Neutral Citation Number: [2023] EWCA Civ 118

Case No: CA-2022-000973

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Deputy High Court Judge Lance Ashworth QC
[2022] EWHC 970 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE BAKER

- -

Between :

PANKIM KUMAR PATEL	**Claimant/ Respondent**
- and –	
(1) MINERVA SERVICES DELAWARE, INC **(2) PAUL BAXENDALE-WALKER** **(3) MARK BARRY SLATER**	**Defendants/ Appellants**

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Patrick Harty (instructed by **Bark & Co Solicitors Limited**) for the **Respondent**
Christopher Loxton (instructed by **Wordley Partnership**) for the **First Appellant**
The Second and Third Defendants did not appear and were not represented

Hearing date: 25 January 2023

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on 10 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This is an appeal from the order of Mr Lance Ashworth KC, sitting as a deputy High Court judge in the Business and Property Courts, dated 9 May 2022. Amongst other things, the judge granted the Respondent, Mr Patel, an anti-suit injunction preventing the Appellant, Minerva Services Delaware Inc ("MSD") from taking any further steps in an arbitration in Delaware (the "Delaware Arbitration") or commencing or pursuing any other claims or proceedings in any jurisdiction, other than England and Wales, arising out of or in connection with a purported Deed of Fiduciary Undertaking dated 7 April 2008 (the "2008 Deed"). He also refused to grant MSD freezing and proprietary injunctions. It is that refusal which is the subject of this appeal.

Background

2. The background to this matter is rather unusual. It is set out in Mr Ashworth's judgment, the citation for which is [2022] EWHC 970 (Ch). Reference should be made to his judgment for the full details.

3. The basis for Mr Patel's anti-suit injunction against both MSD and Messrs Baxendale-Walker, and Slater, the Second and Third Defendants (who have taken no part in this appeal) was that the Delaware Arbitration was vexatious and oppressive and an abuse of the Court's process, England and Wales being the proper forum for the dispute.

4. It was said that the Delaware Arbitration had been commenced at the behest of Mr Baxendale-Walker following a failed application for an injunction by Bay Mining Consultants Ltd ("Bay") which had been heard by Tipples J on 30 April 2021. Bay had made the application as the assignee from a Belize company known as MSL Services Ltd ("MSL Belize 2018") of the causes of action arising from the 2008 Deed and a Deed of Fiduciary Declaration of 2021 (together referred to as the "Deeds"). It was claimed that Mr Patel held in the region of £11 million on trust for the principal under those Deeds.

5. Tipples J refused Bay's application for an interim freezing injunction. Those proceedings were discontinued in May 2021 and MSD was incorporated in Delaware in June of that year. The rights under the Deeds were then purportedly assigned to MSD and the Delaware Arbitration was commenced against Mr Patel in August 2021. It was not contested before Mr Ashworth that the arbitration was in respect of the same sums claimed to have been advanced to Mr Patel under the Deeds which had been the subject of the proceedings before Tipples J.

6. Mr Patel challenged the jurisdiction of the arbitrator in Delaware on the basis that there was no enforceable arbitration agreement and before the arbitrator gave any ruling Mr Patel commenced the Part 8 claim seeking the anti-suit injunction in England. On 27 December 2021, the arbitrator held that as there was a dispute as to whether there was an enforceable arbitration clause, a matter which he did not have jurisdiction to determine, he could not proceed.

7. Thereafter, MSD obtained freezing relief from the Chancery Court in Delaware, on 27 January 2022 on an ex parte basis. That relief was discharged by an order dated 7 February 2022.

8. Before Mr Ashworth, it was alleged that Mr Patel signed both Deeds under which he acknowledged that monies paid to him by Minerva Services Limited, ("Minerva BVI") a company incorporated in the British Virgin Islands, or by Baxendale Walker LLP, or any other representative as defined, were held for the benefit of Minerva BVI. It was pleaded that Mr Patel received £9.4 million and that he holds that money on trust for Minerva BVI in accordance with the 2008 Deed. It was said that the monies were intended to be available to meet claims by clients who invested in tax-avoidance schemes that were unsuccessful.

9. It was also stated that the rights under the Deeds were assigned from Minerva BVI to a Belize company called Minerva Services Limited ("Minerva Belize 2013"). It appears that that company then assigned the rights to MSL Belize 2018. MSL Belize 2018 then assigned the rights to MSD.

