Neutral Citation Number: [2020] EWHC 1465 (QB)

Case No: QB-2020-001530

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

ROBERT PURBRICK	**Claimant**
- and -	
(1) MARK CRUZ	
(2) MM CRUZ DEVELOPMENTS LTD	**Defendants**

- -
- -

Giles Bedloe (instructed by **Dean Wilson LLP**) for the **Claimant**
George Woodhead (instructed by **Rix and Kay Solicitors LLP**) for the **First Defendant**

Hearing dates: 3 June 2020

- -

Approved Judgment

The Honourable Mr Justice Julian Knowles

Introduction

1. This is an application by the Claimant, Dr Robert Purbrick, for the continuation of a freezing injunction granted *ex parte* against the Defendant, Mark Cruz, by Morris J on 21 May 2020. The return date was 3 June 2020 and on that date I held a remote hearing at which both parties were represented by counsel.

2. For the reasons set out below Mr Cruz seeks to have the injunction set aside on the grounds of what he alleges was material non-disclosure at the hearing before Morris J. He also argues there is not a good arguable case against him justifying the continuation of the order.

3. There is also an application to add MM Cruz Development Ltd, a company of which Mr Cruz is the sole director and shareholder, as the Second Defendant.

Factual background

4. Dr Purbrick and his wife, Eleanor, and their children live at 13 Friar Road, Brighton, BN1 6NG. He a consultant ophthalmologist. In September 2016 Dr and Mrs Purbrick decided to have some building works done. The works were to be extensive and so they engaged architects to produce plans, assist with planning applications, and assist with the tendering process. The work included the erection of a single story extension and associated structural and landscaping works.

5. Mr Cruz is a builder. He was recommended to Dr Purbrick and his wife by a friend for whom he had worked. He knew the Purbrick's neighbours. Dr Purbrick and his wife met with Mr Cruz and viewed work he had done at a nearby property. Mr Cruz submitted a tender. His quote was competitive and Dr Purbrick and his wife decided to engage him.

6. Contracts were signed on 3 May 2018. The contract was in two parts. Each part was signed by Dr Purbrick (described as 'the Employer') and by 'Mark Cruz of MM Cruz Developments Ltd' (described as 'the Contractor'). Both parts of the contract were on the headed notepaper of MM Cruz Developments Limited, 8 Warren Close, Brighton, East Sussex, BN2 6DT. That is Mr Cruz's home address. They bore the company's registration number and its VAT number. He is the sole director and shareholder of the company.

7. As I will explain later, there is a live and important issue as to whether Dr Purbrick contracted with Mr Cruz personally, or with MM Cruz Developments Ltd.

8. The first part of the contract stipulated that the Employer would pay the Contractor £74,033.75 in cash. This sum was said not to be subject to VAT. Paragraph 17.1 of the Particulars of Claim aver that this was because they were paid to Mr Cruz personally in his personal capacity. Mr Cruz says in his witness statement of 2 June 2020 that none of this money went into his personal account but was used to buy materials and pay sub-contractors, who wanted to be paid in cash. He says Dr Purbrick wanted to pay in cash.

9. The second part of the contract stipulated the Employer would pay the Contractor the sum of £137,491.25 plus VAT at 20%, a total of £164,989.50. These payments were to be made by BACS. Under the hearing 'Bank info for transfer' the title of the account was described as 'MM Cruz Developments Mr Mark Cruz'. As a matter of fact, the account was the company's account, and that is where the money was paid.

10. Each contract contained a payment schedule.

11. Work began on 3 September 2018 and the contractual completion date was 1 March 2019 (not 1 May 2019 as in Dr Purbrick's affidavit). Dr Purbrick and his family moved out of the house and rented a maisonette nearby for the duration of the works. Over the next months, Dr Purbrick made substantial payments pursuant to the payment schedules.

12. Prior to work beginning Dr Purbrick became aware that Mr Cruz had a business interest in Mexico and sought, and received, an assurance from him that he would be fully involved with the building work.

13. Dr Purbrick's affidavit of 28 April 2020 in support of the application for the freezing injunction sets out what happened thereafter. Taking matters shortly, problems began in December 2018 in relation to the patio. Dr Purbrick says Mr Cruz misinterpreted the plans, and then demanded an additional payment of £4,500 for excavation of chalk and other work. He says that Mr Cruz then ordered the wrong type of rolled steel joists which resulted in further additional charges. An underfloor heating system was misinstalled and Dr Purbrick said he was told by Mr Cruz that a Mr Lez Williamson was working on it, when that was not the case and – as Dr Purbrick later discovered - Mr Williamson had not been involved at all. Mr Cruz also told Dr Purbrick that an electrician called Phil Hoare had done the electrical works when that also was not the case, and Mr Cruz had done the work himself despite not being qualified to do so. Dr Purbrick's case is that Mr Cruz did not employ specialist sub-contractors in order to maximise his profit. Dr Purbrick said that Mr Cruz also made demands for a number of additional payments.

14. The project fell substantially behind schedule and Dr Purbrick had to extend the rental contract at the property which he and his family had moved to.

15. Dr Purbrick's case is that after the family moved back into the house in May 2019, there was a problem with the electricity tripping out. Mr Cruz, who was shortly to leave for Mexico on holiday, was unable to solve the problem. This prompted Dr Purbrick to commission a report from a firm of electricians (Sussex Sparks), who reported that the electrics had been left in a dangerous state, including numerous exposed live parts, which carried the risk of electrocution and had to be made safe. The electrician's report referred to the electrics being in a condition which posed 'a threat to life'. It said that, 'the installation has clearly not been installed by a competent contractor.'

16. That report prompted Dr Purbrick to commission a report from a surveyor (Stiles & Co). They reported that the work deviated from the architects' plans and that there were numerous breaches of the building regulations and other defective works. This report concluded:

> "Observations to date confirm unauthorised deviations from the contract documentation, defective works and work items that are unlikely to comply with the Building Regulations.
>
> As a result of this, further investigative work and costly remedial works are unavoidable, with the inherent disturbance and cause for concern by the employer.
>
> There is no doubt that extensive remedial works and alterations will be required to complete the extension satisfactorily."

17. On 15 May 2019 Dr Purbrick instructed the workmen to stop work. On 16 May 2019 he terminated the contract because of what he regarded as repudiatory breaches by Mr Cruz.

