Neutral Citation Number: [2023] EWHC 1 (Comm)

Case No: CL-2021-51

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 06/01/2023

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

4VVV LIMITED AND OTHERS

Claimants

- and –

(1) NICHOLAS SPENCE
(2) DEREK KEWLEY
(3) ANDREW CRUMP
(4) EMERGING PROPERTY INVESTMENTS LIMITED (IN LIQUIDATION)
(5) EMERGING PROPERTY LIMITED
(6) GREEN PARKS HOLDINGS (ILFRACOMBE) LIMITED
(8) GP ILFRACOMBE MANAGEMENT COMPANY LTD
(9) GREEN PARKS (WESTWARD HO!) MANAGEMENT COMPANY LIMITED
(10) ALPHA PROPERTIES (BRADFORD) LIMITED
(11) A1 PROPERTIES (SUNDERLAND) LIMITED **Defendants**

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Daniel Saoul KC, Matthieu Gregoire and **Melody Hadfield** (instructed by **Trowers and Hamlins LLP**) for the **Claimants**
Matthew Collings KC (instructed by **Simon Burn Solicitors**) for the **First Defendant**
Simon Johnson and **Mairi Innes (instructed by Seddons Law LLP) for the Third Defendant**

Hearing dates: 11,12 and 13 October 2022

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Approved Judgment

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

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the hearing of:

   i) Applications by the first and third defendants for the discharge of a worldwide freezing order ("WFO") made against them on 4 February 2021 by Calver J on a without notice application and continued on 12 March 2021 by Cockerill J;

   ii) An application by the third defendant for further fortification of the claimants' cross undertaking in damages, (currently fortified in the sum of £500,000) in the event that his discharge application fails; and

   iii) An application by the claimants for *Chabra* relief against various companies controlled directly or indirectly by the third defendant.

2. The first defendant's discharge application is advanced solely on the basis that there is no sufficient evidence of a real risk of dissipation and that in the circumstances such a risk cannot be inferred from the allegations of wrongdoing by the claimants.

3. The third defendant submits that the Injunction should be discharged on the basis that there is an insufficiently strong case on the merits against the third defendant or on the basis that there is no sufficient evidence of a real risk of dissipation or on the basis that the claimants failed to comply with their obligations of full and frank disclosure and fair presentation when making the without notice application to Calver J.

4. It follows from the defendants' respective cases on the discharge applications that rather more attention will have to be focussed on the claimants' substantive cases against each of the applying defendants than might otherwise be necessary or desirable. It is no doubt for this reason that the parties thought it appropriate to file as much evidence as has been filed thereby generating a hearing bundle running to the electronic equivalent of 27 lever arch files containing many thousands of pages and an authorities bundle with 41 separate entries. The volume of material it has been necessary to consider meant that the hearing lasted for no less than three days and this judgment (which I have consciously attempted to reduce to the bare minimum necessary to resolve the applications) is as long as it is and has taken as long as it has to prepare. None of this should be necessary, particularly when the original freezing order was granted as long ago as 4 February 2021. The focus of attention could and should have been on bringing this claim to trial. Had this been the focus of attention, it is likely that the trial could have been completed by the end of the first quarter of 2023.

The Discharge Applications

Applicable Principles

5. The principles applicable to the grant and discharge of freezing orders have been most recently and comprehensively re-stated in Lakatamia Shipping Co Ltd v Morimoto [2019] EWCA Civ 2203; [2020] 1 CLC 562 by Hadden-Cave LJ at [35] and following. In summary:

i) The applicant must establish:

a) a good arguable case on the merits;

b) a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer; and

c) that it would be just and convenient in all the circumstances to grant the freezing order;

ii) The risk of dissipation must be established by solid evidence;

iii) The risk of dissipation must be established separately against each respondent;

iv) What must be established is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment; and

v) Each case is fact specific and relevant factors must be looked at cumulatively.

As Hadden-Cave LJ added at paragraph 36: "*An applicant for a freezing order does not need to establish the existence of a risk of dissipation on the balance of probabilities. It is sufficient for the applicant to prove a danger of dissipation to the 'good arguable case' standard*". As he added, that meant demonstrating there was a plausible evidential basis for the alleged risk of dissipation. It necessarily follows that an application of this sort is not the opportunity for a mini trial of the dispute.

6. In respect of the relationship between the first and second of the core requirements referred to in (i) (a) and (b) above, Hadden-Cave LJ referred to the distinction between what Patten LJ characterised in Jarvis Field Press Ltd v Chelton [2003] EWHC 2674 (Ch) as " ... *a mere unfocused finding of dishonesty*...", (meaning in the context of an application such as this an "allegation") which would not be sufficient to justify an inference of real risk of dissipation, and what Lloyd LJ characterised in VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808; [2012] 2 CLC 431 as " … *dishonesty ... at the heart of the claim against the relevant defendant*...". Where dishonesty falling into the last mentioned category has been alleged, "… *the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets*".

7. Notwithstanding that Hadden-Cave LJ had observed in Lakatamia Shipping Co Ltd v Morimoto (ibid.) that the reference to " … *the heart of the claim*..." by Lloyd LJ was

to the heart of the claim for the injunction, the meaning to be attributed to the phrase was controversial between the parties. That controversy is immaterial for present purposes as long as it is understood (as Hadden-Cave LJ said at paragraph 61 of his judgment), that the search is for dishonesty by the relevant defendant or defendants in relation to the underlying merits of the claim that points to a risk of dissipation. Thus, hypothetically, a real risk of dissipation could not be inferred for example from an allegation that a sale of a residential property was induced by a fraudulent misrepresentation concerning its susceptibility to flooding, whereas such a risk could readily be inferred from an allegation that a defendant had induced a claimant to purchase the property by a fraudulent misrepresentation (supported by sham documentation) that he was the registered proprietor when he was not, particularly where the purchase money had been transferred to multiple different bank accounts in the name of various offshore corporate or trust entities. Where within these extremes a claim falls is to be assessed separately against each respondent, in each case by reference to the relevant factors looked at cumulatively, applying the good arguable case standard. This is entirely orthodox, ought to have been common ground and ought not to have required the copious citation of authority.

The Claimants' Case on the Merits.

8. There are currently 435 claimants. Each entered into one or more purchase contracts and long leases ("Superior Leases") of units within one or more of three property development schemes ("Developments"), being (i) a holiday flat development known as Westbeach, which is located in Westward Ho! ("Westbeach"); (ii) a holiday resort re-development at Ilfracombe ("Ilfracombe") and (iii) a scheme that consisted of a number of student accommodation buildings, mainly located in North East England ("Student Accommodation Scheme"). In each case the investor paid a substantial capital sum to the vendor, which was invariably a company (collectively hereafter "Developers" or "Head Lessors" as the context requires) controlled by the first and second defendants.

9. A key feature of the offer to investors was a guaranteed return (usually of between 8-12% of the sum invested) for a 10 year term, to be achieved by a so called "*leaseback*" arrangement. In most cases however, investors were not invited to lease back the units to the Head Lessor and so the arrangement was not, strictly, a "*leaseback*" at all. Instead (if investors wanted to participate in the guaranteed return scheme) they were required to lease the units they acquired to an entity ("Underlessee") usually within the same group of companies as the Head Lessor, with any service or maintenance charges that might arise under the Superior Leases being paid by the Underlessee. In the marketing material for the schemes generated by the third defendant or companies controlled by him, it was represented that the underlessee's obligations were either guaranteed or "asset backed". That was never so in relation to either Westbeach or Ilfracombe. In relation to properties within the Student Accommodation Scheme, the Head Lessor was usually a special purpose vehicle controlled by the first and second defendants and leasebacks were typically required to be made to A1 Alpha Properties (Leicester) Limited ("A1A"), another entity controlled by the first and second defendants which the Claimants contend had insufficient assets to honour its obligations.

10. As long as the Underlessee was properly capitalised or its obligations guaranteed by others that were, then any deficit between what it obtained from its under tenants and the sum of (i) the service or maintenance charges it had to pay and (ii) what it had to pay to the investor, was immaterial. Where, however, the Underlessee was not properly capitalised or its activities otherwise funded, the cash payments due to early investors at least realistically arguably could only be funded from the capital payments made by later investors and when that ran out no payments could be made. That this is what happened was implicitly admitted in an email dated 25 November 2016 sent to an intending investor by a Mr Wilkes (an employee of the fourth defendant, a company then controlled by the third defendant, responsible exclusively for marketing the schemes). I refer to this email in more detail below.

11. Thus although the first and third defendants maintain that the sale and leaseback model is one that is adopted throughout the industry, or was one that had been applied to at least some buildings within the Student Accommodation Scheme by owners from whom those buildings had been acquired by the Head Lessors, that is not to the point for present purposes. If the claimants are right to contend that they have a realistically arguable case that (i) there was no prospect of sufficient income being generated by the sub underletting of the units by the Underlessees to pay the sums due under the Underleases, (ii) the Underlessees were not otherwise able to meet the sums due from their own resources and (iii) their obligations were not underwritten by any other entity with the resources to enable the Underlessees to meet their obligations to investors under the Underleases, then the fact that the structure can be properly and successfully operated by others in different circumstances and by offering different rates of return for different periods is simply not an answer, at least where all that the claimants must show is a good arguable case as to the merits. In short, the claimants' case does not depend on the structure adopted but on the way that structure was carried into effect by the Developers.

12. The claimants' case in summary is that (i) the Head lessors and underlessees were a group of companies known as the Alpha Group; (ii) the Alpha Group was controlled by the first and second defendants; (iii) there was no or no realistic prospect of the guaranteed minimum return on investment being delivered by sub-leasing the units; (iv) the underlessees did not have the means to meet their payment obligations under the underleases other than from rents received from the sub underlessees, nor were those obligations guaranteed by entities with the means to discharge those obligations; (v) the first and second defendants knew that was so and the third defendant either knew that was so or was reckless, not questioning whether it was so or not; (vi) although some investors received some payments initially, those payments were made out of capital payments made by other investors; so that (vii) in essence the schemes were Ponzi or teaming and lading frauds and (viii) the schemes collapsed between October 2018 and January 2019, following which no returns were paid and the under leasing entities were placed in creditors voluntary liquidation.

13. The investment properties were exclusively marketed and sold under the "*Emerging Property*" brand principally by the fourth defendant, which was exclusively controlled by the third defendant. The claimants' case against the third defendant is that he caused or permitted the marketing material generated by the fourth defendant, by which the schemes were promoted to the public, to contain fraudulent misrepresentations concerning the safety of the investments promoted in particular by

promises that the fixed minimum return was guaranteed or offered by asset backed entities, who in consequence could be relied on to comply with their obligations.

14. Although the third defendant maintains that the role of the Emerging Property group was essentially that of an estate agent, which was engaged after the schemes had commenced operating, the claimants allege that there was a quasi partnership type relationship between the first and second defendants and their companies on the one hand and the third defendant and his companies on the other. In support of that claim, the claimants rely on the contents of marketing material produced by the third defendant and the companies controlled by him. Those representations are contained in brochures and other marketing material produced on behalf of the Developers by the third defendant and the companies he controlled, some of which I refer to in more detail below. There is no dispute that the production of these materials was a joint effort between the first to third defendants – see paragraph 44 of the first defendant's fifth affidavit, where he states:

> "So far as the creation of the marketing material is concerned, there was dialogue between us and Mr Crump [the third defendant] because it was in all of our interests to ensure that any material provided to investors was correct. Mr Crump was always provided with factual materials such as photographs and plans, a copy of the draft sales contract, lease and underlease. I believe he based his sales materials on these documents. We could not have a viable long term business any other way."

The claimants maintain that to the knowledge of the first, second and third defendants, the marketing material produced and disseminated with the authority of the third defendant by the companies he controlled fraudulently misrepresented the risk posed by the investment by representing the schemes as viable and the returns offered as guaranteed when they were not.

15. The principal allegedly fraudulent representations relied on consist of (i) the "*Return Representation*" (that the investor would receive a fixed return of between 8-12% for a period of 10 years); (ii) the " *Substance Representation*" (that the Underlessee concerned was an entity of substance capable of meeting its obligations under the underlease); (iii) the "*Track Record Representation*" (that the Underlessees had a proven track record of paying the promised returns) and (iv) the "*Underwritten Representation*" (that the returns were underwritten or guaranteed). The claimants also rely on various implied representations derived from the express representations I have so far referred to. They include that the first and second defendants intended that the under leasing entities would comply with their obligations under the underleases.

16. Against that background I turn to the detail of the allegations made by the claimants in relation to their case on the merits. I will pick up the points made on behalf of the defendants as I do so. The main focus of this part of the judgment is on the third defendant since the first defendant does not dispute that the claimant has demonstrated a sufficiently strong case against him on the merits to pass the merits hurdle identified earlier in this judgment. Before turning to the detail however, I repeat two points I have made already. Firstly, an application of this sort is not the opportunity for a mini trial on the merits. Secondly, all that the claimant must satisfy

me of is that they have a realistically arguable case or in other words a plausible evidential basis for the case they advance on the merits. Thus, other than for the purpose of considering whether there is a plausible evidential basis for the claim against the third defendant, the sole reason for considering the claimant's case on the merits in any detail is because the claimants maintain that "*this is clearly a case where the nature and extent of the fraud alleged is indicative of a real risk of dissipation* …"- see T2/11/17-18.

