was made.

*(x) The equivalence drawn by Mr Kumar in his 7 October 2021 affidavit between there being no reason for him to give up his shareholding in the Second Company for free and Mr Sharma not being willing to do the same in respect of the First Company is a false one, because Mr Sharma invested his money to buy his share in Saka Maka 1 whereas Mr Kumar did not invest any capital, time or labour in it*

94. I have dealt above in the section on good arguable case with Mr Sharma's contention that Mr Kumar did not invest any capital, time or labour in the Second Company. This is denied by Mr Kumar on the grounds that I have set out earlier and therefore his refusal to accept this cannot amount to a failure of full and frank disclosure.

*(xi) When Mr Kumar first accused Mr Sharma of dishonesty*

95. While not mentioned in Mr Walters' skeleton or orally before me, Mr Sharma's 2 February 2022 affidavit suggests that Mr Sharafi misled the Court by submitting at the 8 October 2021 hearing that "[w]e have been accusing him of dishonesty since March and we could well have brought a freezing order on that basis". The passage complained of by Mr Sharma arose in response to a suggestion from the Judge that there might be some tactical manoeuvring going on, to which Counsel responded that "I would not accept that, my Lord, simply because, as you correctly noted, we have been accusing him of dishonesty since March and we could well have brought a freezing order on that basis…".

96. The passage that Counsel was referring back to appears to me to be the passage where the Judge is referring to Mr Kumar's case that the dishonest purported transfer of his shares *occurred* in March, namely "[y]ou also rely on dishonesty, but that is dishonesty in relation to the original transfer back in March which you had known about for quite some time." Assuming it is correctly recorded in the transcript, what Counsel then said was factually inaccurate. However, given that his skeleton made clear that Mr Kumar did not discover the purported

March transfer until May, this appears to be an innocent slip in oral submissions on which in my judgment nothing turns. While unfortunate, this had no impact on the Judge's reasoning, as he made clear in his judgment, according to the note of it, that Mr Kumar only discovered the purported March 2021 transfer in May- the date which Counsel had included in his skeleton- and that Mr Kumar not do anything about it at the time. Therefore, in my judgment no consequences should flow from this.

**Real risk that a future judgment would not be met because of unjustified dissipation of assets**

97. As Mr Walters submitted, the relevant principles were helpfully summarised by Popplewell J in *Fundo Soberano de Angelo* at paragraph 86. These principles include, using Popplewell J's numbering, that (1) "[t]he claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets"; (2) "[t]he risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient"; (4) "[i]t is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty"; and (6) "What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate…".

98. This summary was adopted by the Court of Appeal in *Lakatamia Shipping Company Limited v Toshiko Morimoto* [2019] EWCA Civ 2203 at paragraph 34, with the gloss that the words "are likely to be" in sub-paragraph (4) should be replaced by with "may be". Therefore, I adopt the principles with that gloss.

99. Mr Walters relied particularly on aspects (1), (2) and (4) as highlighting the hurdles that Mr Kumar's case had to surmount. In particular, he emphasised that there had to be solid evidence of a real risk that a future judgment would not be met because of the unjustified dissipation of assets, and that the test is an objective one of assessment of the risk that a judgment may not be satisfied because of a risk of an unjustified dealing with assets. I accept those submissions.

100. Mr Sharafi submitted that the following four factors gave rise to a real risk of that a judgment would not be satisfied because of unjustified dissipation of assets by Mr Sharma:

(1) his attempt on 23 September 2021 to make Mrs Sharma a 50% shareholder of the Second Company;

(2) the transfer by Mr Sharma, at some point between 21 or 22 September 2021 and 14 October 2021, of at least £11,200 out of his personal bank account;

(3) Mr Sharma having made his wife sole shareholder of a new company, Sharma & Nitin Limited; and

(4) Mr Sharma's dishonesty, for which purpose Mr Sharafi relied on the points that he had made in relation to the purported transfer of Mr Kumar's 50% shareholding in the Second Company to Mr Sharma in March 2021.