18. Dr Purbrick got Brighton and Hove City Council's Trading Standards Department involved in relation to Mr Cruz doing gas and electric work that he was allegedly not qualified to undertake.

19. At [46] of his affidavit Dr Purbrick says that he has had to spend £151,871.04 on remedial works to put matters right.

20. On 21 May 2020 Dr Purbrick issued a claim form against Mr Cruz personally as defendant for damages for breach of contract. Particulars of Claim were served on 2 June 2020. These name both Mr Cruz and his company as Defendants.

21. Mr Cruz has made a witness statement dated 2 June 2020 in opposition to the application to continue the freezing injunction and in support of his application to set it aside. It is his case that he has been wrongly sued as an individual because the contract was between Dr Purbrick and his company, MM Cruz Developments Ltd. He argues that there was material non-disclosure at the hearing before Morris J, who would not have granted the freezing injunction if he had been taken to all of the relevant material. I will turn to the substance of that argument when I address the parties' submissions later.

22. Mr Cruz says that Dr Purbrick knows that he contracted with the company and points to the fact, for example, that on social media posts following the breakdown in the relationship Dr Purbrick criticised the company. He also says that email communications were always to the company's email address. He also relies on a message from him to Dr Purbrick on 22 May 2019 (at a time when Dr Purbrick was planning to meet the surveyor without Mr Cruz present) when he said that he assumed from that Dr Purbrick did not 'want to continue the project with MM Cruz Developments'. He said that Dr Purbrick did not respond by saying, for example, that the contract was with Mr Cruz personally and not with the company. He also relies on Dr Purbrick contacting the company's insurers with a view to making a claim.

23. On the substance of Dr Purbrick's complaints, Mr Cruz's case is, in essence, that Dr Purbrick shut the work down and closed the site when the work was incomplete which could have been completed satisfactorily. He says Dr Purbrick refused to let him re-enter the site to rectify works. He said that following Dr Purbrick closing the site, he declined to meet and did not return phone calls.

The hearing before Morris J

24. I have the Claimant's solicitor's notes of the *ex parte* hearing before Morris J and her note of his ruling. These are only notes and not a stenographer's transcript. They are reproduced below as rendered in the exhibits. Obviously, they are not agreed.

25. The judge had a Skeleton Argument from Mr Bedloe, counsel for Dr Purbrick; Dr Purbricks's affidavit and exhibits. He also had a shorter, core bundle of exhibits. The exhibits including a lengthy series of 'WhatsApp' messages between Dr Purbrick and Mr Cruz. The judge was referred to that, but not taken through it in any great detail.

26. Mr Bedloe took the judge through Dr Purbrick's affidavit, including the details I have already set out. He submitted:

> "The contract of course includes the implied term that the works will be carried out with reasonable care and skill and the Purbricks will say quite clearly that Mr Cruz fell very far short of that, at its most basic, even disregarding the terms, the specifications within the contract. They will also say that reasonable care and skill includes a duty to carry out the works either to schedule or alternatively to a timely fashion - having overrun by, over 2 months, he failed in that regard. By April 2019 the Purbricks were expressing their concerns to Mr Cruz, there are 50 or so pages of Whatsapp chat in the main bundle – which I wont take your Lordship to at this stage – that document is dense and suffice it to say there were two whatsapp chats going on throughout the project. One chat with Mr Purbrick and Mr Cruz and the second chat including Mrs Purbrick and two of the employees carrying out the work on a day to day basis, under Mr Cruz's supervision and instruction."

27. During the hearing the judge raised the issue of the Claimant's duty of full and frank disclosure:

> "Mr Justice Morris: Can I just raise this with you Mr Bedloe, both from general experience and in our current circumstances, your client is under a duty of full disclosure – which I am sure you are fully aware of – the point that's occurred to me in previous cases where there is material within a large exhibit to the material places before the judge which could be said to be material the defendant would want to rely on and which is not expressly drawn to the attention of the judge at the time. So what I am asking you to do, because I haven't printed off all pages and read every single one, for you to be satisfied that if theres anything in the material to which your not referred to in the affidavit which might be said to be in favour of the defendant that you will do so?
>
> Mr Bedloe: Yes – of course I appreciate that is my duty and I will do so so far as I can. The only response there has been from the

> defendant is the page that your Lordship printed off separately, page 164.
>
> Mr Justice Morris: which was dated February this year, [reads exhibit] the project was not completed as Robert Purbrick closed the site when I was away.
>
> Mr Bedloe: Yes, clearly Mr Cruz will say this was an ongoing project and that the reason it terminated prematurely was because the Purbricks shut him and his labourers out of the site, even presumably say that the contract would have been completed but for that act. The Purbricks on the other hand say they don't accept that and the fact they were heavily over time and moved in with Mr Cruz's acquiescence, leaving the electrics in the state they were and when the circuit tripped he was unable to deal with that demonstrate.
>
> …
>
> Mr Justice Morris: now you have drawn that to my attention, there may be arguments for waiver of the breach – but anyway you have drawn that to my attention."

28. Mr Bedloe continued:

> "… in my submission there is a good arguable case on the basis of the affidavit of Dr Purbrick supported by the expert report from the electrician and the surveyor and it is quite clear that the contract had overrun in excess of months by the time the contract was terminated. I will say set out additional significant charges that were levied against Dr Purbrick which were not provided for in the contract."

29. On the question of dissipation, Mr Bedloe submitted as follows:

> "So, my Lord, looking at the factors that the court will want to consider in relation to dissipation – this is at paragraph 19 of the skeleton argument – the ease or difficulty of which the assets disposed of, I can say although its not in the evidence that until recently that both properties where marked on the respective search platforms as STC, as of today theyre not so marked. Our belief is that sales have been agreed but fallen through and our concern would be that if Mr Cruz was aware that there was a legal claim in the offing seeking in excess of £150,000 there would be an incentive to expediate the sale of his properties and offers to which has previously been accepted and fallen through could be resurrected by for example – agreeing to sell at a slightly reduced price. The anecdotal evidence from the property industry is that although Corona virus has clearly impacted on the way they do business, has impacted on new properties coming on to the

> market. It has not substantially affected progress of sales with properties already on the market."

30. Relevantly for the issues before me, later Morris J said this:

> "I have a concern that Mr Cruz is going to liable, that he was the contracting party. You are going to have to satisfy me that you have a good arguable case that he is."