The judgment below

10. Mr Ashworth refused to grant injunctive relief for a number of reasons. First, he held that the application before him was an abuse of process [57]. The basis for the abuse of process argument had been that given the judgment of Tipples J refusing a freezing order in the proceedings brought by Bay in April 2021, it would have been an abuse by Bay to have brought a further application and that the position could not be any different because MSL Belize 2018 had purported to assign the claim to a different assignee being MSD [51].

11. The judge noted that the relief which had been sought was an interim injunction ordering disclosure from Mr Patel and his partner, Ms Sheppard, and restraining Mr Patel from disposing of certain assets, and that Tipples J had noted that there were numerous issues with the application but that she did not need to deal with them all. She focussed on the following: that service had not been effective and that there had not been full and frank disclosure in this regard [53]; that the assignment to Bay did not satisfy section 53(1)(c) of the Law of Property Act 1925 [54]; and that there was no evidence to support a cross-undertaking in damages [55]. The judge considered it to be of significance to the argument before him in relation to abuse of process that Tipples J would have dismissed the application on the third ground alone, namely the lack of evidence in relation to the cross-undertaking [56].

12. He went on to decide that had Bay gone away and procured a valid assignment and then made a fresh application for a freezing order offering a cross-undertaking in damages properly supported by evidence, such an application would have been an abuse of process [57]. In particular, he held as follows:

> "57. …Although there would have been a significant and material change of circumstances in one respect, namely the new assignment, as regards another, being the third of the Judge's reasons in respect of the cross undertaking in damages there would have been no change of circumstances, nor could it be said that Bay had become aware of facts which it did not know and could not reasonably have discovered at the time of the first hearing. All that would have happened would have been that Bay had got its tackle in order. There is no reason why it could not, and should not, have done so first time round. That point

> was sufficient on its own for Tipples J to dismiss the application. Taking into account the Court's duty to ensure efficient case management and the public interest in the best use of court resources, in my judgment it would be an abuse for a party to come back to have another go, having rectified this omission."

13. Proceeding on the basis that the assignment to MSD was effective, the judge went on to consider whether the fact that the application before him was made by another assignee was similarly abusive and concluded that it was [59]. He reasoned as follows:

> "59. …Under the purported assignment to Bay, the recoveries were intended to be for the benefit of MSL Belize 2018. Under the March 2022 assignment to MSD, MSD is entitled to keep 10% of the recoveries with 90% being remitted to MSL Belize 2018. In paragraph 15 of Mr Denny's affidavit in support of the current application, he says that "MSL Belize 2018 first attempted to bring proceedings in England by means of an assignment to Bay … but Mrs Justice Tipples held that the assignment was defective". This was mirrored in paragraph 33 of Mr Halpern's skeleton argument for the hearing.
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> 60. It is therefore clear, in my judgment, that the assignees are merely being used as litigation vehicles for MSL Belize 2018 to seek to recover the sums said to be owing (I note in passing that it has never been explained why MSL Belize 2018 could not have brought the proceedings in its own name). It cannot be right that a party can avoid being held to be abusing the court's process by bringing an application through one assignee, failing in that application, discontinuing those proceedings and then assigning to a new assignee before starting the whole process again including the seeking of an interim freezing order."

14. Secondly, he decided that there was a good arguable case that monies received by Mr Patel via the offices of Baxendale Walker LLP and other "fiduciary companies" were paid to him pursuant to the 2008 Deed and were intended to be held on trust for Minerva BVI and that the interest in those monies and the right to recover them lay with MSD [84] and [86]. However, the judge held that there was no "solid evidence of a risk of unjustified dissipation" which was "indicative that there is no such risk" [92] and [93]. The judge stated that even if he had not decided that the application was an abuse of process, he would have refused the application on this basis [93].

15. In this regard, the judge noted that: a property had been purchased for £2.4 million without the need for a mortgage in 2013 and that it was accepted by Mr Halpern QC (as he then was) on behalf of MSD that there was no evidence that Mr Patel was seeking to dispose of his property or to charge it [88]; payments of a domestic nature and some substantial cash withdrawals had been made in April 2018 and 2019 and there was a transfer to Ms Sheppard of £580,000 for which no explanation had been put forward [89]; it was implied that the monies in Mr Patel's accounts in May 2019 will be used to meet his tax liabilities of approximately £2.3 million and that Mr Halpern did not suggest that discharging such liabilities could amount to an unjustified dissipation of assets [90]; there had been significant delay in seeking to secure the sums [91]; and if

Mr Patel was determined to dissipate his assets unjustifiably, he could have done so in this period and that there was no evidence that he had sought to do so [92].