101. Mr Kumar relied on factors (1) and (4) in his without notice application of 7 October 2021. Factor (2) comes from the asset disclosure given by Mr Sharma on 14 October 2021 pursuant to paragraph 10 of the 8 October 2021 order of Michael Green J and factor (3) was discovered by Mr Kumar at some point between 22 January 2022 and Mr Sabapathy's affidavit of 7 February 2022. Mr Sharafi contended that some of the attempts at asset dissipation here might appear crude and unlikely to be effective but that does not detract from them constituting attempts to put assets beyond reach or further from the reach of Mr Kumar. He contended that I should bear in mind that we are not dealing with actors with many millions of pounds at their disposal and a network of offshore structures into which they might seek to decant their assets if they wish to seek to put them beyond reach. I accept that I should take into account this last point.

102. In my judgment, there is a real risk that a judgment would not be satisfied because of unjustified dissipation of assets by Mr Sharma.

103. Starting with the purported transfer of 50% of the Second Company shares to Mrs Sharma and the transfer of sums out of Mr Sharma's personal account, these need to be placed in chronological context.

104. Having taken legal advice, Mr Kumar's solicitors Raffles Haig had written to Mr Sharma on 21 July 2021, stating among other things that they had been informed of a series of actions that constituted serious breaches of Mr Sharma's duties as directors and shareholder of both the First and Second Companies, and would be writing separately on then compensation due to Mr Kumar for the losses that he had suffered by Mr Sharma's breaches.

105. Following exchanges between Raffles Haig, and Parker Arrenberg solicitors- the lawyers then instructed by Mr Sharma- Raffles Haig wrote on 9 August 2021. The letter principally dealt with the First Company but stated at the end that they would also be applying to rectify the shareholders' register in respect of the Second Company to reflect Mr Kumar's 50% shareholding, contending that Mr Sharma had dishonestly changed the register in an attempt to appropriate these shares from Mr Kumar without compensation. The letter also suggested that Mr Sharma had attempted the previous week to appoint himself as director of the First Company by changing the register, and stated that an injunction would be sought to prevent Mr Sharma making further changes in

relation to the First Company at Companies House unless Mr Sharma gave an undertaking not to do so.

106. Mr Sharma's solicitors wrote the following day, 10 August 2021, to state that they had ceased to act for him, and Mr Kumar states that- on asking Mr Sharma by e-mail later that day for details of any new solicitors instructed by Mr Sharma- Raffles Haig received no response to that e-mail.

107. On 13 September 2021, Raffles Haig sent Mr Sharma a letter before action, stating among other things that Mr Sharma had not responded to the 9 and 10 August 2021 communications, it was evident that he was unwilling to engage with Mr Kumar or take steps to rectify his wrongdoing, and should Mr Sharma not respond to this letter, Mr Kumar would be forced to take legal proceedings against Mr Sharma as set out in the letter.

108. The letter then went on to inform Mr Sharma that an application had been made to the Court to wind up the First Company on just and equitable grounds and to recover Mr Kumar's legal costs from Mr Sharma. A copy of the winding up petition was enclosed. The letter then explained that Mr Sharma had dishonestly registered himself as sole shareholder of the Second Company, and therefore Mr Kumar intended to present an unfair prejudice petition to the Court seeking that Mr Sharma buy out Mr Kumar's 50% shareholding in the Second Company at fair value, and that Mr Kumar would seek to recover his legal costs from Mr Sharma.

109. Mr Sharma responded in some detail on 20 September 2021 by e-mail to Raffles Haig and stated that his solicitor would be in contact shortly. The final substantive paragraph of the e-mail stated in its last sentence:

> "Your client was transferred £25000 from company account (as mentioned dividend 2020-2021) to his personal account at 5/7/2021 in acknowledgment of previous Solicitior [sic] but still you insisted that you have no faith in me and accountant."

110. On 21 and 22 September 2021, Mr Sharma caused £25,000 to be transferred by three payments from the First Company's account to himself, by entries described on the bank statement as "REFERENCE DIVIDEND 2020-2021".

111. On 23 September 2021, 3 days after Raffles Haig's 20 September 2021 letter, Mr Sharma e-mailed Raffles Haig, stating among other things that:

> "Your client has been paid the dividend for the year 2020-2021 on 5/7/2021 which is £25,000.
>
> I have taken my share of dividend just letting you know…"

112. No objection was taken before me on Mr Kumar's behalf to Mr Sharma's entitlement to pay himself the £25,000. Mr Kumar's argument related to the onward transmission of money by Mr Sharma and the timing of the payments to and from Mr Sharma.

113. The same day, 23 September, a confirmation statement was filed at Companies House showing Mr and Mrs Sharma each holding 50% of the shares of the Second Company. Mr Kumar states that his lawyers discovered this the next day.