31. There was then this exchange:

> Mr Bedloe: Where personal liability is concerned, as I have set out in the skeleton argument, paragraph 29 although Mr Cruz has a limited company, he is the sole director and shareholder. The Companies House website shows that the company has no assets. For that reason, there is nothing to prevent Mr Cruz dissolving the company and no incentive for him to keep it going. More importantly, the contract is signed by Mr Cruz personally – although the letterhead references the business, the contract is made between Robert Purbrick and Mark Cruz of MM Cruz Developments Limited. One part of the contract is payable in cash and not subject to VAT."

32. Pausing there, [29]-[30] of Mr Bedloe's Skeleton Argument was in the following terms:

> "29. MM Cruz Developments Ltd ('the Company') is a company of which D is the sole director and shareholder. It is apparent that the Company has no or no significant assets. If, as seems to be the case, D intends to relocate permanently to Mexico, it is anticipated that the Company will be dissolved, and that D will have no compunction in taking that course of action.
>
> 30. The contract was signed by D personally. The bank account for BACS payments under part 1 of the contract was a personal account in D's sole name. The cash payments required under part 2 of the contract were to be paid to D personally. Part 2 of the contract did not attract VAT."

33. In fact, the account specified on the contract was the company's bank account, and not Mr Cruz's personal account. Mr Cruz has produced as an exhibit a bank statement (Ex MC1, p9) in the name of the company showing the initial deposit payment of £23,900 on 4 May 2018, as well as other bank statements showing payments from Dr Purbrick. The account number on the statement matches that on the contract.

34. At [31] of his Skeleton Argument Mr Bedloe referred to [57] of Dr Purbrick's first affidavit:

> "I intend to commence proceedings against Mr Cruz personally to recover £151,871.04 incurred for remedial works by third party contractors so far due to payments being made direct to Mr Cruz.

> In particular, cash payments were were made to and accepted by Mr Cruz in his personal capacity and agreed in writing at RP4 [ie, the two parts of the contract] payments are received by 'Mark Cruz of MM Cruz Developments'. Cash payments are 'not subject to VAT' which you expect for an individual and not a business."

35. Continuing with the note of the hearing:

> "Mr Justice Morris: I do not understand that point. Whether he is a sole trader or company he would have to register for VAT – one part with VAT and one part isn't. He should be registered for VAT. You tell me the point.
>
> Mr Bedloe: There is potentially VAT evasion by constructing the contract in this way but by taking payments in cash personally, rather than through the business, we say that he is liable personally for the contract.
>
> Mr Justice Morris: It is pretty ambiguous isn't it ?
>
> Mr Bedloe: It is arguable, there's clearly an analysis on both directions, in submission the facts are that the personal payment and the non-VAT element does allow the claimant to claim against Mr Cruz personally.
>
> Mr Justice Morris: I have not had drawn to my attention, any other material, whether in the bundle or otherwise or correspondence that goes to this issue and I going to assume that anything relevant has been drawn to my attention. I did notice that in the Stiles report at page 2 of the report, they assume that the contract is with the company. It goes in your favour, that the wording of the contract, it is not Mark Cruz on behalf of MM Cruz Developments but Mark Cruz of MM Cruz Developments – you might say that describes who he is. Of course, the fact that the paper is headed with their letterhead, VAT number and registration would militate towards it being limited. The only thing that might go the other way is that when you get to progress review meeting it says contractor and employer to meet fortnightly etc – meetings can be face to face or by telephone. Of course, a company cannot have a face to face meeting. Its not a very straight forward point.
>
> Mr Bedloe: I accept there's an argument that will need to be made.
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> Mr Justice Morris: Your client will be at risk, that on an application to set aside – if grant it.
>
> Mr Bedloe: That is an aspect of the claim that Dr Purbrick is aware of. Your Lordship, the papers in the bundle that argument can be drawn in both directions. That is one of the reasons the

> draft order contains terms for compensation for any loss arising. I cannot dress you with any further detail on that aspect.
>
> Mr Justice Morris: there is nothing else in the bundle, so far as you're aware that has any reference to this distinction between him personally and the company?
>
> Mr Bedloe: No.
>
> Mr Justice Morris: That Deals with that."

36. The judge granted the freezing injunction. The note of his ruling is as follows:

> "The summary of that decision is that I am prepared to grant a freezing injunction, subject to being satisfied that the claimant, I am only going to grant it in favour of Robert Purbrick as the claimant, but I am going to want to be satisfied before this order is issued that the claimant Robert Purbrick is good for his undertaking in relation to damages and in line with the case of Staines to which we have referred, I would like some evidence as to his ability to meet an undertaking. Such evidence should or accompanying submission should address likely amounts of liability of that undertaking – its very difficult to predict and I accept that – obviously if the likely amount is run into the millions the fact that Dr Purbrick had a house worth £300,000 would not do, but on the other hand if it is going to run to thousands or tens of thousands only he has sufficient assets elsewhere – but that requirement will have to be met.
>
> The way that should be is by the submission of a further short affidavit with the accompanying submission, which can be submitted to me. I am not sitting tomorrow I do not need it this evening.
>
> This is an application on a without notice basis for a freezing injunction, made by Dr Robert Purbrick against Mr Mark Cruz. Proceedings have not yet commenced, the underlying claim relates to a claim for damages for breach of contract by which the intended defendants wish to build a ground floor extension at the home of Dr Purbrick and his wife Eleanor Purbrick, in Brighton. That contract being concluded in May 2018, by May 2019 relations had broken down. Dr Purbrick, the intended claimant, contends that the contractual defendant Mr Cruz was in repudiatory breach of the contract as a result of some substantially defective work and that he accepted that repudiatory breach in or around the 16 May 2019. In order he intends to claim damages in the amount of approx. £150,000 as the costs of either correcting the defective work or completing the work and intends also to claim for overpayments in respect of that contract.

