Neutral Citation Number: [2017] EWHC 3121 (Ch)

Case No: BL-2017-000150

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

4 December 2017

Before :

MISS AMANDA TIPPLES QC

- -

Between :

ROMAN FRENKEL	**Claimant**
- and -	
(1) ARKADIY LYAMPERT	
(2) LA MICRO GROUP (UK) LIMITED	**Defendants**

- -
- -

Mr Alex Barden (instructed by **Blake Morgan LLP**) for the **Claimant**
Mr Matthew Thorne (instructed by **O'Melveny & Myers LLP**) for the **First Defendant**
Mr Paul Strelitz (instructed by **Owen White Solicitors**) for the **Second Defendant**

Hearing dates: 2, 3 and 6 November 2017

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Approved Judgment

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

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Miss Amanda Tipples QC:

Introduction

1. On 17 July 2017 Kerr J, on the application of Mr Roman Frenkel ("**Mr Frenkel**"), granted a freezing injunction against Mr Arkadiy Lyampert ("**Mr Lyampert**") and LA Micro Group (UK) Limited ("**the UK Company**") in respect of specific property, namely Mr Lyampert's shareholding and retained dividends in the UK Company ("**the freezing injunction**").

2. The freezing injunction was granted in support of Mr Frenkel's claim to enforce a judgment obtained in February 2017 against Mr Lyampert in the Superior Court of the State of California in the sum of US$2,042,376.67, together with costs assessed in the sum of US$184,300 (together "**the US Judgment**"). In accordance with the undertakings given to the Court, Mr Frenkel's claim was issued in the Commercial Court later the same day.

3. Mr Frenkel's application was made without notice to Mr Lyampert or the UK Company and, at the conclusion of his judgment, Kerr J said that he was "prepared by the narrowest of margins" and by "a hair's breadth" to grant "a short term holding injunction only".

4. The first return date in relation to Mr Frenkel's application was on 26 July 2017 before Knowles J, by which time Mr Lyampert had issued an application to discharge the freezing injunction ("**the Discharge Application**"), whereas Mr Frenkel wanted an order continuing the freezing injunction ("**the Injunction Application**").

5. A few weeks earlier in June 2017 I had heard the trial of Mr Frenkel v (1) Mr Lyampert; (2) Mr David Bell ("**Mr Bell**"); and (3) the UK Company (HC-2015-004753) ("**the Chancery proceedings**") over 7 days in the Chancery Division. The trial ended on 28 June 2017 and I reserved judgment.

6. In the light of the fact a trial between the same parties had taken place in the Chancery Division, Knowles J decided that the claim should be transferred to the Chancery Division, and that the applications in relation to the freezing injunction should be listed for further consideration before me, as the trial judge, following the handing down of my judgment. This transfer to the Chancery Division was subject to the consent of the Chancellor of the High Court, which was duly given.

7. On 13 September 2017 I dismissed Mr Frenkel's claim in the Chancery proceedings and my judgment is reported at [2017] EWHC 2223 (Ch). I shall refer to this as "**the Trial Judgment**" and my decision is summarised at paragraph 2:

> "I have decided that Mr Frenkel's claim to a 25.5% shareholding in the UK Company must fail. The agreement to establish the UK Company was made between Inc and Mr David Bell, the Second Defendant ("**Mr Bell**"), and the agreement was that the shares in the UK Company would be held as to 51% by Inc and as to 49% by Mr Bell. There was no agreement between Mr Frenkel, Mr Lyampert and Mr Bell in the terms alleged by Mr Frenkel, and there is therefore no basis on which he can claim a personal entitlement to shares in the company, let alone a 25.5% shareholding."

8. On 2 November 2017 I ordered Mr Frenkel to pay the defendants' costs of the action, a substantial part of which he was ordered to pay on the indemnity basis. There has been no appeal against the Trial Judgment, or against my decision on costs.

9. On 6 September 2017 I circulated my judgment in draft to the parties. It was then that I was told about the freezing injunction and that the return date of the applications had been listed before me on 13 September 2017. Given that I had only allowed time to deal with costs on 13 September 2017, there was insufficient time for me to deal with the other matters in relation to the injunction (which counsel estimated would take up to two days of court time).

10. The two applications were therefore listed before me on 2 and 3 November 2017, and the hearing continued on 6 November 2017. This judgment relates to those applications. For the reasons explained below, I have decided (a) to discharge the freezing injunction on the ground of material non-disclosure; and (b) not to continue or replace the injunction. In the light of this decision, it is necessary for me to set out in some detail the background to this matter, what happened at the hearing before Kerr J and, so far as material, what has happened since that hearing.

11. There is, and remains, a live dispute between the parties as to whether some of the evidence relied on by Mr Frenkel before Kerr J on 17 July 2017 was, and remains, confidential by reason of a protective order made on or about 15 July 2011 in the proceedings between the parties in California (referred to in the Trial Judgment as "**the Californian Claims**"). It was for that reason that the hearing before me took place in private. However, at the end of the hearing, I explained to the parties that I wished to hand down judgment in public. It is in these circumstances, there are a few matters in this judgment that have been anonymised.

The parties

12. Mr Frenkel and Mr Lyampert are two Russian Americans. They both live in California. They were friends and business partners for the best part of a decade until February 2010 when they fell out. That fall out has led to extensive and very acrimonious litigation which has been going on for over seven years. First of all in California in relation to an American Company called LA Micro Group Inc ("**Inc**") and, more recently, in this country in relation to Mr Frenkel's unsuccessful claim to a 25.5% shareholding in the UK Company. The relevant background to the UK Company is at paragraphs 4 to 8 of the Trial Judgment.

13. Mr Frenkel commenced proceedings against Mr Lyampert in California on 18 March 2010. The nature of these proceedings was summarised at paragraph 22 of the Trial judgment:

> "On 8 February 2010 Mr Frenkel dissolved Inc by giving notice to Mr Lyampert. The dissolution of Inc has given rise to extensive litigation between Mr Frenkel and Mr Lyampert and others in the United States. Mr Frenkel commenced proceedings in the Superior Court of California, County of Los Angeles against Mr Lyampert. There was also a cross claim, and the action became an action for damages and an accounting between "two former 50% owners of Inc, a computer equipment company that had a substantial on-line presence". I shall refer to these proceedings, which had case numbers BC434040 and BC434901 and were consolidated, as "the Californian Claims".

14. Mr Frenkel's claim in the Chancery proceedings against Mr Lyampert, Mr Bell and the UK Company was commenced on 13 November 2015.

Chronology of events in the California litigation between April 2016 and 17 July 2017

15. In order to understand many of the points made in support of the Discharge Application, it is necessary to explain the chronology of events in the Californian Claims, and also in another claim numbered BC620673, in the period from April 2016 until the date the freezing injunction was granted on 17 July 2017.

The Fraudulent Conveyance Claim and Mr Frenkel's 2016 application for an injunction

16. On 19 April 2016, the Californian court issued its "Tentative Statement of Decision" in the Californian Claims. The ruling was in favour of Mr Frenkel and the court concluded that Mr Lyampert was obliged to return more than US$ 4 million to Inc.

17. On 18 May 2016 Mr Frenkel commenced case number BC620673 which related to the business of Inc, and which is referred to as the "Fraudulent Conveyance Claim", in the papers before me, and I shall use the same definition in this judgment. This is a claim that Mr Lyampert has been disposing of his assets to others, and in particular to family members, without adequate consideration so as to defeat Mr Frenkel's ability to enforce his judgment in the Californian Claims. There are more than 15 Defendants to this claim. The opening paragraphs of the Second Amended Complaint (filed on 12 April 2017, and described as "the operative pleading") summarise the nature of the Fraudulent Conveyance Claim in these terms:

> "[1.] Plaintiff Roman Frenkel brings this action after having learned that defendant Arkadiy Lyampert is attempting to conceal his assets to avoid having to pay Frenkel anything in connection with a multi-million dollar judgment resulting from Lyampert's thefts and misappropriation of assets. In particular, Frenkel brings this action to keep Lyampert from using his personal "investment company" and family trusts as shields against Lyampert's liability to Frenkel and/or from otherwise transferring his assets to various individuals and other companies in an effort to avoid payment of the judgment.
>
> [2.] Specifically, this action relates to a prior action, BC434040 (the "Prior Action"), which Frenkel filed in March of 2010 to dissolve a corporation mutually owned by Frenkel and Lyampert and to recover from Lyampert's shameless theft of corporate assets …
>
> [3.] In or about April 2016 (when the Court in the Prior Action issued its tentative ruling), Frenkel learned that Lyampert was planning to liquate all of his assets and transfer them so as to be outside of the reach of what was then a forthcoming judgment…
>
> [4.] Frenkel therefore brings this action for preliminary and final relief to prevent Lyampert from hiding his assets in EAA, family trusts or any other entity or with any person within the United States or outside of them. Given that Lyampert's conduct is wilful and malicious, Frenkel is also entitled to punitive damages pursuant to Civil Code section 3294."

18. On 23 May 2016 Mr Frenkel made an *ex parte* application in the Fraudulent Conveyance Claim for the "right to attach order and for issuance of writ of attachment as to Defendant Arkadiy Lyampert or, in the alternative, for temporary protective order". The basis of Mr Frenkel's application was an allegation that Mr Lyampert intended to transfer assets off-shore. That application was refused on 25 May 2016 by the Honorable Mary H Strobel on the basis that "the amounts to be attached are not fixed or readily ascertainable until a judgment is entered. In addition, there is an insufficient showing of irreparable harm."

19. On 12 April 2017 substantial amendments were made to the Fraudulent Conveyance Claim.

The US Judgment

20. On 11 January 2017 the Californian Court handed down the final version of its decision in the Californian Claims (paragraph 23 of the Trial Judgment). This decision was entitled "Revised Statement of Decision" and Mr Frenkel was the successful party. On 22 February 2017 Mr Frenkel was awarded judgment of US$2,042,376.67, plus costs, against Mr Lyampert. Costs were assessed at US$184,300 on 25 May 2017.

The stay of the US Judgment

21. On 9 March 2017 Mr Lyampert applied for a stay of the judgment in the Californian Claims "until 10 days after the notice of appeal would otherwise be due".

22. That stay was granted on 16 March 2017 but was "subject to a freezing order against Mr Lyampert for the duration of the stay of enforcement" (paragraph 15 of Ms Borlund's affidavit dated 14 July 2017). The freezing order was in terms that Mr Lyampert, his agents and anyone acting on his behalf were "forbidden and enjoined from selling, assigning, transferring, encumbering, or disposing of any property". Notwithstanding the stay Mr Frenkel was however permitted to serve judgment-debtor interrogatories and judgment-debtor requests on Mr Lyampert.

Mr Frenkel's post-judgment interrogatories and Mr Lyampert's responses thereto

23. On 17 March 2017 Mr Frenkel served post-judgment interrogatories on Mr Lyampert.

24. On 25 April 2017 Mr Lyampert served his responses to the post-judgment interrogatories. Mr Lyampert's responses were served "subject to any protective orders entered in this matter". It is in these responses that Mr Lyampert identified that he made a transfer or proposed transfer of his interest in the UK Company.