17. The claimants have shown a realistically arguable case that the first defendant knew by no later than the time when they came to invest that that there was no prospect of investors receiving the promised 8% to 12% returns for a period of 10 years that had been or was being promised.

18. The claimants adduced expert evidence ("the CBRE Report") at the without notice stage and before me that demonstrates at least a realistically arguable case that (one or two units aside) the properties were incapable of generating returns net of costs when sub underlet that would enable the promised returns to be met.

19. The first defendant criticises the CBRE Report in matters of detail. They are set out in paragraph 88 of his fifth affidavit. In addition, there is some forensic criticism of the net yield value that has been adopted in the report. However there is no evidence at all to support the proposition that it is in excess of industry standard (which is fatal to this point at any rate at this stage and applying the test I have to apply) but in any event the point has no impact on the part of the report that is most relevant for present purposes, which is the achievable net revenue per unit. That is a function of the difference between achievable gross revenue on the one hand and likely cost of operations on the other.

20. In any event there is some contemporaneous evidence that suggests this issue was one the defendants were all familiar with. On 25 November 2016, an intending investor emailed a Mr Wilkes (an employee of the fourth defendant) asking "*...I also saw the rental rates for the property as was concerned about how the developer could offer the returns when rental prices were low?* The response was:

> "The developer has now 17 buildings in their name and 12 of those have been operational for at least a year so these buildings have now started their increase in rent for the students which is how the developer make their money while you are on a fixed income. The developer actually does not make any profit on any building until at least year 2 which they are happy with as this is also a long term investment for them as well. So with the profit they are now making with the other 12 buildings, the money is there to comfortably pay each investor for the first 2 years on new projects. They will of course benefit from this one the rent rises in Scholar's Village."

The financial and commercial logic of the response seems questionable because it appears to mean that the net revenue from 12 properties was financing payments to the investors in 17 properties and would have to do so until sub under rents rose sufficiently to enable the guaranteed returns to be met from rental income. In fact, as the administrators of the Underlessees in relation to the Student Accommodation

Scheme have reported, the Underlessees concerned " … *never generated sufficient profits in the past to meet the costs of ground rent and service charge and pay the additional rent. A1A had previously relied upon capital injections from associated development companies, presumably generated from the ongoing sale of further leasehold properties*". Similarly, in relation to Ilfracombe, it " … *never made a profit and returns to investors were not paid from genuine profits .... As has been confirmed in writing, paying a fixed return is not a viable business model (never was) and as soon as sales of new units stopped the entire scheme came crashing down*".

21. Although the first defendant challenges the contents of the claimants' expert report, he has not produced any report from a qualified expert that suggests what is set out in the claimants' expert report is wrong in its conclusions on the issues that matter for present purposes or for that matter has understated the residual value of the developments. Neither defendant has produced any modelling, financial projections or feasibility studies generated either internally, within the companies controlled by the first and second or third defendants, or by external consultants retained to advise those companies (whether now or at the relevant time), that suggest the properties were capable (or might reasonably have been thought at the time to be capable) of generating returns when sub underlet that would enable the promised returns to be met. The material that has been produced by the first defendant does not purport to contain performance forecasts. Such a point might be of limited value if it had been deployed at a return date within a few weeks of the grant of an injunction at a without notice hearing. However, as pointed out already, that is not this case. Some 18 months have gone by since Calver J granted the freezing order at a without notice hearing. There is no evidence that either the first or third defendants were precluded by financial constraint from obtaining such a report. Given the level of legal representation that has been deployed in this case such an assertion would be surprising. In my judgment to allege that a report such as this is flawed lacks forensic potency without producing a counter expert report that shows in detail why that is so and crucially for present purposes why it is wrong in the conclusions concerning net revenues achievable.

22. Whilst I could not resolve a dispute between experts as to likely returns on an application of this sort, the production of either internal or external models that demonstrated that sufficient returns could be met, might have been relevant to an assessment of the claimants' dishonesty case on this application. However, no material of this sort has been produced. Thus the only evidence going to the net achievable returns issue that assists has been produced by the claimants when all the evidence (if it exists) that would suggest the contrary is or should be in the possession (or could be acquired) by the first and second defendants. Its absence in the context of an application of this sort is significant in my judgment, given the low threshold test that I have to apply and particularly given the asymmetry of access to the relevant material that exists as between the defendants on the one hand and the claimants on the other at this stage in the litigation. No case is or at any rate can be advanced by the defendants at this stage to the effect that the representations on which the claimants rely were true or could have been thought reasonably or honestly to be true. That is in my judgment material not merely to the merits test as against the first defendant but also the third defendant, given that there is at least a realistically arguable case that the third defendant and his companies operated in quasi partnership with the first and

second defendants and their companies, although in relation to the latter this material is not sufficient of itself to enable the merits test to be passed.

23. In my judgment however, what is known in these proceedings as the "*Kennedys Letter*" is of significant importance to an assessment of the claimants' case against the third defendant both in relation to the merits test and the real risk of dissipation test. The existence of the Kennedys letter came to light in paragraph 92 of the third defendant's second affidavit, when he stated:

> "EPIL[1] continued to receive negative press and complaints were made to the Property Ombudsman. As far as I can recall the last complaint was concluded in or around January 2020. At that time EPIL's Insurers had indicated that they would no longer provide insurance cover to EPIL. Accordingly, with no business or insurance available, on 15 June 2020 a resolution was passed that EPIL be wound up and that Mr Fortune and Mr Faulds of Portland Business & Financial Solutions of 1580 Parkway, Solent Business Park, Whitely Fareham, Hampshire be appointed as liquidators"

This resulted in the claimants' seeking information from the fourth defendant's liquidators about insurers' avoidance. They did so by issuing an application. This led to objections from the third defendant's solicitors by a letter dated 11 May 2022 on multiple different grounds including:

> "*Paragraph 44.3, correspondence between the liquidators and EPIL's insurers including copies of the policy of insurance*: This is wholly irrelevant to the issues in the claim."

This was presumably something that the third defendant's solicitors said on instructions. I return to this after I have completed the relevant factual narrative. To cut a long story short, ultimately it was agreed that the liquidator would give disclosure by list and the third defendant would have a limited opportunity to object on legally justifiable grounds. No objection was made and the relevant documents were disclosed. The disclosure included a letter dated 21 January 2020 from Kennedys, who were acting for the fourth defendant's professional indemnity insurers ("the Kennedys Letter"). It is a document that Mr Saoul KC describes as one whose "*... importance cannot be over stated...*"

24. The Kennedys Letter commences at paragraph 1 in these terms:

> "1.1 In summary, Insurers' current position, on the basis of the material that they have seen, is that they consider that EP did not provide a fair presentation of the risk when it, in particular:
>
> (a) misrepresented the nature of its business by describing itself as simply "an estate agent selling UK property";

[1] The Fourth Defendant.

> (b) failed to inform Insurers that it was in fact providing investment advice to potential purchasers when specifically asked whether it was;
>
> (c) failed to inform Insurers that it had received legal advice from Warner Goodman ("WG") that its marketing material was misleading; and
>
> (d) failed to inform Insurers that it had not followed that legal advice."

This has a particular impact in relation to the third defendant because it was he who completed and signed the proposal forms. The marketing material referred to in (c) was that generated in respect of the schemes the subject of these proceedings. Thus receipt of legal advice to the effect alleged has a direct impact on an assessment of the knowledge of the third defendant in relation to the merits test issue and is material too to an assessment the dissipation risk issue.

25. Having summarised the nature of the schemes being promoted (being those the subject of this claim), the letter addressed the issue of marketing material in the following terms:

> "EP issued Investor Reports in relation to each development, which were passed to prospective purchasers. …
>
> While the Investor Reports relate to different types of development - student flats and holiday apartments - they are largely very similar in terms of the lay out and the language used. For example, they all include a statement that the properties will provide a "guaranteed" or "fixed" (10-12%) income for 10 years. They also all include very similar descriptions of EP's business, one example being as follows:
>
> "*Our vision is to help you tap the enormous potential of property and alternative investing. Emerging Property bring you unique investments, many that have never before been available to individual investors.*
>
> *Underpinning our recommendations is thorough research, which we make available to you with our Investor Reports and personal consultation. Realise your investment goals starting today."* [Emphasis added]
>
> 2.8 In addition to the Investor Reports, EP also issued more general marketing material to potential purchasers. By way of example, we have seen copies of documents entitled: "*Beginner's Guide: our approach to property investing*"; "*How to ensure that a commercial property investment is secure*"; "*Guaranteed Income FAQs*"; and "*Getting Started in property investment*". The latter document includes the following statements:

> "*What returns can you expect from property?*
>
> *Returns are achieved via rental income or capital growth - preferably both over time.*
>
> *• After all outgoings and costs, you should be looking for at least 7% NET annual yield*
>
> *• Historically, UK property prices roughly double each decade*
>
> *• Remember to factor your time into your calculations*"
>
> and
>
> "*But there are other ways to invest in property which deliver: High yields; enhanced investor security; Above average capital growth prospects and full legal ownership - allowing you to sell whenever you choose*."

The letter then turned to training material generated by the fourth defendant. It records that if asked about how the guarantee worked, staff were to respond that:

> "The guarantee is made by the developer, who is also the freeholder of this and many other projects. This means that not only is the guarantee a contractual obligation on the developer's part, but it is also asset-backed." [Emphasis added by Kennedys]

This is particularly striking since, as Mr Saoul put it in his oral submissions, "*…it is undisputed that in more than 97 per cent of cases there was no contractual guarantee…* but "*… Mr Crump is training his employees to say the reverse*".

26. The Kennedys Letter then summarises the legal advice received by the third defendant from Warner Goodman as being to the following effect:

> "2.11.1 The website was misleading as it suggested that EP "either [was] the developer or that [it] goes out into the market and select[s] developments suitable for [its] target buyers available in multiple locations and from multiple developers". EP was only acting for one developer - Alpha.
>
> 2.11.2 The Investor Reports (on the basis of the report relating to Jubilee Court) should be "substantially re-written", including the removal of certain key words or phrases, such as "investor"/"investment", "guaranteed" and "asset backed".
>
> 2.11.3 A1L could not be described as "asset backed" (given their financial position, as set out in their annual accounts).
>
> 2.12 With regard to the marketing material in general, WG commented as follows:

> "you have a choice: water down what you are saying or take a risk. The risk: Prosecution of unfair trading with consumers. Adverse publicity from an adverse finding from the Advertising Standards Authority. Legal action from buyers who relied on your statements before investing and who lose out following a disaster and insolvency of A 1 Alpha." [Emphasis added]"

The letter then went on to record assertions by the third defendant that the statements to which the solicitors had referred were true as to which Kennedys observed " … *If EP did so believe, that was assumedly on the basis of EP's own research. If EP had not undertaken its own research, then on what basis did EP believe that its representations were robust*?"

27. Kennedys added that they had requested sight of the marketing material that was generated following the legal advice set out in the letter but that it had not been forthcoming and then stated:

> "Pending sight of the above, we have analysed copies of several of the complaints made against EP. By comparing those complaints with the Investor Reports that we have seen, it is clear that the wording of the marketing material and the advice given to purchasers did not change to reflect the advice received from WG."

That analysis is set out in detail. It would unnecessarily lengthen this judgment to set it out here. The point that the material continued as before in the face of the legal advice could only be justified on the basis of the third and fourth defendant's own enquiries. There is no evidence of such enquiries being made. Unsupported assurances from the first and second defendant at least realistically arguably do not amount to the sort of enquiries required in light of the advice apparently received.

28. Concerning the third defendant's knowledge of the position, Kennedys quote from an exchange of emails between the second and third defendants concerning a query raised by a potential investor with either the third or fourth defendant concerning the financial stability of one of the Under Lessees in these terms:

> "**A 1 Alpha Properties (Leicester) Ltd**
>
> 2.30 On 21 April 2017, following enquiries from a purchaser(s), you sent an email to Derek Kewley[2] raising queries regarding A1L's accounts, stating as follows:
>
> "*We have a client who has asked about info on the companies relating to Q [Studios]:*
>
> *Based on latest available information on Companies House ...*
>
> **A 1 Alpha Properties (Leicester) has been incorporated since 2001, however, according to its latest available financials, the*

[2] The second defendant.

> *company had, as of Feb-2016 a negative Current Liabilities [sic] of £1.4m on shareholders equity of £163,900.*
>
> *I can come up with something, but you may have something positive off the top of your head? Just wondering if you do ... many thanks*!" [Emphasis supplied]
>
> 2.31 On the same day, Derek Kewley responded as follows:
>
> "It's just an accounting thing...
>
> With regards to A 1 Alpha this comes up every now and again it's down to the way debt and income are viewed on the accounts. The underlease in which we guarantee the rent over the next 12 months have to be shown in the accounts as a liability, but there is no provision in the accounts to show potential rental income over the same 12 month period - so the accounts are always going to look crap - which to be fair means we pay substantially less corporation tax."'