16. Thirdly, in relation to the application for a proprietary injunction, the judge held that although there was a serious issue to be tried as to whether the monies received by Mr Patel were held on trust for Minerva BVI, Mr Halpern had accepted that he could not demonstrate on the evidence that the property was purchased with monies which came from that source. In addition, the judge stated that the evidence did not support such a conclusion [95]. He added "Mr Patel was involved in the entertainment industry for a number of years and I have no information as to whether those activities generated sums which could now be in the bank accounts". As a result, he concluded that he was not satisfied that there was a serious issue to be tried as to whether the remaining assets in Mr Patel's name were held on trust for MSL Belize 2018 [96].

17. The judge went on to conclude that even if he were satisfied that there was a serious issue to be tried in this regard, he would not have granted a proprietary injunction because the balance of convenience came down against doing so. In this regard, the judge referred to Mr Patel's alleged liability to HMRC and weighed the effects of paying the outstanding sums, HMRC having been put on notice of the claim by MSD, against Mr Patel incurring interest and penalties, and potentially being subject to bankruptcy or enforcement proceedings, if he was unable to meet the tax liability [98] and [99]. He concluded that it was difficult to see that that sort of damage could be compensated by a cross-undertaking in damages and that the course of action likely to cause the least irremediable prejudice was to decline to make the proprietary injunction [100].

18. Lastly, although he described it as not being determinative, the judge stated that had he not dismissed the application on other grounds, he would have needed a lot of persuading that the limits on the ability to provide full and frank disclosure should not have led him to decline to make the orders as a matter of discretion [102]. He had noted that the highest Mr Halpern was able to put it was that MSD "had not been able in the time since he and his solicitors had been instructed to carry out the same level of investigation as would normally have been carried out".

Grounds of Appeal and Respondent's Notice

19. The grounds of appeal for which Males LJ gave permission are that: the judge was wrong to hold that the application for a freezing injunction was an abuse of process; he was wrong to hold that there was insufficient evidence of a risk of unjustified dissipation and that there was no serious issue to be tried as to whether the remaining assets in Mr Patel's name were held on trust; the judge was wrong to rely solely on the need to make a payment to HMRC when considering the balance of convenience; and when considering full and frank disclosure, he did not identify any material fact which the application had failed to disclose.

20. It is important to bear in mind that Males LJ expressly stated that permission was not granted to challenge the judge's finding that MSD was being used as a litigation vehicle for MSL Belize 2018 and that MSD does not have permission to argue that it was unnecessary to give full and frank disclosure.

21. In Mr Patel's Respondent's Notice, it is also said that the application for a freezing injunction should have been rejected on the additional grounds that: the kind of damage which might be suffered would not be adequately compensated for by the cross-undertaking in damages, even assuming that it was sufficiently fortified; in any event, the cross-undertaking in damages was inadequate; that there was no good arguable case that Mr Patel received any amount on trust; and as a matter of discretion, or because MSD lacked clean hands, neither a freezing nor a proprietary order should have been granted.

Applications

22. Before turning to the grounds of appeal I should mention that there were four ancillary applications before the court. They were: an application on behalf of Mr Patel made in the Respondent's Notice for permission to adduce the fifth witness statement of Mr Riz Majid, dated 5 August 2022, and to rely on the new documentation exhibited to it; an application on behalf of Mr Patel dated 7 December 2022 to adduce new evidence which was exhibited to the sixth witness statement of Mr Riz Majid being meta data of certain documents filed in the Delaware Arbitration and in these proceedings; an application on behalf of MSD dated 17 January 2023 to adduce new evidence relating to the sale of a property in Essex was which exhibited to the seventh witness statement of Mr Graham Denny; and an application dated 18 January 2023, also on behalf of MSD, to rely upon a supplemental skeleton argument.

23. The documentation exhibited to Mr Majid's fifth witness statement was the unredacted versions of bank statements which had been relied upon by MSD at the without notice hearing before Mr Ashworth as evidence that sums had been transferred to Mr Patel which were trust monies. It is said that the unredacted versions of those statements were inconsistent with the monies having been trust funds.