25. By an email dated 28 April 2017, Ms Borlund, Mr Frenkel's Californian lawyer, emailed Mr Farrow, Mr Lyampert's Californian Lawyer in relation to Mr Lyampert's responses to the post-judgment interrogatories. She said this to Mr Farrow:

> "There is a sentence in the Preliminary Statement that the responses are subject to the protective order. Did you intend to include that? If so, what material are you contending to be protected and are you contending that it cannot be used in [Mr Frenkel's] other actions?" (underlining added)

26. In relation to the protective order and the preliminary statement the following points are relevant:

    a. The protective order is an order which all the parties to the Californian Claims entered into on or about 15 July 2011. The recital on page 1 provided that the parties desired to "obtain a Protective Order sanctioned by this Court to protect such information [ie confidential and/or private information revealed to the other parties during the course of Case No BC434040] from unnecessary disclosure to others outside of the context of this litigation". The protective order therefore appears to provide the parties with protection which is equivalent or similar to CPR Part 31.22(1).

    b. The sentence in the Preliminary Statement referred to said this: "These responses are made solely for the purpose of this action, are defined as "confidential" and such confidential information is subject to all relevant and applicable limitations from any protective orders entered in this matter including but not limited to the entered Protective Order dated July 15, 2011".

27. Mr Farrow responded to Ms Borlund's email on 1 May 2017 asking: "What other action(s) does [Mr Frenkel] want to use the information/documents?" Ms Borlund responded on 2 May 2017 in these terms:

> "The information is obviously relevant to (and discoverable in) the fraudulent conveyance action [the Fraudulent Conveyance Claim], but it may be relevant to any other actions involving [Mr Frenkel] and [Mr Lyampert] – like the one in the UK. The more relevant question though is what I asked below – namely, what are you contending to be confidential? Until you identify that, I can't evaluate whether it should even be designated as such under the protective order. Let me know."

28. Mr Farrow did not respond to Ms Borlund's email dated 2 May 2017.

29. There was then correspondence between the parties' solicitors in relation to the protective order in the Chancery proceedings. This arose in the context of the documents to be included in the trial bundle. On 8 June 2017 O'Melveny & Myers, Mr Lyampert's solicitors, wrote to Blake Morgan, Mr Frenkel's solicitors, making the following complaint:

> "2. <u>Attempting to introduce a US Document subject to a US Protective Order into UK Proceedings</u>
>
> On 2 June 2017, Chris Potts emailed us a revised Trial Bundle … Index … On 3 June 2017 we responded expressing our surprise that the "Response of Mr Lyampert to Post-Judgment Interrogatories" dated 25 April 2017 had been included in the revised index, given it was submitted in the US subject to a Protection Order (a copy of which is attached). We asked whether the US Court had given permission for this document to be submitted in the UK Proceedings… On 5 June 2017 [Chris Potts] confirmed … and attached an updated index that had removed several documents, including the "Response of Mr Lyampert to Post-judgment interrogatories. We note that we are still awaiting an explanation for this attempted inclusion. Furthermore, please confirm whether prior permission from the US court was sought before you attempted to submit this document in the UK proceedings."

30. Blake Morgan responded the same day as follows:

> "We did not seek to use the "Response of Mr Lyampert to Post-Judgment Interrogatories" dated 25 April 2017 in these proceedings … In any event, we understand that "Response of Mr Lyampert to Post-Judgment Interrogatories" dated 25 April 2017 is not subject to the Protective Order enclosed with your letter". (*emphasis (italics)* added)

31. However, notwithstanding the last sentence set out above, Blake Morgan's actual understanding was that "the position was in doubt" as to whether Mr Lyampert's responses to the post-judgment interrogatories were subject to the protective order. This was because, as Mr Potts explained in his second affidavit dated 25 July 2017, "the status of the relevant documents under [the protective order] was unclear". Mr Lyampert's solicitors did not respond to Blake Morgan's letter of 8 June 2017.

Mr Lyampert's notice of appeal

32. On 19 May 2017 Mr Lyampert filed a notice of appeal against the judgment dated 22 February 2017. Thereafter, on 22 June 2017 the stay of the US Judgment and freezing order granted against Mr Lyampert expired.

Mr Frenkel's motion for preliminary injunction

33. On 21 June 2017 (the day before the stay expired) Mr Frenkel issued a "notice of motion and motion for preliminary injunction" in the Fraudulent Conveyance Claim which, on its face, was returnable on 1 August 2017. I shall refer to this as the "**motion for preliminary injunction**" and it claimed the following relief:

> "**PLEASE TAKE NOTICE THAT** on August 1, 2017, at 8.30am or as soon thereafter as the mater may be heard in Department 36 of the above entitled Court located at … California, … Plaintiff Roman Frenkel ("Frenkel"), by and through his counsel of record, will and hereby does move the Court for an order pursuant to California Code of Civil Procedure $3439.07(2) & (3) enjoining defendant Arkadiy Lyampert ("Lyampert"), his agents or those acting in concert with or in support of [Mr] Lyampert from selling, assigning, transferring, encumbering, or disposing of any property including but not limited to Lyampert's equity interest in [the UK Company]. This motion is made upon the grounds that, having (a) already closed virtually all of his known bank accounts, (b) purported to transfer his multi-million dollar home to a pair of irrevocable trusts controlled by his wife, and (c) purported to transfer his interest in his family investment company to his wife, defendant Lyampert has indicated that he is in the process of transferring his equity interest in [the UK Company] to [an off-shore] entity for the apparent purpose of hindering and delaying any collections against that equity interest. Frenkel is a judgment creditor to whom Lyampert owes more than $2.2 million dollars, and Lyampert's equity interest in [the UK Company] appears to be one of the only (if not *the* only) remaining material asset available for collection. The evidence demonstrates that Frenkel is likely to prevail on the merits of the fraudulent conveyance action [the Fraudulent Conveyance Claim], and the balance of hardships tilts strongly in favor of the proposed injunction. (underlining added)

> **PLEASE TAKE FURTHER NOTICE** that Frenkel intends to seek, by ex parte application, an earlier date for this Motion, preferably 14 July 2017, as there is a Case Management Conference scheduled for the date as well.

34. Having been issued on 21 June 2017, the motion for preliminary injunction was personally served by hand on Mr Jeffrey D Farrow of Michelman & Robinson LLP, US attorneys for Mr Lyampert, the very same day. This is set out in the proof of service executed on 21 June 2017 by Genevieve Fenster (page 326 to Exhibit AB1 to the affidavit of Affidavit of Amy Borlund dated 14 July 2017).

35. On 28 June 2017 the Californian court heard Mr Frenkel's application to have the hearing of the motion for preliminary injunction brought forward from 1 August 2017 to the earlier date of 14 July 2017. The application was opposed by Mr Lyampert, and was dismissed by the Californian court on 28 June 2017. This meant that Mr Frenkel's motion for preliminary injunction remained in the list for hearing on 1 August 2017.

Mr Frenkel's motion to appoint a trustee of receiver

36. On 30 June 2017 Mr Frenkel filed a motion in the Californian Claims "for the Appointment of a trustee or receiver to recover property owned or owed to [Inc] relating to [the UK Company]". The application was opposed by Mr Lyampert and Inc and the application was scheduled for hearing in October 2017. Exhibited to Ms Borlund's declaration accompanying the motion were Mr Lyampert's responses to the post-judgment interrogatories and, it appears, it was in this context they were placed on the US court's website on 30 June 2017. This application to appoint a trustee or receiver was heard and dismissed on 12 October 2017.

Chronology of events in the Chancery proceedings up to 17 July 2017

37. On 3 February 2017 Mr Frenkel was ordered to provide security for costs of Mr Lyampert in the sum of £250,000 within 14 days. On the same day he was ordered to pay security of £60,000 in respect of Mr Bell's costs, and £30,000 in respect of the UK Company's costs.

38. The trial of the Chancery proceedings commenced on Tuesday 20 June 2017 and the last day of the hearing was Wednesday 28 June 2017.

39. Mr Bell, a director of the UK Company, gave evidence during the trial. He was cross-examined by Mr Barden, counsel for Mr Frenkel. At one point during cross-examination he was asked, in particular, about a Board Resolution signed and dated 29 March 2014 relating to the issue of shares in the UK Company. The document recorded that Mr Bell and Mr Lyampert were present at the meeting and had a "current shareholding of 1 share each". The Board Resolution recorded that:

> "It is agreed that a total of 2500 new shares are to be issued and distributed as follows.
>
> | | |
> |---|---|
> | David Bell | 1000 Preferential Shares – Voting. |
> | Arkadiy Lyampert | 1000 Preferential Shares – Voting. |

> 500 Common non-voting shares are to be made available to key staff at the true market price for the company on 30 April 2014. A third party company/accountancy firm is to be employed to do a full assessment of the market value of the company as of the 30 April 2004. 500 shares (20%) of the company that are being offered to key staff, will be made available for purchase at the market price based on the market assessment received. For example. If the company is valued at £1,500,000 as of the 30 April 2014, then 500 common shares will be made available (£300,000) at a purchase price of £600.00 per share. Any revenue received from the sale of these common stock is to be split evenly between David Bell and Arkadiy Lyampert."

40. In relation to this document, Mr Bell was asked the following questions by Mr Barden in cross-examination (recorded on pp 36-37 of the transcript of Day 6):

> "Q. Can I just ask you about one other thing in this time frame which is at page 377 [the Board Resolution dated 29 March 2014].
> A. Yes.
> Q. This is a board resolution or draft board resolution, I'm not sure which. Can you fill me in?
> A. This was an agreement between me and Arie where I was looking to start a share option scheme at the company to tie in key staff.
> Q. The proposal was to issue some shares to you, some shares to Arie, in equal amounts, and then to have 500 common non-voting shares to be made available to key [*p. 37 of transcript*] staff?
> A. Correct.
> Q. Did this actually happen in the end?
> A. No, but it is something I want to pursue.
> Q. I see. Have there been any other proposals or suggestions for changing the shareholding, either by transfers of shares or by issuing new shares?
> A. No.
> Q. None that you're aware of?
> A. None I'm aware of."

41. Mr Bell's evidence was therefore that, although shares in the UK Company had not been issued in accordance with the agreement made in March 2014, it was still "something he wanted to pursue" some three years later.

42. Mr Frenkel's application before Kerr J was made on Monday 17 July 2017, which was over two and a half weeks after the end of the trial.

Without notice hearing before Mr Justice Kerr on 17 July 2017

43. The application was heard on the afternoon of 17 July 2017. I have a detailed seven-page note of the hearing, which was prepared by Blake Morgan ("**the hearing note**"), together with a note of Kerr J's judgment also prepared by Blake Morgan. The application was heard in Room 37 on the basis it was urgent and could not therefore be determined by the Commercial Court.

Application notice

44. The application notice, which was then in draft, provided that Mr Frenkel sought an order in these terms:

> "[1.] Until after the return date or further order of the court, [Mr Lyampert] must not in any way dispose of, deal with, charge, or diminish the value of: (a) the one ordinary share in [the UK Company] currently registered in his name; (b) any other interest (legal or beneficial) which he has, or claims to have, in the share capital of [the UK Company]; (c) the dividends referable to the share referred to in (a) above, which [the UK Company] has reserved, and any further dividends becoming payable in respect of that share.
>
> [2.] Until after the return date or further order of the court, [the UK Company] shall not: (a) register any proposed transfer of the one ordinary share in [the UK Company] currently registered in [Mr Lyampert's] name. (b) issue any further shares in [the UK Company]; (c) in any way dispose of, deal with, charge, or diminish the value of the dividends becoming payable in respect of the share referred to in (a) above.
>
> [Mr Frenkel] seeks the Order as [Mr Lyampert] has (1) indicated that he intends to transfer his interest in [the UK Company] to [an off-shore entity] and (2) sought to dissipate his assets in the USA and there is a serious risk that [Mr Lyampert] will dissipate his assets in the UK to avoid enforcement of the US Judgment and/or any judgment against him in the Chancery Proceedings."