The claimants submit and I agree that that this material provides a plausible evidential basis for asserting that the third defendant was aware of this entity's true financial position from no later than the date of this exchange of emails and that thereafter its obligations under the Underleases could not honestly be described as "*asset backed"*. It also suggests (by the expression " *…I can come up with something…"*) that the third defendant was willing to attempt to disguise the effect of what was set out in the accounts or at any rate come up with an explanation not caring whether it was correct or not. That provides a plausible evidential support for the claimants' case on the merits and also in relation to their case on the dissipation issue. This may ultimately turn out to be wrong and that the third defendant's case that he believed on reasonable grounds that there was an asset base for the guarantees offered may ultimately be accepted but that is not the point. This material suggests a plausible evidential basis that there was no basis for such a belief at any rate by the time this exchange of emails took place. This is not a mini trial without disclosure and cross examination.

29. In relation to the advice received by the third defendant set out above, Kennedys concluded:

> "5.9 The advice received from WG in September 2015 was clear - EP's marketing material (in terms of the Investor Reports, training materials and information on the website) was misleading and, if not substantially amended, could lead to "legal action from buyers" should Alpha run into financial difficulties. This is, of course, exactly what has now happened.
>
> 5.10 It is apparent from both the Investor Reports we have seen and the wording of the complaints received from various Claimants that the advice was not followed. EP continued to issue Investor Reports and marketing material including wording which WG had expressly advised should be amended/removed. EP's employees also continued to respond

> to queries in line with the advice given in that marketing material and following the training documents that we have referenced above"

Insurers avoided the fourth defendant's policy on the basis of these conclusions. That was ultimately not challenged by the third defendant, nor was the fact that he received the advice alleged. This was explained by the third defendant in emails to brokers as because the third defendant had no funds, a lack of human resources and because no legal action had been taken against the fourth defendant. I should record that the third defendant maintains that the advice received from the solicitors referred to in the Kennedys Letter changed subsequently but Mr Johnson accepts that this is not material I can rely upon for present purposes because there is no evidence to support the assertions made.

30. The Kennedys Letter is dated 21 January 2020. These proceedings were commenced in early February 2021. Even now however, the third defendant has not produced any evidence of modelling or attempt at independent fact-checking of the representations that were made in the marketing material he was responsible for. Even if it is plausible that the third defendant would rely on the assurances of the first and second defendants at the outset of their relationship (although that plausibility is undermined by what the third defendant was prepared to allow the fourth defendant to represent was the nature of the relationship between the fourth defendant and the Alpha group) that cannot survive the advice that was received or the emails in which it became apparent that in critical respects what had been represented was not being carried into effect.

31. This absence is all the more startling in light of the procedural exchanges that have taken place. I do not intend to further lengthen this judgment by describing these in detail. It is sufficient to note that the claimants sought particulars under CPR Part 18 of the due diligence that the third defendant alleges was carried out to which the response was "[*t]hese requests seek evidence in advance of disclosure for which there is no present need and are accordingly impermissible*" (Request 3) and "[*g]enerally when an Alpha Group company contacted EFZE (or EPIL) with a new project, in addition to inquiries initiated by Mr Crump, other employees of EFZE/ EPIL would check the projected rental return by reference to data on the local lettings market and property prices on the internet, and would analyse and discuss components of the purchaser proposition and seek information from Mr Spence and Mr Kewley in so far as necessary (see further the response to question 24 below). Relevant documents evidencing this process will be disclosed in due course. Question 8.3 seeks evidence in advance of disclosure for which there is no present need and is accordingly impermissible*".

32. As things presently stand, I conclude that the claimants have established a realistically arguable case that no relevant due diligence was carried out by the third defendant either before or after the legal advice referred to above was received. That, in combination with the apparently close relationship between the first and second defendants and their companies on the one hand and the third defendant and the companies he controlled on the other and the evidence concerning the ability of the sub-underlease rents to generate the sums necessary to generate the guaranteed

minimum sums suggests that the claimants have a realistically arguable claim in relation to knowledge to at least the level of reckless disregard.

33. I return to the point I made earlier in relation to the disclosure of the Kennedys Letter. It will be recalled that the third defendant's solicitors had objected to the disclosure of this letter on the basis that it was *"... wholly irrelevant to the issues in the claim*." That is an assertion that could only have been made on instructions. However, it is difficult to see how such instructions could have been given in circumstances where the summary of the legal advice given and the conduct of the fourth defendant (controlled by the third defendant) after receipt of that advice was as it was, given the allegations being made in these proceedings. Whilst I accept that the letter was concerned with an entirely separate dispute concerning the fourth defendant's insurance coverage, that is not the point. What matters for present purposes is the substance of the advice and what Kennedys alleged happened in relation to marketing thereafter. Whilst arguably this attempt to avoid disclosure does not impact on the assessment of whether the claimants have demonstrated a realistically arguable case on the merits, it does impact on the risk of dissipation issue to which I turn below.

34. I fully accept that at a trial this material may be challenged or demonstrated to have been referred to out of context or otherwise not to support the conclusions reached by Kennedys by reference to the material. It is true to say that what Kennedys say in their letter is what they maintain to be the effect of advice contained in emails that they had seen but which have not been disclosed by the third defendant in these proceedings to date. As I have said already, the third defendant has asserted that the advice changed in either 2019 or 2020. It may be therefore that the Kennedys summary is inaccurate. Whilst I do not consider it appropriate to draw any inference from the third defendant's failure to disclose the emails referred to in the Kennedys Letter at this stage, that non disclosure means that I am entitled to accept at face value Kennedys' summary of their effect, particularly given they had been retained to advise insurers on coverage issues and erroneously declining cover could result in substantial prejudice to insurers. More generally, the answers that might be deployed in the future are immaterial to the issues I have to determine. The material provides a plausible evidential basis for the claimant's case against the third defendant as to whether there is against the third defendant a good arguable case on the merits. It is not in dispute that the third defendant was the main point of contact with the first and second defendants – see paragraph 25 of the third defendant's third affidavit. Therefore, although the third defendant maintains he did not write the marketing materials, that is not the point. He was the conduit through which the information in those materials was used and he could have been the only one who authorised their use given his control of the fourth defendant. The material I have referred to above establishes a realistically arguable case that he could have no honest belief in what was said in the material at any rate after the advice had been received and the exchange of emails concerning the accounts referred to in the Kennedys Letter.

35. The marketing material has to be read for present purposes in the context of the advice that apparently was given in September 2015. During the hearing there was extensive references to brochures of various sorts that contained essentially the representations made throughout. The representation concerning the relationship between the fourth defendant and the "*developer*" is emphasised throughout. The point is particularly stark in a generic email generated by an employee of EP dated 18

January 2016. Amongst other statements appearing in that email, there are included representations as to the fourth defendant operating in partnership with the developers, to the developer retaining ownership of the freehold of the development and that the " … *developer ... rents the units back from investors, becoming your contractually fixed tenant for the next 10 years.*" The email continues:

> "What you are effectively buying is a fully managed physical buy-to-let property with the added security of a predetermined fixed income provided by an experienced, involved and incentivised developer for the next 10 years, regardless of the costs or occupation of the property …
>
> … you will have full recourse against the developer's assets from the moment you exchange contracts. The developer's entire asset base is there to be sold in order to pay investors if need be."

This was at least realistically arguably untrue. It would be unreal to conclude at any rate at this stage and on an application of this sort that the third defendant was not aware of what was being said in generic marketing emails of this sort. It would be apparent where no guarantee was being provided and it would be apparent and whether the Underlessee was indeed "*asset backed*" as alleged. Even if it could be said that was not something that the third defendant should have checked at the outset it is at least realistically arguable that was not so following the advice in September 2015 or the other warning signs to which I refer below.

36. The point made by the claimants is that all this was well known to the first and second defendants because they were the architects of the schemes. The same point arises if as is asserted by the first defendant, the third defendant or the fourth defendant was always provided with the sale contract, lease and underlease.

37. The position at least realistically arguably is no different so far as the third defendant is concerned. First, the marketing material disseminated by the companies he controlled emphasised the existence of a commercial if not legal partnership with the developers. That is apparent on the face of the marketing material in general and is a point that was emphasised for example in the generic email referred to above where the relationship was described as being:

> "Emerging Property works first and foremost as a consultant for its clients. We have very carefully chosen to work with just one single trusted and experienced developer. We have exclusive access to their investment opportunities and such exclusivity makes us their sole marketing agent. This partnership allows us the opportunity to work closely together in order to create the best investments possible for our clients"

Leaving to one side that the author appears confused as to who the fourth defendant's "*client"* was for present purposes, the impression given is a clear one in which the fourth defendant is working closely with the developer in a relationship that was akin to a partnership. If that was correct, then it is realistically arguable inferentially that the third defendant either knew as much as did the first and second defendants about

how the schemes in fact operated, or was in a strong position to do so, unless what was being said about this issue was untrue. The nature of the relationship described suggests that robust enquiries had been carried out by or on behalf of the fourth defendant but in fact no such enquiries had been carried out beyond what is referred to below.

38. The third defendant's answer to this point is to assert that he was told by the first and second defendants that "*... their companies owned the freeholds, and that the freeholds provided assurance.*" He maintains however that he was lied to by the first and second defendants on this issue in relation to the Student Accommodation Development freehold ownership issue. However at this hearing that is not asserted in relation to either Ilfracombe or Westbeach. The third defendant seeks to avoid the impact of the corporate structure points by saying " … *I believed that Mr Spence and Mr Kewley would cause their other companies to step in if a default on rent payments arose. This is what they told me, which I have no reason to doubt*." The difficulty about this is that it does not stand well together with the red flag warnings referred to below or that by definition this meant that the representations concerning guarantees and asset backing were false and realistically arguably known by the third defendant to be false from no later than the date when the advice referred to in the Kennedys Letter was received.

39. The structure adopted for the Student accommodation Scheme involved there being individual special purpose vehicles for each site with A1A being the Underlessee for all student accommodation. The first defendant's case is that this structure was adopted by the first and second defendants at the suggestion of the third defendant. A1A was the company that supposedly held most of the assets within the group.

40. By October 2015, the third defendant was aware that freeholds to some sites were being sold to third parties. The explanations offered at least realistically arguably could not justify the representations being made in the advertising material being generated by the fourth defendant. This was all the more serious in light of the legal advice that the third defendant had received a month earlier. I can do no better than quote from the third defendant's own affidavit:

> "On 15 June 2015 I received an email from. Mr Kewley telling me that AIA had sold part of the freehold for Hylton Road to Moore Investments Limited. I know nothing about the latter company. Mr Kewley said "we have split the title and are retaining the bulk of it" [AJLC3/362-363]. The sale went through on 10 November 2014….
>
> In or around October 2015 I discovered by my own inquiries that AlA had sold the freehold of Norfolk Street. I raised this (and other matters) with Mr Kewley on 17 October 2015 who replied [AJLC3/364]: "...we have sold the basic freehold but have retained ownership of the valuable common parts such as the office and roof space (for solar insulation). This doesn't effect any buyers as we still control and maintain the building " [sic]."

41. The Norfolk Street enquiry was an email from the third defendant to the first defendant. The reason for the enquiry was said to be because *"[w]e are putting information out to clients on a daily basis that shows A1 owns t he freehold to all your previous projects*". That being the basis of the enquiry and given the representations that were being made it was obvious that in relation to the Student Accommodation Scheme retention of the freehold by A1A was a key plank of the representations being made. The response received did not begin to answer this point. Firstly, the explanation given was at least realistically arguably absurd. The value of the freeholds (if any) lay in the ground rent value or equity of redemption. It was that which on one view supported the asset backed representation. The third defendant as an experienced property dealer and intermediary can safely be assumed to know that because it is close to obvious. Secondly, it was obvious that the first and second defendants were willing to operate the affairs of the Alpha group without regard to the representations that were being made to investors. This was at least realistically arguably a red flag that was simply ignored by the third defendant.

42. Whilst I accept that this material may look very different at trial, it provides some support for the case on the merits against the third defendant because it provides a plausible evidential basis for the claimants' assertion that the marketing material he was ultimately responsible for publishing was likely to be false but he continued regardless. None of this material can be viewed in isolation. These exchanges took place in October 2015 – that is about a month after the third defendant had received the legal advice set out in the Kennedys' Letter and had responded to it as described in the part of the letter quoted from earlier. It is also fair to repeat that the position may look markedly different once disclosure has taken place. The limited information available to the claimants at this stage is something that has to be borne in mind throughout.

43. I return to the first question I must decide, which is whether the claimants have shown a realistically arguable case on the merits against each applying defendant. That this requirement has been made out is not disputed by the first defendant, for the purposes of this application. Given the cumulative weight of the evidence relied on by the claimants this is unsurprising. In relation to the third defendant, I am satisfied that the claimants have made out this requirement to the requisite standard.

44. The third defendant does not dispute that the representations were made nor does he dispute falsity. His case is that he was lied to on the issues that matter and accepted at face value what he was told by the first and second defendants. That is not a sufficient answer given the low threshold nature of the question that I am answering in the circumstances of this case. It is realistically arguable that the relationship between the first and second defendants and their companies on the one hand and the third defendant and the companies he controlled on the other was much closer than that of a normal estate agent and scheme vendor. Either what the third defendant permitted the fourth defendant to say in its marketing material on this point was accurate in fact and demonstrates the closeness of the relationship or it wasn't, in which case even at that level the material was untruthful. The purpose of those assurances in the material was to give those reading the material the implied assurance that they could rely on what was being said.

