Neutral Citation Number: [2019] EWHC 1529 (QB)

Case No: QB/2018/000709

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 June 2019

Before
MR JUSTICE MORRIS
- -

Between:

ANDREY ROGACHEV	**Claimant**
- and -	
MIKHAIL GORYAINOV	**Defendant**

- -
- -

Philip Coppel QC and **James Shirley** (instructed by **Edwin Coe LLP**) for the **Claimant**
Jonathan Nash QC and **William Edwards**
(instructed by **White & Case LLP**) for the **Defendant**

Hearing dates: 20 and 21 March 2019

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Approved Judgment

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

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Mr Justice Morris:

Introduction

1. On 21 December 2018 on the without notice application of Mr Andrey Rogachev ("the Claimant"), Mr Justice Stewart granted a worldwide freezing injunction against Mr Mikhail Goryainov ("the Defendant") until the return date of 15 January 2019, restraining the Defendant from removing any assets within the jurisdiction up to the value of £9 million or in any way disposing of, dealing with or diminishing the value of any of his assets whether in or outside England and Wales up to the same value ("the Freezing Injunction"). The assets restrained include specifically the sale proceeds of a property known as Volgogradskiy Prospect 177 in Moscow ("V177"), if it has been sold. The order was continued with variations by further orders of 21 January 2019 and 26 February 2019.

2. There are now before me three applications. The first two applications were considered at an oral hearing on 20 and 21 March 2019 and are as follows:

   (1) An application by the Claimant, made by application notice dated 14 January 2019, for an order that the Freezing Injunction be continued until further order; and

   (2) An application by the Defendant, by application notice dated 12 March 2019, that the Freezing Injunction be revoked and discharged. The Defendant further applies for an order that the Claimant provide the Defendant's solicitors with a full and accurate list of each and every person who has been informed of the Freezing Injunction, and that the Defendant have liberty to apply for an enquiry as to the damages on the Claimant's undertaking in schedule B to the injunction.

3. Since the hearing in March 2019, the Claimant has applied, by further application notice dated 2 April 2019, for an interim proprietary injunction, in lieu of the Freezing Injunction, restraining the Defendant from transferring ownership or control of, or dealing with, V177. Whilst the injunction sought by this further application is based on contractual, as well as proprietary rights, for ease of reference, and by way of contrast to the Freezing Injunction, I refer to it as "the Proprietary Injunction".

The parties' cases in outline

4. The Defendant contends as follows:

   (1) The Freezing Injunction should be discharged for a series of overlapping reasons:

      (a) There was no justification for the application to Stewart J having been made without notice;

      (b) The Claimant does not have a good arguable case for damages or equitable compensation in the amount identified in the Freezing Injunction or at all;

(c) When making the application to Stewart J, the Claimant was in breach of his duty of full and frank disclosure;

(d) There is (and was) no real risk of dissipation;

(e) The grant of a Freezing Injunction is not appropriate in all the circumstances.

(2) In any event the Freezing Injunction should not be continued, for the same reasons as in (1)(b), (d) and (e).

(3) Further, there is no basis for the grant of an interim proprietary injunction in lieu of the Freezing Injunction.

5. The Claimant contends as follows:

(1) The Freezing Injunction should be continued, and not discharged; or in any event should be granted afresh.

(2) Alternatively, if no freezing injunction is warranted, there should be an interim proprietary injunction restraining dealings with V177.

The Evidence

6. The principal evidence before me is the Claimant's first affidavit dated 24 December 2018 and a witness statement of Roger Kennell dated 20 December 2018 in support of the without notice application; the Defendant's first witness statement and a witness statement from Mr Artem Bukin, both dated 12 March 2019; the Claimant's first witness statement dated 15 March 2019 responding to the Defendant's witness statements and, now, in relation to the Proprietary Injunction, a second witness statement from Mr Bukin dated 26 April 2019.

7. In this judgment, I address first the factual background, and then, deal in turn with the Freezing Injunction and the application for the Proprietary Injunction.

The Factual Background

8. The Claimant is a Russian businessman with investments in retail and real estate sectors. He is currently a member of the supervisory board of a group of companies running a supermarket chain in Russia. M1 Managing Company LLC ("M1") is a company which has been and is involved in the operation of three of the four operational markets (as described below). Mr Ilya Sinitysin is M1's chief financial officer.

9. The Defendant is a Russian businessman whose investments are primarily in real estate. He controls Gremm Group, a Russian real estate group. Mr Bukin is currently chief development officer at Gremm Group.

10. In late 2013 the Claimant and the Defendant agreed to enter upon a joint business to develop and operate farmers' markets in Moscow. That joint business ("the Joint Venture") was to comprise at least five market sites, namely; V177, a former car factory in Volgogradskiy Prospect, Moscow; three currently established and operating

undercover markets in Moscow, known respectively as K25, K24 and LB30; and a further currently established and operating undercover market known as Usachevskiy Market.

11. This initial overall joint venture agreement made in January or February 2014 provided the agreed framework under which the Claimant and the Defendant could acquire individual sites, with each site separately acquired, developed and thereafter operated as a market. In mid-January 2014, the Claimant instructed lawyers to draft a shareholders' agreement which would, when put in place, govern the corporate holding structure for the Joint Venture and accommodate the acquisition of separate sites. At that time the Claimant and the Defendant anticipated that the corporate holding structure and shareholders' agreement would be in place within a matter of months, before the acquisition of specific sites under the Joint Venture. In fact the drafting of the agreement and establishing the corporate structure took considerably longer and it was not until 26 June 2015 that the Shareholders Agreement was executed. In the meantime progress on the Joint Venture had moved at a faster pace.

12. More generally, each party was to own 50% of the joint business. They would share 50% of the costs, including the costs of acquiring developing and operating the markets, and 50% of the returns. The funding for the joint business was provided by companies controlled by each of the parties. There is no dispute that the amount contributed by companies controlled by the Claimant (US $29.5 million) was approximately US $9 million more than that contributed by companies controlled by the Defendant (US $20.2 million).

13. Four of the five sites are operational. The operating company for three of those four sites was and is M1. Although there is a dispute as to the historic position, there is no dispute that M1 de facto now acts on the Claimant's instructions. Thus, the Claimant is in de facto control of three operational sites, namely K24, K25 and LB30 and the income they produce.

V177 Agreement

14. The Claimant's claim centres upon the V177 site. In about February 2014 the Claimant and the Defendant agreed that they would acquire V177 by purchasing the two corporate owners of the units which comprised the site (OJSC Moskvich Servis and LLC Rolvent) and then develop the site for use as a market.

15. By the Particulars of Claim, the Claimant alleges that an initial agreement concerning V177 was reached on 10 February 2014 and that on 7 July 2014 the terms of that agreement were modified. The express and implied terms of the V177 Agreement (as modified) and the breaches of those terms, as alleged by the Claimant, are set out in paragraphs 69 to 74 below. In essence, V177 was to be transferred by the Defendant to a holding company within the corporate group structure, once established.

16. By 3 March 2014 the Defendant had made the first payment towards the acquisition of V177 and by 20 March 2014, the Defendant had acquired the two companies and then transferred V177 into a new company, Pigmalion LLC, a company, registered in the name of the Defendant's father, and controlled by the Defendant. By the summer of 2014 preparatory work was underway in relation to V177.

17. In October 2014 the Defendant asked the Claimant to contribute 50% of the cost of acquiring V177 that had been incurred by that stage by the Defendant. This was done by way of a payment between companies controlled respectively by the two individual parties. Accordingly on or about 11 November 2014 a payment of US $10,953,170 was made by Gerthing Limited (the Claimant's company) to Shannon Finance Limited (the Defendant's company) by way of a loan, the terms of which formally deferred repayment for 15 years, but on the basis that the loan would in fact be forgiven.

18. At a meeting on 17 December 2014 it was agreed that renovation works would start in February 2015. On 30 December 2014 Pigmalion became the registered owner of the whole of V177.

The Shareholders Agreement

19. The Shareholders Agreement ("SHA") executed 26 June 2015 provided for the transfer into the corporate holding structure of each of the companies which held each of the markets. Under that Agreement, the corporate structure was that Agro Market Ltd, a British Virgin Islands company ("Agro Market"), was incorporated as the intended holding company for the Russian assets owning and operating companies. Agro Market was to be owned 50% by each of New Heights Partners Ltd (a company owned beneficially by the Defendant) and Agro Holding Group Ltd (a company owned beneficially by the Claimant). However none of those operating companies or markets have in fact been transferred into the ownership of the holding company.

The breakdown of the Joint Venture

20. It is common ground that in August 2015 the Defendant informed the Claimant that he wished to bring the joint business to an end. The Defendant says that this was because the reconstruction of V177 was far behind schedule and would require additional financing. There then ensued discussions as to how matters may be resolved. The Claimant contends that the outcome of those negotiations was that the terms of withdrawal were never agreed. The Defendant says agreement in principle was reached about the separation of assets. In any event there were lengthy discussions.