The first issue is whether there is a good arguable case that he will succeed in that claim for damages, that he will have a good arguable case, being well known and set out in the Narmeenia Case (sic) – by way of expansion on that test, a good arguable case does not require the claimant to show that there is a better than 50 percent chance of success but that it is a higher chance of success than a serious issue to be tried. That being the requirement in an ordinary interim injunction application. I am satisfied that there is a good arguable case, that Dr Purbrick has a claim for damages against the relevant contracting party. The evidence I have seen from the reports from Sussex electrics and from Stiles does show evidence of defective work and substantial loss on Dr Purbrick's part. The more difficult question is whether or not Mr Cruz, as opposed to his company, MM Cruz Developments Limited is the contracting party and therefore the correct defendant. On this issue, without going into great detail there are indications that helping both ways – the contract itself is on company letterheaded paper with the company registration number and company VAT number. The contract is said to be made between the claimant and 'Mark Cruz of MM Cruz Development Limited' that in itself seems to me to be ambiguous and could be said, because it is framed Mark Cruz of MM Cruz Development Limited not on behalf of, that Mr Cruz is contracting on his own behalf on not on behalf of his company. There is also reference in two parts of the contract to meetings between the contractor and the employer – the contractor being defined as I just indicated – and they reference to meetings being face to face or by telephone. That tends towards a suggestion that as a company itself cannot meet, personal face to face meetings would be between the two individuals. This is not a straightforward point I am satisfied on the basis of the argument I have heard today that there sufficient evidence for a good arguable case, that the contracting party is Mr Cruz personally, whether upon further inter parties arguments that conclusion will be maintained is another matter which I can comment further. As I am satisfied there are arguments going both ways, and it is more than a bear argument – there is a good arguable claim.

The second requirement is that there is a risk of dissipation of assets, that also links in this case with whether or not the court is satisfied that this application has been made without notice. Again, it seems to me that there are question marks – the application has not been made extremely promptly the dispute has been running since last year, August at the latest being an indication that there might be claims between the parties. On the other hand, I do accept that there are reasons linked to the COVID-19 crisis which have caused the application to be later then it otherwise would. Not least Dr Purbrick has had heavy involvement as a doctor working within the crisis. The main assets identified are the defendant's yacht and two properties in

> Brighton. There is evidence that he has been taking steps to dispose of those assets. It appears he has already disposed of the yacht and has done so since the dispute arose, there is evidence that he is seeking to dispose of his properties. I have some doubts as to whether or not if notice has been given, of this application, the defendant would have been able to dispose of the two flats prior to an application being heard. However, nonetheless, I accept that there is some risk that he might have accelerated that process and there is some risk that he might have managed to have dealt with those assets in the intervening period, between notice of the application and the hearing of the application, in such a way that the assets will have been depleted. For example, as put to me by Mr Bedloe, charging or mortgaging the property and releasing some of the equity in it or indeed reigniting offers which it appears he has already had on the properties by reducing the price. There is more generally in relation to the risk of dissipation a sufficient objective evidence to satisfy me that there is a risk which is more than fanciful of dissipation. That is the connection between the defendant and his connection with Mexico, his indications in some material that he is/has been intending, with his wife, to emigrate to Mexico and with the coincidence of his efforts to dispose of his properties in the months since this dispute arose. In particular, placing Warren Close on the market or the appearance on Rightmove website on October 2019 and the placing of the Silwood Place property or appearance on the Rightmove website a matter of days after there had been an exchange between the defendant and the local authority – in which the local trading standards authority was making serious allegations effectively of misconduct, or noncompliance on the defendants part. In my Judgment there is a sufficient evidence of a risk of dissipation. Given those matters, I am satisfied – subject to the issue about the claimants assets – this is sufficient to warrant a grant of injunction.
>
> I am going to order a 14 day return date. The Defendant will be under liberty to apply, before those 14 days for this discharge."

37. Shortly afterwards Dr Purbrick swore an affidavit as to his assets.

The freezing injunction

38. The injunction restrains Mr Cruz from removing from England and Wales or in any way disposing of or dealing with or diminishing his assets which are in England and Wales up to the value of £200,000.

39. Paragraph 6 of the injunction specifies the following assets in particular: (a) Flat 2, Sillwood Place, Brighton, BN1 2LK, or the net sale monies if the flat has been sold; (b) 8 Warren Close, Brighton, BN2 6DT, or the net sale monies if the property has been sold; (c) Mr Cruz's shareholding entitlement in MM Cruz Development Ltd, or the net sale money if any part of it has been sold; (d) any money standing to the credit of any

bank account, including the amount of any cheque drawn on the account which has not cleared. Mr Bedloe told Morris J that Sillwood Place is on the market for £450,000 and Warren Close for £600,000.

40. In his witness statement Mr Cruz confirmed that both properties are currently on the market with a view to being sold. He says the proceeds will be used to buy a home in Mexico and a property in the UK.

The parties' cases on this application

The Defendant's case

41. On behalf of the Defendant, Mr Woodhead submitted that Morris J was not taken to all of the relevant material bearing on the question of who Dr Purbrick's contractual counterparty was, and that had he been shown the relevant material, he would not – or might not - have concluded that there was a good arguable case that it was Mr Cruz personally, as opposed to his company who contracted with Dr Purbrick. Accordingly, Mr Woodhead submitted I should set aside the injunction for material non-disclosure: *Brink's Mat v Elcombe* [1988] 1 WLR 1350, 1356-1357.

42. Mr Woodhead submitted the identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. He said a central question was, therefore, who did the Claimant and the Defendant think were the parties to the Contract such that were legal relations between them ? He pointed to authorities such as *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, which establish that where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.

43. Mr Woodhead said that there was what he called in his Skeleton Argument a 'wealth' of evidence pointing to the fact that it was the company and not Mr Cruz personally with whom Dr Purbrick contracted to which the judge was not referred by the Claimant, when he should have been. He said this material included (a) the travelling draft contractual document of 3 May 2018; (b) details of payments from the Claimant to the company's bank account as shown on its bank statements; (c) details of invoices for the purchase of materials by the company for use at the Property; (d) the policy of insurance in the name of the company which the Claimant had seen and used as a basis for his discussions with loss adjusters; (e) the Claimant's failure to object or rebut to Mr Cruz's suggestion that the 'project' was with the company in the WhatsApp message of 22 May 2019; (f) the Claimant's acknowledgement that it was the Company that was insured, as per the company van; and (g) the Claimant's own comments on social media that it was the company that caused him harm.

44. Mr Woodhead went on to argue that there is not a good arguable case against Mr Cruz. He said that the evidence did not support that conclusion. In addition to the points already made he pointed to emails between Dr Purbrick and Mr Cruz (to the company's email address) pre-works, and Mr Cruz's email signature had the company's name in it. He referred to one in particular from 1 April 2018 where Mr Cruz said 'it is my company, my trading name and my team, and I am responsible for every job I take on …'. He said Dr Purbrick was an intelligent man and a 'details man' who asked many questions

but never queried the status of the company. He said there is an absence of extrinsic evidence to show that Dr Purbrick thought he was, or intended to, contract with Mr Cruz personally.