114. Paragraph 10 of the 8 October 2021 order required Mr Sharma swear and serve on Mr Kumar's solicitors within 7 working days an affidavit setting out all his assets worldwide exceeding £1,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

115. Mr Sharma listed the following assets in his 14 October 2021 affidavit:

> "4.1 Matrimonial Home, property known as 11 Ravensworth Road, London, SE9 4LN held in Joint name with my wife Mrs Rashmi Sharma.
>
> 4.2 My personal current account with Barclays Bank plc, Account No; 40677663, Sort Code; 20-25-36 and the available balance of £10,305.77 as on 14th October 2021.
>
> 4.3. My HSBC current account held jointly with my wife Mrs Rashmi Sharma, Account No: 51445138, Sort Code: 40-42-27 and the available balance of £3,496.08 as on 14th October 2021.
>
> 4.4. I also have an Indian bank account held in joint name with my wife, but the account is not operative, and the available balance is less than £50 as on date.
>
> 4.5. Business account with HSBC Bank held in my company name Saka Maka 2 Ltd, Account No: 61731084, sort code 40-02-05 with an available balance of £9,535.78 as on 14th October 2021
>
> 4.6 Business Account with Santander Bank held in my company name Sharma & Sons Ltd, Account No: 44850184, sort code 09-01-29 with an available balance of £39,802 as on 15th October 2021"

116. Mr Sharma states in his 2 February 2022 affidavit, among other things, as follows:

(1) "I transferred the shares to my wife, because I owned 100% shares in the Second Company. I was free to transfer my shares to whoever I wanted."

(2) A transfer of shares cannot constitute dissipation of assets because they represent a form of asset class that has not been realised yet: there might be value in them but there equally might not be.

(3) The transfer of the £25,000 to him occurred prior to any freezing order.

(4) "I transferred some funds to my wife's Individual Saving Account, for example and spent the rest on my bills and household expenses."

(5) He had not transferred funds from his account after the freezing order had been made.

(6) "I dealt with the funds in my personal accounts as I usually do from one month to another."

In respect of point (5), it was not contended before me by Mr Kumar that the payment was made after the freezing order had been made.

117. In my judgment, the attempted transfer of 50% of the shares in the Second Company and the timing of the money transfers from Mr Sharma's account in the period 21 September to 8 October 2022 constitute, taken together with the purported transfer of 50% of the shares in March 2021, solid evidence that there is a real risk that a future judgment would not be met because of an unjustified dissipation of assets. My reasons are as follows:

(1) The 13 September 2021 letter from Raffles Haig was a significant escalation of the previous dialogue, as it enclosed a winding up petition that had been issued in respect of the First Company and stated that Mr Kumar intended to present an unfair prejudice petition in relation to the Second Company. Therefore, Mr Sharma would have known that Court proceedings were likely to follow in respect of 50% of the Second Company's shares.

(2) Mr Sharma's 20 September 2021 e-mail shows that he had considered the 13 September 2021 letter.

(3) Further, there had been reference in the 9 August 2021 letter to the possibility of Mr Kumar seeking an injunction against Mr Sharma to stop Mr Sharma making any further changes at Companies House in respect of the First Company.

(4) The purported transfer of the shares to Mrs Sharma occurred 3 days after Mr Sharma's 20 September e-mail and 10 days after the letter before action.

(5) No proper explanation is given by Mr Sharma in his 2 February 2022 affidavit as to why he tried to transfer 50% of the Second Company shares to his wife on 23 September 2021. His explanation that he did so because he owned 100% of the shares and was able to transfer them to who he wanted, does not explain why he chose to transfer them to his wife or why he chose to do so on 23 September. The allegation made by Mr Kumar as to the purpose of this transfer was a key element of the original application for the freezing order, and in my judgment the failure of Mr Sharma to put forward a positive account in his affidavit of why he made it is significant.

(6) Therefore, in my judgment this appears to be a crude attempt to make Mr Kumar's claim for buy-out of 50% of the Second Company shares and/or its enforcement more difficult, or to put the assets out of his name before an injunction was sought by Mr Kumar to prevent any attempt to transfer the shares further in the Second Company. This is strengthened by the absence of proper explanation offered in Mr Sharma's 2 February 2022 affidavit.