21. By September 2015 it was agreed that the parties would conduct a reckoning of the investment each of them had made in the business to date. The parties produced a comprehensive spreadsheet setting out all of their respective investments in the "Joint Venture" and used that as a basis for bargaining over the proper division of the assets. The Claimant points out that the contributions to the two markets then controlled by the Defendant were US $29.9 million, whilst those for the three markets controlled by the Claimant only had contributions of US $8.385 million. In a different comparison, the Defendant points out that, in terms of overall contributions, about US $29 million had been put in by the Claimant and US $20 million had been put in by the Defendant.

22. Whilst the SHA itself set out a mechanism in relation to the breakup of the joint venture, the ensuing discussions were conducted without reference to that mechanism. As Mr Nash QC pointed out, clause 7 of the SHA, and indeed that Agreement as a whole, was predicated on the assumption that the individual companies and/or

projects for each of the markets sites had been transferred to the joint venture holding company, Agro Market. In fact that had never happened, and so the SHA mechanism for breakup could not apply.

23. The Claimant alleges that the Defendant never procured the transfer of the registered ownership of V177 (held by Pigmalion) to Agro Market. The Defendant alleges that, equally, the Claimant has never procured the transfer of the ownership of the other markets (K24, K25, and LB30) to Agro Market.

24. By October 2015, relations between the parties had deteriorated and there are allegations of threats and improper pressure. On or around 4 November 2015 the Defendant took control of K25 and Usachevskiy markets. There is a dispute as to the manner in which the Defendant took control.

November 2015: meeting(s) at STEP and "the Protocol"

25. In the course of November 2015, there were one or more meetings between the Claimant and the Defendant, involving mediation at STEP Consulting. There are different accounts of these meetings and indeed of how many meetings there were.

26. Regardless of this dispute, it is common ground that at a meeting at STEP (either in mid or late November 2015) the parties reached some form of agreement as to separation terms, with those terms being recorded in a single page manuscript document entitled "Protocol" which recorded, inter alia:

> "4. Termination of SHA and waiver of any mutual claims
>
> …
>
> Penalty for the absence of the agreement until 8 December 2015 is 2000USD (mutually)"

27. As to what was agreed, it is common ground that the Defendant would pay the Claimant US $5,159,000 in two tranches, would sell his 50% interest in K25 to the Claimant and that the Claimant would be the owner of K25, K24 and LB30, whilst the Claimant would waive his interest in Usachevskiy. The Defendant maintains that it was also agreed that he would keep V177; the Claimant, by contrast, maintains that no such agreement was reached over the fate of V177, arguing that the "waiver" in clause 4 of the Protocol did not cover non-operational markets. The Defendant further contends (and the Claimant has not disputed) that at the meeting he had mentioned to the Claimant that he was considering selling V177 to Lenta, Karusel or OBI, large Russian supermarket chains.

The Claimant's letter to three supermarkets: 10 December 2015

28. Significantly, on 10 December 2015, the Claimant sent a letter to OBI indicating that he had become aware of ongoing negotiations between the Claimant and OBI regarding the lease of the site at V177 and notifying OBI that the Defendant had stolen his 50% interest in V177 and that "we will take all the possible actions to restore a lawful title and bring fraudsters to justice". The Defendant says that similar letters were sent to Lenta and Karusel.

Kommersant article: 14 December 2015

29. An article dated 14 December 2015 in Kommersant, the daily business newspaper, reported upon the outcome of the meeting in November, stating that the parties had discussed the division of assets and that in that division, the Defendant would be left with both Usachevskiy and V177. At the same time the article reported that the Claimant had doubts that the Defendant had enough money to pay for the two facilities and the Claimant doubted the information that had been given about the deal.

30. On 17 January 2016 the Claimant took over control of K25. The Defendant maintains that this was done by force.

2016: The Claimant's negotiations with Lenta

31. However in January 2016 it appears that the parties agreed that they would proceed as if ownership of V177 was to be taken over by the Claimant. In any event from that time *the Claimant* entered into negotiations for the sale of V177 to Lenta. Mr Bukin, on behalf of the Defendant, provided information requested by the Claimant team in relation to that potential sale to Lenta. This proceeded in the course of 2016. In the summer, at the Claimant's request, the Defendant obtained three valuations of V177 from established firms of valuers, produced for Pigmalion, and which valued the property at between US $8 million and US $12 million.

January 2017 plan and onwards

32. In January 2017 a revised proposal for the separation of the business was discussed ("the 2017 Plan"). As a result, EY proceeded to prepare documentation to implement this plan. On 13 March 2017 EY wrote to the parties recording their understanding of the plan which had been agreed. The Claimant points out that the documentation makes no mention of V177 expressly. The Defendant's case in relation to these discussions is set out in paragraph 85 below. He contends that at least from January 2017 the negotiations proceeded on the basis that in the division of the joint business, the Defendant was to retain V177. This is apparent from the documentation prepared by EY.

The Defendant's negotiations with Lenta

33. By early February 2017, *the Defendant* had entered into negotiations with Lenta for the sale of V177. The Defendant claims that the Claimant was aware that he was doing this and indeed that he had effectively taken over, from the Claimant, the negotiations with Lenta. Mr Nash QC however accepted that he could not point to a document which established that knowledge.

The Advert on the Property Website

34. On 18 April 2017 the Defendant placed an advert on a real estate website in Russia advertising the sale of V177, at a price equivalent to about US $20 million. According to Mr Bukin that advert remained online until February 2019.

35. In December 2017 the Claimant met with Mr Bukin, Mr Sinitsyn and others at the President Hotel in Moscow. Mr Bukin and Mr Sinitsyn signed a document which

recorded that the deal was to be completed by 1 February 2018. Mr Bukin maintains that, when the final documents were due to be signed on 1 February 2018, the Claimant's team did not show up.

36. It is common ground that the 2017 Plan did not, in the end, lead to concluded documentary agreements and that the documentation prepared by EY was never completed.

Kommersant notice: 5 February 2018

37. On 5 February 2018 the Claimant caused to be published in the Kommersant, a public notice, notifying potential investors and buyers of V177 and Usachevskiy, that the two properties "are currently subject to an economic dispute between the owners" and warning them that the acquisition of the properties from Gremm and/or the Claimant "can be fraught with significant legal risks".

38. In May and July 2018 there were further meetings between the parties to discuss the implementation of the arrangements. These did not lead to final agreement. The Claimant maintains that, at the meetings, the Defendant did not mention that V177 was on the market or that he was negotiating with Lenta.

39. On 18 May 2018 the Claimant wrote to New Heights Partners, alleging various breaches of the SHA, including failure to transfer V177 to Agro Market. On 27 June 2018 he gave notice of commencement of arbitration.

September to December 2018

40. According to his affidavit as set out below, it was at the end of September 2018 that the Claimant learned for the first time that the Defendant had put V177 on the market and agreed a sale to Lenta. It was at that point that he found the advert on the property website.

41. On 2 October 2018 a preliminary contract for the sale of the shares in Pigmalion (which owns V177) to Lenta ("the Preliminary Agreement") was concluded. It provided for the Claimant to carry out, prior to completion of the sale, remedial and renovation works at V177 in accordance with Lenta's specifications. The sale and purchase agreement is to be completed no later than 1 February 2020.

4 October 2018 onwards: correspondence between the Claimant and Lenta

42. On 4 October 2018 M1, on behalf of the Claimant, gave Lenta written notice of its interest in, (and of "the economic dispute relating to") V177, in terms similar to the public notice given on 5 February 2018 (paragraph 37 above), and referred in terms to that public notice. On the next day, Lenta responded asking the Claimant to clarify the nature of the economic dispute relating to V177. On 8 October 2018 M1 wrote to Lenta, explaining in more detail the background to the Joint Venture and the SHA. That letter attached the article in the Kommersant dated 14 December 2015, and the public notice of 5 February 2018. This correspondence between M1 and Lenta of 4 to 8 October 2018 was exhibited to the Claimant's affidavit of 24 December 2018. However the affidavit itself did not expressly refer to either of the two documents published in the Kommersant.

Arbitration

43. On 25 October 2018 the Claimant commenced arbitration proceedings in London against the Defendant. The Claimant has not sought to discontinue or withdraw those proceedings. In those proceedings the Claimant alleges that in breach of the V177 Agreement the Defendant did not procure the transfer of the ownership of V177 to a new holding company within the new corporate structure established by the SHA. No application for interim relief has been made by the Claimant in those arbitration proceedings, despite its availability in principle.

44. On 8 November 2018 the Claimant wrote to Lenta asserting that he is the co-owner of V177 and requesting confirmation of the signing of the sale and purchase agreement with the Defendant. In his affidavit, the Claimant states that a few days later, on around 11 November, in a telephone conversation with Lenta's legal and public affairs director, he learnt that Lenta was close to finalising the acquisition of the site.