24. Rather than deal with the applications separately, we considered that it was most appropriate to consider them in the context of the appeal as a whole.

Ground 1 - Abuse of process

25. There is no dispute that the principles in relation to abuse of process apply to interlocutory hearings as much as to final hearings. That was made quite clear by this court in *Koza Ltd & Anr v Koza Altin Isletmeleri AS* [2021] 1 WLR 170. In that case, Popplewell LJ conducted a thorough consideration of the relevant authorities and concluded at [41] and [42] that the ". . . *Henderson* and *Hunter* principles apply to interlocutory hearing as much as to final hearings."

26. The *Henderson* principle was encapsulated by Sir James Wigram V-C in *Henderson v Henderson* 3 Hare 100 at pp 114-115 in the following terms:

> "…where a matter is the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which could have been brought as part of the subject in contest, but which were not because they have, from

> negligence, inadvertence, or even accident, omitted part of their case."

Lord Bingham, with whom on this issue Lords Goff of Chieveley, Cooke of Thorndon and Hutton agreed, provided the modern authoritative statement of that principle in *Johnson v Gore Wood & Co* [2002] 2 AC 1, distinguishing it from *res judicata* in the following terms at 30H – 31F:

> "...what is now taken to be the rule in *Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson* abuse of process, although separate and distinct from cause of action and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This is reinforced by the emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public.
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> …
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> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also all the facts of the case, focussing on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

27. Popplewell LJ in the *Koza* case went on as follows:

> "42. . . . Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in *Johnson Gore Wood & Co* [2002] 2 AC 1 that it is not sufficient to establish that a point *could* have been taken on an earlier occasion, but a recognition that where it *should* have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in

> *Woodhouse v Consignia plc* [2002] 1 WLR 2558 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. . . "

28. When reviewing the decision of the court below in relation to abuse of process, the Court of Appeal will give considerable weight to the view of the judge: see Buxton LJ in *Laing v Taylor Walton* at para 13 which was referred to by Simon LJ at [48] in *Michael Wilson & Partners Ltd v Sinclair (Emmott, Part 20 defendant)* [2017] 1 WLR 2426. The same point was made by Thomas LJ in *Aldi Stores ltd v WSP Group plc* [2008] 1 WLR 748 at para 16, as follows:

> "an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion which was impermissible or not open to him."

29. In summary, Mr Loxton submits that the application before Mr Ashworth was not an abuse of process as the first claim: (i) was brought by Bay, (ii) was based upon a statement of case, unlike MSL's application in the present case; (iii) was for a different amount; and (iv) was in respect of separate and distinct allegations. He also submitted that there had been a material change since the hearing before Tipples J because the evidence filed on behalf of Mr Patel provided no explanations as to the monies used to purchase the Property, the origin of £2.2 million in his accounts, cash withdrawals of £600,000 odd and a transfer of £580,000 to Mr Patel's partner, Ms Sheppard. In addition, he submitted that Tipples J's judgment only addressed technicalities about the application, rather than the substantive merits of the injunction presently in issue.

30. Mr Loxton also relied heavily upon the concurring speech of Lord Millett in *Johnson v Gore Wood* at 59A-E in which he stated that the principle of abuse of process had the same purpose as cause of action and issue estoppel but emphasised that: "it is one thing to refuse to allow a party to relitigate a question that has already been decided; it is quite another to deny him the opportunity for litigating for the first time a question that has not been previously adjudicated upon".

31. On the other hand, Mr Harty submitted that: (i) the alleged evidence of dissipation relied on by MSD relates to payments said to have been made four to five years ago; (ii) nine months have passed since the April 2022 application; (iii) it is noteworthy that instead of appealing Tipples J's judgment, Bay decided to discontinue the proceedings and commence new proceedings on the same issue in Delaware through their new litigation vehicle, MSD; and (iv) Mr Baxendale-Walker is a "notorious vexatious" litigant, and this kind of conduct is "strikingly similar" to previous cases where the court has decided that he had been in control of corporate litigation vehicle who were pursuing claims by way of "questionable commercial assignments". He also drew attention to the fact that when giving permission to appeal, Males LJ expressly stated that in relation to abuse of process MSD did not have permission to challenge the judge's finding that it (MSD) was being used as a litigation vehicle for MSL Belize 2018 and, accordingly, MSD could be in no better position than Bay.