(7) In relation to the onward transfer of sums by Mr Sharma at some point between 21 September and 8 October 2021, Mr Sharma does not suggest that his personal accounts were overdrawn at any point over that period. Given that his personal accounts totalled around £13,800 at 14 October 2021, Mr Sharafi submits, and I accept, that it can be inferred that at least £11,200 of the £25,000 was transferred from Mr Sharma's personal accounts over that period. Mr Walters did not dispute this. Mr Sharma's 2 February 2022 affidavit, in stating- after mentioning receipt of the £25,000- that "I transferred some funds to my wife's Individual Savings Account, for example and spent the rest on my bills and householder expenses", taken literally might suggest that £25,000 had been transferred out by Mr Sharma. However, I do not need to go that far for present purposes. In my judgment, the transfer of £11,200 out of his personal account over the period 21 September to 8 October 2021 is itself evidence, taken together with the other factors that Mr Sharafi points to, of a real risk of dissipation:

(a) The timing of Mr Sharma's transfer of a significant proportion of the £25,000 out of his personal accounts is around the same time as seeking to put 50% of the shares in the Second Company in his wife's name, and shortly after the 13 September 2021 letter from Raffles Haig and Mr Sharma's 20 September response;

(b) It is a reasonable inference that most of the £11,200 was transferred to Mrs Sharma's savings account;

(c) Therefore, while is true that a balance of £13,800 was kept in the personal accounts, there was a not insignificant movement of funds by Mr Sharma to his wife;

(d) While Mr Sharma states in his affidavit that he dealt with the funds in his personal accounts as he usually did from one month to another, he has not put forward any evidence of previous payments into his wife's account, as he could have easily done to show such a pattern;

(e) Therefore, it is a reasonable inference that these transfers were at least in part motivated by the prospect of Mr Kumar's then imminent unfair prejudice claim.

(8) More generally, this appears to be a bitter dispute between two business partners who have fallen out. Given what appears to me to be an attempt in September to put assets beyond reach following the intimation of legal proceedings in relation to the Second Company and launching of proceedings in respect of the First Company, in my judgment there is a real risk that these attempts would be stepped up now that proceedings are on foot and the prospect of a share buyout order is a real one. Whether or not any of the previous steps have been effective, evidence suggestive of previous attempts to put assets beyond reach is solid evidence that there is a real risk that attempts could be made in future and cause a future judgment not to be met.

118. I have taken into account in reaching the above conclusions the factors urged on me by Mr Walters and by Mr Sharma in his 2 February 2022 affidavit, including (i) that lodging at Companies House a document showing that Mrs Sharma was 50% shareholder of the Second Company would be discoverable by Mr Kumar's solicitors, as demonstrated by the fact that it was so discovered the next day; (ii) the fact that Mr Sharma mentioned in his 23 September 2021 e-mail that he had taken the £25,000 dividend, and that no objection is taken to him having transferred that to his personal account; (iii) that Mr Sharma contended, and Mr Kumar did not resist this, that Mr Kumar had received £25,000 previously by way of what was intended to be a dividend; (iv) Mr Sharma's statement that he dealt with the funds in his personal accounts as he usually did from one month to another; and (v) that Mrs Sharma is a respondent to the Unfair Prejudice Petition. In relation to (i), the fact that the act was discoverable after it was done is not in my judgment decisive. In relation to (iii) specifically, I do not consider that the fact that £25,000 may have been paid by Mr Sharma prior to Mr Kumar instructing Raffles Haig is decisive, as what is to my mind most relevant here is how Mr Sharma has acted after Mr Kumar has taken steps towards issuing the Unfair Prejudice Petition. In relation to (v), it is far from clear that an order would be made against Mrs Sharma, and in any event the shares could be purportedly transferred away.

119. I have also taken into account that one of Mr Sharma's listed assets is the matrimonial home owned jointly with his wife. In breach of paragraph 10 of the 8 October 2021 order, Mr Sharma's affidavit of assets did not include a value for this asset, and there was no other evidence in the papers before me of the equity in the house. However, to the extent that there is such equity, my reasoning above applies to this asset too.

120. The next factor relied on by Mr Sharafi related to a company called Sharma & Nitin Limited. Nitin is Mr Sharma's first name. Mr Kumar and/or his representatives had discovered at some point between 22 January 2022 and 7 February 2022, when Ms Sabapathy swore her affidavit, that on 22 January 2022 a confirmation statement had been filed at Companies House stating that all shares in the company were now held by Mrs Sharma. The shares had initially been held on its incorporation on 18 January 2021 by Mr Sharma. The nature of the company's business, according to the company overview on Companies House, is "[u]nlicensed restaurants and cafes".