45. According to the Defendant's first statement, on 15 November 2018, his father's 100% shareholding in Pigmalion was transferred to his mother, due to his father's health issues. He confirms that he nevertheless controls Pigmalion through his mother.

December 2018: Criminal proceedings

46. In early December 2018, about two weeks before the application to Stewart J the Claimant made a formal request to Russian law enforcement agencies to commence a prosecution against the Defendant, making similar allegations as he has made in the present proceedings.

The Freezing Injunction

The proceedings

The Without Notice application for the Freezing Injunction

47. On 20 and 21 December 2018 the Claimant made his without notice application to Mr Justice Stewart. That application was supported by a draft generally endorsed Claim Form, by the Claimant's first affidavit in draft and by a skeleton argument.

The Claim Form

48. Under "brief details of claim", the Claimant asserted, at paragraphs 1 to 3 and in summary terms, breach of a joint venture agreement made on or before 11 November 2014 concerning the acquisition of V177, alternatively breach of trust and dishonest assistance and/or knowing assistance to Pigmalion made in breach of constructive trust. The brief details of claim continued:

> *"4. Interest on the US $10,953,170 paid by the Claimant to the Defendant on 11 November 2014 at the rate of 3% pa…*
>
> *5. Further or alternatively to 4, interest on damages, compensation or the amounts found under 1, 2 and 3."*

The claim form concluded by certifying that "the liquidated demand claimed against the Defendant (namely US $10,953,170) amounts to £8,658,510 and that the interest claim, namely US $900,860, amounts to £712,132, and the daily rate is £474.44". This was the basis of the cause of action and claim as it was placed before Stewart J.

The Claimant's affidavit

49. In his draft affidavit, subsequently sworn on 24 December 2018, the Claimant set out his own business background and the background to the dispute, referring to the initial proposal for a joint venture in 2013/2014. He went on to describe first V177, describing events between the summer and end of 2014, including the decision to register the shares in the name of the Defendant's father and the payment of the US $10,953,070 made by Gerthing. He then gave brief details of the acquisition of the other four markets. Next he described events leading to the conclusion of the SHA.

50. In a further section, the Claimant addressed the breakdown of the joint business from August 2015 up to the meeting at STEP in November 2015. He stated that the Defendant and he had "agreed basic terms for terminating the joint business in mid-November 2015." After referring to the Protocol, he stated "we did not reach agreement over the fate of V177". He referred to, and exhibited, the article in the Kommersant on 14 December 2015, concluding that no part of the terms of the Protocol had ever been performed by the Defendant.

51. As regards the period from the end of December 2015 until September 2018, the Claimant stated merely that since early 2016 his team had periodically been in negotiations with a view to reaching a settlement, that he had had several personal meetings with the Defendant and that, most recently, Mr Sinitsyn and Mr Bukin were in contact in August 2018. "However, none of these exchanges has resulted in an amicable resolution".

52. The affidavit continued that "at the end of September 2018" the Claimant had learned for the first time "completely by chance" that the Defendant "had put V177 on the market and, it appears, agreed a sale to [Lenta]". He had discovered the advert on the property website at that point in time. He then went on to refer to the correspondence between himself and Lenta in early October 2018 and in early November 2018 (see paragraphs 42 and 44 above). He believed that the Claimant's decision to sell V177 had been prompted by the letters before action which he had sent to New Heights in May and June 2018. He concluded:

> *"The decision was made behind my back, I believe, with the intention of placing this asset, or its value, beyond my reach."*

53. The affidavit concluded by referring to, and exhibiting, the notice of arbitration given at the end of October 2018 and by referring to his duty of disclosure, indicating that his lawyers would raise some theoretical issues, but as far as the facts were concerned, at no time had the Defendant ever denied his interest in V177.

The skeleton argument for the without notice hearing

54. In his skeleton argument for the hearing before Stewart J, Mr Coppel QC described the arrangements for V177 - effectively the V177 Agreement. He made passing

reference to the other markets (including K25 and Usachevskiy), but repeatedly stated that it was not necessary to go into the detail of those projects, as being not relevant for present purposes. After stating that the Defendant had informed the Claimant that he wished to withdraw from the V177 venture (rather than the entire Joint Venture, as in fact accepted by the Claimant in his affidavit), the skeleton asserted that discussions petered out and agreement was not reached adding merely that "there have been sporadic meetings in the last 2-3 years". There was no reference at all to events in 2016 and 2017, including the involvement of EY. No mention is made of the fact that the other sites have not been transferred to Agro Market.

55. In the skeleton it is asserted expressly and repeatedly, first that the Defendant had been "clandestinely" negotiating and "furtively arranging" the sale of V177 (in general and not just to Lenta), that this had been "dishonestly" "concealed" from the Claimant and that the Claimant had only discovered this by "chance".

56. As regards good arguable case, the claim was said to be based on breach of the agreement made in 2013 or subsequently in 2014 (without distinguishing between the Joint Venture agreement and the specific V177 agreement) arising from the Defendant's decision to organise the sale of V177.

57. The risk of dissipation was said to arise from four matters: first, "D's clandestine dealings with V177"; secondly, the Defendant's habit of arranging his affairs so as to conceal his personal connection with his assets; thirdly, the Defendant being in the process of winding up his interest in the joint venture; and fourthly, the Defendant's willingness to resort to "criminal methods" in order to try and get the better of the Claimant in relation to the division of the Joint Venture assets.

58. As regards the timing of the application, the skeleton asserted that the catalyst for the application was the discovery in *October 2018* that the Defendant was attempting to sell V177. As regards urgency and the need for applying without notice, it was stated that completion of the sale was thought to be imminent and that, if the Defendant learned of the proceedings, there was good reason to think that he might accelerate completion and/or find a way of receiving the sale proceeds which avoided the effects of the order.

59. Finally, Mr Coppel QC addressed full and frank disclosure in the concluding part of his skeleton. In particular he referred to the fact that some time had been taken between learning of the "clandestine" attempt at sale and the making of the application. He also referred to the arbitration clause in the SHA.

60. The skeleton concluded that "in view of D's dishonest concealment from C of his proposal to sell V177 and the imminence of that sale, there is a real risk that V177 will be sold very shortly and that the Claimant will take steps to put the proceeds of that sale beyond the reach of C unless a freezing order is made."

The hearing before Stewart J

61. The Claimant's note of the hearing before Stewart J records that at the hearing the Judge expressly raised a particular concern about the period of delay since the Claimant first heard about the planned sale of V177. It is also clear from that note that the Judge was under the impression that the Claimant had become aware of that sale

in mid-November and therefore he considered that the period of delay was five weeks. His understanding was mistaken. The Claimant had been aware since the end of September 2018, some 6 weeks earlier (as indeed set out in the Claimant's affidavit). Mr Coppel QC fairly accepts that at the hearing he did not correct the Judge's mistaken impression as to the true period of delay, either by referring to the terms of the affidavit or otherwise.

62. The note further recorded that the Judge queried the amount of the freezing order and asked where the figure of £9.75 million came from. Mr Coppel replied that it was the amount paid for V177 converted to sterling, and then with interest since November 2014 and something for costs. The Judge reduced the figure to £9 million because of difficulties he saw with the interest claim.

The terms of the Freezing Injunction

63. The Freezing Injunction contains standard terms. The Defendant is restrained from removing from England and Wales, or in any way disposing of dealing with or diminishing the value of any of his assets wherever they are up to the value of £9 million. By paragraph 7, the prohibition expressly includes the net sale money of V177 "if it has been sold".

64. The Freezing Injunction is a maximum sum order in the amount of £9 million. Implicitly the Claimant was asserting that he had a good arguable case to recover £9 million in damages/equitable compensation. This is addressed further in paragraphs 96 and 97 below.

Notification to Lenta and effect on the sale to Lenta

65. The Claimant's representatives have notified Lenta of the Freezing Injunction. The Defendant contends that, if the Freezing Injunction is maintained (or the Proprietary Injunction is granted), this has the potential to cause the sale to Lenta to fall through and this will cause substantial loss, particularly where substantial renovation works have been done at the site to Lenta's specification; such renovation is unlikely to be acceptable to alternative purchasers.

66. Following notification to Lenta by the Claimant of the Freezing Injunction, a moratorium agreement was concluded between the Defendant and Lenta, temporarily suspending the obligations of the parties to the Preliminary Agreement and Lenta ceased undertaking all its works on the V177 site. Under the terms of that moratorium, unless the Defendant can provide Lenta with confirmation, within 6 months (i.e. by 28 June 2019), that the Freezing Injunction has been discharged or that the Freezing Injunction does not prevent the sale of V177, Lenta may unilaterally terminate the Preliminary Agreement, and in that event the parties shall bear no liability under the Preliminary Agreement.