45. Secondly it is realistically arguable that by no later than the third quarter of 2015, the third defendant was aware that the material was so misleading as to expose the fourth defendant to legal action from buyers who relied on the material before investing and who suffered losses following the demise of the Under lessee under the schemes. That is the apparent effect of the legal advice that was provided to him, as summarised in the Kennedys Letter. That advice must have been premised on information supplied by the third defendant to the solicitors who provided the advice. Notwithstanding that advice, the third defendant made no attempt to instigate meaningful due diligence in relation to what he as allegedly being told but simply continued to accept what he was apparently being told by the first and second defendants. The third defendant maintains that the legal advice he or the fourth defendant received changed in later years. For the reasons I give when considering the dissipation issue in relation to the third defendant, that is not material that I can rely on for the purposes of determining the discharge application.

46. It is realistically arguable that by no later than September 2015, the third defendant should either have instigated those enquiries or re written the promotional material in accordance with the advice that he had received. It is realistically arguable that by failing to do so he was displaying a reckless disregard for the truth and accuracy of the representations being made. By May 2015, the third defendant had become aware that the freeholds for the student accommodation were not being transferred to A1A prior to completion of investor purchases in relation to at least some student accommodation sites (the Foundry site being a particular example) and by October 2015, he had become aware that A1A was selling at least some freeholds to third parties, thereby at least potentially devaluing the asset based value of the underlessee commitment. The third defendant is keen to emphasise that the Norfolk Road site was relatively small and that investors would have recourse if necessary to the assets of A1A that remained. However, there is no evidence as to its value, nor what other contingent liabilities A1A would have had. More particularly, there is no evidence that the third defendant gave this any thought and a realistically arguable inference case that he simply ignored that point. That inference at least realistically arguably arises when this conduct is considered in the round with what had happened.

47. Thirdly, he apparently made no attempt to assess whether what was promised was capable of delivery. The CBRE report suggests that it was not. It is realistically arguable that before embarking on a marketing exercise of this sort involving the sale of millions of pounds of property interests to hundreds of individuals, the third defendant ought to have assessed the deliverability of what was being promised, particularly after September 2015, when he had received the legal advice referred to in the Kennedys Letter. There is no evidence of advice having been sought on this issue or of any internal or other modelling. That sort of modelling is relatively straight forward, particularly for property professionals. In any event, the third defendant could have asked the first and second defendants for whatever modelling they had carried out. It should be borne in mind that the third defendant does not suggest it was beyond his remit to carry out such an analysis given his evidence in paragraph 47 of his second affidavit.

48. The simple reality is this: There is sufficient material available against the third defendant to demonstrate a realistically arguable case based on deceit. It may be that

at trial he will be able to satisfy a court that he did not have the requisite intention but that is not an answer for present purposes.

Risk of Dissipation - First Defendant

49. At the heart of the first defendant's case on this issue is that he was divorced in England and moved to Florida where he made a new life for himself with a new wife and that there is no question of him having fled the jurisdiction or trying to move assets out of this jurisdiction for the purpose of defeating claims but on the contrary has simply moved assets to what Mr Collings KC calls an "*amenable jurisdiction in an entirely bona fide and open way"* – see T2/56/27-28. He maintains that this case has not been engaged with. However that misses the point because that is not the basis on which the claimants invite me to conclude that there is a risk of dissipation unless the first defendant remains subject to the freezing order.

50. Although Mr Collings submits that the allegations made against the first defendant in relation to the schemes the subject of this claim do not say anything about there being a risk of dissipation, I am not able to agree. The claimants maintain the scheme operated as a Ponzi or teaming and lading fraud whereby payments to earlier investors could be maintained only by using the capital sums received from later investors to supply or augment the sums available to meet the guaranteed income returns. If the claimants have a realistically arguable case that the first defendant was willing to promote such schemes that provides some support for the contention that a real risk of dissipation can be inferred as against at least the first defendant, applying the principles referred to at the start of this judgment.

51. This issue is to be tested for present purposes on the basis of realistic arguability. Mr Saoul submits that even at this early pre disclosure stage in the life of this claim, there is evidence that surpasses this hurdle. Without sight of the accounting material that ought to be available to the corporate defendants, inevitably this issue is dependant upon relatively sparse direct evidence. This is the result of the evidential asymmetry that applies between the parties, which I have mentioned already. The evidence that supports this analysis is set out above but in summary stems from the conclusions of the CBRE Report, the 25 November 2016 email from Mr Wilkes, the evidence of Mr Kenkre at paragraph 41 of his first affidavit and the report by the Administrators in relation to the Student Accommodation Scheme referred to above. The first defendant maintains that on a proper analysis the failures of the companies operating the schemes were the result of external events over which the first and second defendant had no control. That is disputed by the claimants both chronologically and by reference to the point that the schemes could never have worked in light of what is said in the reports referred to above. It is not appropriate that I should attempt to resolve this dispute at this hearing. The material relied on by the claimants establishes a reasonably arguable case on this point.

52. Secondly, the first defendant's schemes depended on the use of a complex corporate structure. In particular as I have explained he was able to encourage investors by causing the fourth defendant to represent that the obligations of the Underlessee would be guaranteed or asset backed but was able to defeat this by ensuring that the promoters of the schemes were SPVs without any assets or by delaying the transfer of the freeholds relevant to the Student Accommodation Scheme to A1A, the

Underlessee for that scheme. Whilst I accept that of itself the existence of complex corporate structures would not justify the inference of a real risk of dissipation, that is not so where such structures have been used to carry into effect the alleged Ponzi or teaming and lading frauds.

53. Thirdly, notwithstanding that it had been represented in relation to the Student Accommodation Scheme that the Underlessee company A1A had retained freeholds in the various student accommodation sites, as I have explained that company embarked on the disposal of those assets thereby undermining the assurances that had been given to investors concerning the value of their right of recourse against A1A as Underlessee. This provides some evidence from which a real risk of dissipation can be inferred as against the first defendant. It is simply not good enough to say that there was no reason why the freeholds should be retained once the development of the sites concerned had been completed, given the representations that were being made to investors and given that the ground rent entitlement that went with the freeholds was valuable.

54. Fourthly the claimants rely on a multi-faceted failure on the part of the first defendant to comply with the information disclosure orders contained in the initial freezing order granted by Calver J and the extension granted by Cockerill J. The detail of this took up many pages of the written submissions and many more pages of the transcript of the hearing. I intend to limit my description as far as possible, noting however the over arching submission by the claimants that the first defendant has shown a cavalier failure to comply with mandatory orders of the court containing penal notices that have forced the claimants to make multiple further applications, which ultimately have not been contested by the first defendant, in order to obtain the financial information to which they were already entitled by prior orders of the court. Mr Collings' submission was that this can be explained away as "*... something of a false start ...*" by the first defendant and his former solicitors.

55. I do not underestimate the difficulties and pressure that respondents to freezing orders are placed under by the information provision requirements contained in such orders, particularly in the first few days or weeks following the service of such orders and when attempting to obtain legal advice and assistance – a task often made all the more difficult by the effect of the freezing order itself. I accept that there can be difficulties in obtaining the relevant information and I have taken that into account in considering the points relied on by the claimants. However, in my judgment there is a significant difference between failing to provide information until a few days later than ordered and either not providing it at all or doing so months after it was first ordered to be disclosed. The points relied on by the claimant are more serious than complaints of minor delay.

56. In relation to two of the breaches relied on by the claimants, it is said they each had the effect of concealing assets that plainly should have been disclosed and which were of substantial value or potential value. Broadly, I agree that the breaches have occurred, and I agree that there has been no satisfactory explanation for why they occurred although explanations have been offered. Before descending into the detail, I make clear that in my judgment, failures (other than minor delay issues caused by the difficulty in initial compliance with information provision following service of an order obtained without notice) without reasonable excuse to disclose information

pursuant to orders contained in freezing orders are likely to support a conclusion that there is a real risk the respondent concerned will seek to dissipate in the sense identified in the authorities referred to above by concealment. The reasons for this are obvious: concealing assets is precisely what dissipation is concerned with and the failure to comply with mandatory orders to disclose assets shows a propensity to conceal. Obviously some breaches will be more serious than others and some will more easily support an inferential risk of dissipation than others so an evaluation of what is alleged is unavoidable. However, I repeat what I have said more than once already. This hearing is not the opportunity for a mini trial on what in the end will be a satellite issue. The only question is whether there is a plausible evidential basis for concluding there is a real risk of dissipation by reference, in this context, to the active failure to disclose assets as required by a mandatory order of the court.

57. I start with Calver J's initial order in these proceedings. That order (endorsed with a penal notice) required the first defendant " … *within 7 days of service of this Order and to the best of his ability inform the Applicants' solicitors of all his assets worldwide exceeding £10,000 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* …". The response to this was a letter dated 25 February 2021 from the first defendant's solicitors, in which they stated:

> "You will see that on Mr Spence's personal spreadsheet the existence of his bank accounts in the US and UK and the amounts in them, but not the bank where they are held or the account numbers. That is deliberate. We are informed by Mr Spence that the bank holds the cash balance of £8,888,900 as security for the US $ denominated loans in the USA specified in the spreadsheet. If the bank is notified of the existence of the freezing order it is more than likely to consider that an event of default under the facility which entitles them to terminate the facility, and exercise their contractual rights to set-off that sum against the $ loans. The facility was taken out by our client to hedge against the drop in the exchange rate of the E against the $ following the Brexit referendum as set out in our client's notes on the spreadsheet.
>
> We understand that the exchange rate has recovered since the referendum but nevertheless if the facility was terminated, our client would suffer a loss in the region of £800,000. That would not be in your clients' interests and further if the cross-undertaking in damages on the injunction is called on in due course, that loss would exceed the value of the security given to back it up."

There are a number of points that arise. The first is that the letter refers to bank accounts whereas the ostensible reason for not disclosing the accounts related only to one. Secondly, no attempt was made to either agree with the claimants' solicitors the need for confidentiality in respect of what had to be disclosed or apply to the court for a variation of the order. Thirdly, this issue was considered by the Court of Appeal when giving judgment on an appeal from an order made by Moulder J ([2022] EWCA

Civ 500) increasing the security to be provided by the claimants in respect of their cross undertaking by £800,000. As Phillips LJ identified at the start of his judgment the " *... basis of the application was evidence from the first defendant ... that there was a substantial risk that the existence of the WFO might cause Coutts & Co. ... to make demand for repayment of a loan of US$9,292,719 ... and to realise security held for that loan, being a sterling deposit Mr Spence had lodged with Coutts in the amount of £8,888,900 ...*". Philips LJ held at paragraph 12 of his judgment, in relation to the disclosure referred to above: *"No justification has ever been provided for the refusal to identify Mr Spence's other bank accounts …*" He added at paragraph 47 that "*… there was insufficient evidence to justify the Judge's finding that there was a real (as opposed to fanciful) risk that Coutts would call in the US Dollar Loans because of the grant of the WFO*". Mr Collings said of this that "*... I am not suggesting that there is any justification ...*".

58. On this basis there was no justification on any view for not disclosing the relevant details of all bank accounts other than those giving rise to the supposed concern about the relationship with Coutts. In my judgment the failure without reasonable excuse to disclose the existence of bank accounts when directed to do so by a court without reasonable excuse is evidence of a real risk of dissipation by concealment. Even the excuse offered in relation to the Coutts transaction was rejected by the Court of Appeal as fanciful. In any event, what is nonetheless not excusable is the failure to engage with the claimants' solicitors on the issue or to apply to the court for a variation of the order rather than simply unilaterally refusing to provide information.

59. In light of the failure by the first defendant to provide all the relevant bank account information and details in relation to the Coutts arrangements, further information provision orders were made by Cockerill J on the first return date following Calver J's order. Aside from repeating the obligation to disclose all assets with a value of more than £10,000, Cockerill J's order required the first defendant to disclose:

> "2. …
>
> a. full details of bank account numbers and sort codes held by the First Respondent and Second Respondent;
>
> b. in the case of the First Respondent, the identity of the parties to the loan and security arrangements ("the Arrangements") referred to by his solicitors, Darbys GE Limited, in their letter to the Applicant's solicitors dated 25 February 2021…
>
> 3. the First Respondent must by Friday 19 March 2021 provide copies to the Applicant's solicitors of:
>
> a. copies of the loan and security agreements relating to the Arrangements in his possession or control;
>
> b. the most recent statement of account in relation to those Arrangements showing all transactions in respect of the same for the period from 25 February 2021 to date;

> c. bank statements setting out all transactions in respect of his bank accounts for the period 25 February 2021 to date in relation to the U.S. accounts listed in exhibit NS1 to his affidavit dated 3 March 2021, and for the period 25 February 2021 to 3 March 2021 (inclusive) in the case of the UK bank accounts listed in the said exhibit. "

In summary, the thrust of paragraphs 2(b) and 3 was the provision of information relating to the Coutts transaction to which the first defendant's solicitors had referred in the initial disclosure letter referred to above.