121. In his 7 February 2022 affidavit, Mr Sabapathy mentioned the discovery of the 22 January 2022 filing, and stated that it was matter of serious concern, because it was, he stated, yet another example of Mr Sharma placing assets into his wife's name, this time while subject to a freezing order.

122. Mr Sharma's solicitor e-mailed Raffles Haig later on 7 February, stating in relation to Sharma & Nitin Limited that:

> "…your client appears desperate that he has not been able to prove any dissipation of assets on the part of our client. Your insinuation that transferring shares in Sharma & Nitin Ltd into our client wife's name is an example of dissipation of assets is completely misplaced. Sharma & Nitin Ltd is a shell company. It has not traded at all. Its shares are worth nothing

> whatsoever. Our client registered this company on 18 January 2021 with the aim of expanding his business with his wife. Their plans were delayed because of the ongoing effects of the pandemic. It was always intended that his wife would be the sole shareholder of the company, which is why he transferred his shares to his wife."

123. There is, however, no explanation of why a company owning a business to be run with his wife and bearing Mr Sharma's name would be placed in his wife's sole name, rather than for example in joint names. Mr Sharafi contends that the most likely explanation is that Mr Sharma has placed the company in his wife's name so that any profits that it generates will fall outside the freezing order.

124. In my judgment, I cannot reach that conclusion on the material before me. There is cause for some suspicion, particularly given my conclusion on the other three factors, that this was the aim. In particular, taken together with the attempted transfer in September 2021, it is the second transfer of shares by Mr Sharma to his wife. However, I would not go further than concluding that it gives rise to some suspicion. It is not solid evidence of a real risk of dissipation.

125. Therefore, I rest my conclusion on the other factors. I consider that those factors are on their own sufficient to conclude that there is a real risk of dissipation here.

126. The final factor relied on by Mr Kumar was what he contends was the dishonest purported transfer of his 50% shareholding in the Second Company in March 2021. As set out above, in my judgment Mr Kumar has at least a good arguable case that the purported transfer of his 50% shareholding in the Second Company to Mr Sharma was dishonest, given the terms of the 11 March 2021 e-mail and Mr Sharma's account of the 10 March 2021 agreement, and given also Mr Sharma's subsequent explanation of the 11 March 2021 e-mail.

127. I take careful account of the guidance in principle (4) of paragraph 86 of *Fundo Soberano* that it is not enough merely to establish a good arguable case of dishonesty. One must scrutinise the evidence to see whether the dishonesty points to the conclusion that assets may be dissipated and take into account as part of that properly arguable responses to the allegations of dishonesty. Here, the dishonesty would relate to the transfer of an asset away from Mr Kumar to Mr Sharma. Therefore, I consider that this dishonesty is a relevant factor to take into account in assessing the risk of dissipation. In doing so, I factor in the following:

(1) Mr Sharma's counter-arguments on whether the purported transfer of the shares was dishonest, including but not limited to the agreement reached in December 2020, his contentions as the agreement reached on 10 March 2021 and his arguments on informing Mr Kumar of the purported transfer at the time on 17 March 2021.

(2) Transferring shares to yourself is not itself an attempt at dissipating assets. On the contrary, it is putting assets in your own name rather than moving them away from one's ownership. I took Mr Sharafi's point to be that the

incident showed that Mr Sharma was prepared to act dishonestly in transferring assets.

(3) In any case, the purported transfer took place nearly a year ago, and at a time before Mr Sharma had legal representatives acting for him from whom he can take advice, and before Court proceedings were on foot against him in which his conduct will be carefully scrutinised.

(4) Further, Mr Kumar did not, even after taking legal advice and raising claims in relation to his 50% shareholding in the Second Company in August 2021, initially seek a freezing order. He contends that it was when he discovered on or around 24 September 2021 that an attempt had been made to put 50% of the shares in the Second Company in *Mrs* Sharma's name that he considered it necessary to take steps to seek a freezing order.

## Just and convenient

128. It was common ground between the parties that given that it must be "just and convenient" within section 37(1) of the Senior Court Act 1981 for relief to be granted, the Court should bear in mind that there is a discretion to be exercised in all the circumstances of the case. This includes, as explained in Gee at paragraph 12-051, attention to the degree of intrusion which would be imposed by the particular relief granted. For example, if the freezing order might itself destroy the defendant's business, whether by causing the withdrawing of a line of credit or otherwise, it may, depending on the facts, be inappropriate to grant a freezing order even though the claimant shows a good arguable case and a risk that without the injunction judgment may go unsatisfied.