Agreed variations

67. Subsequently a number of variations to the Freezing Injunction have been agreed in correspondence. In particular, a variation to include the standard form "Angel Bell" exception allowing disposal of assets in the ordinary course of business. Secondly, a variation requiring the fortification of the Claimant's cross-undertaking in damages,

to be provided by payment into a solicitor's account of the required amount of £100,000. Thirdly, a provision restricting the dissemination of information provided by the Defendant pursuant to the terms of the Freezing Injunction.

68. On 29 January 2019, the Defendant's solicitors wrote to the Claimant's solicitors. In that letter the Defendant provided information about the Preliminary Agreement and the moratorium. They asserted that the Preliminary Agreement is an arm's length transaction based on market value and that no prejudice would be suffered by the Claimant as a result of the sale continuing - the asset would be converted from property to cash. They invited the Claimant to agree to allow the sale to Lenta to proceed and offered to pay into an escrow account the sum of £9 million of the sale funds until the claim is resolved. That, they said, would provide more than adequate protection for the Claimant. The Claimant's solicitors responded by letter dated 8 February 2019, stating that the Defendant's assurances were insufficient. The Claimant would approve a sale of V177 on conditions, including a condition that the *entire* proceeds of sale were held in escrow by an agent reasonably satisfactory to the Claimant. Alternatively they proposed that the Defendant agree simply to share the proceeds of the sale. There was no further response from the Defendant to this counter-proposal.

The Claimant's pleaded case: The Particulars of Claim

69. In Particulars of Claim served only on 18 January 2019, the Claimant now sets out his case: as to agreement and breach, breach of trust, and relief, including in particular damages and compensation.

The alleged terms of the V177 Agreement

70. Paragraph 12 pleads that the following were express terms of the V177 Agreement as modified:

> "a. V177 would be acquired developed and operated as a market under the Joint Venture;
>
> b. D or his nominee would acquire V177;
>
> c. Pending the setting up of the Joint Venture's corporate holding structure, title to V177 would be transferred to a corporate vehicle under the control of D;
>
> d. C and D would share the beneficial ownership of V177 equally;
>
> e. Once D had completed the acquisition of V177 and it had been transferred into the ownership of a new company within the Joint Venture, C would reimburse 50% of the total acquisition costs;
>
> f. D would fund and arrange the development of V177 as a market site and on completion of those works C would reimburse 50% of the development costs;

> g. Once the Joint Venture's corporate structure had been set up, D would procure the transfer of the registered ownership of V177 to a new holding company within the new corporate structure;
>
> h. C and D would share 50:50 in the profits from V177, whether recurrent or on realisation;
>
> i. D would hold 50% of all the sums received by him from the operation or sale of V177 for the account of C or C's nominee and would procure the same result in respect of such sums received by his corporate vehicles or nominees;
>
> j. the V177 Agreement would be governed by English law." (emphasis added)

71. Paragraph 15 of the Particulars of Claim further pleads certain implied terms of the V177 Agreement. In particular paragraph 15 d. alleges as follows:

> "Pending the transfer of the registered ownership of V177 to a new holding company within the new corporate structure, D would not seek to dispose, or procure the disposal, of V177 without the full knowledge and prior consent of C."

Breach

72. The Claimant, at paragraphs 19 to 24, alleges the following breaches of the terms of the V177 Agreement:

    (1) failure to procure the transfer of the ownership of V177 to a new holding company within the new corporate structure established by the SHA;

    (2) stopping funding and arranging the renovation of V177;

    (3) entirely without the Claimant's knowledge or consent and in bad faith, entering into negotiations with Lenta for the sale of V177 to Lenta;

    (4) intending, by marketing V177 without the Claimant's knowledge, not to share or procure the sharing of 50% of the proceeds from the sale with the Claimant, as result of which the Claimant "would have suffered" loss and damage in the amount of the Claimant's share;

    (5) threatening and intending to progress the sale to Lenta and/or to withhold and refuse to share with the Claimant the proceeds of such sale.

Relief claimed

73. After pleading the alternative claim in trusts/equity, at paragraph 30 the Particulars of Claim set out the Claimant's claim for damages/relief, alleging that:

> "by reason of D's breaches of contract and/or trust and/or fiduciary duty and/or equity and/or dishonest assistance, C has

> suffered loss and damage and/or is entitled to equitable compensation to be assessed."

74. At paragraph 31 the Claimant claims a number of declarations and/or injunctions including a declaration that the Claimant is the beneficial owner of a 50% share in V177 and that he is entitled to a 50% share in the profits and that 50% of any sums received from the operation or sale of V177 is held on trust for the Claimant or the Claimant's nominee. The Claimant further claims injunctions, including (at sub-paragraph e), the following final injunction:

> "Pending transfer of the registered ownership of V177 to a new holding company owned by Agro Market, D is not permitted to seek to dispose, or procure the disposal, of V177 without the full knowledge and prior consent of C."

However the Claimant does not seek an order requiring the transfer of V177 to Agro Market or a new holding company. (The Claimant's case as to the intended transferee – Agro Market or a holding company owned by Agro Market – is not consistently stated.)

Relevant legal principles relating to a freezing injunction

75. I have been referred to a number of authorities, including *Taylor v Van Dutch Marine Holdings Ltd* [2017] EWHC 636 (Ch) at §10; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at §69; *Fourie v Le Roux* [2007] UKHL 1 at §33; *Gill v Flightwise Travel Services* [2003] EWHC 3082 (Ch) at §29; *The Niedersachsen* [1983] 2 Lloyd's Rep 600 at 605; *Ras Al Khaimiah Investment Authority v Bestfort Development LLP* [2017] EWCA Civ 1014 at §§55-56; *Linsen International Ltd v Humpus Sea Transport Pte Ltd* [2010] EWHC 303 at §§37-41, 51-55; and *Kazakhstan Kagazy plc v Arip* [2014] CLC 451 at §36.

General principles

76. Certain general principles can be summarised as follows:

(1) A freezing injunction operates in personam. It does not give security to the creditor – over any particular asset or otherwise.

(2) The Court should impose the minimum necessary restraint on the respondent's freedom to give the applicant the protection which the court considers he is entitled.

(3) The objective of a freezing injunction is to provide protection to ensure satisfaction of a money judgment which the applicant hopes to obtain in the substantive proceedings.

(4) If an applicant makes an application without notice, the evidence must state the reasons why notice has not been given: CPR 25.3(3).

(5) Where a person applies without notice he owes a duty of full and frank disclosure.

Without notice applications: the duty of full and frank disclosure

77. As regards the duty of full and frank disclosure, in *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm), at §66 Cooke J summarised the content of the duty as follows:

> "(1) The duty on the applicant in such circumstances goes beyond merely identifying points of defence which might be taken against him, important though that is.
>
> (2) The applicant has to show the utmost good faith, identifying the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents.
>
> (3) The applicant has to investigate the nature of the claim asserted and the facts relied on before applying, and has to identify any likely defences. He has to disclose all facts which reasonably could or would be taken into account by the Court. The duty is not restricted to matters of fact but extends to matters of law.
>
> (4) The applicant also has a duty to investigate the facts and fairly to present the evidence.
>
> (5) There is a high duty to draw the Court's attention to significant factual, legal and procedural aspects of the case.
>
> (6) Full disclosure has to be linked with fair presentation. The judge has to have complete confidence in the thoroughness and the objectivity of those presenting the case for the applicant.
>
> (7) It is the undoubted duty of counsel to draw to the judge's attention weaknesses in his case and to make sure the judge understands what might be said on the other side even if the judge says he has read the papers."

78. Additional principles include the following:

(1) The duty to investigate includes investigating the nature of the cause of action asserted: *Siporex Trade SA v Comdel Commodities* [1986] 2 Lloyd's Rep 428 at 437.

(2) It is not sufficient for the relevant information to be included somewhere in the court bundles. Proper disclosure means specifically identifying all relevant documents for the judge, taking the judge to particular passages in the documents which are material and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read: *R (Lawer) v Restormel BC* [2007] EWHC 2299 (Admin) at §69.

(3) However, the court should adopt a sensible and proportionate approach to applications to set aside a freezing order for non-disclosure. In cases of any

magnitude and complexity, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of fact which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established. It is important to preserve a due sense of proportion and the judge should not lose sight of the wood for the trees. *Kazakhstan Kagazy* at §36.

(4) That the applicant has commenced or is about to commence proceedings in another jurisdiction is a potentially significant factor. *Behbehani v Salme* [1989] 1 WLR 723 at 730G-H and 736-737.

79. As regards the consequences of failure to make full and frank disclosure, the Court has a discretion whether or not to discharge an order obtained ex parte and whether or not to grant fresh injunctive relief: see summary in *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1357C-F, stating, in particular, that, whilst it is not for every omission that the injunction will automatically be discharged, whether immediate discharge is justified depends on the importance of the fact for the issues which were to be decided by the judge on the application. The applicant's ignorance of the particular fact or failure to perceive its relevance may be an important consideration, but it is not decisive because of the duty on an applicant to make all proper enquiries and to give careful consideration to the case being presented. Where there is non-disclosure of a material fact, whilst discharge is not automatic, it would only be in exceptional circumstances that a court would not discharge an order where there has been *deliberate* non-disclosure or misrepresentation: *Congentra AG v Sixteeen Thirteen Marine SA* [2008] EWHC 1615 (Comm) at §§62-63.