60. The first defendant failed to comply in all respects with this order both by providing what was required by the date and time ordered and failing to provide some of the documents that Cockerill J had directed should be provided. This resulted in correspondence from the claimants' solicitors seeking either the apparently missing documents or authority from the first defendant to enable the claimants' solicitors to seek the apparently missing documentation from Coutts. A similar issue arose in relation to some material relating to a Barclays account. In the result, as Ms Briant put it in paragraph 26 of her second statement in these proceedings, the first defendant " *… neither consented to this proposal, nor provided the documents which appear to be missing, nor is he willing to sign a witness statement to the effect that there are no missing documents*". Ultimately this led the claimants to issue an application and to the first defendant conceding provision. Nothing that has emerged since suggests this material could not have been obtained earlier or without the need to apply to the court for a further order. Of itself this non compliance may not appear very serious and arguably would not support an inference of real risk if viewed on its own. However it must be viewed cumulatively with the other material and in that context in my judgment it provides further support for the conclusion that there is a real risk of dissipation by concealment.

61. The next non disclosure relied on by the claimants concerns a debt due to the first defendant from one of the Alpha companies called A1 properties (Sunderland) Limited. The sum repayable appears to be about £938,000. The existence of this loan came to light from a document disclosed pursuant to Cockerill J's order, albeit from a document for which the claimants had to chase for disclosure. A review of one of the Barclays statements revealed a payment with the description "*A1 Properties Sun Directors Loan Rep*". By a letter of 29 April 2021, the claimants' solicitors sought an explanation of this entry. In a letter of 6 May 2021 from his solicitors, Mr Spence stated that he was owed money by A1 Properties (Sunderland) Limited. His solicitors alleged that "*… the value of the debt due to him from that company is reflected in the value given to their interest in it on the corporate holdings spreadsheet …*". His (current) solicitors also suggested that there " *… is a settled understanding that borrowings are not covered under the standard form of Freezing Order. In certain circumstances the right to drawdown under a loan …*" This misses the point. It was not the case that the first defendant owed the company anything (or was entitled to draw down under a loan facility made available to him by the company) but that he was owed money by the company. This is not a difficult distinction and is one that would be obvious to most people and certainly most experienced business people.

62. In his evidence, the first defendant explained what had occurred in these terms:

> "…for A1 Properties (Sunderland) Limited we valued it by reference to the value of the commercial properties which it owns. I have an outstanding loan of £938,161 from the company, but rather than attributing separate values to the loan and then a consequent smaller value to the company (i.e. reducing its value by taking the loan into account) we attributed the full unencumbered value to the company (by reference to the value of its properties). We thought that this was the most transparent approach and also erred on the side of caution in that we did not seek to reduce value by reason of making any deductions"

I accept the claimants' submission that it is not open to the first defendant to obscure the position by seeking to account for the sums owed by reference to the value of the shares in the company, particularly when what has allegedly been done has not been disclosed. The money is not due to him as shareholder but as lender. What is required is a straightforward disclosure of (in this instance) sums owed to the first defendant. I accept the claimants' submission that this incident had the effect of concealing assets. I also accept the submission that the impact of the point is aggravated by the fact that it only came to light as a result of the claimants pushing for disclosure of information that should have been disclosed months before. I regard this as evidence of a real risk of dissipation by concealment, when viewed together with the other factors to which I have referred.

63. The next point relied on by the claimants is that when eventually the first defendant disclosed the documents relating to the Coutts arrangements, he did so in a form that was redacted without disclosing that the documents had been partly redacted and without carrying out the exercise in a way that made it apparent that the redaction had taken place. One of the things obscured by this was his alleged interest in a property at 36 Boonton Meadows Way. Aside from the fact that redacting documents in this way is a means by which assets can be concealed and therefore is additional evidence of a risk of dissipation by concealment, that the first defendant's interest in this property (or that he had no interest in it notwithstanding what was contained in the register for that property) was not disclosed was more cogent evidence from which the existence of a real risk of dissipation by concealment can be inferred.

64. The circumstances in which the existence of this property came to light are set out in Ms Briant's draft third affidavit. It is in draft because it was not in the end deployed but Mr Saoul confirmed on instructions that it would have been sworn as drawn had it been necessary to do so (T2/14/28-9 and T2/15/22-23). The property was registered in the name of one of the first defendant's daughters, having been purchased by him on 29 June 2018 for a price of £352,995. The claimants' solicitors sought information as to the first defendant's interest in the property.

65. In the course of those enquiries, it was said on behalf of the first defendant that the property belonged to his daughter, that he bought it as a gift for her and that used it only as a correspondence address after he moved to the United States of America. It would have instilled confidence in the reliance that could safely be placed in what was said by the first defendant if he had disclosed the existence of the property and why he was mentioned on the title of the property at the outset but he chose not to do so. The

explanation for the redaction was that the first defendant wished to protect his daughter. In those circumstances, it is surprising that the first defendant sought to redact the address from the materials he disclosed without first seeking the consent of the court (or the claimants' solicitors) to do so or identifying that a redaction had been made. Neither of these steps would have involved identifying the property prior to either agreement or a court ruling on the issue. That is further evidence (taken together with what I have considered already) of a real risk of dissipation. I accept that while the terms of the restriction imposed on the resale of the property may have been imposed in order to prevent a sale otherwise in the best interests of the first defendant's daughter it is difficult to see on what basis that would have been effective if the first defendant's daughter wanted to sell and the property truly was transferred to her absolutely. It could only work if the property was held by the first defendant's daughter on bare trust for him. It almost certainly would not be effective if either the first defendant's daughter enjoyed sole legal and beneficial ownership of the property or even if the property was jointly owned. On its face the effect of the Restriction was to prevent the first defendant's daughter from selling the house without his consent.

66. Mr Collings sought to explain this away as an "*oddity"* that can be expected to arise "*... when you have this intrusion and scrutiny of somebody's affairs ..."* and that the (unauthorised and unjustified) redaction was simply the result of the first defendant wanting to protect his daughter and that *"(i)f you make a gift to your daughter and you are a rich man, of a house the whole thing is about reversing the burden* …" of proof. I reject this submission. This was not a transfer that did not call for an explanation. This was a purchase with a reservation on the part of the first defendant to control disposal. That could only work as a matter of law if he was the sole beneficial owner. In its context plainly it did require an explanation, as did the attempt to conceal its existence without first seeking court approval or consent to conceal the details. This led Mr Collings to submit that the redaction was "*cack handed"* and that " … *the explanation has been offered and it might seem somewhat incredible* …". He maintained however that I should accept that the redaction was not to hide an asset and that the reason he did not disclose it was that it was not his asset.

67. As I have said repeatedly, this application is not the opportunity for a mini trial on collateral issues such as this. The property has now been secured by undertaking in lieu of a *Chabra* order. The question whether the first defendant has retained a beneficial intertest in the property will be resolved if and when that issue is tried as between the claimants and the first defendant's daughter. It is not an issue that I can or should attempt to resolve on an application of this sort. It may turn out that what appeared on the register as no more than a benign attempt to prevent sale otherwise than in the best interests of the first defendant's daughter. However that is an issue for trial. The claimants argue that there is a realistically arguable case that the first defendant is at least a beneficial owner of the property by reason of him having purchased it, particularly given the timing of the purchase – a time when the first defendant must have known that the schemes the subject of these proceedings were in significant financial difficulty. I agree that is so when tested by reference to reasonable arguability. I also accept that this provides a plausible evidential basis for concluding that there is a real risk of dissipation in the relevant sense by the first defendant. In the end it was only not necessary for the claimants to seek *Chabra* relief against the first defendant's daughter because she offered acceptable undertakings.

However it cannot be said that these were obtained quickly or without significant efforts by the claimants' solicitors.

68. It is necessary that I mention one other matter that in my judgment demonstrates a realistic risk of dissipation. The claimants issued an asset disclosure order application against the first defendant that in the end was determined by Butcher J in a judgment given on 22 July 2022 ([2022] EWHC 2398 (Comm)). Many of the issues the subject of that application had been resolved by the time the application came before Butcher J. However as Butcher J said in [4] to [5] of his judgment, disclosure was sought by the claimants in respect of two matters:

> "4. The first is in relation to a payment which was made by EP LLP by cheque on 18 February 2021, that being the same date as the worldwide freezing order was served on the First Defendant. EP LLP is a company which is owned by Mr Spence and by his wife. The payment was made out by a cheque to an unknown beneficiary in the sum of US$190,487.50. The Claimants seek identification of the beneficiary and documents relating thereto.
>
> 5. The second matter is in relation to filings of accounts for EP LLP. Mr Spence has offered to provide such filings, but he wants to redact the name of the agent who filed those accounts."

The first defendant had refused to supply the information concerning the payment on grounds that were not in the event maintained by the first defendant before Butcher J and replaced with an assertion (supported by his 6th witness statement) that the first defendant did not know the name of the payee. In essence he said that the money was paid to an agent of the company whose identity was unknown to him but was known to the first defendant's current wife, who had declined to provide the information. As I have noted already, the first defendant now lives in America, his current wife is a USA national and EP LLP is a real estate agency that operated at the material time in the US. The first defendant's explanation was he could not ask his wife for the information because of confidentiality obligations imposed by the agreement with the agent and by State regulatory obligations. After Butcher J had dealt with the facts in detail, he then concluded:

> "I accept that there is, on the face of things, inherently improbable that Mr Spence, who owned the business with his wife, did not know who this one remaining agent was, even though it does appear that he knows that it was a man. That apparent implausibility derives from the fact that it would mean that Mr Spence and his wife have been in discussion about their affairs, including this business, for some years but without mentioning the name of this last, active agent engaged by EP LLP.
>
> 12. As to the suggestion that there would be a possible breach of the confidentiality clause in the agreement with the agent, I agree with Mr Saoul that it seems unlikely that there would be

> any breach of a confidentiality clause in a case where there was disclosure made in accordance with an order of the court. Equally, it appears that there is a significant question mark over the extent or actuality of the confidence involved, given that the agent's name appears in a register called MLS which is a real estate listing of past and present transactions in the United States."

Butcher J then concluded that it was appropriate to make the first of the orders sought because it was necessary for the purpose of policing and ensuring compliance with the worldwide freezing order but was not necessary to make the second at any rate at that stage since it was plausible that the filing was by the company's accountant. In reaching his conclusion on the first of the orders made, the judge considered as of particular relevance that:

> "First of all, that this payment was not initially revealed. Secondly, that there has, to some extent, been inconsistency in the explanations given about the reason for not revealing the identity of the payee ranging, as I have said, from an apparent unwillingness to provide the name of a known payee, to an explanation which involves that Mr Spence does not know the name of the payee. Thirdly, the apparent, albeit potentially explicable, improbability of the current explanation. Fourthly, that it seems to me that there cannot be any real difficulty in Mr Spence getting this information, if not from his wife, then from the bank, given that he is a controller of the relevant bank account. Fifthly, the limited nature of the disclosure which is now sought. Sixthly, the protection to Mr Spence afforded by the undertakings which the Claimants are prepared to give. Seventhly, the potential utility of this disclosure, in seeing what the position in relation to the business of EP LLP was actually, in understanding the value of the asset which is involved, and of course if this payment was made to someone who is subject to the worldwide freezing order, that would of itself be a potential utility. I do not consider that this is simply a matter of seeking material for a contempt application. Finally, as to confidentiality, the fact that it appears very unlikely that there would be any breach of confidence in the face of a court order and, as I have already indicated, the limited extent of any confidentiality which there can actually be, given the MLS register to which I have referred."

The key points are first the refusal to provide the information sought in relation to the first of the issues that arose, which was maintained for about a year, secondly the inconsistency of explanations offered and thirdly the improbability surrounding the explanation relied on at the hearing. Mr Collings submits that this was all making a mountain out of a mole hill that was the result of what he contends to be over zealous detective work on the part of the claimants' solicitors. Whilst I accept that as things have turned out this is not the most significant issue, nor one that of itself would necessarily justify a conclusion that a real risk of dissipation has been demonstrated

that is not the position. Aside from the aggravating circumstances referred to by Butcher J, this issue is not an isolated one but is to be evaluated together with the other facts and matters to which I have referred. In my judgment in that context, these events too provide a plausible evidential basis for considering there is a real risk of dissipation by the first defendant if the order is not continued.

69. I fully accept that the first defendant moved to the US and has established a new personal and business life there. I do not conclude that there is a risk of dissipation that arises simply as a result of those life choices. I accept too that as a consequence of these life choices he could legitimately have transferred assets from the UK to the US in furtherance of those arrangements. I place no reliance on transactions where the first defendant maintains that the transactions were in the ordinary course of business. I accept that on the face of it, where notice was given of transactions that the first defendant maintains were in the ordinary course of business no particular inference is to be drawn from the structures that were used for carrying into effect that business. However, that does not detract from the effect of the points that I consider point towards a real risk of dissipation, which I have set out above. The exercise is an evaluative one with the focus of attention on being whether on balance the material available viewed as a whole demonstrates a real risk of dissipation including dissipation by concealment. The facts and matters to which I have referred above in my judgment demonstrate that to be so in relation to the first defendant.