45. There was a draft order attached to the application notice. The application was supported by the affidavit of Christopher David Charles Potts ("**Mr Potts**") and Exhibit CDP/1 (136 pages) and the affidavit of Amy Borlund ("**Ms Borlund**") and Exhibit AB1 (326 pages). Mr Potts is a partner at Blake Morgan, Mr Frenkel's English solicitors. Ms Borlund is a partner of Doll Amir Eley LLP, a firm based in Los Angeles, who are Mr Frenkel's US lawyers. She is Mr Frenkel's US attorney and has acted for him since 2011.

Skeleton argument

46. Mr Barden was counsel for Mr Frenkel at the without notice hearing and he prepared the skeleton argument for the hearing. The skeleton explained that the injunction was sought in support of two causes of action, namely the enforcement of the US Judgment (and in respect of which Mr Frenkel undertook to issue proceedings to enforce the judgment), and Mr Frenkel's claim in the Chancery proceedings in respect of which judgment was awaited. The "so-called *Chabra* jurisdiction" was relied on for the purposes of seeking the injunction against the UK Company. Having identified the key legal principles, the skeleton then, under a number of headings, set out the reasons relied on in relation to the following topics: good arguable case, risk of dissipation, just and convenient, the "full and frank disclosure points", the form of order sought, and service outside the jurisdiction. The skeleton argument did not include a chronology listing the events in the litigation between the parties in California, which I have identified at paragraphs 16 to 35 above.

47. The skeleton argument also explained that:

> "The application has not been bought before the trial judge because it involves material which she did not see, and which might affect her assessment of the witnesses. It was therefore thought prudent to bring it in a separate division."

48. In relation to risk of dissipation, the skeleton referred to the evidence of Ms Borlund which it was said dealt "in detail with risk of dissipation". It was submitted that there were a series of general points which "collective [sic] suggest that there is a real risk of dissipation". Mr Barden referred to Mr Lyampert's "stewardship of the assets of Inc", "the closing of the large majority of Mr Lyampert's bank accounts, the purported transfer of the family home into a trust (which Mr Lyampert claims was rectifying an earlier mistake) and the purported transfer of a shareholding into his wife's name", the Fraudulent Conveyance Claim, and that "following these transfers, the Judgment Debtor Responses do not disclose any significant assets from which Mr Lyampert could pay the amounts owing…" The skeleton argument continued by saying that: "the most direct point is explained at Borlund/26 – in his Judgment Debtor Response, Mr Lyampert appears to indicated (sic) (although there is a lack of clarity) that he has transferred (or perhaps intends to transfer) his interest in shares in the UK Company to [an offshore] entity …".

49. It was then submitted that it would be just and convenient to grant an injunction in this case, balancing the interests of the parties. The skeleton explained:

> "Mr Frenkel is faced with the possibility that, if there is a transfer or dissipation of the shares and/or dividends, there will be no or insufficient assets against which he can enforce the legitimate claims. That is the principal reason why freezing orders are granted. That point is all the stronger when there is no evidence of other substantial assets, and where any transfer may be irreversible. By contrast, it is hard to see why Mr Lyampert would suffer immediate harm from any such Order. The Order does not involve freezing liquid assets which he might otherwise be employing in business or similar …"

50. Under the heading "Full and Frank Disclosure Points", a number of points were made. In particular, it was explained that Mr Lyampert had not yet filed a substantive response to the Fraudulent Conveyance Claim. Rather he had only filed "a general denial – so there may be points which he would make in response to the allegations of dissipation".

51. However, the skeleton does not, at the same time, explain that in the Fraudulent Conveyance Claim on 21 June 2017 Mr Frenkel had issued, and personally served on Mr Lyampert's attorney, the motion for preliminary injunction "enjoining [Mr Lyampert], his agents or those acting in concert with or in support of [Mr] Lyampert from selling, assigning, transferring, encumbering, or disposing of any property including but not limited to Lyampert's equity interest in [the UK Company]". The fact this had happened is shown by the Proof of Service dated 21 June 2017, which was exhibited at pages 326-7 of Exhibit AB1 to Amy Borlund's affidavit sworn on 14 July 2017.

Evidence in support

52. Turning now to the evidence in support of Mr Frenkel's application. Mr Potts explained that, as a result of the Chancery proceedings, the UK Company had withheld "some

£560,000 attributable to part of the disputed shareholding" which he defined as "the Withheld Dividends". Under the heading "The Freezing Order" Mr Potts said this in his affidavit:

> "[24.]Mr Frenkel's concern is that Mr Lyampert may seek to dispose of his UK assets, being his shareholding [in the UK Company] and/or the Withheld Dividends, in order to avoid enforcement of the US Judgment against them, and/or in order to avoid or deprive of effect any judgment against him in the Chancery Proceedings. Where the latter judgment is potentially imminent, that risk appears to be enhanced.
>
> [25.] Mr Borlund explains in her affidavit the particular reasons for these concerns, but in summary they include [and he then refers to the reasons set out at paragraph 48 above].
>
> [26.] For that reason an order is sought, the effect of which would be to preclude any dissipation of Mr Lyampert's interest in the shares, or of his right to the Withheld Dividends. An order is also sought in respect of future dividends.
>
> [27.] Mr Bell is Mr Lyampert's co-director and there is at present no suggestion that he is party to any plan by Mr Lyampert to dissipate his assets. Mr Bell was asked in the Chancery Proceedings whether there had been any "proposals or suggestions for changing the shareholdings, either by transfer or by issuing new shares" and he said that there had not, except for an unconsummated proposal enabling shares to be issued to key staff."

53. The important point about paragraph 27 of Mr Potts' evidence is that it does not set out in terms that at trial in the Chancery proceedings, Mr Bell gave evidence that the proposal "to issue some shares to [Mr Bell], some shares to [Mr Lyampert], in equal amounts, and then to have 500 common non-voting shares to be made available to key staff" was something he intended to pursue. In addition to that the transcript of Mr Bell's evidence from Day 6 of the trial (pp 36-37), which I have set out at paragraph 40 above, was not included in Exhibit CDP/1 to Mr Potts' first affidavit dated 14 July 2017. The point that the issue of shares was something Mr Bell intended to pursue was not mentioned at the hearing before the judge.

54. In her affidavit Mr Borlund explained, under the heading "Steps taken by Mr Frenkel in the US in relation to the removal of assets", about the Fraudulent Conveyance Claim filed against Mr Lyampert and numerous other defendants. She said this at paragraphs 28 and 29:

> "[28.] On June 21, 2017, I filed a motion seeking a preliminary injunction that would prohibit Mr Lyampert from transferring his shares of [the UK Company] to the [offshore jurisdiction] (pages 246-327 [*Identified below*]). The motion is scheduled to be heard on August 1, 2017. If it appears, however, that a judgment will issue sooner in the UK proceedings, we will seek a temporary restraining order prohibiting transfer until the Court hears and decides the motion for preliminary injunction.
>
> [29.] As the shares at issue are of a foreign company ([the UK Company]) which is not readily subject to the jurisdiction of the courts in Los Angeles, Mr Frenkel cannot obtain an order in the US Litigation preventing [the UK Company] from transferring the shares.

> [30.] I understand that for those reasons, Mr Frenkel proposes to apply for a freezing order in the UK in relation to the shares in [the UK Company] and dividends from that company…".

55. In Exhibit AB1 to her affidavit dated 14 July 2017, the documents at pages 246 to 327 were as follows:

    a. The application entitled "Plaintiff Roman Frenkel's Notice of Motion and Motion for Preliminary Injunction" in the Fraudulent Conveyance Claim (Case BC620673); and Declaration of Amy I Borlund filed on 21 June 2016 (pages 246-260);

    b. Exhibits A to G – pages 261-325.

    c. Proof of Service dated 21 June 2017 – pages 326-7. This is the evidence of Genevieve Fenster that the motion for injunction was personally served on Mr Lyampert's US lawyers on 21 June 2017 (see paragraph 51 above).

The hearing before Kerr J

56. I now turn to the note of the hearing before Kerr J.

57. The hearing took place in private because the judge was satisfied that "the object of the application would be defeated if heard in public" and he "appreciated that the proposed Claimant [Mr Frenkel] needs the space to make its submissions without either of the proposed Respondents being aware".

58. The judge explained that "he was not initially clear about the background to the matter". However, he said that the Particulars of Claim in the Chancery proceedings had been the most helpful for background information and he asked about the trial in the Chancery Division. Mr Barden then took the judge through the documents in the exhibits in relation to the US Judgment, and he then moved on to explain the issues in the trial in the Chancery Division, and the nature of the claim.

59. The judge then asked about the UK Company and Mr Bell. The hearing note records the following discussion between counsel and the judge:

> "The Judge said that he had seen from the papers that Mr Bell and the UK Company shared representation. Mr Barden confirmed this and said that the Company took a neutral position in the UK Chancery proceedings. The Judge asked why the claim was issued against Mr Bell and the UK Company. Mr Barden explained that it was necessary for them to be bound – the company had made an offer to comply with the terms of any order made at court, but ultimately Mr Bell and the UK Company had been represented.
>
> The Judge stated that Mr Bell may have something to say about this application. Mr Barden submitted that an injunction would be 'no skin off the English company's nose'. The injunction would freeze the reserved dividends and the 51% shareholding. The reserved dividends and shares are already held and nothing is due to happen to them ie so far as known, there are no commercial agreements to sell. Nothing in this would seem to affect the UK Company's ability to trade.

> The Judge said he was conscious he could not make any decision which would tie the hands of the Chancery Judge. It is the Chancery Judge's job to decide the substantive ownership of the shares. An injunction may have to be varied or discharged if she rules a certain way. Mr Barden agreed and said that nothing in this Order cuts across what the Chancery Judge would have to decide. He highlighted that it is not as simple as the injunction turning on the outcome of the Chancery Proceedings – the UK shares and dividends are the only assets to enforce the US judgment against and this might in any event be a freestanding basis for an order…
>
> The Judge asked what would happen if the UK Company got into financial difficulty and potentially needed to sell the shares? If there was an injunction in place, they would be unable to do anything with the shares if needed. Mr Barden said the UK Company is solvent and is trading profitably as evidenced by the accounts produced at trial.
>
> The Judge asked if Mr Frenkel was solvent. Mr Barden referred the Judge to paragraph 30 of Mr Potts' affidavit, where it says that Mr Frenkel is willing to provide a cross-undertaking in damages.
>
> Mr Barden reiterated that there would be minimal difficulties should the shares be frozen. There is no suggestion that there is a commercial deal to be done. The withheld dividends are reserved in any event."

60. As can be seen from this exchange between the judge and counsel, the judge was not told that in the future Mr Bell wished to issue shares in the UK Company to key staff. Rather, he was told that the injunction was "no skin off the English company's nose" and "there would be minimal difficulties should the shares be frozen".