129. As the Court of Appeal held in *McDonald v Graham* [1994] RPC 407 at 438, there is no automatic requirement for the insertion of a maximum in a freezing order in all cases. That flows from the test being whether it is just and convenient to grant the freezing order. In most cases, as the Court of Appeal explained, it will be right to insert a maximum amount in order to avoid any unjustified interference with the defendant's freedom to use his own assets.

130. Given that the question of whether to insert a maximum amount in the order, and if so at what level, turns on what is just and convenient, I deal with these questions in this section of the judgment.

131. In *McDonald*, the Court went on to provide the following, more specific, guidance: (1) the mere inability of the claimant to calculate the extent of damages will not necessarily justify a decision not to insert a maximum amount in a freezing order; and (2) it must be rare for the nature of the claimant's business to be such that a realistic maximum could not be proposed which would effectively protect the plaintiff.

132. Mr Walters submitted that the following factors led to the conclusion that it would not be just or convenient to grant the freezing order:

(1) the weakness of the unfair prejudice claim and the argument on real risk of dissipation;

(2) the low value of the claim;

(3) Mr Sharma had been unable to take from his bank accounts the £1,000 a week living expenses or reasonable legal expenses that he was permitted to draw under the freezing order, because a complete internal freeze had been placed by the banks on his accounts, despite letters being written on Mr Kumar's behalf making clear that the £1,000 withdrawals were permitted;

(4) a block was placed on the business account for the Second Company, held at HSBC, on or around 4 February 2022, and this, Mr Walters suggested on instructions, is because of the legal proceedings; and

(5) the final hearing of the unfair prejudice claim is some way off, because the case management conference is scheduled for 16 May 2022, so the freezing order will remain in place for a significant period of time if it continues until trial.

133. His fallback submission was that the freezing order should be capped at £10,000 on the basis that Mr Sharma estimated the value of the Second Company to be around £20,000.

134. Mr Sharafi contended that the maximum amount should continue to be at £60,000.

135. Given the difficulties being experienced by Mr Sharma in accessing his personal accounts, I asked Mr Walters whether there was any evidence before me on what the value of the equity in Mr Sharma's house is, to ascertain whether that would on its own exceed the maximum amount, but there was not.

136. I also received written and oral submissions on the value of the Second Company. By way of background, Michael Green J indicated during the 8 October 2021 hearing that he was only willing at that stage to provide a cap of £60,000, as broadly reflecting the sum of £52,000 and a £10,000 allowance for legal costs. Therefore Mr Sharafi reduced the £150,000 that he originally sought to a £60,000 cap. The Judge indicated that if Mr Kumar put forward in due course some more evidence to justify an increase to that amount, it could be considered then. Mr Kumar has not put in any further evidence as to the value of the Second Company, because he does not have access to its detailed financial position.

137. Mr Sharma has put in three pieces of evidence as to the valuation of the Second Company. No permission was sought under Part 35 of the Civil Procedure Rules to put in such evidence, but Mr Kumar did not object to such evidence being admitted and considered by me, particularly as there was no other valuation evidence before me. Indeed, his solicitors suggested on 21 December 2021 that Mr Kumar put before the Court at the return date an estimate of the value of the Second Company, and Mr Sharafi made submissions about the valuations. Therefore, I considered it appropriate to have regard to the valuation evidence.

138. The first piece of valuation evidence was a 20 January 2022 letter from Mr Aryal, the accountant to the Second Company. He provides a net value for each

of the First and Second Companies based on the values of their assets and liabilities. His calculation is that this produces a net value of £73,453.19 for the First Company but a net value of -£1,475.00 for the Second Company. The letter states that Kanti & Co Ltd does not accept "any responsibility whatsoever" and "any use of wish to make of the information [sic] is therefore entirely your own risk".

139. The second piece of evidence is a 28 January 2022 letter from Abacus Partners, chartered certified accountants and statutory auditors, which states that it provides an independent assessment of the valuation of the Second Company on the basis of accounts compiled and submitted by Kanti & Co Ltd for the year ended 31 July 2021, together with discussions with Mr Sharma. The letter explains that given the trading history was only a year at the time of submission of its last accounts, there were difficulties in conducting an open market valuation, so while not dismissing such an exercise, Abacus Partners would assess the total net asset value of the business.