The elements to be established: Good arguable case and risk of dissipation

80. In order to found a claim for a freezing injunction, the applicant must establish:

(1) He has a good arguable case against the respondent on the underlying claim. The applicant must show that he has a good arguable case for a monetary award up to a particular level as specified in the terms of the order itself.

(2) There is a real risk of dissipation of assets by the respondent, namely (1) a real risk that a judgment will go unsatisfied; that arises if there is a real risk that the respondent will dissipate or dispose of his assets other than in the ordinary course of business or (2) assets are likely to be dealt with in such a way as to make enforcement of any judgment more difficult, unless those dealings can be justified for normal and proper business purposes.

81. As regards delay in applying for a freezing injunction, relief is often denied where the applicant has pursued his rights in a dilatory fashion. In particular where there are or have been discussions or negotiations over a period of time, that will be a relevant consideration.

The Defendant's case on the Freezing Injunction

82. The Defendant applies to discharge the Freezing Injunction on the following grounds:

(1) There was no justification for the application being made without notice.

(2) The Claimant did not have (and does not have) a good arguable case to recover £9 million (or indeed any sum) as damages or equitable compensation. The case, even as now pleaded, does not explain how such a monetary claim arises on the facts of this case.

(3) The Claimant failed to make full and frank disclosure to Stewart J. The presentation was seriously misleading:

(a) There was no proper explanation of the extensive negotiations for a division of the joint business. Contrary to what was said, those negotiations did result in agreement made in January 2017, at least in principle, for a division under which the Defendant would receive V177.

(b) The Claimant did not explain sufficiently his control of sites K24 and LB30 nor his control of three of the four operational sites through his control of M1 – nor the fact that the Claimant himself had not transferred title to K24 and LB30 to Agro Market.

(c) The Claimant did not engage with the Defendant's likely defence; namely that the parties had agreed to divide the joint business, with the Defendant receiving V177.

(d) The Claimant failed to refer to his own letter of 10 December 2015 to OBI in which he was alleging that the Defendant had stolen V177 – this was completely inconsistent with the assertion of the "chance" discovery in September 2018 that the Defendant had put V177 on the market and/or had been negotiating the sale of V177.

(e) It was misleading to suggest that V177 had only recently been advertised on a Russian property portal, when in fact that advert had been available since 18 April 2017. This contradicts the Claimant's case put before Stewart J that the attempt to sell V177 was recent and clandestine.

(f) It was misleading to give the impression that V177 was worth about US $20 million. The Claimant failed to refer to the three independent valuations provided to the Claimant, showing a value of US $8-12 million. In this way the Judge was misled as to the value of Claimant's potential claim.

(g) The Claimant failed to refer to the Claimant's own involvement with Lenta in 2016. The evidence gave the impression that only the Defendant had been involved in the sale to Lenta and that the Claimant only found that out at the end of September 2018.

(h) The Claimant failed to explain properly the nature of the arbitration proceedings and made no reference at all to the Russian criminal complaint.

(i) There was no reference to the Defendant's case that the Claimant has been attempting to sell K25, K24 and LB30.

(j) The Claimant failed to correct Stewart J's misapprehension about when the Claimant became aware of the planned sale of V177 and the consequent delay in making the application, a matter about which the Judge was concerned.

(k) The Claimant wrongly sought relief which omitted the standard "Angel Bell" exception and offered fortification for the cross-undertaking in an amount which was obviously insufficient.

(4) None of the matters relied upon justify a conclusion that there is a real risk of dissipation. In particular the Defendant's dealings with V177 were not "clandestine".

(5) It is not just and convenient to grant the Freezing Injunction, given the fact that the Claimant currently has control of three of the four operating markets and their income streams; it is no-one's interest to prevent the agreed sale to Lenta at the best price; moreover that would cause very substantial losses to the Defendant which would not be covered by the existing fortification of the cross-undertaking.

The Claimant's case on the freezing injunction

83. The Claimant contends that it is just and appropriate to continue the Freezing Injunction:

(1) The Claimant has a good arguable case of breach of contract, including fiduciary duties, or if not, an equitable claim. The key breach of contract is breach of the term alleged in paragraph 12 g of the Particulars of Claim; i.e. the failure to transfer V177 into Agro Market (or other holding company) in June 2015. The Claimant's "loss" is the loss of the property right in V177; namely the loss of rights to V177 under the terms of the SHA. But for that breach, the Claimant would have equal control and ownership of V177. The Defendant's dealing with Lenta with regard to V177 and his intention not to share the proceeds of sale with the Claimant amount to further breaches of contract. Further the Defendant was in breach of the obligation not to dispose of V177 pending transfer to Agro Market (paragraph 15 d of the Particulars of Claim). No binding agreement as to the division of assets had been reached either in January 2017 or since, and so the Claimant cannot rely upon an alleged agreement as a defence. Alternatively, the Defendant's conduct amounts to a breach of common intention constructive trust or establishes a proprietary estoppel or *Pallant v Morgan* equity, giving rise, in turn, to a right in the Claimant to an equal beneficial share in the assets of the Joint Venture. In the further alternative, the Defendant is guilty of assisting Pigmalion in its breach of trust. These claims are all based on the contention that the Claimant still retains a property interest in V177. The Defendant's suggested cross-claim relating to the other markets is not sufficiently specific to constitute a defence.

(2) As regards risk of dissipation, the Claimant relies upon the first three matters relied upon before Stewart J. As regards the fourth, he now refers to the Defendant's "willingness to *take matters into his own hands* in order to try and get the better of the Claimant in relation to the division of the Joint Venture assets". The Defendant has shifted the shareholding in Pigmalion from his father to his mother and his explanation makes little sense. Moreover, despite being expressly asked, the Defendant has not given an undertaking to keep safe the proceeds of sale of V177, should the sale to Lenta go ahead.

(3) As regards the Defendant's complaint of non-disclosure, the Claimant contends, first, that the Defendant has not sufficiently particularised the complaint. In any event, the material now relied upon is nothing more than the Claimant and the Defendant differing in their accounts of the underlying facts, relying on the principle in *Kazakhstan Kagazy* (see paragraph 78(3) above). As to the Defendant's particular points:

(a)/(b) The Claimant's affidavit did refer to the other markets and sites. The V177 Agreement is a self-standing agreement. The claim is for breach of that Agreement and it was entirely appropriate for the Claimant to put the case before Stewart J on that basis alone. The Claimant was not obliged to tell the Judge about a possible counterclaim or set off in relation to the other markets nor of the detail of negotiations conducted years before, which led to nowhere.

(c) The Claimant could not anticipate that the Defendant would allege that the January 2017 Plan resulted in a *binding* settlement agreement. The letters to Lenta in October 2018 are inconsistent with the Claimant having been previously aware of the sale to Lenta.

(d) The 10 December 2015 letter was irrelevant: it predates the settlement discussions and the taking over of negotiations with Lenta by the Claimant in 2016.

(e) As to the advert on the property website, the Claimant was not, and could not have been, aware, either in April 2017 or as at 20 December 2018, that it dated back to April 2017.

(f) As to valuation, at the time of the application, the Defendant was offering to sell for US $20 million.

(g) The Claimant's involvement with Lenta was history and the Claimant had not been aware of the Defendant's entirely separate negotiations until September 2018.

(h) The arbitration proceedings and the Defendant's response were referred to in the Claimant's affidavit. As to the criminal complaint, it had not been appropriate to disclose its existence to the Defendant, until the authorities in Russia had completed their initial inquiries.

(i) The Claimant's attempts to sell K25 were not relevant.

(j) The Judge's understanding of discovery of the sale in mid-November was explained by the correspondence and phone call on 11 November 2018.

(k) The Angel Bell point was an oversight and had been corrected promptly.

(4) Finally as regards the Defendant's suggestion that because he owns and controls the other markets, the Claimant has adequate security for sums to which he may be entitled upon sale of V177, the protection afforded by the value of the other markets is only partial at best, because the lion's share of the value of all the assets lies in V177. In any event, there is no sufficient certainty as to the parties' respective interests in the markets to be sure that Claimant is adequately secured for loss resulting from sale of V177.

Discussion

84. By way of background, the Claimant's case now is that the parties have not reached a concluded settlement for the termination of the Joint Venture, and that, in the absence of such a settlement, the terms of the framework Joint Venture agreement and the specific V177 agreement remain in place. Under those terms, the parties are 50:50 joint beneficial owners of V177 and the Defendant remains under an obligation to procure the transfer of V177 to Agro Market, and pending such transfer, not to deal with V177 without the Claimants' consent.