32. Mr Harty's submitted that the purpose of the rule in *Henderson*, as distinct from *res judicata*, is to prevent abusive litigation tactics whereby parties bring successive applications arising *ad infinitum*. It is, by design, intended to limit the extent of successive applications and adds finality to proceedings. He went on to say that if MSD can succeed here, this would effectively give anyone free rein to have another go: "if this is not an abuse of process, then what is?"

33. Both parties sought to add their separate glosses on the *Henderson* principle, derived from other cases. Mr Loxton sought to rely on Simon LJ's dicta at [48] of the *Michael Wilson & Partners v Sinclair* case, where he held that a court, in deciding whether proceedings are abusive, must:

> "…have in mind that the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within the **'**spirit of the rules**'**. Thus, it may be an abuse of process, where the parties in the later proceedings were neither parties nor their privies in earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated."

Mr Loxton's posited that the present proceedings are not 'manifestly unfair' to Mr Patel, as: (i) MSD's application was heard as part of litigation that he himself had brought; (ii) MSD satisfied the judge below that there was a good arguable case (and thus a serious issue to be tried) in respect of the alleged trust monies and MSD's interest in them; and (iii) Mr Patel has been on notice since 2021 that MSD sought to recover the monies from him.

34. Mr Harty submitted to the contrary that 'manifestly unfair' is not the correct test to apply, and was taken out of context by Mr Loxton. He relied instead on *Chanel Ltd v FW Woolworth Ltd* [1981] 2 WLR 485 at 492H, where the court held that the test is whether a successive application is an attempt to "fight over again a battle which has been fought unless there has been some significant change in circumstances". This would include new evidence that the applicant "could not reasonably have known, or found out, in time for the first encounter": at 492G-493A. Mr Harty submitted that,

since none of the evidence presently relied on by MSD can be said to be "new", MSD fails to establish any significant change of circumstances for the purposes of avoiding the proceedings being characterised as abusive.

35. Having considered Mr Ashworth's approach to the question of abuse of process, it is not clear to me that he erred in any of the ways set out by Thomas LJ in the *Aldi* case which would warrant this court to interfere with his decision. However, I come to no definitive conclusion in that regard because it is unnecessary to do so. Even if the judge was wrong to decide that MSD's application was an abuse of process, in my judgment, MSD's appeal fails on numerous other grounds.

Serious issue to be tried as to whether the remaining assets were held on trust ?

36. It seems to me that it is more convenient and logical to deal with the question of whether Mr Ashworth was wrong to hold that there was no serious issue to be tried as to whether the remaining assets in Mr Patel's name were held on trust, before turning to the question of whether he was wrong to find that there was insufficient evidence of the risk of unjustified dissipation of assets when determining whether a freezing injunction should be granted.

37. Mr Patel argues that Mr Ashworth was right to decide that there was no serious issue to be tried in relation to the remaining assets but was wrong to decide that there was a good arguable case that monies received by Mr Patel were trust monies in the first place. MSD's ground of appeal relates to the application for a proprietary injunction whereas Mr Patel's point, raised in his Respondent's Notice, goes to both the freezing and the proprietary injunctions. In fact, in the light of the application to adduce further evidence made by MSD and dated 17 January 2023, the ground may also be relevant to the question of whether there is a real of risk of dissipation. It is for this reason that I address it first.

38. Before turning to the substance of MSD's argument on this ground, it is necessary to consider the scope of the phrase "remaining assets" which is used in MSD's ground of appeal. Mr Harty says that the ground refers only to the remaining funds in Mr Patel's possession, represented by positive balances in his bank accounts and not to the property known as the Old Vicarage, Piercing Hill, Theydon Bois, Epping, Essex, which was purchased without a mortgage by Mr Patel and his partner in 2013 (the "Property"). Mr Harty bases that submission on [95] and [96] of the judgment. At [95] the judge deals with the Property on the basis of Mr Halpern's concession that he could not demonstrate on the evidence before the court that it was purchased with trust monies. He then went on to consider the bank balances and concluded that in his judgment the evidence did not support the conclusion that they too represented trust monies. At [96] the judge stated that "[A]ccordingly", he was not satisfied that there was a serious issue to be tried as to whether the "remaining assets" in Mr Patel's name were held on trust. It seems to me that Mr Harty's interpretation of the judgment and, as a result, of the ground of appeal, is too narrow. The judge deals with both the Property and the bank balances at [95] and begins [96] with "accordingly". There is nothing to restrict the scope of "remaining assets" to the bank balances alone.