140. The estimate they arrive at is between -£1,400 and £28,000. The reason for this range is that the £-1,400 was based on the figures in the accounts, but they had identified two potential misclassifications within the accounts, namely:

(1) the detailed unaudited accounts showed an expense described as "equipment expensed" to the value of £9,459 and repair costs to the total value of £13,069, so this could have been equipment or new fittings which had been omitted from the balance sheet in the accounts; and

(2) the submitted accounts do not show any stock, but it was feasible that as a licensed restaurant that was some liquor inventory and other stock at 31 July 2021.

141. They do not place any value on the goodwill of the business, because "it is not long established (incorporated 21/07/20), does not show evidence of acquisitions on its balance sheet, and nor does it obviously hold an identifiable and distinguishable brand or location".

142. The third piece of evidence is a 27 January 2022 letter from Kala Atkinson, chartered certified accountants and registered auditors. They were provided with the balance sheet for the Second Company for the year ended 31 July 2021, a detailed trading and profit account, and some pictures of the restaurant. They considered that:

(1) such small businesses are very difficult to value, and that a valuation could range from simply the net asset valued to one based on a multiple of week's turnover;

(2) if the former approach was used, this would result in a value of approximately £2,000;

(3) if the latter approach was used, then based on the recorded turnover of c.£100,300 for the year ended 31 July 2021, which they state would result in a weekly turnover of around £2,300, and in turn a minimum valuation of

£14,000 and a maximum valuation of £23,000 (there appears to be an error in the move from a £100,300 yearly figure to a £2,300 weekly figure);

(4) having seen the pictures of the restaurant and its kitchen, if placed on the market, it should be priced at £30,000;

(5) for such small businesses, the real valuation is the value that people are prepared to pay given the area, condition, likely turnover, demand and the length of the lease.

143. Finally, Mr Sharma himself states that he considers the value of the Second Company to be £20,000 in his 2 February 2022 affidavit based on the three pieces of valuation evidence that he has seen.

144. In my judgment, the maximum amount should be set at £35,000 for the following reasons:

(1) I place weight on the view of Kala Atkinson, because (i) they deal with valuation methods other than a net valuation basis, (ii) their assessment, which I regard as a realistic one, is that the real valuation is what people are prepared to pay based on the area, condition, likely turnover, demand and length of the lease, and (iii) they saw pictures of the restaurant and kitchen. Their view was that they would place it on the market at £30,000. Mr Aryal does not consider any valuation method other than a net asset value basis, and Abacus only put forward a net asset valuation and do not appear to have been provided with any pictures of the premises.

(2) There are a number of reasons for considering that a higher value that will be placed on the Second Company at trial, and that the present value is already higher. The £14-23,000 figure that Kala Atkinson generated on the basis of weekly turnover was on the basis of accounts for the year ended 31 July 2021, which Kala Atkinson considered produced a weekly turnover figure of £2,300, and this was presumably also factored into their £30,000 figure given their assessment that the real value will turn in part on likely turnover. However:

(i) It is common ground that Saka Maka 2 was only opened in December 2020. Therefore, it had two-thirds of a year trading in the year to 31 July 2021, which would mean that their weekly turnover figures should be scaled up by a factor of around 1.5 on account of that, giving a range based on weekly turnover up to 31 July 2021 of around £21,000-35,000;

(ii) the Deliveroo receipts alone for the 4 month period from 24 May to 26 September 2021 total over £53,000;

(iii) the Deliveroo receipts for the period from 1 August 2021 to 26 September 2021 range from just under £3,000 to over £4,000, which is significantly higher than the range of around £1,500 to £3,200 for the period up to the end of July 2021, suggesting that a valuation based on

weekly turnover up to 31 July 2021 should be increased to take account of this;

(iv) the photos of the restaurant show that it used at least one other delivery app; and

(v) while the effect of Covid-19 restrictions easing will depend on the restaurant in question, the turnover may well improve to some degree now that lockdown as over and the restrictions on the hospitality industry are lifted, because of the increased possibility of in person dining, and the sum included in any share buyout order will only be determined months, and possibly more, into future.

While, as Mr Sharafi submitted, there may be some goodwill that should be attached to the Second Company by virtue of the previous Saka Maka business and it is not clear from their letter whether Abacus was informed of the history of the Saka Maka brand, the existence and value of such goodwill is speculative on the evidence before me. Therefore, I do not place significant weight on this point.