61. Mr Strelitz, as counsel for the UK Company, has criticised what Mr Frenkel told the judge, through counsel, in relation to the UK Company. He says that the judge was given the "wrong and opposite view" in relation to the impact the freezing injunction would have on the UK Company. This is because:

    a. Mr Barden's skeleton argument does not deal with any of the implications that the injunction might have on the UK Company's business, and does not identify Mr Bell's continuing intention to issue shares (for example at paragraphs 10, 20(a) and 26 of the skeleton argument).

    b. Mr Barden did not spell out in his oral submissions to the judge that there was a continuing intention to issue shares, and not just "an unconsummated proposal enabling shares to be issued to key staff".

    c. In response to the judge's observation that "Mr Bell might have had something to say about the application" and his questions about the shares, Mr Barden failed to (i) take the judge to paragraph 27 of Mr Potts' first affidavit, and (ii) ensure that the judge was informed of all Mr Bell's evidence at trial that the issue of non-voting shares to key staff was something he intended to pursue (ie as set out on page 37 of the Day 6 transcript; paragraph 40 above). Instead, the judge was told that "the injunction would freeze the reserved dividends and the 51% shareholding. The reserved dividends and shares are already held and nothing is due to happen to them

ie so far as is known, there are no commercial agreements to sell. Nothing in this would seem to affect the UK Company's ability to trade".

d. In relation to Mr Bell's intention to issue shares, Mr Frenkel failed to make any inquiries of the UK Company in relation to this before making his without notice application before Kerr J.

62. I agree with Mr Strelitz that the upshot of this is that the potential impact of the injunction on the UK Company was "downplayed" before the judge. I do not understand why, in Mr Potts' first affidavit, he paraphrased the evidence that Mr Bell gave at trial in relation to, and arising out of, the board resolution dated 29 March 2014. It seems that this evidence, which was only short, should have been set out in full in his affidavit and, in relation to the potential impact of the freezing injunction on the UK Company, the judge should then have been taken through this at the hearing.

63. Returning to the hearing note, there was then a discussion about Mr Frenkel's causes of action and, according to the note, the judge expressed the view that "the application should ultimately be sitting in the Chancery Division". The judge asked Mr Barden about Mr Frenkel's cross-undertaking in damages. The hearing note records the following exchange:

> "The Judge said that the only evidence that Mr Frenkel is good for the cross-undertaking is in Mr Potts' affidavit at para 30. Mr Barden submitted that Mr Frenkel has provided security for costs previously, as there is money held to order in Blake Morgan's client account. The Judge asked how much. Mr Barden said they thought it was around £200,000, but would check. The Judge said that Mr Barden should have addressed the provision for security for cost. That is something the Judge needed to know about. The Judge asked if there were any other disclosure points which Mr Barden wanted to draw particular attention to. Mr Barden said that the defence of laches had not been mentioned in his skeleton but had been raised earlier in his oral submissions. The defence of laches had been pushed hard as a defence.
>
> The Judge asked Mr Barden if anyone had applied for dissolution of the UK Company in the Chancery Proceedings. Mr Barden confirmed that they had not and said that the UK Company is trading profitably.
>
> The Judge said that Mr Barden is claiming that the claim at trial means that there is a good arguable case here for an injunction. Mr Barden said that this is right, but the US judgment is also relevant".

64. Pausing there, in his judgment Kerr J held that "I do not equate the mere trial of [the Chancery] proceedings itself with the existence of a good arguable case".

65. Returning to the hearing note, the judge then asked about the proceedings in the US. The hearing note records the following exchange took place between the judge and counsel:

> "The Judge asked if a freezing order had been sought in the US. Mr Barden explained that an application had been made but was yet to be heard. Mr Barden referred the Judge to page 246 of exhibit AB1 (Notice of Motion for Preliminary Injunction). At page 247 line 6-9, it confirms that the injunction is also in respect of the property in the UK Company. The motion is to be heard on 1 August 2017. At line 19, it shows that an

earlier *ex parte* date had been sought for 14 July 2017. The Judge asked why it was not heard on 14 July. Mr Barden said it didn't happen and that he is unsure why. Mr Barden referred the Judge to paragraph 28 of Ms Borlund's affidavit which states that the motion is scheduled to be heard on 1 August 2017.

The Judge asked if the application has been served on any of the other parties. Mr Barden said that the UK lawyers' understanding was that it had not.

The Judge said that he would need to know why the hearing did not take place on 14 July as mentioned. He said that reading between the lines, it would seem that the hearing was not chased because the US lawyers were concerned that it may seem premature. Why should the UK Judge not take the same view here? Mr Barden submitted that it may be the practice of the California courts and that it may not be as straightforward to obtain a hearing for an urgent freezing order there as it is here.

The Judge mentioned the reference to a CMC on page 247 of Exhibit AB1 and asked how there can be a CMC when the parties have not been served? Mr Barden explained that he did not know what a CMC was over in the US."

66. It is clear from this exchange that the judge was trying to understand what was, or had been, happening in relation to Mr Frenkel's application for an injunction in California.

67. In this regard the information the judge was provided by counsel, and in the evidence, was wrong, and incomplete, in a number of important and material respects:

    a. First, the motion for preliminary injunction had been served on Mr Lyampert. It was personally served on his US attorney, Mr Farrow, on 21 June 2017 (and therefore over three weeks before the hearing before Kerr J on 17 July 2017). The evidence for this was at pages 326-7 of Exhibit AB1, and in the documents placed before the judge on 17 July 2017. This is not explained in Ms Borlund's affidavit and, when the judge specifically asked whether the application for an injunction in California had been served on the other parties, Mr Barden failed to take the judge to the evidence of service and told the judge "the UK lawyers' understanding was that it had not".

    b. Ms Borlund had in fact emailed Mr Farrow on 21 June 2017 in these terms:

> "Also, I am advised by counsel in the UK that there could be a decision in mid-July in that matter [the Chancery proceedings] and, that if the Court there determines that [Mr Lyampert] owns all or a portion of the shares at issue, [Mr Lyampert] could then be free to seek [the UK Company's] permission to transfer the shares. Based on the discovery response, it appears that he intends to transfer the shares ... In the light of the foregoing, I just filed a motion for preliminary injunction to prevent any such transfer. I've currently got it scheduled for August 1, but I'd like an earlier date in the event the UK court issues a decision prior to that. The Court is dark the last two weeks of July, but we have a case management conference on July 14. Accordingly, I'd like to have the motion heard that day. Let me know if you'll stipulate to that date. I can present a stipulation to the Court or seek the date by an ex parte application. If you'd like to discuss further, let me know."

> Mr Farrow received that email, as he responded on 25 June 2017. By a further email dated 27 June 2017 to Mr Farrow, Ms Borlund recorded her understanding that Mr Lyampert's shares "are still in the UK and will not be transferred until there is a decision in the UK action [the Chancery Proceedings]".

c. Second, the notice of motion does not actually show "that an earlier *ex parte* date" for the hearing of the motion for preliminary injunction had been sought for 14 July 2017. Rather, the motion for preliminary injunction shows that Mr Frenkel "intends to seek, by *ex parte* application, an earlier date for this Motion, preferably July 14, 2017, as there is a case management conference scheduled for that date as well" (see page 247 of Exhibit AB1 (lines 19-21)).

d. Third, the judge was not told that on 28 June 2017 Mr Frenkel had, on notice to Mr Lyampert, made what is described as the "*ex parte* application" to the court "to seek an order advancing the hearing date" of Mr Frenkel's motion for preliminary injunction. This is not explained in Ms Borlund's affidavit.

e. Fourth, it was not explained to the judge that the term "*ex parte* application" in the notice of motion dated 21 June 2017 had nothing to do with the manner in which the motion for preliminary injunction would be heard. The hearing was to be <u>on notice</u> to Mr Lyampert, and that was the position from the outset. This is not explained in Ms Borlund's affidavit.

f. Fifth, the judge was not told the reason why Mr Frenkel's motion for a preliminary injunction was not heard on 14 July 2017. The reason was that Mr Frenkel's application to have the motion for preliminary injunction brought forward to 14 July 2017 had been refused by the court 28 June 2017. This is not explained in Ms Borlund's affidavit. On refusing the application the judge noted "that the matter had been proceeding for over a year with almost no movement, and that he did not believe there was any imminent or irreparable harm that would warrant advancement of the hearing to 14 July 2017" (para 37 of the witness statement of Eric John Rans dated 24 July 2017).

g. Sixth, the judge was not told that Mr Frenkel's application against Mr Lyampert for "the right to attach order and for issuance of writ of attachment" was dismissed by the Californian court on 25 May 2016 (paragraphs 17 to 19 above). The application was made in the context of the Fraudulent Conveyance Claim following the issue of the Californian Court's "Tentative Statement of Decision". One of the reasons the application was dismissed was because "there [was] an insufficient showing of irreparable harm".

68. The upshot of this is that Kerr J was not told that Mr Frenkel's application for a freezing order against Mr Lyampert in California was being made <u>on notice</u>, and that Mr Lyampert had been on notice of that particular application since 21 June 2017, and therefore for over a period of three weeks. Rather, the judge was led to believe that the application for "an urgent freezing order in California" would be made on an "ex parte" basis and, as he was not told the reason why Mr Frenkel's application for an injunction had not been heard on 14 July 2017, and he inferred (incorrectly, because he was not told the full facts) that

"reading between the lines, it would seem that the hearing was not chased because the US lawyers were concerned that it may be seen as premature".

69. As to why the judge was not told the reason why Mr Frenkel's motion for freezing injunction was not heard on 14 July 2017, Mr Potts has since provided the following explanation in his affidavit dated 25 July 2017:

> "[35.] Mr Barden was asked during the ex parte hearing on 17 July 2017 whether the listed hearing in the US on 14 July 2017 had taken place. He expressed our (correct) understanding that it had not, but we were not able to say why this was so.
>
> [36.] I now recall that I had been aware that an application had been made ex parte to advance the hearing date, which had not been successful. This is a matter that should have been brought to the attention of the court on 17 July 2017 and I apologise that it was not. I simply did not recall it at the time. <u>The trial in the Chancery proceedings commenced on 19 June 2017 and concluded on 28 June 2017 and so I was not paying close attention at the time to the details of the steps being taken in the US Proceedings</u>." (underlining added)

This, it seems to me, does not explain why Mr Frenkel's legal team were not on top of points such as these before Kerr J. There was, after all, over two weeks between the end of the trial and the date on which they attended before Kerr J without notice. That was more than enough time to catch up with, and investigate, the details of the steps which had been taken in the US Proceedings.

70. Returning again to the hearing note, Mr Barden then took the judge through the motion for preliminary injunction. The note records the following:

> "Mr Barden referred the Judge to line 9 of page 247 of Exhibit AB1 and explained it outlined the main arguments for the application [in California]. At page 251 of Exhibit AB1 at bold heading C, the motion deals with the [off-shore] entity. At page 252 line 2, it states that Mr Lyampert will need the consent of all directors to transfer his shares. However, the consent of all directors is not needed to transfer the beneficial interest of the shares.
>
> The Judge asked Mr Barden why the Claimant did not ask the Chancery Judge to make this order at trial. Mr Barden explained that the UK lawyers' understanding is that the interrogatories relied on were not public documents at the time of trial. So at the trial they could not rely on the evidence that they now rely on.
>
> Going back to page 252, and the [off-shore] entity, the Judge said to take it at its simplest. If Mr Frenkel really believes that Mr Lyampert will transfer shares as soon as possible, then the [off-shore] argument will be his best case. Mr Barden needs to confirm to the Judge that there is that strong concern. Mr Barden pointed out that this was the key motivation for the application, there would otherwise be little point – but the Judge noted that the courts now have to be vigilant in avoiding applications which are in substance people trying to get security for costs…
>
> Mr Barden then took the Judge to line 11 of page 187, which shows Mr Lyampert's shareholding in [the UK Company]. It says in the table [particulars of the alleged share transfer are set out].