39. In any event, the question in relation to the remaining assets can be dealt with quite shortly. It seems to me that there is no basis upon which it can be said that the judge erred in this regard. In fact, it is clear both from the judgment at [95] and from the

transcript, that Mr Halpern on behalf of MSD conceded that there was no evidence before Mr Ashworth to link Mr Patel's purchase of the Property in 2013 to the payments received by him, which are alleged to have been trust monies.

40. In relation to the bank balances, it is also clear from the transcript that Mr Halpern accepted the judge's observation that there was nothing to say that they did not relate to monies obtained by Mr Patel as a result of his involvement in the entertainment industry. It appears from the transcript, however, that a positive submission that there was a good arguable case in relation to the balances was made subsequently in reply, when further documents were handed up. But, as Mr Harty submitted, that was too late. The application had been made on short notice and Mr Patel had no opportunity to respond. The judge was entitled to decide that the onus on MSD to show that there was a good arguable case in this regard had not been satisfied. Accordingly, the appeal must fail on this ground.

41. In relation to the logically prior question of whether there was a good arguable case that the monies received by Mr Patel in the first place were impressed with a trust, Mr Harty took us to the new evidence exhibited to Mr Majid's fifth witness statement and the meta data exhibited to his sixth witness statement.

42. Mr Harty did so both as an additional argument against MSD's ground of appeal and in the light of the fact that MSD asks us to make orders for injunctions in the form in which they were sought before the judge. In the light of my conclusions in relation to this ground and the remaining grounds of appeal, in my judgment it would be inappropriate for this court to grant injunctive relief in any event. However, for the sake of completeness and in the light of the fact that it appears that there has been serious non-disclosure, I will consider the prior question and the evidence in support of it.

43. The new evidence exhibited to Mr Majid's fifth witness statement takes the form of partially unredacted copies of the bank statements relied upon by MSD when seeking the freezing injunction before Mr Ashworth. In support of that application, which was made on short notice, MSD's solicitor, Mr Denny, swore an affidavit in which he asserted that Mr Patel had received sums of around £9.4million from Minerva Services Limited and associated entities. In support of this, he relied upon evidence from the Delaware Arbitration in the form of a declaration by a Mr Auluk and bank statements exhibited to that declaration. Many of the bank statements related to a business current account held at HSBC, in the name of "Baxendale Walker LLP Office Account" which was in overdraft for significant parts of the period of the statements which were exhibited. The statements were heavily redacted and showed only the payments made to Mr Patel.

44. In his fifth witness statement, Mr Majid explains that it was possible to remove some of the redactions but not all of them. He goes on to state, amongst other things, that the entries in the partially unredacted statements reveal payments which are manifestly personal and are inconsistent with payments of trust funds. There are payments, for example, to a number of actresses and to "Griffin Law Office" and "Griffin Law Client" which are said to relate to litigation conducted on behalf of Mr Baxendale-Walker. It is said, therefore, that the payments which have been revealed are inconsistent with the funds in the account having been trust monies held for the benefit of the Minerva businesses. It is also stated that it is now apparent that some of the payments should not have been claimed against Mr Patel at all because they were made to Praslin Pictures.

45. It seems to me that permission to adduce the statements in their unredacted form, and the metadata exhibited to Mr Majid's sixth witness statement in evidence before us, should be granted. They are inherently credible and important to the application and the appeal. Although the statements in redacted form were first exhibited in the Delaware Arbitration and, therefore, had been available to Mr Patel and his advisers for some time, the application for freezing and proprietary orders were made without notice and, therefore, there was no opportunity to adduce evidence in response at that stage.

46. Furthermore, it seems to me that the further material revealed in the unredacted form of the statements should have been disclosed by MSD under its duty of full and frank disclosure. Accordingly, reliance on the evidence at this stage cannot cause prejudice to MSD.

47. No explanation has been given for why the redactions were made in the first place and by whom, nor has it been explained why statements in an unredacted form were not placed before the court in accordance with MSD's duty of full and frank disclosure on a without notice application. It is pertinent to note in this regard that Mr Ashworth stated at [48] of his judgment that Mr Halpern did not say that full and frank disclosure had been given and there was no section in the evidence or in Mr Halpern's skeleton to that effect.