Risk of Dissipation – Third Defendant.

70. The claimants place heavy reliance on the contents of the Kennedys Letter as evidence from which a real risk of dissipation can be inferred. Mr Johnson's submissions in essence is that there are good explanations for a lot of the things that have happened. Whilst I accept that explanations have been offered, that is not necessarily an answer to the points made by the claimants. As I have said more than once this is not a mini trial. The test that must be applied to the claimants' case is one of realistic arguability. That is all the more the case here because as I have emphasised throughout there is a marked asymmetry of information between what is available to the claimants and what ought to be available to the defendants viewed against the critical point made by Mr Johnson himself namely that "*... this claim is at a very early stage in its life ...*"- see T2/72/303-31. This led Mr Johnson to say in relation to a privilege issue to which I refer below in more detail *"...(i)f at disclosure, there is a credible case on waiver of privilege, then no privilege will obtain but we are not there yet…*" Thus, only explanations that have the effect of reducing a point relied on by the claimants to the level of fanciful will be sufficient.

71. As I have said, the claimants place significant reliance on the Kennedys Letter. There was a substantial debate about the detail leading to the disclosure of the letter with Mr Johnson maintaining that the third defendant was being unreasonably criticised for resisting the disclosure of the material sought from the fourth defendant's liquidators. In my judgment the rights and wrongs of that are not material for present purposes. What matters is the substance of the letter, to which I turn in a moment. Mr Johnson places some reliance on the fact that ultimately the third defendant did not seek to obstruct disclosure as he might have done by making " … *unmeritorious objections to disclosure on a whole variety of grounds* …". With respect I do not accept that the failure to make unmeritorious objections assists in the evaluation I have to undertake.

Rationally, such objections are not made because they won't prevail and are likely to be visited by adverse costs orders, perhaps even adverse costs order with costs being assessed on the indemnity basis.

72. Mr Johnson maintains that I should take into account in assessing whether a real risk of dissipation has been demonstrated that no steps have been taken by the fourth defendant's liquidators against the third defendant and that the documents disclosed suggest they have given him a clean bill of health. Whilst I accept that no steps have been taken against the third defendant by the fourth defendant's liquidators, there is limited value that I can attach to that in the circumstances. The company has no assets and there is no evidence as to the availability of funding to enable the liquidators to take any steps against anyone, nor as yet any creditors that would wish to fund or otherwise encourage the taking of such steps. I develop this further below. Finally, before turning to the substance, I record that Mr Johnson maintained that I should take into account an assertion by the third defendant that his solicitors advice changed by 2019 from that summarised in the Kennedys Letter as having been given in 2015. I have drawn attention to this point already when considering the claimants' case on the merits. The difficulty about that is that privilege has been claimed in respect of that material by the third defendant. There is a question mark as to whether the third defendant can claim privilege or not – that depends on whether the advice was given to the fourth defendant acting by the third defendant or whether it was given to the third defendant or the third defendant jointly with the fourth defendant. I leave that out of account because I cannot resolve that dispute. I accept however that it is not open to a court to draw inferences from an assertion of privilege. However, an assertion of privilege in the circumstances of this case means that on the one hand I have what is set out in the Kennedys Letter and on the other an assertion of a change of view by the solicitors concerned, which has not been documented or corroborated by the solicitors as it might have been. That is highly material to an evaluation of the material available. As Mr Johnson correctly submitted "*I accept that your Lordship does not have before him evidence of what was said or not said in 2019 and 2020 and therefore, I accept that your Lordship cannot place reliance on that paragraph, I accept that*". It necessarily follows for present purposes that I must accept what is set out in the Kennedys Letter at face value. To do otherwise would be to fail to apply the realistic arguability test that applies in this area.

73. I accept the claimants' submission that the material referred to in detail earlier in this judgment concerning the insurance issues is relevant to an assessment of whether there is a real risk of dissipation. The conclusion reached in the Kennedys Letter was that the third defendant had failed to deal with insurers in good faith. It is necessary to refer to only one point made in the Kennedys Letter that in my judgment is relevant to this point. When insurers challenged the suggestion that the fourth defendant did not look like a standard estate agency, the fourth defendant's brokers (instructed by the third defendant) represented that " *... they are in essence just a normal estate agency, albeit they sell off plan properties and are home based ...*" given the circumstances that was at least realistically arguably not a truthful or good faith representation of the position. Similar points can be made concerning the failure to inform insurers that it was not following the advice it had received from its solicitors. The point that emerges from the letter is that there is at least a realistically arguable case that the third defendant was willing to mislead insurers and that advice that is perceived to be contrary to the third defendant's interests will be ignored.

74. In my judgment this is material to an assessment of whether there is a real risk (or a plausible evidential basis) for concluding that the third defendant would place assets out of reach of a judgment creditor by concealment. Secondly, this material demonstrates to at least the standard of realistic arguability a willingness to ignore advice when it is given where that is perceived to be in the third defendant's best interests. There is no evidence whatsoever that any of the advice from his solicitors referred to in the Kennedys Letter resulted in any changes to the manner in which the schemes were promoted to the public. That is particularly cogent given that even on the third defendant's case the advice did not change before 2019. That is a powerful consideration when considering whether on the totality of the evidence the claimants have demonstrated a real risk of dissipation because it shows a willingness to misrepresent having been advised and thus knowing that what is being included within the presentation material were misrepresentations that exposed the fourth defendant to the risk of legal action, it shows a willingness to ignore advice concerning his conduct and it shows a disregard for the effect of such conduct on the persons to whom the material was being presented.

75. This material cannot be viewed in isolation. The third defendant established a network of companies known in these proceedings as the "XIP" companies. Mr Johnson submits (correctly) that the companies were formed at different times prior to the schemes starting to unravel (1 October 2018 in the case of the Student Accommodation Scheme and January 2019 for the others). That is not material or centrally material. The point for present purposes is not when or why originally the companies were formed but how they were utilised and how they were controlled.

76. The structure was complex or became so. In summary however, the third defendant was at all material times the sole director and ultimate beneficial owner of these companies. XIP Capital Limited ("Capital") was incorporated on 18 March 2016. XIP Holdings Limited ("Holdings") was incorporated on 28 March 2018. Its sole shareholder was the third defendant. Capital's shares were held equally by the third defendant and Holdings. The effect of this was that the third defendant was the sole beneficial owner of the shares in Capital. Capital appears to have held a majority of the shares in the fourth defendant and Holdings the remainder. Thus the third defendant was the sole ultimate beneficial owner of the shares in the fourth defendant because (a) Holdings' shares were held solely by the third defendant and (b) Capital's shares were held jointly by Holdings and the third defendant.

77. XIP Invest Limited ("Invest") was incorporated on 2 April 2019. Its sole shareholder was Capital. Thus, the third defendant was the sole beneficial owner of the shares in Invest since Capital's shares were held jointly by the third defendant and Holdings and Holdings' sole shareholder was the third defendant.

78. Finally, XIP Services Limited ("Services") was incorporated on 3 July 2020. Its sole shareholder was Holdings and thus its sole beneficial shareholder was the third defendant since he was the sole shareholder in Holdings.

79. It will be readily apparent from what I have set out above, that the third defendant started to construct the XIP structure in March 2016 with the shares in the fourth defendant being held as I have described from the end of March 2018. Thus the construction of this group started about 6 months after the third defendant had

received the advice from his solicitors referred to in the Kennedys Letter and Capital and Holdings had become the shareholders in the fourth defendant about 6 months before the schemes the subject of these proceedings collapsed between October 2018 and January 2019 although ultimately the shares were owned beneficially by the third defendant as I have explained because Capital's shares were held jointly by the third defendant and Holdings and Holdings' sole shareholder was the third defendant.

80. As I explain in more detail below, the fourth defendant (controlled by the third defendant) (a) declared dividends in substantial amounts after the advice referred to in the Kennedys Letter had been received, (b) in the knowledge that (i) the material to which that advice related exposed the fourth defendant to the risk of civil claims; (ii) the content of the material had not been changed materially following the receipt of that advice; and (iii) when at least realistically arguably the third defendant was aware of the impending collapse of the schemes; and (c) was then placed in creditors voluntary liquidation at a point when it had no assets of any material value to future judgment creditors.

81. On a realistic arguability test, in my judgment that constitutes real evidence of a risk of dissipation. This is nothing to do with a lazy or unfocussed reliance on the creation or existence of a complex corporate structure. The point is not that a complex structure has been created (something that is routinely done for legitimate commercial reasons and for that reason does not justify on its own a conclusion that there is a real risk of dissipation) but rather that on the claimants' case it is at least realistically arguable that the structure has been created after receipt of the advice summarised in the Kennedys Letter and was used by the third defendant as a means of diverting cash resources from the fourth defendant that has had the effect of defeating potential claims followed by placing the company in creditors voluntary liquidation. The third defendant's case is that this structure was established to enable him to use the profits generated principally by the fourth defendant to invest mainly in property development. Whether that was or was not the purpose is not the real issue that arises. It is the timing ultimately that matters. As I have explained, if the claimants are correct in asserting that dividends were declared in the circumstances summarised above, whether that was for the purpose of investing in other businesses or not is not the point. It is noteworthy that on the third defendant's own case, the fourth defendant declared dividends that were not in the event paid when declared but retained because the sums concerned were needed for working capital. That in combination with the facts and matters already mentioned provide evidence of a realistic risk of dissipation.

82. At this stage it is necessary that I refer to the evidence of Mr Murray, who was at all material times the accountant for the third and fourth defendants and the XIP companies. The evidence provided is very limited and is to this effect:

> "47. Dividends are paid to shareholders out of distributable profits and therefore reviews were undertaken with Mr Crump when management accounts and draft annual accounts were available to determine the level of distributable reserves, with reference to ongoing working capital requirements. Consideration was given to the tax consequences, which depended on whether the dividends were paid to individuals or companies. Dividends paid to individuals are subject to income

> tax and are recorded on self-assessment tax returns and dividends payable to other companies are tax neutral and disclosed on company tax returns.
>
> 48. MMO's role in dividend declaration was to ensure that there were sufficient reserves available and that there were shares in issue at the date of the relevant declaration. The dividends declared are explainable with reference to the corporate structure in place and not considered unusual."

The claimants submit and I agree that there is no evidence that Mr Murray was aware of the critical facts and matters on which they rely for present purposes including in particular (a) the legal advice received as summarised in the Kennedys Letter and (b) that no material changes were made to the material being used to promote the schemes notwithstanding that advice and so there was a risk of claims being made. This material provides a plausible evidential basis for a real risk of dissipation by reason of the transfer of money to the XIP chain using dividend payments in the knowledge of these two factors whilst relying on apparently competent professional advice given on the basis of incomplete information or instructions. It is no answer to this at any rate for present purposes and bearing in mind the test that applies to say that no claims had been made at the time when the dividends had been paid because of the legal advice given and the absence of any changes in light of that advice.

83. There is an additional factor in relation to dividends that needs to be borne in mind. At paragraph 32(b) of his witness statement, Mr Murray states:

> "XIP Capital Limited ("XIP Capital") loan balance. I prepared for 2nd Crump a table recording the dividends declared by EPIL [AJLC3/437] which shows the dividends paid to XIP Capital (EPIL's parent company) in the total sum of £2,538,896.37 since 2016. XIP Capital then loaned amounts back to EPIL for working capital purposes. There is nothing unusual from an accounting or tax-planning perspective about such an arrangement. By lending money to EPIL, XIP Capital was entitled to interest and other benefits, while putting its money to work."

"*EPIL*" is the fourth defendant. Whilst Mr Murray maintains that this is not an unusual arrangement, it is, in combination with the other matters I have so far mentioned, in my judgment relevant to an assessment of whether these arrangements should be viewed as evidence of a real risk of dissipation for at least the following reasons. Firstly, for a dividend to be lawful, it has to be paid out of retained profits. It is not explained how a dividend can be declared when it is necessary for the company declaring the dividend then to borrow the dividend apparently declared back in order to fund working capital. This is described in the claimants' skeleton submissions for this hearing as "*troubling*". Secondly, there is no evidence of any formal loan agreement, nor of any entitlement to interest " … *and other benefits* ...", nor is there any indication of when and in what circumstances the supposed loan would be repayable. Since the dividend arrangements started after the legal advice referred to in the Kennedy Letter and in circumstances where no material changes were made on

the basis of that advice, it is realistically arguable that these arrangements were put in place to protect the third defendant in the event that claims started to be threatened. Whilst it would no doubt be possible for a judgment creditor to unwind these arrangements, it could only do so with difficulty and at some cost, particularly when it is remembered that liquidators will only take active steps to unwind such arrangements if the funding is available to do so. Generally, this will have to come from the creditors of the company concerned.