> The Judge asked if this was not trying to lock the stable door after the horse has already bolted. Mr Barden explained that it was known that Mr Lyampert has not transferred the registered title to the shares in the UK Company. Otherwise the effect of the documentation was not known."

71. Pausing there, it is clear that the transfer has not been registered. This is confirmed by the documents at Companies House. Mr Lyampert has not therefore transferred legal title to the share registered in his name, which will pass only on the execution of a valid stock transfer form and registration.

72. The hearing note continues as follows:

> "The Judge queried again why Mr Frenkel had not produced this document at trial. They had this since April. Mr Barden submitted that they believed they were confidential and not public documents, so were therefore subject to US confidentiality. The reasons for that he did not fully know, but it is clear there is a different regime in the US. Hence the partial redactions as explained by Ms Borlund, and the fact there is still further material which is confidential unless waived, and cannot be relied upon even in this hearing."

73. The document the judge was referring to was Mr Lyampert's responses to the post-judgment interrogatories. The trial in the Chancery proceedings finished on 28 June 2017. The difficulty with this aspect of the hearing is that, in answering the judge's question, counsel gives the impression that (i) the document was and remained confidential throughout the trial; and (ii) something had happened after the end of the trial which resulted in the document at page 190 of Exhibit AB1, and therefore part of Mr Lyampert's post-judgment interrogatories, being released from "US confidentiality" so that this document could now be shown to an English court by Mr Frenkel. This impression of a change of circumstances appears to provide some explanation for the fact that Mr Frenkel was relying on this document on 17 July 2017, which was over two months after Mr Lyampert had served his responses to the post-judgment interrogatories on 25 April 2017.

74. The problem here is that there was nothing in the evidence before the judge to explain what, if anything, had changed between 28 June 2017 and 17 July 2017 so that Mr Lyampert's responses to the post-judgment interrogatories could be used in an English court. This, it appears, is conceded by Mr Barden in his skeleton argument dated 25 July 2017 prepared for the return date before Knowles J, when he said this:

> "Protective Order – there is a substantial debate over the effect of this. Prior to 28 June the parties adopted conflicting stances on whether the Judgment Debtor Responses were confidential, so for safety's sake they were not deployed. Borlund 2nd will explain that AL's lawyer confirmed on 28 June that confidentiality was not asserted in the Responses themselves. It is fair to say that this basis was not clearly identified at the *ex parte* hearing, where the UK lawyers were not fully able to explain why the US position had become clearer since the trial of the Chancery Proceedings. But Boland 2nd will do that." (underlining added).

75. This is important because, in the context of the Chancery proceedings, it seems to me that the judge should have been told the following material matters at the hearing on 17 July 2017, namely:

a. There was a protective order in place in relation to the Californian Claims, together with the fact that Mr Lyampert's responses to the post-judgment interrogatories were served "subject to any protective orders entered in this matter". The nature and effect of the protective order, together with its effect on Mr Lyampert's responses to the post-judgment interrogatories, should have been explained to the judge.

b. In the Chancery Proceedings, Mr Frenkel and his legal team in the UK had not used Mr Lyampert's responses to the post-judgment interrogatories at any point in the trial in June 2017 because they were aware that "status of the relevant documents under it was unclear" (see paragraph 30 of Mr Potts' second affidavit dated 25 July 2017). The trial ended on 28 June 2017.

c. The reason why Mr Frenkel maintained that Mr Lyampert's responses to the post-judgment interrogatories were no longer subject to the protective order. The reason, as I understand it, was because of what was said in a conversation between the parties' respective US attorneys, Ms Borlund and Mr Rans, at court in California on 28 June 2017 (paragraph 28 of Ms Borlund's witness statement dated 24 July 2017). It was on this basis that, in his submissions in reply, Mr Barden submitted that as far as Mr Frenkel's legal team were concerned there was "nothing that needed disclosing in relation to the underlying dispute" because as at 28 June 2017 there "was no dispute".

d. If, as Mr Frenkel now contends, Mr Lyampert's responses to the post-judgment interrogatories are in the public domain, then the judge should have been told of the basis for this contention. This is because, as I understand it, Mr Frenkel now says that the responses entered the public domain on 30 June 2017 when Ms Borlund filed them on-line with the Californian court in the context of an application by Mr Frenkel to appoint a trustee or receiver in respect of Inc's interest in the UK Company (see witness statement of Xiao Hui Eng dated 26 October 2017).

e. Mr Lyampert's position in the Chancery proceedings was that his responses to the post-judgment interrogatories were confidential and subject to the protective order, as this was the stance taken in his solicitors' letter dated 8 June 2017 (see paragraph 24 above). Given his stance in the Chancery proceedings, Mr Lyampert might well have disagreed with an allegation by Ms Borlund that confidentiality had been lost in this document by reason of something that it is now alleged Mr Lyampert's US lawyer said or did on 28 June 2017. This, it seems to me, is a legitimate point for Mr Thorne to make, and I disagree with Mr Barden's submission that it simply rests on hindsight, although it is clear that Ms Borlund's version of events in relation to her discussion with Mr Rans on 28 June 2017 is disputed (see paragraph 7 of Mr Rans first witness statement dated 25 July 2017)).

76. In the light of the evidence which has been filed since 17 July 2017, there is clearly a dispute between the parties as to whether Mr Lyampert's responses to the post-judgment interrogatories are subject to the confidentiality provisions of the protective order or not. This is a dispute I am unable to resolve in the context of the applications before me because, apart from anything else, the matters in dispute give rise to points of procedure under Californian law.

77. Returning to the hearing note, counsel took the judge to a couple more points, and the judge asked him if he had anything further to say, and he confirmed that he did not. There was then a discussion between counsel and the judge as to the return date, and the hearing note records that "the judge confirmed that he was only prepared to grant an injunction by a hair's breadth and for a short time". The judge said that, if the trial judge in the Chancery Division had not been a deputy, then he would have listed the matter before the trial judge and he also said that the application would eventually need to go to the Chancery Division.

Kerr J's judgment

78. The judge then gave a short judgment. He identified the nature of the application before him, and described the case as "unusual". In the "briefest words" he summarised the details of who the parties were, the Chancery proceedings, the US Judgment, the answers given by Mr Lyampert to the post-judgment interrogatories, the trial in the Chancery Division and that judgment was reserved "and is expected in the next month or two, but it is not known when".

79. The judgment then continued as follows:

> "I must mention that on 21 June 2017 Mr Frenkel's California attorney issued a notice of motion for relief, similar to a freezing injunction, against Mr Lyampert and many other parties, presumably thought to be associated with him.
>
> In support of that relief, reliance is placed on the transfer of the shares in the UK company to the [off-shore] company. An ex parte hearing was due to take place last Friday [14 July 2017]. It did not. Ms Borlund's affidavit does not, with respect, make completely clear why not. Among the assets to be frozen are the UK shares. There is said to be a hearing fixed for 1 August 2017." (underlining added)

80. The fact the judge said in his judgment that "an ex parte hearing was due to take place last Friday", which was 14 July 2017, makes it clear that the judge understood, and proceeded on the basis that, Mr Lyampert had not been served with the motion for preliminary injunction and that Mr Frenkel's application in California to freeze Mr Lyampert's shareholding in the UK Company was to be made on an *ex parte* basis.

81. The judgment then continued:

> "I am told that the UK Company is trading profitably. No one sought its dissolution in the Chancery Division proceedings. Mr Frenkel put up security for costs after an application was made without a hearing. £340,000 is held in, I am told, the solicitors' client account to order.
>
> As to solvency of the Claimant, Mr Potts in his affidavit at paragraph 30 says that Mr Frenkel is prepared to provide the usual cross-undertakings and owns his family home in California, in which he estimates that he holds $1.5m-$1.7m of equity. No further evidence of Mr Frenkel's means and assets is produced.
>
> Mr Barden invites me to make an ex parte and without notice injunction compelling Mr Lyampert not to dispose of property for a short time. He submits, in his skeleton argument and in oral submissions, that the usual tests for a freezing injunction are met,

being 1) whether there is a good arguable case, 2) whether there is a real risk of dissipation, and 3) whether it is just and convenient to make an injunction. He says that both in respect to the Chancery proceedings and enforcement under s25 of the Civil Jurisdiction and Judgments Act 1982 by way of enforcing the Californian proceedings.

As I indicated in the course of argument I am prepared by the narrowest of margins in these slightly convoluted circumstances to grant a short term holding injunction only. It seems to me that the case is made out in the very short term that the likely harm to Mr Lyampert is likely to be minimal. Although the ability of Mr Frenkel to make good on his undertaking is not assured, it seems to me unlikely to be called upon for the short period.

Mr Barden has just persuaded me there is sufficient risk of dissipation of shares that may not be his to dispose of and that the Chancery proceedings may be subverted. I do not equate the mere trial of those proceedings itself with the existence of a good arguable case. However, I do regards the judgement in the US as a good arguable case, or more. The evidence of the risk of dissipation to the [off-shore jurisdiction] is sufficient. On that basis, I will grant an injunction and will now look at the terms of the draft Order."

The Order

82. Mr Barden then took the judge through the draft order. In this context it is important to remember the notes to *Civil Procedure – 2017* (Vol 1), para 25.125.6 (p. 774) provide:

> "*Example of order to restrain disposal of assets* – The example of an order for a freezing injunction annexed to Practice Direction 25A (Interim Injunctions) (see para.25APD.10 below) may be adapted for either worldwide or domestic relief. The content of the example may be modified as appropriate in any case. Any departure from the standard wording must be drawn to the attention of the judge hearing the without notice application… The examples, modified in certain respects, are also contained in App.5 to the Admiralty and Commercial Courts Guide (see Vol. 2, para 2A-162)."

83. Further, paragraph F15.5 of the Admiralty and Commercial Courts Guide (Civil Procedure - 2017 (Vol 2), 485) provides:

> "Standard forms of wording for freezing injunctions and search orders are set out in Appendix 5. The forms have been adapted for use in the Commercial Court. These examples may be modified as appropriate in any particular case. Any modifications to the form by an applicant should be expressly referred to the judge's attention at the application hearing."

The same points are made in Commercial Injunctions (6th Edition, 2016) *Gee* ("***Gee***") at paragraphs 8-004 and 8-015.

84. Mr Barden's skeleton argument said this about the draft order:

> "[27.] A draft order is attached to this skeleton. It is modelled on the standard form in the White Book, but with various amendments. So for example:

(a) It is not a worldwide freezing order over all assets – only the specific assets set out in para 4 and enjoining the various steps set out in para 5 (which might dilute the shareholding).

(b) No asset disclosure is sought.

(c) There is not a provision for living expenses: Mr Lyampert has to date been living perfectly well without recourse to these assets, including funding his defence in the Chancery Division Claim."

85. The hearing note records that Mr Barden took the judge through the draft order as follows:

> "Mr Barden then referred the Judge to the draft order at tab 3 of the bundles. The return date is to be entered as Wednesday 26 July at 10:00am. Mr Barden highlighted paragraphs 4 and 5 which are the operative freezing provisions. The words 'of them' need to be added to paragraph 4(b). There is also a missing 0 in the figure of £860,000. Mr Barden explained that it does not contain provisions regarding information, caps, and legal expenses. This is not a freezing order in respect of all Mr Lyampert's assets and Mr Lyampert has funded litigation in both the UK and US. The Judge confirmed in those circumstances such a provision was not needed. Mr Barden said that there was a missing 'f' from 'set off' at paragraph 11. This just needs to be added in. The address for the Rolls Building is to be crossed out and the address for the Royal Courts of Justice is to be added at paragraph 15 …".