48. It seems to me that if the judge had had this evidence before him it may well be doubtful that he would have decided that there was a good arguable case that the payments allegedly made to Mr Patel, or at least many of them, were trust funds. As I have already decided that the judge was entitled to decide that there was no serious issue to be tried as to whether the remaining assets were held on trust and the question of whether this court should itself grant the injunctions sought does not arise, it is unnecessary to decide the point.

Insufficient evidence of risk of unjustified dissipation?

49. MSD's second ground of appeal was that Mr Ashworth was wrong to decide that there was insufficient evidence of a risk of unjustified dissipation when determining whether to grant a freezing injunction. It is not in dispute, however, that the judge applied the correct test for the grant of a freezing order. It is necessary to show a good arguable case that there is a real risk that a judgment would go unsatisfied by reason of the disposal by the respondent of his assets unless he is restrained from doing so and that it would be just and convenient, in all the circumstances, to grant the order: *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 at [21]. It is also accepted that the judge was correct to refer to *Lakatamia Shipping Company Ltd v Morimoto* [2020] 2 All ER (Comm) 359 at [34] *and Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) in relation to the risk of unjustified dissipation of assets.

50. Furthermore, there is no dispute that when applying the test, a judge must consider the relevant factors cumulatively and consider the totality of the evidence. The question for the appeal court is whether on the proper application of the test the judge was bound to find that it was satisfied, leading to a decision that he was "plainly wrong", or whether he reached a conclusion that was open to him on the evidence: *Les Ambassadeurs Club Ltd v Yu* [2022] 4 WLR 1 per Andrews LJ at [39].

51. In effect, Mr Loxton submits that having found that there was a good arguable case that Mr Patel received trust monies, the onus fell on Mr Patel to explain what he had done with those monies. In the absence of an explanation Mr Ashworth should have inferred that the Property and the retained sums represented trust monies, and that the very purchase of the Property and the admitted payment of substantial sums to Mr Patel's partner was evidence of a risk of unjustified dissipation. He says that Mr Ashworth should have inferred a real risk of dissipation from the pattern of Mr Patel's conduct over the years. He also says that: Mr Ashworth's conclusion at [95] that monies in Mr Patel's bank account may have been generated by his involvement in the entertainment industry was mere surmise which was not open to him; and that he was wrong in his assessment of the proposed payment by Mr Patel to HMRC because there was no proper evidence of Mr Patel's tax liabilities before the court.

52. In this regard, Mr Loxton also seeks to rely upon the new evidence in relation to the sale of the Property which is the subject of the application dated 17 January 2023. In his witness statement Mr Denny states that it had come to MSD's attention that the Property is under offer at a sale price of £3.6 million, the price having been reduced from £3.95 million. It is also said that the current market value of the Property is £3.881 million and that, therefore, Mr Patel intends to dissipate the difference between the reduced sale price and the listed price or proper market value. Mr Denny also states that the intention to use Mr Patel's share of the proceeds of sale to meet his tax liabilities raises the question of what he has done with the remainder of the monies in his bank account.

53. First, in relation to the Property, as Mr Harty points out, the purchase occurred in 2013, nine years before the application before Mr Ashworth and Mr Halpern conceded that there was no evidence that it had been purchased with trust monies. It seems to me that given that the purchase pre-dated any application for injunctive relief by some years and that it was the purchase of real property in the jurisdiction, Mr Ashworth was perfectly entitled to conclude that the purchase itself did not amount to evidence of unjustified dissipation of assets. In any event, as I have already mentioned, Mr Halpern conceded that there was no evidence before the court to support the contention that it had been purchased with trust monies. On that basis, Mr Ashworth was fully entitled to approach the purchase, albeit in the joint names of Mr Patel and his partner, as he did.

54. Furthermore, it seems to me that the new evidence in relation to the Property is not material and that permission to adduce it should not be granted. The evidence in relation to the reduction in the asking price falls far short of prima facie evidence of a real risk of unjustified dissipation. There is nothing to suggest that there is anything improper in the reduction. Nor is there anything to suggest that the use of the proceeds to meet tax liabilities can be characterised as evidence of a real risk of an unjustified dissipation of funds. I will consider this aspect of the matter further below.