(3) I consider that it is reasonable to factor in an allowance of £10,000 for legal costs as Michael Green J did.

(4) Therefore, in my judgment the just and convenient course is to grant an order that protects a £25,000 claim for Mr Kumar's 50% shareholding, plus an allowance of £10,000 for costs. That offers appropriate protection to Mr Kumar's claim.

(5) As to the HSBC freeze on the Second Company's business account, it is-as Mr Sharafi submitted- not in the interests of Mr Kumar either that the Second Company is harmed through such a freeze. I would expect the two parties and their legal representatives to seek to investigate if the freeze can be lifted, and note that Mr Kumar provided letters previously to make clear to the banks in question that the weekly sum of £1,000 could be drawn without breaching the freezing order. If the freeze can be dealt with, then the order leaves Mr Sharma free to incur expenses in the running of the Second Company. Therefore I do not consider that the problems caused for Saka Maka 2 by the HSBC freeze are sufficient to justify refusing to continue the freezing order.

## Terms of the Order

145. Other than the level of the cap, Mr Sharma took one point on the terms of the draft order. He argued that the joint account with his wife held at HSBC should not be frozen because his wife was not the subject of the freezing order. While the point was not expressly dealt with in submissions before me, Mr Sharma's point was not withdrawn.

146. Mr Sharafi contended that:

(1) The standard order set out in Practice Direction 25A of the Civil Procedure Rules applies to assets that are solely or jointly owned;

(2) The sense in that is to avoid a respondent taking himself outside the scope of a freezing order by putting his assets into the joint names of him and his wife (Gee at paragraph 3-048);

(3) The fact that Mr Sharma has made various transfers to his wife, including part of the £25,000 and the attempt to transfer 50% of the shares in the Second Company to her, makes this a suitable case to use the terms of the standard order in this regard;

(4) Mrs Sharma has her own bank account, which should not be affected by the terms of the freezing order.

In relation to (4), I note that in a short affidavit put in by Mrs Sharma in relation to the continuation of the freezing order in October 2021, Mr Sharma stated among other things that her bank card had been frozen and she was unable to operate her account as usual. However, neither party referred me to that affidavit, and Mr Sharma did not take this point, so I do not have evidence before me of whether that represents the current position or not.

147. With that gloss in relation to point (4), I accept Mr Sharafi's submissions. Mrs Sharma has not made any application for the order to be varied in this regard, for example to cater for expenses of her own or for a particular proportion of the account representing her share to be transferred to an account of her own.

148. The draft order provided with the Application provides for a further round of notification by Mr Sharma of his assets followed by a further affidavit of assets. I did not receive submissions on this. Given that- with one exception- Mr Sharma has already provided such information, I am not minded to order a full further round of such information. However, given that the amount of the equity in the matrimonial home and the size of Mr Sharma's share in it was not dealt with in his affidavit of assets, I am minded to order that the value and details of that asset are provided by an affidavit dealing with this within 7 working days of being served with the order. If either party wishes to make short submissions on the points in this paragraph, they can do so on hand-down. I understand from an e-mail received on 16 March 2022 from Mr Sharafi, copied to Mr Sharma's legal representatives, providing a draft order and corrections, that information has now been provided by Mr Sharma as to the value of the matrimonial home, but not yet by affidavit. I have not been provided with this information.

149. One possibility is that that the further affidavit suggests that there is comfortably sufficient equity in Mr Sharma's interest to cover the maximum amount of the freezing order that I have made. The freezing order contains the standard provision that if the total value free of charges and other securities of Mr Sharma's assets exceeds the maximum amount of the order, Mr Sharma may dispose or deal with those assets so long as the total unencumbered value of his assets still in England and Wales remain above the maximum sum. It would be a matter for Mr Sharma whether to seek to have, whether through further application or otherwise, the freezing order limited to that interest in the house

or seek to agree some alternative arrangement giving comfort that the interest in the house will not be touched. I make that comment given the modest size of the freezing order, coupled with the difficulties that I understand have been encountered by Mr Sharma in using for his living or legal expenses any of the bank accounts currently caught by the freezing order, including the Second Company bank account, in circumstances where both sides stated that they did not wish the value of the Second Company to be harmed.

150. I shall hear submissions on costs and deal with any points that arise on the drafting of the order separately on hand-down of my judgment.