86. The respondents complain about this aspect of the hearing as well. This is because they say counsel did not take the judge through each and every modification to the standard form of wording for freezing injunction set out in Appendix 5 to the Admiralty and Commercial Courts Guide (*Civil Procedure – 2017* (Vol 2) at pp. 508-512).

87. Mr Thorne, counsel for Mr Lyampert, complains that there were a number of further departures from the standard wording which were not drawn to the judge's attention. He made the following points at paragraph 14 of his skeleton argument:

> "[14.1] In respect of the ability to deal with or dispose of assets in the ordinary course of business, this was removed apparently without being brought to the Judge's attention, despite Mr Frenkel's knowledge that the Company wished to, for example, issue shares in the course of business …
>
> [14.2] The term for cessation if security was provided was removed without apparently being brought to the attention of the judge.
>
> [14.3] In respect of a guarantee, this was also entirely removed such that Mr Frenkel was <u>not</u> obliged to provide a bank guarantee in respect of his undertakings. This again does not appear to have been brought to the attention of the judge, despite the judge's observation of the lack of information about Mr Frenkel's means and Mr Frenkel's provision of security for costs in the underlying Chancery Proceedings.
>
> [14.4] The standard text in terms of notification of cessation of the order was altered, by removal of the text in brackets, without apparently giving notice to the judge.

[14.5] The prohibition on seeking an order of a similar nature without permission of the court was removed without being drawn to the attention of the court. Importantly, Mr Frenkel was in the course of seeking a parallel order in the US at the same time."

88. Taking these points in turn:

a. *Paragraph 14.1*: This is a reference to the removal of paragraph 11(2), which is in square brackets in the Form of Freezing Injunction (adapted for use in the Commercial Court) ("**the standard form**"). Paragraph 11(2) provides: "This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business, [but before doing so the Respondent must tell the Applicant's legal representatives]." Mr Thorne maintained this was a significant omission as Mr Frenkel knew that the UK Company wanted to issue further shares. In response to this Mr Barden submitted that this paragraph was not included, as it is not connected with a worldwide freezing order and relates to a "*maximum sum*" order. That may be right, but the divergence from the standard form was not drawn to the attention of the judge.

b. *Paragraph 14.2*: This is a reference to the removal of paragraph 11(4), which is in square brackets in the standard form. Paragraph 11(4) provides: "the order will cease to have effect if the Respondent – (a) provides security by paying the sum of £ into court, to be held to the order of the court; or (b) makes provision for security in that sum by another method agreed with the Applicant's legal representatives". In response to this Mr Barden submitted that this paragraph was not included it was not connected with a worldwide freezing order and relates to a "*maximum sum*" order. Again that may be right, but the divergence from the standard form was not drawn to the attention of the judge.

c. *Paragraph 14.3*: This is a reference to paragraph (2) from schedule B (Undertakings given to the Court by the Applicant) to the standard form. This paragraph in the standard form provides: "The Applicant will – (a) on or before [*date*] cause a written guarantee in the sum of £ to be issued from the bank with a place of business within England and Wales, in respect of any order the court may make pursuant to paragraph (1) above; and (b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent." Mr Thorne maintained this was a significant omission as the judge specifically asked if Mr Frenkel was solvent and, in that context, he says that Mr Barden should have drawn the judge's attention to the lack of security in schedule B to the order. Mr Barden's submission in response to this was that the judge did consider this point as, on the draft order, he wrote in manuscript the word "fortify?", which he then crossed out. I accept that this point was considered by the judge.

d. *Paragraph 14.4*: This is a complaint that the words "(for example, if the Respondent provides security or the Applicant does not provide a bank guarantee as provided for above)" were removed from paragraph (8) of schedule B to the standard form. This point ties in with the point made at paragraph 14.3 above. Mr Barden's submission in response to this was that the judge did consider this point (see paragraph 14.3 above), and as for the remainder of para (8) it is included in the

order (see para (6) in schedule B to the order). I accept Mr Barden's submission on this point as well.

e. *Paragraph 14.5*: This is a reference to the removal of paragraph (10) from schedule B to the standard form. Paragraph (10) is in square brackets and provides: ["The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].] There is then a footnote to this paragraph which provides: "Unless the Court directs otherwise this paragraph should be included in Orders for worldwide freezing injunctions." Mr Thorne maintained this was a significant omission which should have been drawn to the judge's attention, particularly in the light of the motion for preliminary injunction which was proceeding before the court in California. Mr Barden's answer to this was that (i) the application was not for a worldwide freezing order, and (ii) the judge knew that Mr Frenkel had made an application for an injunction in California and, as a result, he knew he was not restricting Mr Frenkel from making that application. This may be right, but this omission from the standard form order was not drawn to the judge's attention.

89. The overall thrust of Mr Barden's submissions in response to Mr Thorne's criticisms about the order was that it was "very obvious to everyone including the judge" that the order was not a standard form freezing order. In reply Mr Barden summarised his points as follows:

a. It is well-accepted that not all freezing orders are the same. The practice direction attaches an "example form" which can be modified (paras 6.1 and 6.20), and some provisions are in square brackets.

b. The example form is for a "nuclear" Mareva order freezing all assets up to a specified sum. Certain provisions flow from this eg (i) specified sum; (ii) information provisions; (iii) security; (iv) disposal of assets in the ordinary course of business below maximum sum.

c. The order in this case was fundamentally different. This was because it was not a Mareva order but related to specific assets. This meant that the operative terms were therefore very different. As a result, very few of the terms matched the Example Form – as the judge well understood.

d. The facts of this case can be distinguished from *Greenwich Inc Limited (In administration) v Dowling* [2014] EWHC 2451 (Ch), Peter Smith J. In that case there was a fundamental distinction in that the judge (unlike Kerr J) had been expressly told by counsel that the order he was making was a standard form of freezing injunction (see paragraph 44 of *Greenwich*), whereas that was not the case here (see paragraphs 84 and 85 above).

90. It is established practice that, on a without notice application for a freezing injunction, "Any departure from the standard wording must be drawn to the attention of the judge hearing the without notice application…". This established practice applies to <u>any</u> application for a freezing injunction. It does not matter whether it is an application to freeze specific assets or, as Mr Barden put it, it is an application for a "'nuclear' Mareva order freezing all assets up to a specified sum". In this case Mr Frenkel made an application without notice for a

freezing injunction of specific property. The fact that he did so meant that those representing him were required to, and should have, complied with the practice and drawn any departure from the standard wording to the attention of the judge. They failed to so in respect of paragraphs 11(2), 11(4) in the main body of the standard form, and paragraph (10) in schedule B (see the conclusion set out at paragraph 89 above).

91. Further, the judge was not provided with either:

    a. an order with tracked changes in order to show how the standard form order had been modified in order to produce the order sought on the application, together with annotations explaining the reasons for the changes; or

    b. a schedule to counsel's skeleton argument identifying each and every difference between the standard form order on the one hand, and the order sought by Mr Frenkel on the other, together with the reasons for each and every modification.

If either of these things had been done, then each and every modification, and the reason for it, would have been clear to the judge. Further, it would have avoided the argument that which took place at the hearing before me, namely as to whether any particular modification had been considered by the judge, or whether it had any impact in relation to the hearing. This, as it turned out, was particularly relevant in this case as Knowles J directed that I should hear the Discharge Application, so this was not case where the matter could revert to the judge who made the freezing order (cf what happened in *Greenwich Inc Limited (In administration) v Dowling* [2014] EWHC 2451 (Ch), Peter Smith J).

The return date

92. The return date was on 26 July 2017 before Knowles J. Mr Lyampert and the UK Company gave undertakings to "hold the ring" until judgment was handed down in the Chancery proceedings. In relation to the scope of the order made by Knowles J, paragraph 3 provided that:

> "This Order does not affect the ability of the Respondents to raise such arguments as they see fit, including as to the propriety of the Injunction Application, its supporting evidence and the Order of Kerr J dated 17 July 2017 thereby obtained, such arguments going both to the substantive merits of the Injunction and Discharge Applications and to costs."

93. As I have explained, I was unable to hear the applications in relation to the freezing order on 13 September 2017. The matter was adjourned to the convenience of all parties until 2 and 3 November 2017 and the undertakings given by Mr Lyampert and the UK Company to the court on 26 July 2017 have continued in the meantime.

Events in the litigation in California *after* 17 July 2017: the US Injunction

94. The motion for preliminary injunction was heard by the court in California 1 August 2017. The minutes entered by the county clerk on the same day record that:

> "… the motion is granted as prayed. Moving parties must prepare and serve a proposed order regarding preliminary injunction. The Court's order on motion for preliminary injunction is filed this date."

95. Ms Borlund deals with the grant of the preliminary injunction by the Californian court at paragraphs 6 to 10 of her second witness statement dated 25 October 2017. She explains that on 1 August 2017 the court "issued an order granting the Motion in principle and ordering Mr Frenkel, as the prevailing party, to prepare a proposed order." She then explains that in August two competing orders were submitted to the court and the parties "are waiting for the court to determine the full form of the injunction order. Only once that is done can Mr Frenkel then give the required security (in an amount to be determined by the Court) and the injunction order then be served on Mr Lyampert." In the light of this, Mr Barden submitted that Mr Frenkel does not have "an effective US injunction" because the form of order has not yet been finalised by the court in California.

96. Nevertheless, there does not appear to be any dispute that an injunction has been granted against Mr Lyampert. Mr Lyampert's explanation as to the effect of the injunction is set out in Mr Rans' third witness statement dated 27 October 2017. Mr Rans has provided a more detailed explanation about the effect of the order:

> "[22.]… Under California law, the injunction ("the US Injunction") therefore became effective on 1 August 2017 ("this date") in the form set forth in the US Injunction Motion ("as prayed")… The present text of the US Injunction (granted "as prayed" on 1 August 2017) is binding on Mr Lyampert, and would be binding on any other parties who are on notice of it, without any geographical (territorial scope) limitations.
>
> [23.] The operative portion of the US Injunction states: "*A Preliminary Injunction is hereby issued prohibiting defendant Arkadiy Lyampert ("Lyampert") or his agents or those acting in concert with or in support of Lyampert from selling, assigning, transferring, encumbering, or disposing of any of Lyampert's property including but not limited to Lyampert's interest in [the UK Company]*." The term "Preliminary" has the meaning that the injunction is in force until the conclusion of the underlying proceedings, namely the Fraudulent Conveyance Litigation. Those proceedings are presently in initial stages.
>
> [24.] Per the procedure set by the court on 1 August 2017, Mr Frenkel has filed the proposed text of the final written order which modifies the original ("as prayed") text by allowing Mr Lyampert to spend $3,000 on living expenses, and Mr Lyampert had filed his objects to this proposed text. The limitations on disposition by Mr Lyampert of assets relating to [the UK Company], or any other assets, are not in dispute. The court has not issued the revised written order yet, but based on discussions with court staff, I believe it will do so soon. In the meantime, the present terms of the standing minute of order of 1 August 2017 are binding on Mr Lyampert and all other parties worldwide who are on notice of it.
>
> [25.] The US Injunction has the effect of operating worldwide and has no geographic limitations, both in regard to Mr Lyampert's assets and any persons taking actions with respect to such assets. This is particularly highlighted by the direct mention of a UK-based asset in the text of the US Injunction. The proposed final written order submitted by Mr Frenkel, and the objections filed by Mr Lyampert, do not seek to limit the territorial scope of the US Injunction.
>
> [26.] Depending on circumstances, a breach of the injunction by Mr Lyampert or any other party may be deemed contempt of court. In California, if the court deems actions