45. On the application to add the company as a Second Defendant, Mr Woodhead said that he did not have instructions to represent the company (but anticipated doing so) and said that the application to join the company had only come the day before the hearing. He accepted, however, that the company ought to be added as Second Defendant. He said the proper order would be for it to be substituted for Mr Cruz, but that that was 'a matter for another day'.

The Claimant's case in response

46. On behalf of Dr Purbrick, Mr Bedloe submitted as follows.

47. The first test for continuation of the freezing injunction is the same for the initial application, ie whether the applicant can demonstrate a good arguable case, and whether there is a risk of dissipation: *The Niedersachsen* [1983] 1 WLR 1412, 1417.

48. In essence, Mr Bedloe submitted that the judge was right for the reasons he gave to conclude that the Claimant had a good arguable case against Mr Cruz personally. He said that whilst it remains the Claimant's primary case that he believed he contracted with Mr Cruz personally, he acknowledged that there were points to be made the other way, but that it remained a matter for trial.

49. Mr Bedloe rejected the criticism that there had been material non-disclosure.

50. He said that the issue of the correct identity of the defendant was plainly well before the judge at the *ex parte* application, and that there were numerous references to the point in the note of the hearing, in addition to [57] of Dr Purbrick's first affidavit (which the judge said he had read) where the point was addressed. Mr Bedloe said the Claimant was 'up front' on the issue from the outset and has not sought to shy away. It was acknowledged on C's behalf that arguments clearly existed in both directions on the point. Morris J was concerned about the wording of the contract as Mark Cruz *of* MM Cruz Developments Ltd, and the impossibility of a corporate entity holding regular progress reviews face to face or over the telephone. He also said that the Court was fully appraised of the likely response of Mr Cruz to the claim.

51. The Claimant disclosed the entirety of the WhatsApp conversation between himself and Mr Cruz. Mr Bedloe said this material was available for the judge to consider. There was some concentration by the judge on messages in the days following the termination.

52. Taking the point shortly, Mr Bedloe submitted that the key documents in the case were disclosed in the exhibit to Dr Purbrick's first affidavit, which the judge said he had read. He said that the seven items relied on in particular by Mr Woodhead took the case against his client no further and were of peripheral materiality (at best).

53. He said that the judge had been right to conclude for the reasons he gave that there was a good arguable case against Mr Cruz personally.

54. On the second limb of the test – risk of dissipation – Mr Bedloe again submitted that the judge was right for the reasons he gave to conclude there was an objective risk of dissipation. He said that it was apparent from Mr Cruz's witness statement that he does have substantial ties to Mexico, and that his properties in the Brighton area are on the market with the intention they be sold. He pointed to the fact that Mr Cruz has registered company in Mexico – MM Royale Yachts – albeit it is closed during the Coronavirus pandemic and that he admits to spending considerable amounts of time there.

55. Mr Bedloe also pointed out that the question of dissipation does not feature in Mr Woodhead's Skeleton Argument.

Discussion

The application to set aside for material non-disclosure

56. On the question of setting aside an injunction for non-disclosure, the starting point is the summary of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe*, supra, pp1356-1357.

> "(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *Rex v Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac* [1917] 1 KB 486 at 514, per Scrutton LJ.
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> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v Kensington Income Tax Commissioners*, per Lord Cozens-Hardy MR, at 504, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238; Browne-Wilkinson J. in *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295.
>
> (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in *Bank Mellat v Nikpour* [1985] FSR 87 at 92–93.

> (5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure …is deprived of any advantage he may have derived by the breach of duty': see per Donaldson LJ in *Bank Mellat v Nikpour*, at 91, citing Warrington LJ in the *Kensington Income Tax Commissioners' case* [1917] 1 KB 486 at 509.
>
> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non- disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded" per Lord Denning M.R. in *Bank Mellat v Nikpour* [1985] FSR 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless, to continue the order, or to make a new order on terms. When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed" per Glidewell LJ in *Lloyds Bowmaker Ltd. v Britannia Arrow Holdings Plc*., ante, pp1343H-1344A."

57. Slade LJ said that application of the principle ought not to be carried to extreme lengths (p1359).

58. *Gee on Commercial Injunctions* (6th Edn) says this at 9-021 (footnotes omitted):

> "If the non-disclosure is such that the court, on reviewing the matter *inter partes*, is of the opinion that the ex parte relief was inappropriate and should not have been granted, then plainly the court will discharge the order. But the 'acid test' for whether or not the order will be discharged is not whether or not the original judge who granted the order *ex parte* would have been likely to have arrived at a different decision if the material matters had been before him. It has been said that in considering whether to discharge for non-disclosure the answer to the question is not 'a matter of great significance unless the facts which were not disclosed would have resulted in a refusal of the order'.
>
> …

> Whether or not the relevant non-disclosure was 'innocent', in the sense that there was no intention to omit or withhold or misrepresent information which was thought to be material, is an important factor to be taken into account by the court. The court should assess the degree and extent of culpability. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. Where the non-disclosure was "innocent" in this sense, the court will take into account the degree of culpability of the applicant and his advisers. In complex cases the borderline between what is material and what is not may not be clear when preparing the application. Culpability is not a matter to be assessed with hindsight. It will be relevant to take into account whether the non-disclosure was of matters which were important or only of peripheral importance on the application. If there has been a sustained attempt to give proper disclosure and criticisms are made with the benefit of hindsight in respect of non-disclosure of information which is not of critical importance, this will be a factor in favour of maintaining the relief."

59. I have carefully considered the seven pieces of evidence which Mr Woodhead says the judge was not shown but should have been. Whilst I understand why he says that the judge should have had his attention drawn to this material, and I have some sympathy for that argument in relation to some of it, I remain unpersuaded that separately or together this provides a proper basis for me, in the exercise of my discretion, to discharge the freezing injunction made by Morris J.