84. Some additional reliance was placed by the claimants on the dividend paid in 2019 as evidencing a real risk of dissipation. The fourth defendant's financial year ended at all material times on 31 August. It would appear that in each year from 31 August 2016, dividends were declared at the year end but were not or were largely not taken as I have explained. On 31 August 2018, the dividends of the year ending on that date were apparently declared with the largest payment being made to Capital. In the final year however the pattern changed. On 30 September 2018, a dividend was declared for the year ending 31 August 2019. The claimants maintain that this is entirely unexplained. I should say that it is open to a company to declare a dividend out of its profits retained from previous years so that it is not technically impossible for a company to operate in this manner. However, in this case that dividend was declared apparently on 30 September 2018 for the year ending 31 August 2019 without any attempt to justify those arrangements. Returning to the fourth defendant, its accounts show that on 31 August 2018, it had cash in hand of in excess of £2.7 million. However, by 31 August 2019 it had slightly in excess of £9,500. The accounts were signed off on 28 May 2020 and the fourth defendant was placed in creditors voluntary liquidation on 15 June 2020. The statement of affairs showed that at the date when the resolution was passed the fourth defendant had cash at bank of £22,800 odd which is said to be exactly balanced by the sum due to Invest, which is said to be a preferential creditor. The company was insolvent by £27,000 odd once other unsecured creditors were taken into account. In those circumstances it is not surprising that the liquidators have not done anything to investigate or attempt to recover any part of the dividends. The company has no assets nor any creditor willing to finance the costs of carrying out such an investigation or bring such a claim. That notwithstanding, the insolvency was the result of the payment of the dividends. The date when the dividends were paid is not evidenced by bank statements or any other contemporaneous documentation.

85. Nothing was included in the accounts for the year ending 31 August 2019 about the claims or complaints that came in before the year end. The basis on which the cash was paid out was said to be the historic but unpaid dividends that had been declared but had apparently been lent back to the fourth defendant. The significance of this point is that the schemes started to collapse in October 2018. It is common ground that complaints started to be received by the fourth defendant on 11 January 2019 and at some currently unknown stage between 1 September 2018 and 31 August 2019, virtually the whole sum held by the fourth defendant is paid away by dividends. As Mr Saoul correctly submits those entitled to the payment of a dividend did not have a priority right to be paid, particularly given that apparently the dividend had been lent to the company on an unsecured basis with no formal agreement setting out the circumstances in which the loans would become repayable. Plainly the company was insolvent because otherwise it would not have been placed in CVL. It was insolvent because it had no funds and because it was facing claims with no insurance in respect

of those claims. Given the date when the schemes started to collapse, the date when it is common ground complaints started to be received, the date when claims first started to be received in combination with the legal advice that had been received and apparently ignored it is realistically arguable that the third defendant was aware that the fourth defendant was at serious risk of insolvency from no later than 21 January 2020 (the date of the Kennedys Letter) and at least realistically arguably earlier than that.

86. I accept that there may be an entirely legitimate explanation for all this but as things stand all the information is or should be available to the third defendant and none of it is available to the claimants at this stage. As thing stand the dividend information that is available suggests a real risk of dissipation.

87. Allied to the points I have so far considered is the use to which the XIP monies were put after they had been received. In essence the claimants submit that although the money was ostensibly the assets of the companies to which it was paid, the third defendant used it as if it was his own either to fund purchases or construction projects being carried out by other entities within the XIP group or to fund his legal costs. This leads to a submission that the third defendant is using the XIP companies as "*a personal piggybank …"* – see T2/41/13. I do not propose to add to the length of this judgment by setting out the detail in relation to these assertions. In essence it is alleged that funds belonging ostensibly to one of the XIP companies has been used to fund expenditure apparently incurred by another within that group. I agree this shows a degree of informality and interchangeability between the entities. The difficulty about this is that distributions are or may be made and certainly company funds advanced to a sole shareholder director need to be clearly dealt with as loans, salary or dividends to ensure they receive the correct tax treatment but also more relevantly for present purposes to ensure transparency. Dealing in the way the third defendant has apparently chosen to operate obscures what has been going on and provides further evidence that there is a real risk of dissipation by the third defendant, when considered together with the other matters to which I have referred.

88. In the result, I am satisfied viewing the evidence as a whole that the claimant has shown a realistically arguable case that there is a real risk that the third defendant will deal with his assets so as to defeat the claims of judgment creditors.

Material Non Disclosure

89. This was an issue pursued on behalf of the third but not the first defendant.

90. The principles that apply are well known. In summary, on an application without notice the duty of the applicant is to make a full and fair disclosure of all the facts which it is objectively material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries – see Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269, *per* Lawrence Collins J as he then was at [180]. Material facts are those which a judge would need or want to take into account in deciding whether to make the order sought – see Alliance Bank JSC v Zhunus [2015] EWHC 714 (Comm) per Cooke J at [65] and National Bank Trust v Yurov [2016]

EWHC 1913 *per* Males J as he then was [18(a)]. However, there are limits to this and there is no obligation to disclose points there is no reason to anticipate that the other side would raise if present and more generally, the principle should not be carried to extreme lengths in the hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case – see Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 *per* Slade LJ at 1359B-E. As Males J observed in National Bank Trust v Yurov (ibid.)

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

The ultimate touchstone is whether the presentation to the judge was fair in all material respects – see Federal Republic of Nigeria v Royal Dutch Shell Plc [2020] EWHC 1315 (Comm) per Butcher J at [90].

91. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so- see OJSC ANK Yugraneft v Sibir Energy [2008] EWHC 2614 (Comm), *per* Christopher Clarke J. at [106], where he held that:

> "As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

92. The third defendant maintains that the claimants have been guilty of material non disclosure because seven of the 442 claimants who were parties to the claim when the without notice application was made had been sold properties prior to the involvement of the third defendant. The point the third defendant makes is that the substance of the claimants' case is that the third defendant was involved from the outset in relation to each of the schemes whereas he was not as the claims by the seven claimants who had acquired their investments prior to the third defendant and the companies he controlled becoming involved. The claimants submit and I accept that the inclusion of these seven claimants was an error which was corrected when their claims were discontinued and the freezing order discharged to that extent. I do not consider that Calver J was misled at all as to the nature of the claimants' case.

93. The claim is advanced in the way described above. The question is not whether the third defendant was involved from the outset. That said, it is not disputed that he was

involved from the outset in Ilfracombe and in relation to the Student Accommodation Scheme, where it is the first and second defendant's case that the third defendant advised them to adopt the structure of the scheme. On the claimants' case he was involved in Westbeach within 18 months of its start, only nine units at Westbeach had been sold at the point when the third defendant and his companies became involved in selling units there and that the third defendant and his companies were exclusively involved from that point onward until the schemes collapsed. As presented to Calver J, the claimants' case was that the third defendant was at the heart of things. That is their case. It is not and never was that he was an original designer of the scheme although it was said that he might have been. The affidavit in support of the application described the role of the third defendant as being that " … *it appears that Emerging Property, presumably through Mr Crump, were involved in these property investment schemes from an early stage, alongside Messrs Spence and Kewley.*"

94. On the basis of the contents of an email from an employee of the fourth defendant to a potential investor dated 29 August 2017, to the effect that " … *Alpha only got involved in the PBSA industry with us from 2012. Prior to this, they were involved in housing estates and other commercial developments — like corner shops etc. This fixed 10-year investment structure was only brought out along with Emerging Property in 2012* …" it was suggested in the affidavit in support of the application before Calver J that " … *it is possible, according to the same document, that it was Mr Crump who introduced Messrs Spence and Kewley to this business idea*". Later in the same document it was said that "... *I consider it likely that Mr Crump was an integral part of the operation of this scheme* …" but that " … *as described above, there is evidence that Emerging Property was the party that came up with the fixed return model* …". In the skeleton in support of the without notice application, the third defendant was described as being:

> "… at all material times the director and controlling shareholder (through his interest in XIP Capital Limited and XIP Holdings Limited) of the Fourth Defendant and a co-director and shareholder of the Fifth Defendant (the sole other co-director and shareholder being his wife), which were estate agents that marketed the Properties exclusively at material times."

And a little later in the same document:

> "In the period 2012 to 2019 the Properties were marketed by the Fourth and/or Fifth Defendants (which were owned and controlled by the Third Defendant), at the request of the First and Second Defendants. At all material times, the Third, Fourth and Fifth Defendants acted in concert with and/or at the instigation of the First and Second Defendants in the marketing of the Properties."

and that " ... *the Fourth and Fifth Defendants marketed the Properties through brochures and other promotional material such as prospectuses and investor reports (together the "Brochures") which were communicated to the Claimants prior to their*

purchase of the relevant Properties. …". I consider that a fair presentation. There is no mention anywhere of the third defendant being the or an architect of the schemes.

95. In relation to the third defendant specifically, the skeleton said under the heading "*Full and frank Disclosure*":

> "The Third Defendant's conduct
>
> 80. As set out above, upon the collapse of the investment schemes early in 2019 and upon Underleaseholders ceasing to make payment under the underleases, the Third Defendant was contacted by a number of investors who sought clarification as to why payment was not forthcoming.
>
> 81. The Third Defendant wrote to the Ilfracombe Investors by email on 4 January 2019, explaining that he had been chasing the First and Second Defendants since 22 December 2018 to confirm that they would pay sums due under the investors' leases on time but had received no response. Further, the Third Defendant explained that he had arranged a meeting with Mr Sullivan, who was at that point the director of various Alpha Group companies. Thereafter, the Third Defendant provided investors with regular updates (see, for example, paragraph 227 of the Affidavit).
>
> 82. It would appear, therefore, that upon the collapse of the investment scheme, the Third Defendant sought to be helpful to the Claimants; the Third Defendant is likely to seek to dissociate himself from the First and Second Defendants on this basis. Further, the Third Defendant may well maintain that as investors initially received income, up until late in 2018, he believed that the investment scheme was legitimate.
>
> 83. It is submitted that, nonetheless, the Claimants have a good arguable case to the contrary. As set out above, extravagant representations were made in the Fourth and Fifth Defendants' promotional materials and emails, such that the Third Defendant had good reason to question and/or seek to verify the veracity of those representations. It follows that the Third Defendant must have known that the representations were false or was reckless as to their veracity.
>
> 84. As Mr Kenkre explains in his affidavit, in proceedings before the Property Ombudsman, the Third Defendant maintained that the Fourth Defendant had carried out due diligence in respect of the representations made in the brochures and had carried out site visits personally as part of this due diligence. He maintained, further: "[a]s far as [EPIL] were concerned, we had no reason to believe that the returns which Alpha agreed to pay investors were unrealistic."

> 85. It is submitted that this does not avail the Third Defendant or Fourth Defendant; to the contrary, the statement quoted above strongly indicates that neither party undertook any due diligence in respect of the veracity or plausibility of the promised yields. Whilst reference is made by the Third Defendant to due diligence carried out in respect of the brochure representations, no details of such due diligence (or the outcome of that due diligence) has hitherto been provided to the Claimants.".

In my judgment that was a fair presentation when read with the contents of the affidavit in support to which the skeleton made express reference.

96. It was alleged by the third defendant that the presentation was an unfair one because it failed to make clear or in any event understated the degree to which he tried to assist investors once the schemes started to fail and that this was material since it impacted on whether and if in what terms an injunction would have been granted by Calver J against him. However, that point was made specifically to Calver J in the skeleton in support of the without notice application – see paragraphs 81-83 quoted above. It was addressed too in the affidavit in support – see paragraphs 78 and 79 and again in paragraphs 126, 224-227 and 274.3 of Mr Kenkre's affidavit *passim*. When those paragraphs are read together with paragraph 80, I am satisfied that was a fair presentation of this issue when all the evidence and the skeleton are read together, and no failure to disclose that which had to be disclosed. The reality is this: the claimants do not accept that the third defendant was being sincere in his efforts to assist investors. They have a realistically arguable basis for asserting that to be so. The full and frank disclosure rule does not require a party in the position of the claimants in this case to abandon or downplay their case but merely to draw attention to what the third defendant could reasonably be expected to say in answer to it. That is what the claimants did in this case.

97. It is next submitted that the claimants were in breach of their duty of full and frank disclosure by failing to disclose how a complaint by Mr Ben Diamond had been determined by the Property Ombudsman. Although the claimants rely on that decision not being publicly available, I am not impressed with that as an argument since it was a decision made on a complaint made by an individual who is a director of one of the corporate claimants in this dispute. I am prepared to accept that this is material that could have been obtained by the claimants before applying without notice. However a sense of proportion has to be maintained. This is an application brought by an action group consisting of in excess of 400 claimants, each of whom have a realistically arguable case that, as the fourth defendant controlled by the third defendant put it in his advertising material, it was operating in effective partnership with the first and second defendants. It is entirely unreal to suppose that given the weight of material that was placed before the Judge he would have come to a different conclusion by reference to the complaint by Mr Diamond to the Property Ombudsman. I consider the point that the complaint was in relation to a mis-selling allegation not made in this case is a relevant consideration because what is material and what is not is for the judge not the parties to decide and because the point that is made is that the Property Ombudsman commented in his ruling that "*EP…were, to some extent, entitled to expect that the developer would deliver on the guaranteed rent investments*". Thus I

accept that to an extent this balanced the Property Ombudsman claim by Mr Fox, which features in the evidence of Mr Kenkre and was relied on by the claimants because of the conclusions reached in that case concerning the absence of any meaningful due diligence by the fourth defendant. Whilst I consider that it would have been appropriate to disclose the ruling in Mr Diamond's case I accept that its existence was not known to the claimants' solicitors, because it was not in the public domain, I accept that it was of marginal materiality and that in practice it would have made no difference to the outcome of the application. This is so because the third defendant's likely case on this issue was drawn to the attention of the judge at paragraph 84 of the skeleton submissions for the without notice hearing under the sub heading "*Arguments likely to be raised by the Defendants*" as was an argument that the claimants themselves should have carried out due diligence. Thus whilst I accept that the ruling on Mr Diamond's claim to the Ombudsman is something that ought to have been drawn to the attention of the Judge it is not something that should lead me to discharge or not regrant the injunction granted by Calver J applying the principles and approach identified by Christopher Clarke J in OJSC ANK Yugraneft v Sibir Energy (ibid.). In a case of this evidential complexity to take any other view would be to defeat rather than deliver fairness.