85. The Defendant's case is that, whilst final documentation was not completed, the parties had agreed in principle in January 2017 under the 2017 Plan. It was agreed which of the markets would be left in the ownership of which of the parties and that there would be a balancing payment of US$10 million by the Defendant to the Claimant. The Defendant would retain V177, Usachevskiy and K25. On that basis, the Defendant alleges that the Claimant has no continuing interest in V177 at all. Alternatively if, as the Claimant argues, there was no final binding agreement as to the division of the assets, then, in any event, the Defendant remains free to sell V177. Upon the sale of V177 the Defendant would be required to account for the proceeds of sale, in a final winding up of the Joint Venture. On such a winding up, the Claimant would equally be required to bring into account the value of the assets within the overall Joint Venture which are in his ownership and/or control. Since the value of those assets is at least equal to the value of V177, then following the taking of that account, the Claimant would have no outstanding claim for sums due to be paid by the Defendant to it. The 50% interest which the Defendant has in the assets and revenues which are owned and/or controlled by the Claimant would more than overtop the 50% share of the proceeds of sale of V177 to which the Claimant would be entitled.

(1) Should the Freezing Injunction be discharged for non-disclosure?

86. In my judgment, when making the without notice application to Stewart J, the Claimant failed adequately to comply with his duty of full and frank disclosure, as that duty is explained in *Alliance Bank* (see paragraph 77 above).

87. The application to Stewart J was predicated on two prominent assertions: first, that the Claimant only discovered that the Defendant was seeking to sell V177 (in general)

in September 2018, and secondly, that the Defendant was acting clandestinely (being a principal foundation for the risk of dissipation) i.e. in a way that the Claimant would or could not find out. Whilst I do not accept each of the complaints made by the Defendant, the Claimant's conduct fell short of what was required in the following particular respects.

88. First, the Claimant's own Kommersant notice dated 5 February 2018 indicates that he was clearly aware, several months before September, that the Defendant was or might well be seeking buyers of V177 or was at the least marketing V177. This knowledge at that time is confirmed by the fact that when the Claimant wrote specifically to Lenta in October 2018, he wrote in very similar terms and referred to, and enclosed, the Kommersant notice itself. Whatever the position as regards first discovery of the specific proposed sale to *Lenta*, the Claimant was aware back in February 2018 of the Defendant seeking to market V177 generally and further that he was not acting clandestinely then or subsequently. Whilst the Kommersant notice was within the bundle of papers submitted to the Stewart J, it was only to be found as an attachment to a letter, which itself was only an exhibit to the affidavit (i.e. in the middle of the 16 pages of the 28th exhibit). It was not drawn to the Judge's attention. In this regard, the Claimant failed to comply with the approach set out in *Alliance Bank,* point (2) and *Lawer:* see paragraphs 77 and 78(2) above. (I add that, by contrast, I consider that the Claimant's 10 December 2015 letter was sufficiently in the past, and prior to other relevant events, so as to justify not being referred to in the context of the Claimant's knowledge as at the date of the application).

89. Secondly, as regards the advert placed on the Russian property website from April 2017 onwards, there is no evidence to suggest that the Claimant had actual knowledge either in April 2017 or at the date of the application before Stewart J of the fact of the advert having been placed in April 2017. However, that fact was discoverable by more careful inquiry on the part of the Claimant, both at the time when the Claimant became aware of the advert in September 2018 and by the time of the application to Stewart J. In this regard, the Claimant did not fulfil his duty to investigate the facts fully: *Alliance Bank,* (3) and (4). Had it been discovered by such more detailed inquiry and thus disclosed to Stewart J, the Claimant would not have been able to tell the judge that the Defendant had been acting "clandestinely". Thus the Claimant ought to have known that the Defendant was not acting "clandestinely".

90. Thirdly, and of great significance, is the fact that the Claimant, at the hearing before Stewart J, failed to correct the Judge's impression that the Claimant had only found out about the sale in mid-November, when in fact he had, even on his own case, found out at the end of September, some six weeks earlier. At the hearing itself, counsel did not draw to the judge's attention this weakness in the Claimant's case: *Alliance Bank*, (7). Delay (of apparently five weeks) in making the application was an issue which concerned the Judge when deciding whether to grant the Freezing Injunction. Had he been aware that the delay was in fact at least 11 weeks, this might well have influenced his decision. In particular, the Judge might have concluded that there was no justification for the application having been made without notice. It was certainly a material fact, a misunderstanding of which the judge proceeded upon. That the true position could be found in the affidavit and the Claimant's skeleton is not relevant, given the overriding effect of what was actually discussed as the oral hearing before

the Judge. This was a serious omission which misled the Judge on a highly material fact.

91. Finally, I consider that the Claimant's account of the significance of the other three markets being in his control, of the fact that they too were required to be, but had not been, transferred to Agro Market and of the course of the negotiations, particularly from end of December 2015 until September 2018, was not sufficiently full and frank. There was no reference at all to the 2017 Plan or to the suggestion (at least) that agreement had been reached "in principle" or that as a result EY had been instructed to draw up documentation. The failure to mention these facts meant that the Judge did not have a full picture of the likely defence and/or counterclaim which the Defendant would raise to the claim (*Alliance Bank*, (1) and (3)) or how the Defendant came to be marketing V177 for sale. By failing to present the full course of the negotiations, this is likely to have given a false impression of a heightened risk of dissipation.

92. In these circumstances, in my judgment the statements in the affidavit and skeleton argument that the Defendant had been negotiating "clandestinely", that the sale to Lenta had been discovered "by chance" and that the Claimant was "unaware of a potentially legitimate explanation" were misleading and did not represent a fair presentation of the facts as they were, or ought to have been known, to the Claimant.

93. As to effect of these failures to disclose, first, I consider that the relevant facts were material to the issues before Stewart J and to his decision. Secondly, in the exercise of my discretion, I conclude that the Freezing Injunction should be discharged. The facts which were not disclosed or not fairly presented were centrally important to key issues (of knowledge, delay and risk of dissipation) which fell to be decided by Stewart J. Even if, in some respects, the Claimant or his representatives might not have been aware, or appreciated the full significance, of some of these matters, that does not mean that the Injunction should not be discharged, given the duty to make proper inquiries. Moreover, even if the non-disclosures and misrepresentations could not be characterised as "deliberate", they showed at the least a high degree of lack of care, and in some aspects, recklessness.

(2) Should a freezing injunction be granted afresh?

94. In the light of the foregoing conclusion, I consider whether I should grant freezing injunctive relief afresh.

Good arguable case

95. It is common ground that, to support a freezing injunction, the applicant's underlying cause of action must be for a monetary claim, and thus that he must establish a good arguable case for such a monetary claim. That this is so is inherent in the very purpose of a freezing injunction: to preserve assets to allow enforcement of a monetary judgment.

96. In the present case, the Claimant makes no clear case that he has an arguable claim against the Defendant for a monetary sum. First, as regards the claim in the claim form there was no explanation before Stewart J as to the basis of this amount claimed, save for the fact that the Claimant had contributed US $9 million more to the joint

venture than had the Defendant – or that there was a claim for interest on the US $10,953,170 paid by the Claimant to the Defendant on 11 November 2014.

97. Although not clearly explained in the claim form, it now appears clear that that figure was based on the amount of US $10,953,170 paid by way of loan from Gerthing to Shannon on 11 November 2014 and thus, at that time, was a claim in substance for restitution/recovery of that payment. However, the factual and legal foundation for a claim in this amount and on such a basis has never been explained, and is not now pursued. There can be no basis for a claim for damages in respect of the November 2014 payment – the payment was a loan – there is no allegation that the loan was induced by misrepresentation or the loan monies misapplied. Thus, the basis of the underlying claim placed before Stewart J was misconceived.

98. Secondly, the claim now put forward in the Particulars of Claim is one for damages or equitable compensation. That in turn must be based on loss caused by some breach of duty (contractual or equitable). The primary claim now is for damages for breach of contract, and in particular for breach of the obligation to transfer V177 to Agro Market (paragraph 12 g). In oral argument, Mr Coppel explained that the loss caused by that breach is the Claimant's loss of property rights under the terms of the SHA. However, as Mr Coppel accepted, that alleged loss is inconsistent with the Claimant's continued assertion that he still retains property rights in V177. It is wholly inconsistent with the pleaded claim (in paragraphs 12 d and 15 d) that pending transfer to Agro Market - and with the relief sought (in paragraph 31) - the Claimant retains a 50% proprietary interest in V177. It follows that, on the Claimant's own pleaded case, the breach of the obligation to transfer to Agro Market does not extinguish the alleged pre-existing beneficial interest and loss arising from that breach cannot be the loss of a proprietary right. It is also inconsistent with his claim based on constructive trust, which is predicated on continuing beneficial property rights. Moreover, as V177 has not yet been sold, there is no monetary loss from the breach alleged at paragraph 15 d. Any breach has not yet caused any monetary loss because the Claimant has not lost any proprietary interest arising from the alleged breach.