60. The starting point is, as Mr Bedloe rightly submitted, that the judge had at the forefront of his mind, the issue of who was the correct defendant: Mr Cruz personally, or the company ? He was shown the contracts, which plainly were the most important documents bearing on this issue. These, as the judge said, were ambiguous in as much as they referred to the Contractor as 'Mark Cruz of MM Cruz Developments Ltd.' I agree. The full heading of each was as follows:

> "CONTRACT:
>
> The following agreement is made on the 3rd Day of May 2018
>
> BETWEEN ROBERT PURBRICK
> Hereinafter called 'the Employer'
> 13 Friar Road Brighton BNl 6NG
>
> AND MARK CRUZ OF MM CRUZ DEVELOPMENTS LTD.
> Hereafter called 'the Contractor'"

61. As the judge rightly observed, they did not contain the more usual 'for and on behalf of', which might have removed the ambiguity. Mr Cruz is wrong in [8] when he asserts that is what the contracts said. At the end of each there is 'Name on behalf of the Contractor' and 'Signed on behalf of the Contractor' and two illegible squiggles by each. I infer

these squiggles are Mr Cruz's name and signature. There is no suggestion anyone else signed the contract on his behalf, and at [13] of his first affidavit Dr Purbrick says that it was Mr Cruz who signed the contract. Illegible though the squiggle is, it is clear is that the 'Name on behalf of the Contractor' is definitely not 'MM Cruz Developments Ltd'. As I will explain in more detail later when I consider the question of good arguable case, the way Mr Cruz signed the contracts provides such a case that, viewed objectively, Mr Cruz personally was signing as a contracting party, especially as substantial cash payments were made to him personally and each contract referred to face to face meetings between the Contractor and the Employer.

62. Mr Woodhead said that the travelling draft contractual document of 3 May 2018 (Ex MC1, pp1-4) was in the possession of Dr Purbrick and was not produced to the judge and it should have been. It is true this document was not exhibited to Dr Purbrick's affidavit and the judge was not shown it. I was told those acting for Dr Purbrick were not aware of it. But in my judgment nothing turns on the point and the document was not material. The document is a copy of the first part of the contract dealing with BACS payments. It contains a number of comments and annotations by Dr Purbrick in the margins. These do not deal with the identity of the contracting parties but deal with details of the works, a point Mr Cruz fairly acknowledges in [9] of his witness statement. The details of the Employer and Contractor are the same as on the final signed version of the contracts. The bank account name is 'MM Cruz Developments Mr Mark Cruz', as on the final version. There is nothing in this document which would have carried the issue any further forward than the 3 May 2018 documents had the judge been shown it. The point that Mr Cruz makes in his witness statement and Mr Woodhead makes is that Dr Purbrick never queried why the company's details were on the contract if he was contracting with Mr Cruz personally. But that point is clear from the evidence the judge did see.

63. The next item Mr Woodhead said had not been shown to the judge were details of payments from Dr Purbrick to the Company's bank account. I do not think Dr Purbrick can be blamed for not having these – he could not reasonably have been expected to obtain them. They were the property of the company, whose directing mind and will was Mr Cruz as sole director and shareholder. The account name on the contract, as I have pointed out, was ambiguous as it referred to 'MM Cruz Developments' (no reference to 'Ltd') and also 'Mark Cruz'. Dr Purbrick could not reasonably have been expected to glean from this that the account was in fact that of the company. It is just as consistent with the account being Mr Cruz's personal account. Morris J was misinformed by Mr Bedloe on this issue, as I have pointed out, but in the circumstances I judge that to have been an innocent mistake. But in any event, as I pointed out during the hearing, the fact the BACS payments were made to the company's account was not determinative of who the contracting party was. People may contact individually and then have payment made to a limited company they control for tax or other financial planning reasons.

64. The next item relied on by Mr Woodhead was an invoice for the purchase of material by the company. This is an invoice from 'London Stone' (Ex MC1, pp14-16) for the delivery of slabs. It is dated 4 March 2019 and is addressed to the company at Flat 2, Sillwood Mansions which was also specified as the delivery address. Mr Cruz's evidence about this at [26] of his witness statement is that the order was placed by Dr Purbrick or his wife in the company's name (with Mr Cruz's permission) in order to

obtain a trade discount. There are some related WhatsApp messages about delivery of the stone from Mrs Purbrick. Mr Cruz said the delivery address was wrong and that he paid for the stone to be re-delivered to Friar Road. Again, I do not think this carries matters much further forward. There is no clear evidence Dr Purbrick was aware of this invoice or had a copy of it and I do not think it has much bearing on the question of who the contract was between. The address was of a property which belonged to Mr Cruz: it was not the company's registered address. And even on Mr Cruz's case there was a good reason why the company's name appeared quite apart from it have been a party to the contract.

65. Mr Woodhead next relied on the certificate and policy of insurance in the name of the company which Dr Purbrick had seen and used as a basis for his discussions with loss adjusters when he sought to make claim under the company's insurance policy. This is dealt with at [36] of Mr Cruz's witness statement. What happened is that about a month after Dr Purbrick terminated the contract he made a claim against the company's insurers, NIG. A loss adjuster called Alin Enache contacted Mr Cruz in June 2019 but he did not know anything about it. Mr Cruz produces an email from Mr Enache to him which shows the claim as being 'Robert Purbrick v MM Cruz Developments Ltd' (Ex MC1, p17). He also produces an email from Dr Purbrick which refers to him having seen the words 'fully insured' on the company van. Mr Cruz has put in evidence a number of insurance certificates for employers' liability insurance and public liability insurance. They are in the name of the company. There is an email from 22 May 2019 showing that at least one of these was emailed to Dr Purbrick. There was also discussion of insurance between Dr Purbrick and Mr Cruz on WhatsApp.

66. Dr Purbrick does not deal with this at all in his affidavit. In my judgment he should have done, and this was material non-disclosure. That Dr Purbrick sought to make a claim *against the company under the company's policy of insurance* is something which ought to have been drawn to the judge's attention. Morris J had picked up from the emails that there had been an insurance claim that had been refused, so the issue was semi-raised before him, but Dr Purbrick should have explicitly dealt with it in his affidavit and produced the relevant certificates and the judge should have been addressed on the relevance or otherwise of this to the central issue of the identity of the counterparty.

67. Mr Woodhead also relied on the Claimant's failure to object to or rebut Mr Cruz's suggestion that the 'project' was with the company in the WhatsApp message of 22 May 2019 at 13.24. I do not think this is a good point, and the WhatsApp messages can be read both ways. The particular message which Mr Woodhead highlighted was sent when Dr Purbrick told Mr Cruz he was going to meet with the surveyor and electrician and architect without Mr Cruz present. Mr Cruz wrote:

> "If you're having a meeting without me present, are you saying that you don't want to continue the project with MM Cruz Developments ?"