98. In the result I conclude that the injunctions ought to be continued against both the first and third defendants for the reasons set out above. In summary I am satisfied that the claimants have demonstrated that they have a realistically arguable claim against each of the applying defendants, that they have demonstrated a real risk of dissipation as that concept is to be understood in this context against each of the applying defendants and that the third defendant has not demonstrated a failure of full and frank disclosure or such a want of fair presentation as to merit me discharging or refusing to extend Calver J's order. Even if I am wrong to have concluded that the or any of the points relied on did not demonstrate a want of full and frank disclosure or a want of fair presentation, I consider that the errors that occurred were innocent rather than deliberate and arose in the context of a very complex claim and application prepared inevitably in circumstances of some pressure. Even if I had considered any of the matters complained of disclosed an absence of full and frank disclosure I would have concluded that they each fell within the margin for error referred to by Christopher Clarke J in the authority referred to above and would in any event have continued and not discharged the order made by Calver J.

The Chabra Application

99. By their Application Notice issued as long ago as 11 March 2021, the claimants seek an order that the XIP companies be joined as respondents to the freezing order even though thy are not defendants to the proceedings.

100. The legal principles that apply are not in dispute. Orders may be made against parties against whom no substantive cause of action is alleged where there is reason to suppose that the third party is holding assets as nominee for a defendant against whom a substantive claim is made – see T.S.B. Private Bank International S.A. v Chabra and Another [1992] 1 WLR 231, where the order was made on the basis that there was a good arguable case that there were assets, apparently vested in a company, that may have been beneficially the property of the defendant against whom the substantive claim had been brought - or where the transfer might be avoided by operation of

s.423 of the Insolvency Act 1986 – see Convoy Collateral Ltd v Broad Idea International Ltd [2022] 2 WLR 703 *per* Lord Leggatt at [88], approving Lemos v Lemos [2017] 1 P & CR 12. The underlying principle is that (similarly to a freezing order made against defendants against whom a cause of action is advanced) such orders are made to prevent the injuncted party " … *dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought* …" – see JSC BTA Bank v Ablyazov (No 10) [2015] 1WLR 4754 *per* Lord Clarke JSC at [34].

101. In this context, a nominee is a person (whether a company or individual) who holds an asset on bare trust for a defendant – see Prest v. Petrode 1 Resources Ltd [2013] UKSC 34; [2013] 2 AC 415 per Lord Sumption, who added at [52] that whether this was so was "*... highly fact specific ...*". In the context of an application such as this the factual test is that which applies throughout in this area – that of realistic arguability. In deciding whether such an order should be made, a court at this stage is not required to identify the precise route by which assets could be reached ultimately but only that there are assets and a good reason to suppose they may be reachable and that it is otherwise just and reasonable to grant the order sought. The Injunction holds the position until the substantive rights to the assets can be determined either at a trial or in enforcement proceedings. A good reason and that something is realistically arguable are functionally similar concepts.

102. The claimants submit that there is good reason to suppose that the assets held by the companies are held by them as nominees for the third defendant in the sense defined above. They also maintain that the dividend payments by the fourth defendant to the XIP companies is likely to be avoided under s.423. I have set out at some length already, what is said by the claimants in respect of the XIP companies. I do not intend to repeat it other than to say that I am satisfied that the claimants have shown at least a realistically arguable case that the dividends transferred from the fourth defendant to the XIP companies (a) will be avoided by operation of s.423 and/or (b) the dividends paid to the XIP companies are held by those entities as nominees of the third defendant.

103. As I have explained already, these are not issues that can or should be investigated or determined at this stage. As I have explained, assets apparently belonging to the XIP companies have been used in an entirely undocumented way for example to finance the third defendant's defence costs. Whilst (as I have said above) I accept that there may be legitimate routes by which this can be achieved, there is no material available that defeats the realistic arguability of the claimants' case that the third defendant had used the assets held by the XIP companies as if they were is own. This includes the purchase of property by Services when the dividends apparently went to Capital and Services is not a shareholder in Capital, the payment made to two separate building contractors for building work, each of which identified its customer as being the third defendant as well as funds ostensibly held by Services being used to fund the third defendant's legal expenses. I accept the claimants' submissions that this establishes there is good reason to suppose that the XIP corporate network is holding assets as nominee for the third defendant.

104. I am also satisfied that a realistically arguable case has been shown that the payment of the dividends by the fourth defendant are ones to which s.423 will apply. Dividends

are payments for which by definition the paying company receives no consideration and thus the payment of a dividend satisfies the threshold requirement set out in s.423(1)(a) and/or (c) – see BTI 2014 LLC v. Sequana SA [2019] BCC 631 *per* David Richards LJ (as he then was) at paragraph 49 to 50. As David Richards LJ said at paragraph 49, undistributed profits were beneficially owned by the company until distributed and were not in any sense the property of the shareholders until after distribution. This element of the Court of Appeal's conclusions is unaffected by the subsequent appeal to the Supreme Court. For that reason I reject a submission by Mr Johnson that *"…(o)nce the dividend has been declared, there is a contractual right in law to its receipt and it is not EPIL's money any more*".

105. I do not intend to set out again what I have said already about the dividend payments earlier in this judgment. In the circumstances set out above there is good reason to suppose that at least a substantial purpose of making the payments was to defeat the claims of the fourth defendant's creditors. That satisfies the applicable test under s.423 – see IRC v. Hashmi and another [2002] EWCA Civ 981; [2002] BCC 943. That is so because (i) all the XIP companies were controlled or ultimately controlled by the third defendant; (ii) dividends were apparently voted but not paid out in some cases for years; (iii) part of the dividends paid out was apparently declared and approved only one month into the financial year to which ostensibly it applied; (iv) the effect of the payment of the dividends was at least realistically arguably to deprive the fourth defendant of its entire working capital; (v) the fourth defendant apparently had no or no sufficient working capital other than by retaining the unpaid dividends that had apparently been declared; and (v) all the dividends were paid together at a time when (a) it was apparent that the schemes were collapsing and (b) to the knowledge of the third defendant (by whom the fourth defendant was controlled) the advertising material generated by the fourth defendant exposed it to the risk of legal action by dissatisfied investors if what was promised did not come about but had not been changed notwithstanding that advice. To pay dividends away in such circumstances creates reasons to suppose that the structure and payments were an attempt to put assets belonging to the fourth defendant beyond the reach of persons who may make claims against it or otherwise prejudice the interest of such persons.

106. In those circumstances, I accept that the claimants are entitled to an order in the terms they seek and that it is just and convenient that an order in the terms sought should be made. I have explained at some length above why I consider that the claimants have made out a real risk of dissipation against the third defendant including dealing with assets of companies ultimately solely controlled by him. I accept that it is appropriate to minimise the impact of the orders on the genuine business activities of the XIP companies and that there must be a cross undertaking in damages in case ultimately it should turn out the order should not have been made.

The Fortification Application by the Third Defendant

107. The applicable principles are those summarised by Popplewell J as he then was Phoenix Group Foundation and others v. Cochrane and others [2018] EWHC 2179 (Comm) at [14] in these terms:

> " … an applicant for fortification must satisfy three requirements. First, that the court can make an intelligent

> estimate which is informed and realistic, although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant by reason of making the freezing order. Secondly, that the applicant has shown a sufficient level of risk of loss to require fortification, that is has shown a good arguable case to that effect. Thirdly, that the making of the interim order is or was a cause without which the relevant loss would not be, or would not have been, suffered. In relation to that third requirement, whilst it is open to the respondent to the application to demonstrate that there is no causal link between the granting of the injunction and the loss in question, if disproving that asserted causal link, as to which a good arguable case is shown, requires the deployment of extensive contentious evidence and argument, then that is not an exercise to be attempted at the interlocutory stage."

This formulation was approved by the Court of Appeal in the appeal from the decision of Moulder J in these proceedings reported at [2022] EWCA Civ 500, where Philips LJ (giving the judgment of the Court) added at [20]:

> "20. The appellants emphasised that an application for fortification could not be based on mere assertion or supposition but required an evidential foundation … However, that is not in my judgment a separate requirement, but merely an obvious aspect of the need for the applicant to demonstrate a good arguable case, it being impossible to demonstrate such a case without an evidential foundation.
>
> 21. The appellants further stressed that it was necessary for the applicant for fortification to demonstrate that the losses would result from the grant of the injunction rather than from the underlying proceedings … Again, in my judgment, that proposition, whilst no doubt important for the court to bear in mind, is no more than an aspect of the causation element of the applicable requirements referred to above."

108. I turn now to the factual elements of this application. In his second statement, the third defendant relied on two sources of loss which he maintains justifies fortification. One concerns his SIPP where he says:

> "…the Claimants have frozen my SIPP (held with Hargreaves Lansdown) and I am unable to trade investments within the SIPP wrapper. Trowers has requested 24 hours' notice of any trade. This makes it practically impossible to buy and sell in fast-moving markets. A cryptocurrency Revolut account identified at line 17 on the List of Assets held in my name on behalf of XIP Holdings is losing money as well and I am unable to operate it. I estimate the losses in relation to Revolut to be in the region of £20,000 on a broad brush basis. The losses in relation to my SIPP are likely to be more significant."

109. The other source of loss said to be the result of the freezing order concerns a lost property development opportunity. In essence, the third defendant maintains that prior to the grant of the freezing order he and his wife had applied to Scottish Widows to re mortgage their home in order to reduce the costs of the mortgage repayments and in order to raise capital for a property development to be carried out by XIP Capital with the balance of the cost of purchase of the site (£1.95m) being met " … *by commercial borrowing, for which I would have been required to give a personal guarantee as director*" with the costs of carrying out the development (£850,000) being " … *met by cash reserves in the XIP Holdings group and further borrowing, if required*." As to his ability to raise that sum by commercial borrowing he says simply "(*t)here was no reason why such borrowing would not be available to me*". The third defendant maintains that this would be an entirely normal way of carrying out a commercial property development using a limited liability company as a SPV with funding being provided by its director-shareholders. However, the third defendant maintains that this potentially lucrative development collapsed because of a restriction placed on his matrimonial home by the claimants, which caused the proposed re-mortgage to fail. The third defendant maintains that:

> "The register entry in relation to the freezing order is an impediment to any lending, preventing my wife and me from reducing our expenses and frustrating any further development projects - potentially for years to come as the litigation works its way through the courts."

The combined effect of these three elements – the alleged loss of the redevelopment opportunity, the alleged inability to be able to operate the SIPP effectively and the alleged inability to operate the Revolut crypto-currency account – all lead the third defendant to submit that:

> "… if the court dismisses my application to discharge the freezing order, I ask for the cross-undertaking to be fortified by £600,000, which is a realistic estimate of the losses 1 have already suffered in connection with Western Parade, with an allowance for Revolut and the SIPP"

110. In answer to this the claimants submit on this material there is no evidence of the third defendant's ability to raise the additional borrowing necessary to fund completion of the redevelopment project. The sums involved are significant - £2.35m net of the sums resulting from the re-mortgage of the third defendant's matrimonial home. There is no evidence as to the value of the development site in its undeveloped condition, nor is there any evidence of a commercial or other lender ready willing and able to lend the sums necessary to complete the project on the surety of the site and a personal guarantee from the third defendant but for the freezing order. There is no evidence that validates the commerciality of the proposed development. The third defendant asserts that the flats resulting from the redevelopment could be sold for £3.5m thereby yielding "*net profits"* of £508,750. However none of the figures have been the subject of detailed or independent appraisal. Such an appraisal would be a critical element in securing commercial borrowing on a speculative building project of this sort. There is no evidence that the third defendant had entered into any meaningful negotiations (subject to contract) for the purchase of the development site.

There is some evidence that another party interested in the site was well advanced in its approach to the site. In my judgment the conclusion that the third defendant invites me to reach is not " … *an intelligent estimate which is informed and realistic, although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant by reason of making the freezing order* …".

111. The SIPP and Revolut accounts have been available for use by the third defendant on agreed terms since 5 August 2021 (in the case of the SIPP) and 20 July 2021 (in the case of the Revolut account). There is no evidence of losses incurred prior to those dates that would justify further fortification. In those circumstances, I am not satisfied that the third defendant has established to the level required by the authorities an entitlement to further fortification.

Conclusion

112. For the reasons set out above (a) the discharge and fortification applications fail and (b) the Chabra application succeeds. I will hear the parties after hand down of this judgment on the terms of the order and as to the costs of the application.