> of any party contemptuous, such determination has potential penal ramifications for that party. The enforcement or punishment for contempt, and the determination of penal ramifications, are subject to California Penal Code 166 which makes it a crime to violate a court order, and can carry a sentence of up to 6 months in prison…. The current US Injunction, including the minute of order of the court dated 1 August 2017, is a lawfully issued court order pending trial in the underlying US proceedings. In particular, given the clear language of the US Injunction (both in its current form and after any of the proposed revisions) Mr Lyampert, or any third party notified of the US Injunction, would be in contempt of the US court if he effectuated a transfer or dissipation of Mr Lyampert's equity interest in [the UK Company], or any other property of Mr Lyampert that was located in the UK, the US, or anywhere else in the world. There are no listed limitations in the territorial scope in which the various sections of CPC 166 and, in particular CPC 166(a)(4), operate.
>
> [27.] Under California Civil Procedure Rules, Mr Frenkel is free to apply to modify the existing (or forthcoming) order of the court as to the US Injunction, which could include any requests to further expand the scope of the US Injunction.
>
> [28.] The US Injunction is presently set to operate until the Fraudulent Conveyance Litigation is completed. Under the current scheduling order, the trial in this matter is likely to be scheduled for Fall 2018…"

97. Finally in this section of his witness statement Mr Rans concluded by saying that:

> "[30.] I have reviewed the three successive Orders in the UK Enforcement Proceedings dated 17 July 2017, 26 July 2017 and 13 September 2017 which granted, and then twice extended, the operation of the UK Injunction. With the exception of the prohibition on [the UK Company] issuing additional shares (paragraph 5(b) of the Order dated 17 July 2017; paragraph 2(b) of schedule A of the Orders dated 26 July 2017 and 13 September 2107), the US Injunction appears to operate to prohibit at least the same conduct, as well as other conduct not prohibited by the UK Injunction."

98. Ms Borlund did not file any further evidence in response to Mr Rans' third witness statement disagreeing with the analysis of the position I have set out above.

The Discharge Application and the Injunction Application

99. On 24 July 2017 Mr Lyampert applied to discharge the freezing injunction for the reasons set out in the witness statements of David Edward Foster ("**Mr Foster**") dated 24 July 2017 and Eric John Rans ("**Mr Rans**") dated 24 July 2017. Mr Foster is a partner at O'Melveny & Myers LLP, and Mr Rans is a partner at Michelman & Robinson LLP, a firm of US lawyers.

100. The grounds of the Discharge Application are drawn together in Mr Thorne's skeleton argument as follows:

> "The [freezing injunction] should be discharged for the following (alternative) reasons: [1] It was obtained through improper means: (i) material non-disclosure; (ii) use of inadmissible material; (iii) breach of undertaking. [2] Mr Frenkel does not satisfy the necessary test for an injunction: (i) no real risk of dissipation; (ii) not just and convenient

in all the circumstances. [3] It is duplicative, there now being an injunction in place in the US covering Mr Lyampert's interest in the UK Company."

101. Mr Strelitz has summarised the UK Company's position in the opening paragraph of his skeleton argument in these terms:

"[The UK Company] remains locked into ongoing litigation between [Mr Frenkel] and [Mr Lyampert] despite judgment having been handed down on 13 September 2017. This time [the UK Company] is included by reason of a desire on the part of [Mr Frenkel] to prohibit [the UK Company] from being able to run and structure its business as it seems fit because of [Mr Frenkel's] pursuit of a judgment he has obtained against [Mr Lyampert] in the USA."

102. Following correspondence from the UK Company's solicitors on 18 October 2017 Mr Frenkel issued an application notice for the continuation of the freezing injunction in terms which were "substantially similar" to the order made by Kerr J on 17 July 2017. This was "the Injunction Application" before me. Further, as Mr Barden emphasised to me, the relief sought in Injunction Application (and the relief granted by Kerr J) is broader than the relief sought at paragraph 2 of the motion for preliminary injunction, as it prevents Mr Lyampert from diminishing the value of the one ordinary share registered in this name, and also freezes the sum of £560,000 in dividends the UK Company said it was holding pending the outcome of the Chancery proceedings.

103. The draft order annexed to the application notice included a new paragraph 4, namely:

"[4.] In the event that the [UK Company] proposes to issue further shares to the employees of the Company:

(a) It shall provide written proposals to [Mr Frenkel] and to [Mr Lyampert] setting out the proposals, including (i) the identity of the individuals to whom shares are to be issued, and (ii) the terms on which they are to be issued and (iii) the commercial rationale for the issue.

(b) If [Mr Frenkel] and [Mr Lyampert] consent to the proposed share issue, [the UK Company] shall be entitled to make the share issue notwithstanding the provisions of paragraph 2(b) above).

(c) In the event that [Mr Frenkel] and/or [Mr Lyampert] do not consent to the proposed share issue within 7 days of receipt of the proposal, [the UK Company] shall have liberty to apply to the Court for permission to make the share issue."

104. The UK Company's position at the hearing before me was therefore that:

a. The freezing injunction ought not to have been granted against the UK Company in the first place such that "it militates against the granting of the relief sought by C within [the Injunction Application]".

b. There should be no order going forward which directly or indirectly precludes the UK Company from being able to operate or structure/re-structure itself going forwards as the grant of such an order would not be just and convenient.

c. The UK Company should be able to recover its costs as a result of the freezing injunction, and the Injunction Application from Mr Frenkel.

105. In addition to the evidence of Mr Potts and Ms Borlund dated 14 July 2017, and the evidence of Mr Foster and Mr Rans dated 24 July 2017, a total of 16 further affidavits and witness statements were filed in relation to the Discharge Application and the Injunction Application.

Relevant law

106. There is no dispute about the principal criteria to be applied in order to grant a freezing order. First, the claimant must have a good arguable case against the defendant. This point is not in dispute. Mr Frenkel has a good arguable case that he is owed the US Judgment and, on 17 July 2017, he started a fresh claim in the English court to enforce the US Judgment. Mr Lyampert's defence is that the claim should be stayed pending the outcome of the US appeal. Second, there must be a real risk that judgment will go unsatisified by reason of disposal by the defendant of his assets. In relation to this, the test is whether objectively there is a risk of dissipation such that there is a real risk that the judgment may go unsatisfied. That is an objective test – it is not necessary to show "nefarious intent". Third, it should be just and convenient in all the circumstances to make the order (section 37 of the Senior Courts Act 1981; *Candy v Holyoake* [2017] EWCA Civ 92, per Gloster LJ at para [34]).

107. The obligations on any party seeking a without notice freezing order are very well established. Counsel referred me to the notes at paras 25.3.5 and 25.3.6 of *Civil Procedure – 2017* (Vol 1, p 789), *Gee* at para 8-004, 8-014, 9-004. I was also referred to the well-known speech of Scrutton LJ in *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 KB 486, CA at 514; *Millhouse Capital UK Ltd v Abramovich* [2008] EWHC 2614 (Ch), Christopher Clarke J; *Memory Corporation Plc v Sidhu (No. 2)* [2000] 1 WLR 1443, CA; *Greenwich Inc Limited (in administration) v Dowling* [2014] EWHC 2451 (Ch), Peter Smith J; and *Anglo Financial SA v Goldberg* [2014] EWHC 3192 (Ch), Roth J.

108. Further, in the context of the facts of this case, it is worth remembering that:

> "as a matter of basic principle no order should be made in civil proceedings without notice to the other side unless there is a very good reason for departing from the general rule that notice must be given (e.g. where to give notice might itself defeat the ends of justice). To grant an interim remedy in the form of an injunction without notice "is to grant an exceptional remedy" (para 25.3.5 of *Civil Procedure – 2017*, p. 789).

109. The notes in *The White Book* continue on p. 790 by explaining that:

> "It is well-established that an applicant who applies for an interim remedy without notice to the respondent is under a duty to investigate the facts and fairly present the evidence on which they rely… The applicant must disclose fully to the court all matters relevant to the application, including all matters whether of fact or law, which are, or may be, adverse to it. In *Memory Corporation Plc v Sidhu (No. 2)* [2000] 1 WLR 1443, CA, Mummery LJ said (at p.1459[-1460]) it is a "high duty" and requires the applicant to

make full, fair and accurate disclosure of material information to the court and to draw the court's attention "to significant factual, legal and procedural aspects of the case… The reason for the requirement of full and frank disclosure is because the court is wholly reliant on the information provided by the claimant …" (underlining added)

110. In relation to the passage I have underlined, Mr Strelitz, counsel for the UK Company, drew my attention to the following principles derived the speech of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, at 1356-1357 (quoted in *Anglo Financial SA v Goldberg* [2014] EWHC 3192 (Ch) at para 85):

a. The duty of the applicant is to make "a full and fair disclosure of all the material facts".

b. 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.

c. 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.

d. 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 (i) the nature of the case which the applicant is making when he makes the application; and (ii) the order for which application is made and the probable effect of the order on the defendant; and (iii) the degree of legitimate urgency and the time available for the making of inquiries.

111. Likewise, Mr Thorne, counsel for Mr Lyampert, reminded me of the important passage in Donaldson LJ's judgment in *Bank Mellat v Nikpour* [1985] FSR 87 at 92:

"The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva Injunction. It is, in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked".

112. It is also important to keep in mind what was said by Walker LJ in *Memory Corporation Plc v Sidhu (No. 2)* [2000] 1 WLR 1443, CA at 1455, namely that:

"The correct view, it seems to me, is that the advocate's individual duty to the court, and the collective duty to the court, on a without notice application, of the plaintiff and his team of legal advisers are duties which often overlap. Where they do overlap it will usually be unnecessary, and often unprofitable, to insist on one categorisation to the exclusion of the other."

Material non-disclosure

113. I have reached the clear view that Mr Frenkel was in breach of his duty as an ex parte applicant before Kerr J.

114. First, the most obvious breach to provide full and frank disclosure was that the judge was told that "the UK Lawyers' understanding" was that Mr Frenkel's motion for the preliminary injunction had not been served on Mr Lyampert. That may have been their understanding, but it was an incorrect understanding and the evidence that the application had been personally served on Mr Lyampert's US lawyer on 21 June 2017 was in the exhibit to Ms Borlund's affidavit before the court on 17 July 2017. However, Mr Frenkel's legal team did not notice this, and the judge was not shown Ms Fenster's proof of service dated 21 June 2017. The judge should have been told about this because Mr Frenkel's application against Mr Lyampert in California was also for a freezing order and Mr Lyampert had been on notice of this application for 3.5 weeks.

115. In the course of his submissions I put to Mr Barden that, if the judge had known that the motion for preliminary injunction had been served, then he would have asked why the application before him was not being made on notice. Mr Barden accepted that the judge might have asked that question, but he submitted Kerr J would not have required Mr Frenkel to give notice of the application to Mr Lyampert before granting the relief sought. I disagree. It was highly material for the judge to know that the motion for preliminary injunction was an inter partes application, which had been served on Mr Lyampert in California over three weeks earlier. This was because it obviously goes to the issue as to whether, objectively, there was a real risk that Mr Lyampert would dissipate his assets. It is not, for example, suggested in the evidence that Mr Lyampert, or indeed the UK Company, had done anything between 21 June and 17 July 2017 which had led to a different, or a new, risk of dissipation on the part of Mr Lyampert.