99. Essentially the Claimant is putting forward, at one and the same time, mutually inconsistent allegations: (1) that he has lost proprietary rights in V177 and (2) that he retains propriety rights in V177 justifying the grant of a proprietary injunction. Regardless of whether this is a permissible approach, in circumstances where V177 has not yet been sold the Claimant has not been able to articulate any cogent basis for an accrued claim for damages or other monetary compensation. Accordingly, the Claimant cannot establish a good arguable case for a monetary claim. For this reason alone, I refuse the application for a fresh freezing injunction.

Risk of dissipation

100. As to risk of dissipation, the first and most important ground relied upon by the Claimant is the suggestion that the Defendant has been acting "clandestinely". However on the evidence now before me I am not satisfied that the Defendant has been acting "clandestinely" in seeking to sell V177 either generally, or specifically to Lenta. The Defendant was openly and publicly advertising the offer for sale between April 2017 and February 2019. Further the fact that the Defendant holds interests through other individuals or companies, as does the Claimant, does not of itself lead to an inference of seeking to conceal assets. The suggestion that the Defendant is in

the process of winding up his interest in the Joint Venture has to be put in the context that both parties have been involved in the detailed negotiation process of seeking to terminate their Joint Venture relationship. Finally, as regards, "taking matters into his own hands" each party makes allegations of improper, and indeed violent, conduct on the part of the other; allegations upon which I am in no position to adjudicate.

101. For these reasons, I would not have been satisfied that there is a real risk of dissipation of assets or that the Defendant would be likely to deal with his assets so as to render enforcement more difficult.

102. The only issue that caused me some pause for thought is the fact that the Defendant did not respond to the Claimant's suggestion, in the letter of 8 February 2019, of payment into an escrow account. However in fact the Defendant on 29 January had made an offer to pay at least half the proceeds of the sale to Lenta into an escrow account. That offer was, in my judgment, inconsistent with a suggestion of a risk of dissipation, particularly in circumstances where there is nothing to suggest that the sale price to Lenta is at an undervalue or other than a fair price reached at arm's length.

Just and convenient

103. I further accept that, given the Claimant's ownership and/or control of three of the other four markets and their income streams - which formed part of the Joint Venture - even if the Claimant could show an arguable claim for a monetary judgment relating to V177, that ownership and/or control of the Defendant's interest in those other sites, would provide substantial security for any such judgment. This is a factor which would weigh in the balance against the grant of a freezing injunction.

Conclusion

104. For these reasons I decline to grant a freezing injunction afresh.

The Proprietary Injunction

Introduction

105. In his skeleton dated 18 March 2019 for the hearing on 20 March 2019, the Defendant expressly "stressed" that the Claimant had not sought, and was not seeking, an injunction, aimed at a specific asset, preventing the sale of V177 to Lenta or to protect the proceeds of such sale. Mr Nash repeated the point at the outset of the oral hearing. Despite this, neither at the outset of the hearing nor during the course of argument, was an application for such an injunction made. However, at the very end of his oral submissions Mr Coppel for the first time indicated that, if the Freezing Injunction was not to be continued, the Claimant would seek a proprietary injunction. At that point, as the Defendant pointed out, no formal application had been made.

106. Then almost two weeks later, on 2 April 2019 the Claimant issued and served its further application notice, purportedly "to regularise the application made at the hearing". That application notice was stated to be supported merely by the evidence already before the court in relation to the Freezing Injunction. I then made directions for the service of further written submissions by the parties, pursuant to which the

Claimant served written submissions, as did the Defendant, together with Mr Bukin's second witness statement. The application was therefore very much an afterthought.

107. In his second witness statement, Mr Bukin describes in detail his involvement since 2017 in the renovations of V177 and the transaction with Lenta - both general renovations required to V177 (incurring costs of US $400,000) and construction works required specifically by Lenta (US $940,000), and expenses for maintaining V177 since autumn 2015, running to almost US $2.1 million.

108. He goes on to explain that, in the event of Lenta unilaterally terminating the Preliminary Agreement, in the face of a continuing injunction from the Court, then under the terms of the moratorium the Defendant will not be reimbursed for expenses which he has already incurred for the renovation. Moreover in any event, if the Court were to proceed to grant the Proprietary Injunction, there is a risk that Lenta may insist on all the liability provisions of the Preliminary Agreement. Although to date Lenta has shown understanding and cooperated on issues arising from the grant of the Freezing Injunction, Lenta itself may be up for sale and its new owners may take advantage and terminate the Preliminary Agreement, if an injunction remains in place. Finally he adds that if the Agreement with Lenta is terminated, it will be extremely difficult for the Claimant to find a new buyer for V177.

Relevant legal principles relating to an interim proprietary injunction

109. The claimant for an interim proprietary injunction must establish the following three elements, namely that: (1) there is a serious issue to be tried on the merits (2) the balance of convenience is in favour of the grant of an injunction and (3) it is just and convenient to grant the injunction. This is the conventional *American Cyanamid* approach to an interim injunction and differs from the approach to a freezing injunction. There is no need to show any risk of dissipation of assets, and an injunction may be granted in the face of a delay which would be such as to lead to the refusal of a freezing injunction: see *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm) at §§127-128. (Contrary to the Claimant's submission, §128 of *Madoff* is not authority for the proposition that all that must be shown is a risk of the property being dealt with in breach of the Claimant's rights.)

110. As regards the balance of convenience, this involves considering first the adequacy of damages for the claimant, if interim relief is refused. (I note that some authorities seem to suggest that adequacy of damages and balance of convenience are separate stages). If damages are adequate for the claimants, the injunction will not be granted. Only if they are not adequate does the court go on to consider the adequacy of damages for the defendant, if interim relief is granted. If damages are not adequate for the defendant either, then the court goes on to consider the balance of convenience and which course is less likely to cause "irremediable prejudice". See *National Commercial Bank Jamaica Ltd v. Olint Corp* [2009] UKPC 16 at §§16-17. Contrary to the Claimant's submission, these passages in *Olint Corp* are not authority for the proposition that where the "serious issue" threshold has been cleared in a claim to particular property, it is in reality unlikely that the court will find that the applicant would be just as well off with an action in damages, should the property be dealt with pending trial. Rather the correct proposition is that once the position has been reached that the claimant shows a sufficiently arguable case for a proprietary remedy, the court will *more readily afford* that claimant with interim remedies by way of

injunction and disclosure orders: *Madoff* at §140, citing *Republic of Haiti v Duvalier* [1990] 1 QB 202 at 213-214. Not to do so *might* (but not necessarily will) cause the irremediable damage as referred to in *Olint Corp.* Accordingly, in considering the second stage, it remains necessary to consider the adequacy of damages as a remedy, for one or both parties: see for example *Sukhorchin v van Bekestein* [2014] EWCA Civ 399 at §18.

111. Once it has been shown that the balance of convenience favours the grant of a proprietary injunction, it is extremely unlikely that the court would say that it was not just and convenient to grant the injunction: *Madoff* §141.

112. Finally, as to whether a party should provide fortification for its cross undertaking in damages, *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295 establishes that three requirements must be satisfied:

(1) the court has made an intelligent estimate, being informed and realistic although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant for fortification by reason of the making of the interim order;

(2) the applicant for fortification has shown a sufficient level of risk of loss to require fortification (i.e. showing a good arguable case to that effect); and

(3) 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.

The Claimant's case

113. In making his further application, the Claimant nevertheless maintained his primary position that the Freezing Injunction should be continued and maintains his primary case that the Defendant is liable to the Claimant for damages and/or equitable compensation in a sum not likely to be less than 50% of the amounts used to acquire and develop V177. However he now seeks, in the alternative, an injunction restraining the Defendant from transferring ownership or control or otherwise dealing with or diminishing the value of V177 or Pigmalion, without the Claimant's prior written consent. The basis of this alternative injunction is said to be a proprietary right, alternatively a contractual right.

114. As regards the steps to be established, first, there is at the least a serious issue to be tried that the Claimant is 50% beneficial owner of V177 on the same proprietary bases as put forward in support of the claim for the Freezing Injunction (see paragraph 83(1) above). The essential factual allegation is that, even whilst held by Pigmalion, the beneficial ownership of the V177 is to be shared between the Claimant and the Defendant. The Claimant points to the final relief sought in the action: including namely a declaration as to his beneficial ownership of V177 and a final injunction restraining the Defendant from disposing or dealing with V177, *pending* the transfer of V177 to a new holding company owned by Agro Market.

115. In a somewhat opaque passage in written submissions, the Claimant claims that, in the alternative to his damages claim, he has a beneficial interest in V177, albeit that he "would only take … beneficial ownership of V177 if D kept his promise with regard

to the transfer of V177 once the corporate holding structure was set up, D's breach of contract having cost C the value of a 50% share in V177".

116. Secondly, as regards balance of convenience, in addition to relying upon the proposition which I have already considered in paragraph 110 above, the Claimant relies on the proposition that delay does not have the significance as it does in relation to a conventional freezing injunction because the applicant is not seeking to establish a risk of dissipation.