68. Mr Woodhead argued that the Claimant had the opportunity to refute the suggestion that the contract was with the company but did not do so. Mr Woodhead said that, on the contrary, he showed no surprise or caution as to the mention of the company whatsoever and that it was relevant to note that this conversation took place after he had begun to form the view that there had or might have been a breach of the contract. He said that

had the contract been with Mr Cruz personally, Dr Purbrick would have objected and said so.

69. I think this places weight on this message that it cannot reasonably bear. First, the context in which it was sent is important. WhatsApp is an instant messaging service. On that medium, people do not always express themselves with the sort of precision to be found in solicitors' letters or other legal documents. Second, temperatures were rising by this point; Dr Purbrick had effectively sacked Mr Cruz and his workmen, who had not been allowed back on site. It had or was becoming clear to both sides that the working relationship had broken down irretrievably. It is not reasonable to suppose that the precise identity of the counterparty would have been at the forefront of Dr Purbrick's mind, and thus in my view no significance can be attached to his failure to state expressly in response that he had contracted with Mr Cruz personally. Plainly, his mind was very much focussed elsewhere. Next, Mr Cruz did not refer to a limited company: it could have been inferred that he was just referring to his trading name. Next, it is plain from the WhatsApp and other messages exchanged between Dr Purbrick and Mr Cruz that the latter used the terms 'we', 'I' and 'MM Developments' interchangeably, so that not too much store can be set by his choice of a particular term. For example, on 23 May 2019 he sent this to Dr Purbrick who had asked him if he had received some keys (emphasis added):

> "Yes I did. I'm not sure how long *I'm* able to postpone things. Do you have any idea how long this is going to take or can you tell me when or if *I* am to resume with your project ? *I* have other customers waiting for start dates so if you're able to, *I'd* appreciate some clarity on the situation. Thanks Mark"

70. Mr Bedloe took me to messages from Dr Purbrick to Mr Cruz where he appeared to be treating Mr Cruz as the counterparty. Mr Bedloe pointed out that Mr Cruz did not correct Dr Purbrick to say it was the company, and not him, who was the counterparty. Thus, Mr Bedloe said that the WhatsApp messages looked at as a whole went both ways and so were not of any great materiality. I agree. For example, on 8 August 2019 Dr Purbrick wrote:

> "I've never been rude or aggressive. You'd be slightly aggrieved if you'd been ripped off. What gives you the right to steal from me/Eleanor?"

71. Later the same day, Dr Purbrick wrote:

> "I can only assume your failure to comment on Martin Stiles' report betrays the fact that you have no defence and is an acceptance of your liability."

72. Another example is in relation to insurance. On 22 May 2019 Dr Purbrick sent this message (referring to a proposed meeting which never, in fact, took place):

> "Hi Mark. Where do you suggest on Sat @ 11? Please could you forward me your insurance details. Thanks."

73. The only insurance was in the name of the company but there was no correction from Mr Cruz no doubt, too, because his mind was very much focussed elsewhere. Further, Mr Cruz replied shortly afterwards:

> "…and lastly, my insurance provider is NIG. If you would like to see my certificate as evidence of insurance let me know. Thanks Mark"

74. Not, it is to be noted, 'the company's insurance provider is NIG' or 'the company's insurance certificate'. This reinforces the point I have already made that Mr Cruz's use of 'we', 'I' or cognate terms are not a precise guide whether he was referring to himself or the company and not a great deal can therefore be read into them.

75. I have reached the same conclusion about the point in [21] of Mr Woodhead's Skeleton Argument that the contract documents of 3 May 2018 followed a text message from Mr Cruz to Dr Purbrick in which Mr Cruz had stated (emphasis added):

> "With regard to the planned 6 months …. *We* will do our utmost to finish on time but if there is unforeseen extras this will impact on …"

76. Given that Mr Cruz would need to employ workmen and sub-contractors (as Dr Purbrick would readily have anticipated on a project of this size), the use of the term 'we' could have easily been understood as a reference to the building team as a whole, and not necessarily to a limited company, and it would not have struck him as being inconsistent with Mr Cruz being the counterparty.

77. Next, Mr Woodhead relied on an email from Dr Purbrick to Mr Cruz in which he referred to seeing a reference to insurance on the company van. As I have explained, the insurance claim against the company policy should have been something which Dr Purbrick should have dealt with in his affidavit.

78. Finally, Mr Woodhead referred to the Claimant's own comments on social media that it was the 'company' that caused him harm. Again, I do not think these can bear the weight that Mr Woodhead sought to place on them. It is true that in one post, referring to Mr Cruz's Mexican yacht business, MM Royale Yachts, Dr Purbrick referred to it as being 'funded by an unscrupulous UK-based building company'. But there are also posts going the other way. For example, in a later post in response to a query he wrote,

> 'Yes, Mark and Moon [Mr Cruz's wife] are the sole directors of MM Cruz Developments. They have seriously ripped us off and put our money into their Mexican venture …'. (In fact, I was told only Mr Cruz is a director).

79. In a further post he wrote:

> "The owners of this company are cowboy builders in the UK and have financed this venture by defrauding innocent homeowners like us …".

80. In my judgment, read as a whole, these posts are ambiguous and capable of being read either way. I conclude they are, at their height, of peripheral materiality.

81. Taking all of these matters together, I am not persuaded that there was sufficient material non-disclosure to justify setting aside the injunction on that basis. All of the evidence save the insurance matter relied upon by Mr Woodhead was of peripheral materiality, or ambiguous, or there were points that could be made both ways. I agree that the judge should specifically have been told that Dr Purbrick had attempted to make a claim against the company's insurance policy. However, I have no doubt that even if this had been disclosed to Morris J, it would not have caused him not to grant the injunction. Even taking this into account, there is a good arguable case against Mr Cruz, for reasons I will explain in a moment. This provides a proper basis for declining to set aside the injunction: *Brink's Mat*, supra, p1357.

Good arguable case ?

82. It is common ground that the first limb of the test which Morris J had to apply was whether the Claimant had shown that there was a good arguable case *against Mr Cruz personally*. I have to be similarly satisfied to continue the injunction. A good arguable case is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success: *The Niedersachsen* [1983] 2 Lloyd's Rep. 600, 605 (Mustill J at first instance); *Alternative Investment Solutions (General) Ltd v Valle De Uco Resort & Spa SA* [2013] EWHC 333 (QB), [7].