55. Secondly, I turn to the monies standing in Mr Patel's accounts when this matter came before Mr Ashworth. In this regard, it seems to me that Mr Loxton is seeking to reverse the burden of proof. It was for MSD to satisfy the judge that there was a good arguable case that the Property and the positive balances in the bank accounts represented trust monies and the judge was entitled to find that there was insufficient evidence to support that contention. It did not immediately fall to Mr Patel to explain where every asset and every positive bank balance had come from. The burden is upon the applicant to satisfy the threshold. Unless the applicant raises a prima facie case to support a freezing

injunction, the respondent is not obliged to provide any explanation. MSD had not done so. As Gloster LJ explained at [51] in *Holyoake & Anr v Candy & Ors* [2018] Ch 297: "[I]t is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the claimant will be expected to provide an explanation".

56. Thirdly, it seems to me that the argument that an intention to satisfy one's liability to HMRC can amount to unjustified dissipation is hopeless. In fact, the judge records at [90] that Mr Halpern did not suggest that discharging such a liability could amount to an unjustified dissipation of Mr Patel's assets. Mr Loxton submitted, nevertheless, that in the absence of evidence of those liabilities and of what Mr Patel had told HMRC about how the income subject to the alleged tax had been earned, the judge had merely made assumptions on the basis of an assertion. It seems to me that in the light of Mr Halpern's proper concession and the fact that the application was made on short notice, Mr Ashworth was fully entitled to approach a proposed payment to HMRC in the way he did. He was clearly correct to do so.

57. Accordingly, in my judgment, this ground of appeal should be dismissed.

Delay

58. It is also said that Mr Ashworth placed too much weight on MSD's delay in applying for the freezing injunction when determining whether to grant that order. Although it is not clear that permission to appeal was granted in relation to this ground, I will address this issue shortly.

59. As Mr Ashworth pointed out at [92] delay would not have been determinative of itself of whether a freezing injunction should be granted. As he put it, however, in the absence of other solid evidence of an unjustified risk of dissipation, delay is generally indicative of there being no such risk. In this case, injunctive relief had been sought before Tipples J in April 2021, the Delaware Arbitration was then commenced and injunctive relief was sought from the Court of Chancery in Delaware, before the application was made before Mr Ashworth in this jurisdiction in April 2022. It seems to me that Mr Ashworth was fully entitled to take that delay into account in the way he did at [92] and in all the circumstances there was no error in his approach.

60. In my judgment, therefore, the appeal must fail on this ground also.

Balance of convenience

61. I come now to Mr Ashworth's consideration of the balance of convenience. It is well known that the determination of that issue is an exercise of discretion. In order to succeed in appealing such a matter it is necessary to show that the judge reached a conclusion which was not open to him, took into account matters which were irrelevant or failed to take account of relevant matters.

62. Mr Loxton's complaint in this regard is that Mr Ashworth's consideration of the balance of convenience concentrated on Mr Patel's ability to pay his tax liabilities of which he says there was no evidence and that the judge's conclusions at [98] were hypothetical.

63. In my judgment, this ground of appeal is hopeless. Mr Ashworth focussed on the balance of convenience were Mr Patel prevented from paying an alleged debt to

HMRC. I can see nothing wrong with his reasoning or his conclusion which was quite clearly open to him. As he pointed out, if HMRC received the monies from Mr Patel with notice that MSD contends that they are trust monies, HMRC would hold those funds as constructive trustee, if, in fact, the trust claim were made out. That is neither hypothetical nor a matter of surmise. There is nothing to suggest that Mr Ashworth exercised his discretion improperly in this regard. Nor, as I have already mentioned, would the intention to make a payment of monies due to HMRC be capable of amounting to a real risk of unjustified dissipation of assets for the purposes of determining whether to grant a freezing injunction.

64. For the same reason, it seems to me that the fact that it is said that the proceeds of sale of the Property will be used to meet Mr Patel's obligations to HMRC cannot be evidence of a risk of unjustified dissipation.

Clean hands and cross-undertaking

65. Mr Harty also made submissions in relation to what is said to be MSD's and/or Mr Baxendale-Walker's lack of clean hands which would be relevant to whether this court should grant an injunction. He also referred to the inadequacy of the cross-undertaking which is fortified by £50,000 having been lodged in MSD's solicitors' bank account. In the circumstances, it is not necessary to consider those additional submissions as the question of whether this court should grant injunctive relief does not arise.

Conclusions

66. It follows that I would dismiss the appeal on all of the grounds for the reasons set out above. I would also allow Mr Patel's application to adduce new evidence and would refuse MSD's application in that regard.

Lord Justice Baker:

67. I agree.

Lord Justice Bean:

68. I also agree.