117. Thirdly, the Proprietary Injunction here is just and convenient: the Defendant alone has been guilty of clandestine dealings; the Defendant is defiant in his assertion that V177 is his to deal with as he pleases, and the Defendant has shown himself prepared to act wrongfully in order to achieve his goals, relying upon the alleged taking by force of Usachevskiy market and K25 in November 2015.

118. Finally, in the further alternative, the Claimant seeks the Proprietary Injunction on the basis of his contractual (as opposed to proprietary) rights on normal *American Cyanamid* principles. This formulation is based on the alleged contractual obligation upon the Defendant not to dispose of V177 pending transfer to Agro Market, as set out in paragraph 15 (d) the Particulars of Claim. The balance of convenience favours grant of this injunction, most particularly because it requires the Defendant only to obtain Claimant's consent to dealing with V177 and the Claimant has made it clear that he will not oppose a mutually beneficial sale.

The Defendant's case

119. By way of preliminary, the Defendant submits that the application for the Proprietary Injunction is an afterthought and the evidence before the Court (which was directed towards the application for a freezing injunction) is less than complete.

120. As to serious issue to be tried, the Defendant, for limited present purposes, does not dispute that the Claimant can establish a serious issue to be tried as to whether he has a proprietary interest in, or a contractual right in relation to, V177. However the correct question is whether there is a serious issue to be tried in respect of the claim to *an injunction at trial,* which claim the interim relief is sought to protect. Effectively the final relief sought is an injunction requiring transfer of V177 to Agro Market and this amounts to specific performance of the Defendant's obligations. Under the principle of mutuality established in *Price v Strange* [1978] Ch 337 at 367-368, the Court will not compel a defendant to perform his obligations if it cannot, at the same time, ensure that any unperformed obligations of the claimant will be specifically performed, unless, perhaps, damages would be an adequate remedy to the defendant for any default on the part of the claimant. In the present case, on the Claimant's own case that there has been no binding agreement to terminate the Joint Venture, the Claimant is equally under an obligation to transfer the other markets to Agro Market. The Claimant has not offered any undertaking in respect of those markets and wishes to leave himself free to deal with those sites. There is evidence that he is seeking to sell and not being fully open relation to the receipts of M1. In those circumstances the Court should refuse the interim injunctive relief the Claimant seeks in respect of V177 without the Claimant offering undertaking so as to ensure that by the time of trial he has not prevented there being mutuality. No such undertaking has been offered.

121. As regards adequacy of damages, there is no presumption that in an interim proprietary injunction the court will find damages not to be adequate; the Claimant has not addressed the question whether damages would be an adequate remedy in respect of the Proprietary Injunction being sought. First, the Claimant has not given up his claim for a freezing injunction as being his primary claim. That claim must be a claim based on a claim for damages and thus the Claimant himself must regard that as an adequate remedy. Secondly, the Claimant's interest in V177 has no value independent of its monetary value and there is no evidence of difficulty in valuing V177. It is difficult to understand why the Claimant would not be compensated by an award of damages/equitable compensation calculated by reference to what has been spent and/or the open market value of V177.

122. As to the balance of convenience, first, the Proprietary Injunction would not impose any corresponding restraint upon the Claimant; secondly the injunction seeks an absolute bar on disposal, and not relief designed to preserve half its value. The latter is the most that could be sought in view of the breakdown in the commercial relationship between the parties; thirdly the Claimant has security for his claim by way of his ownership and/or control of the other Joint Venture sites. The evidence as to the value of those sites is limited, but that is a consequence of the fact that the Proprietary Injunction has been made late and after the evidence had closed. Finally the balance of prejudice is in favour of not granting the Proprietary Injunction. There is a very substantial risk of irremediable prejudice to the Defendant if the sale to Lenta to goes off, as shown by Mr Bukin's second witness statement.

123. Finally relief should be refused because the cross undertaking offered by the Claimant is insufficient: first, because the fortification offered is wholly insufficient in amount. The evidence of Mr Bukin in his second statement is relied upon to show that the grant of an injunction would cause substantial loss. The Defendant has spent in total a further US $5 million on V177 since its acquisition. Secondly, the Claimant has offered no undertaking that he will not sell the other assets of the Joint Venture.

Discussion

124. As regards the first stage, as the Defendant accepts, there is a serious issue to be tried that the Claimant has proprietary rights in V177. Moreover I do not accept that the fact that the Claimant has not offered an undertaking to preserve the other sites over which he has control negates the finding of a serious issue to be tried. Whilst it is correct that the question is whether there is a serious issue to be tried on whether the Claimant will be entitled to a final injunction, contrary to the Defendant's contention, the Claimant is not seeking a final injunction that V177 should be transferred to Agro Market (or another "holding company"). The final injunction he seeks is an injunction preventing dealing with or disposal of V177 *pending* transfer to Agro Market: see paragraph 74 above. In those circumstances, I do not accept the Defendant's argument based on mutuality and *Price v Strange*. I consider that there is a serious issue to be tried that the Claimant has a proprietary and/or contractual right to prevent sale pending transfer.

125. As regards the second stage, balance of convenience, I consider first whether damages would be an adequate remedy for the Claimant:

(1) Whilst in a case seeking a "proprietary remedy" the Court is "more ready to afford" an interim injunction, this does not mean that it should not consider the question of the adequacy of damages as a remedy for the claimant, if an injunction is not granted.

(2) Moreover, in the present case, the final relief sought is not a proprietary remedy in the sense of an order for return or delivery of particular property in specie; see *Duvalier* as cited in *Madoff* at §131. It is an injunction seeking to restrain dealings in property and one based on only a 50% proprietary interest. In any event, as joint beneficial owner, there must be a question as to whether the Claimant has a right to delivery of the property or indeed to prevent the sale of V177, as opposed to a right to a share in the proceeds of sale.

(3) In any event, the Claimant has produced little or no evidence to suggest that in the event of the sale to Lenta going ahead, even if in breach of his property or contractual rights, any loss he sustains cannot be adequately compensated in damages, or indeed that he will suffer any loss. The Claimant has no interest in the inherent subject of the property other than it its monetary value. Secondly, there is no evidence to suggest that the sale price to Lenta is at an undervalue. Moreover on 29 January 2019 the Claimant offered to pay £9 million of the sale proceeds into an escrow account. Even if possible losses might include sale at an undervalue or sums contributed by the Claimant to the acquisition or development of V177, there is nothing to suggest that those losses could not be adequately quantified. Thirdly, throughout argument, the Claimant has maintained that his primary position is that he is seeking damages and/or equitable compensation, which suggests that he himself considers damages to be an adequate remedy. Finally, if ability to pay is a relevant consideration, then, there is nothing to suggest that the Defendant would not be able to pay any damages.

(4) I therefore conclude that, applying the first limb of the balance of convenience, damages would be an adequate remedy for the Claimant. On that basis, it is not necessary to go on to consider the question whether damages would be an adequate remedy for the Defendant if an interim injunction were to be granted, but final relief refused. Accordingly and for this reason alone, the application for the Proprietary Injunction is dismissed.

126. In any event, as regards damages as a remedy for the Defendant, in the event that at trial it turned out that interim restraint had not been justified, on the basis of the evidence of the Defendant himself and of Mr Bukin there is at least a real risk that an interim injunction will jeopardise the sale to Lenta, and in that event, will cause the Defendant some considerable financial loss. Whilst that may be quantifiable, the amount of such loss is likely to be significantly greater than the £100,000 currently paid into an account, by way of fortification for the Claimant's cross-undertaking in damages. I am satisfied that the Defendant's evidence meets the requirements set out in *Energy Venture* and that fortification of the cross-undertaking in a substantially greater amount would be required, if the Court were to consider the grant of a Proprietary Injunction. Despite the filing of Mr Bukin's further evidence, the Claimant has not responded by offering any further fortification. This is a further reason for me to decline to grant the Proprietary Injunction.

127. Finally, whether as part of the balance of convenience or at the third stage of "just and convenient", I do consider that delay is a relevant factor in the present case. On his own case, the Claimant has been aware of the proposed sale to Lenta since last September. However it has taken almost 6 months for the Claimant to seek an injunction which in terms seeks to restrain dealings with V177. The Freezing Injunction did not in terms seek such relief, but rather was directed, inter alia, to the proceeds of sale of V177. That delay may not be as significant in the case of a proprietary injunction which seeks the return of a specific asset. However here, where what is sought to protect is a 50% interest in the value of the property, I consider that delay remains a relevant consideration.

128. For all these reasons, the further application for a Proprietary Injunction is dismissed.

Conclusion

129. In the light of the conclusions in paragraphs 93, 104 and 128 above, the Freezing Injunction is discharged; and the Claimant's applications for a fresh freezing injunction and for a Proprietary Injunction are dismissed.

130. I will hear submissions in due course as to the appropriate terms of an order and matters consequential upon these conclusions.