83. The law in relation to the parties to a contract is as follows. In *Homburg Houtimport BV* v *Agrosin Ltd (The Starsin)* [2004] AC 715, [175], Lord Millett said:

> "The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract. Like the nature and amount of the consideration and the intention to create legal relations it is a question of fact and may be established by evidence. Such evidence is admissible even where the contract is in writing, at least so long as it does not contradict its express terms, and possibly even where it does."

84. In *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, [57], Jackson LJ summarised the principles as follows:

> "57. In my view the principles which emerge from this line of authorities are the following:
>
> (i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.
>
> (ii) In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a

> reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.
>
> (iii) If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification.
>
> (iv) Where the issue is whether a party signed a document as principal or as agent for someone else, there is no automatic relaxation of the parol evidence rule. The person who signed is the contracting party unless (a) the document makes clear that he signed as agent for a sufficiently identified principal or as the officer of a sufficiently identified company, or (b) extrinsic evidence establishes that both parties knew he was signing as agent or company officer."

85. For the reasons given by Morris J, with which I agree, and the following reasons, I have concluded that there is a good arguable case that the counterparty to the contract was Mr Cruz personally and not the company. In other words, I consider that there is a good arguable case that a reasonable person, furnished with the relevant information, would conclude that Mr Cruz was the contracting party.

86. That is because, first, Mr Cruz personally was named as the Contractor. If the company was intended to be the Contractor there was no need to name Mr Cruz. The Contractor would have been unambiguously named as the company. Further, he was not identified as an officer of the company but just 'of MM Cruz Developments Ltd', which could have meant anything. The documents did not say he was signing as an agent of the company.

87. Second, the two contractual documents referred to meetings between the Contractor and the Employer: ie, between Mr Cruz and Dr Purbrick, and that is what happened.

88. Third, the company was not named at the foot of the contracts as the Contractor. Whilst the squiggles in question against 'Name on behalf of the Contractor, and 'Signed on behalf of the Contractor' are illegible, as I have already said, they must be Mr Cruz's name and signature. He personally had been named as the Contractor at the top of the document. Thus, if my conclusion is correct – and it is at least strongly arguable that it is not least because Dr Purbrick says it is - he was naming himself, and signing on behalf of himself. He did not qualify his signature to make clear he was not intending to bind himself or that, for example, he was signing on behalf of the company in his capacity as its director. This *dictum* from *Internaut Shipping GmbH v Fercometal SARL* [2003] EWCA Civ 812, [53], is accordingly relevant here (emphasis added):

> "Prima facie a person does not sign a document without intending to be bound under it, or, to put that thought in the objective rather than subjective form, without properly being regarded as intending to be bound under it. *If therefore he wishes to be regarded as not binding himself under it, then he should qualify his signature or otherwise make it plain that the contract does not bind him personally*."

89. There is at least a good arguable case Mr Cruz did not do that.

90. Fourth, and importantly, one of the contractual documents provided for extremely large payments in cash to Mr Cruz personally in respect of the works to be undertaken. The contract did not specify that these payments were for materials or for sub-contractors. There is no evidence that Mr Cruz made clear the payments were not for him. Looked at objectively there is a good arguable case that Mr Cruz was personally being paid in cash as the Contractor to carry out the works specified on the relevant contractual document. Like Morris J, I do not understand how these payments were not liable for VAT.

91. Fifth, Mr Cruz's name appeared on the bank details. Whilst the account in question was actually that of the company, the name of the account given on the contractual documents, viewed objectively, suggests it was Mr Cruz who would receive the BACS payments. The contract misdescribed the name of the account.

92. Sixth, there is Mr Cruz's email of 1 April 2018 which, although it refers to his company, it also said (emphasis added):

> "Regarding the price, as you know *I* have been passionate about wanting to do your job from the beginning. Therefore *I* have dropped *my* pricing and margins to the minimum to win the contract. I appreciate Thaisa's comments regarding negotiations but for her scenario *I* was competing with 4 local builders who were overpriced and therefore we had more room for manoeuvre."

93. I acknowledge there are points going the other way. For example, the fact that a written agreement is on the headed paper of a company and bears a company's details is relevant to the question of whether the third party contracted with the company or an agent of the company personally: see *Badgerhill Properties Limited* v *Cottrell* [1991] BCLC 805, 809. However, overall, for the reasons I have given, I am satisfied that Dr Purbrick has a good arguable case against Mr Cruz personally.

Risk of dissipation

94. Mr Woodhead did not argue that Morris J had been wrong to conclude there was a risk of dissipation of assets so as to justify a freezing order. He was right not to do so. The judge was plainly right so to conclude for the reasons that he gave. I agree with his reasons. Mr Cruz is in the process of selling two valuable assets, namely the two Brighton properties identified on the order. He has already sold a valuable yacht. He appears to be in the process of liquidating his UK assets. His own evidence shows that he has strong personal and business links with Mexico and is planning to buy property there and possibly emigrate there using some of sale proceeds of the two properties. His properties, as Morris J identified, were placed on the market after this dispute arose. I accept this application could and should have been brought more promptly by the Claimant but on balance, like Morris J, I do not regard this as reason not to continue the order.

95. I understand the freezing order is onerous and restricts Mr Cruz's spending in a number of ways. But that can be catered for by applications to vary the order, which will be addressed on their merits if and when they are made.

96. I therefore continue the freezing order made by Morris J on 21 May 2020 until further order of the court.

Addition of MM Cruz Developments Ltd as Second Defendant

97. Parties may be added in existing proceedings either on the court's own initiative (CPR rule 3.3(4)) or on application under CPR r 19.4(2). The application must be supported by evidence. As to this, the hearing bundle contains the Particulars of Claim which address both Mark Cruz and MM Cruz Developments Ltd as Defendants. Mr Cruz's witness statement says that the proper defendant is the company. Mr Woodhead accepted that the correct Defendant is either one or other of these.

98. I accept Mr Bedloe's submission (from which, as I have said, Mr Woodhead did not really dissent) that given the underlying nature of the claim, it is clearly appropriate for the company to be added as the Second Defendant so that the court can resolve all matters in dispute in the proceedings. I therefore order that MM Cruz Developments Ltd be added to the claim as the Second Defendant. This is without prejudice to any application for substitution that Mr Cruz may make in the future, or any other application.