116. Further, Mr Thorne made this point in his skeleton argument:

> "This is particularly relevant as it confirms that, at the time of the UK without notice hearing, Mr Lyampert had already been aware of Mr Frenkel's attempt to obtain similar relief in the US and had not taken any steps to dissipate his assets in the meantime – and puts into doubt the need for the UK application for similar relief to have been brought without notice at all."

I agree with this submission, although I would go further. In the circumstances of this case I do not think there was in fact any justification for Mr Frenkel to have made his application before the judge without notice. Further, to my mind if the judge had been told that the motion for preliminary injunction had been served, then it seems to me he would not have acceded to Mr Frenkel's application, and he would have told Mr Frenkel and his advisers that if they wished to pursue the application, then they should do so on notice to Mr Lyampert and the UK Company.

117. Second, Mr Frenkel and his team of legal advisers failed to make proper inquiries in relation to the various steps that had taken place in the Fraudulent Conveyance Claim, which had been issued in California in May 2016. If they had done so, the following material facts would have been apparent to them which should then have been disclosed to the judge:

a. Mr Frenkel's motion for preliminary injunction was, and always had been, an inter partes application. On 28 June 2017 the court dismissed Mr Frenkel's application to expedite the hearing date of this application to 14 July 2017 because there was no imminent risk of harm. That was the reason the application was not heard on 14 July 2017, and remained in the list for 1 August 2017. My analysis of what the judge should have been told is set out at paragraphs 67 and 68 above.

b. The reasons why Mr Frenkel maintained that there was no longer any confidentiality attaching to Mr Lyampert's responses to the post-judgment interrogatories, so that they could be shown to the judge, whereas they could not be shown to the judge at trial in the Chancery proceedings. The reasons now relied on to explain this emerge from the hearing in California on 28 June 2017. The basis for this change of circumstance should have been explained to the judge, together with the fact that it was possible Mr Lyampert might argue his responses to the post-judgment interrogatories were still covered by the protective order and therefore confidential. My analysis of what the judge should have been told is set out at paragraphs 73 to 75 above. Further, it seems to me that this is a point which would have re-inforced the need for the application to be heard on notice.

c. That Mr Frenkel's *ex parte* application for an attachment order against Mr Lyampert had been dismissed in May 2016 and one of the reasons for this was there was insufficient evidence of irreparable harm (see paragraphs 17 to 19 above).

118. Mr Frenkel's legal advisers have not provided much by way explanation in relation the non-disclosures identified above. The most there is has been set out in Mr Potts' second affidavit dated 25 July 2017 in which he seeks to explain the failure to tell the judge the motion of preliminary injunction had been served. The explanation provided was that: "the trial in the Chancery proceedings commenced on 19 June 2017 and concluded on 28 June 2017 and so I was not paying close attention at the time to the details of the steps being taken in the US Proceedings." The difficulty with this is that, after the trial in the Chancery proceedings finished, there were 12 clear working days before the application was made to Kerr J on 17 July 2017. That, it seems to me, was ample time to make proper inquiries in relation to "the details of the steps being taken in the US Proceedings". That is particularly so when the steps in question all took place on or before 28 June 2017.

119. Third, the judge was not given the complete picture in relation to the UK Company's intention to issue shares key staff in the future (paragraphs 53, 60 to 63 above). The judge should have been taken to all of Mr Bell's evidence in this regard (which was very brief) on Day 6 of the trial in the Chancery proceedings. The potential impact that the injunction might have on the UK Company, and the points that the UK Company might have made in relation to the application, would then have been understood by the judge at the without notice hearing.

120. Fourth, the modifications to the standard form freezing injunction were not all drawn to the judge's attention (see paragraphs 88 to 91 above). Fifth, Mr Frenkel failed to serve his application for the continuation of the freezing injunction "as soon as practicable" after 17 July 2017. Rather, it took two months for this application to be issued and served.

121. The breaches identified at paragraphs 115 to 119 above were substantial breaches of Mr Frenkel's obligation to provide full and frank disclosure at the without notice hearing before

Kerr J. The fourth and fifth points are also breaches of the obligation of an ex parte applicant but, in the overall context of case, not as significant as the substantial breaches of the full and frank disclosure obligation.

Consequences

Legal principles

122. The principles about how the court should respond to a breach of the duty of an *ex parte* applicant were examined in *Dar Al Arkan Real Estate Development Co v Al Refai* [2012] EWHC 3539 (Comm), Andrew Smith J, 12 December 2012 at paras [148] and [149]:

> "[148.] The principles about how the court should respond to a breach of the duties of an *ex parte* applicant were usefully set out by Mr Alan Boyle QC, sitting as a Deputy High Court Judge, in *Arena Corporation Ltd v Peter Schroeder*, [2003] EWHC 1089 (Ch) at para 213. The general rule is that the court will discharge any orders that were granted and will not renew them until trial. In *Millhouse Capital UK Ltd v Sibir Energy Plc*, [2008] EWHC 2614 (Ch) Christopher Clarke J said (at para 104) that "such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him". However, the court has jurisdiction, albeit one which it exercises sparingly, to continue an order or to replace an order that it discharges with a new order to similar effect. While the court must have proper regard to the need to protect from abuse the administration of justice and in particular its jurisdiction to grant orders *ex parte*, it will not apply the general rule so rigidly as to allow it to work injustice.
>
> [149.] When making decisions of this kind the court should, of course, weigh all relevant considerations, and they include importantly these:
>
> (i) The culpability of the applicant (and his advisors) with regards to the breach, and in particular the extent of the breach and whether it was deliberate;
>
> (ii) The importance and the significance to the outcome of the application of the matters not disclosed to the court;
>
> (iii) The merits of the applicant's case; and
>
> (iv) The nature of the order obtained *ex parte.*
>
> When assessing this last consideration, the court has regard to the consequences of the order for the person(s) against whom it is to be made: see *Payabi v Armstel Shipping Corp (The "Jay Bola")*, [1992] QB 907, 918B-D. Christopher Clarke J observed in the *Millhouse Capital* case (loc cit at para 104) that the general rule is applied particularly strictly in the case of freezing and seizure orders."

Conclusion

123. My conclusions mean that there were numerous breaches of duties on the part of Mr Frenkel as an *ex parte* applicant, and I regard the non-disclosure as serious and significant. This is particularly so given the judge was only prepared to grant the injunction, as he put it, by a "hair's breadth". Mr Frenkel's UK legal team, it appears, took their eye off the ball in relation to the litigation in California because, until 28 June 2017, they were immersed in the trial of the Chancery proceedings. That is no excuse. It is quite clear to me that if the judge had been provided with all the facts in relation to Mr Frenkel's application for an injunction against Mr Lyampert in California he would not have granted the freezing injunction on 17 July 2017. In fact, given what had been happening in relation to the Fraudulent Conveyance Claim in California, there was no reason for Mr Frenkel to make the application to Kerr J without notice at all.

124. In terms of the merits of the Injunction Application, there is no dispute that Mr Frenkel has a good arguable case. However, in relation to risk of dissipation, once the full facts are before the court, it is clear that there was no evidence that Mr Lyampert did anything to dissipate his assets once the notice of motion for preliminary injunction had been served on him in California on 21 June 2017. There was no new evidence to justify a without notice application against Mr Lyampert before the English court on 17 July 2017. This, in turn, meant there was no evidence to justify the injunction against the UK Company as a third party based on the *Chabra* jurisdiction (see *Civil Procedure – 2017* (Vol 2) at para 15-63 (p. 3003)). Further, there is nothing in the evidence to explain why Mr Frenkel is now concerned Mr Lyampert's shareholding in the UK Company might be diluted. The allegation that Mr Lyampert might transfer "his assets to various individuals and other companies in an effort to avoid payment of the [US] judgment" has been on the cards since the Fraudulent Conveyance Claim was issued in March 2016. However, there has been no change to the shareholding in the UK Company since that date.

125. Given that Mr Frenkel lost the Chancery proceedings, he is now concerned as to what will happen to the £560,000 of so-called dividends held by the UK Company pending the outcome of that dispute, and to which Mr Lyampert is or may be entitled. The position here is that I have evidence before me that Mr Lyampert's interest in any property, including the UK Company, is now subject to the preliminary injunction in California, and that injunction is enforceable with proceedings for contempt of court (see the evidence of Mr Rans; paragraphs 96 and 97 above). This, of course, calls into question whether there is a proper basis for granting a further injunction against Mr Lyampert in this jurisdiction. To my mind, there is now an injunction against Mr Lyampert in California which, according to Mr Rans' evidence, bites on the dividends. In these circumstances I do not see why it would be just for this court to grant an injunction against Mr Lyampert as well.

126. The UK Company has been at pains to remain neutral in relation to the dispute between Mr Frenkel and Mr Lyampert and I referred to this in the Trial Judgment (see paragraphs 59, and 117 to 120). The UK Company has remained neutral in relation to some aspects of the Injunction Application. However, in other respects it has opposed Mr Frenkel's application to continue the injunction. It seems to that, as Mr Strelitz submitted, there is a real concern that paragraph 2(b) of the draft order (set out at paragraph 44 above) has the potential to affect the future viability of the UK Company going forward. Further, this concern is not met by paragraph 4 of the draft order, which is set out at paragraph 103 above. The reasons are as follows:

a. In 2010 Mr Frenkel was involved in setting up a company called IT Creations Inc, which is mentioned in the Trial Judgment. IT Creations Inc is, according to Mr Bell, "a large competing entity" to the UK Company with which "[Mr Frenkel] is associated" (para 17 of Mr Bell's witness statement dated 24 July 2017). If this is right, then one can understand the UK Company's concern if, in order to issue shares to key staff, it has to provide to Mr Frenkel with its proposals for doing so, together with the identity of the staff which it wishes to issue shares to, the terms of the share issue, and the "commercial rationale" for the share issue. That kind of information is very likely to be commercially sensitive and, on the evidence before me, I do not see why the UK Company should be providing it to Mr Frenkel.

b. However, if I am wrong about this and it was reasonable for Mr Frenkel to ask for this information, Mr Frenkel has a track record for being unreasonable in his approach to litigation. It was for this reason that he was visited with indemnity costs orders (which have not been appealed) in relation to the costs of Mr Lyampert and the UK Company in the Chancery proceedings. In the context of this case, it is not difficult to see that, even if Mr Frenkel is provided with the categories of information identified in paragraph 4(a) of the draft order, that he will ask more questions or will refuse to consent to the share issue. The UK Company will then need to make an application to the court for permission to issue the shares under paragraph 4(c), in respect of which there will inevitably be cost and delay. I do not see that there is any justification for putting the UK Company in such a position, which could lead to considerable legal expense being incurred.

c. I agree with the submission made by Mr Strelitz that to grant an injunction now against the UK Company in terms which would prevent it from being able to structure its shareholding as it thinks fit in accordance with its articles of association would be to ignore the seriousness of the non-disclosure on behalf the applicant, Mr Frenkel.

127. The freezing injunction must be discharged. Further, having regard to the considerations I have identified above, I am quite satisfied that I should refuse Mr Frenkel's application for a further injunction and the Injunction Application must be dismissed. This is simply not a case where the court's sparing jurisdiction to continue or re-grant an injunction upon the discharge of a freezing order should be exercised.