Neutral Citation Number: [2019] EWHC 2510 (Comm)

Case No: CL-2019-000477

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2019

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

- -

Between :

IVY TECHNOLOGY	**Claimant**
- and -	
(1) MR BARRY MARTIN	**Defendants**
(2) MR PAUL BELL	
(3) AXL MEDIA LIMITED (trading as PREMIER PUNT)	

- -
- -

Dominic Happé (instructed by **Malvern Law**) for the **Claimant**
Adam Solomon QC (instructed by **Hill Dickinson LLP**) for the **Second Defendant**
The First and Third Defendants did not appear and were not represented

Hearing date: 5 September 2019

- -

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.

.....

Andrew Henshaw QC (sitting as a Judge of the High Court)

Mr Andrew Henshaw QC :

(A) INTRODUCTION 2
(B) BACKGROUND FACTS AND IVY'S CLAIMS AGAINST THE DEFENDANTS 3
(C) GOOD ARGUABLE CASE AGAINST MR BELL 3
(1) Conspiracy 4
(a) Conspiracy to make misrepresentations 8
(b) Conspiracy to breach non-competition covenant 10
(2) Procuring breach of non-competition covenant 12
(D) RISK OF DISSIPATION 13
(E) NON-DISCLOSURE/MISREPRESENTATION 22
(F) IVY'S FALLBACK POSITION 26
(G) CONCLUSION 26

(A) INTRODUCTION

1. This judgment follows a hearing on the return date of a freezing order granted by Knowles J at a without notice hearing on 29 July 2019. The order requires the Defendants not to remove from the jurisdiction or dispose of assets up to the value of £4 million.

2. The Claimant ***("Ivy")*** applies for the continuation of the freezing order (substantially in the same form, with minor variations) as against all Defendants and against a Fourth Respondent, Mrs Lisa Martin.

3. The First Defendant ***("Mr Martin")*** consented to the continuation of the freezing order against him in varied form. The Third Defendant ***("Premier Punt")*** did not consent, but issued no application and indicated that it did not intend to appear on the return date. The Fourth Respondent consented to the grant of a freezing order against her in agreed form.

4. The Second Defendant ***("Mr Bell")*** applies by notice dated 23 August 2019 for the freezing order to be discharged against him on the bases that:

   i) there is no good arguable case against him: he says Ivy's case against him is based entirely on surmise without any direct evidence;

   ii) there is no risk of dissipation: Mr Bell's evidence is that he has assets of over £100 million, including assets in this jurisdiction far exceeding £4 million, and he says there is no evidence of any risk of dissipation; and

   iii) there was material non-disclosure and/or misrepresentation by Ivy at the hearing before Knowles J.

5. For the reasons set out below, I have come to the conclusion that the freezing order should be discharged as against Mr Bell.

(B) BACKGROUND FACTS AND IVY'S CLAIMS AGAINST THE DEFENDANTS

6. The claim arises in connection with the sale of an on-line gambling business known as "***21Bet***" by Mr Martin to Ivy. By a Sale and Purchase Agreement dated 4 April 2019 ***("the SPA")*** Ivy agreed to buy, and Mr Martin agreed to sell, the shares in five companies who together constituted the business. Mr Bell was not a party to the SPA, but was a 50% beneficial owner of the business (via beneficial interests in the five companies). Ivy alleges that Mr Bell conspired with Mr Martin to make misrepresentations in connection with the sale, and to breach a non-competition covenant in the SPA ***("the non-competition covenant")***; and that Mr Bell also procured Mr Martin's breach of the non-competition covenant.

7. In overview, the claims Ivy makes against the Defendants are (adopting Ivy's summary for present purposes) that:

   i) Mr Martin made representations as to the financial status of the 21Bet business that were fraudulent, or negligent or within section 2(1) of the Misrepresentation Act 1967, and which induced Ivy to enter into the SPA;

   ii) Mr Martin has breached provisions of the SPA, including in particular (a) breach of the non-competition covenant via a competing business, Premier Punt, which is the Third Defendant; and (b) breach of warranties as to the financial status of the business;

   iii) Mr Bell is liable for procuring a breach of the Agreement and/or for unlawful means conspiracy to injure Ivy; and

   iv) Premier Punt is run by or as a vehicle for Mr Martin, and possibly also Mr Bell, and is liable for procuring a breach of the SPA and/or for unlawful means conspiracy to injure Ivy.

   Ivy also submits that, on the basis of Mr Bell's evidence, he was and is involved in the acquisition with Mr Martin of a further competing business, Incentive Gaming Limited ("***Incentive***").

(C) GOOD ARGUABLE CASE AGAINST MR BELL

8. It is common ground that Ivy has to show a "*good arguable case*" against Mr Bell, meaning "*one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success*" (*Ninemia Maritime v Trave Schiffartgesellschaft, The "Niedersachsen"* [1983] Lloyd's Rep 600, 605 per Mustill J).

9. Ivy alleges that in the course of negotiations leading up to the SPA, which started in June 2018, Mr Martin made representations including that (a) the EBITDA (earnings before interest, tax, depreciation and amortisation) of the 21Bet business in 2018 were £1.6 million (based on income stream figures provided on 27 August 2018) and (b) the business was profitable and self-sustaining from its revenue, such that Mr Martin would be able to earn considerable sums under earn-out provisions contained in the draft SPA: a point which Ivy says was discussed by Mr Martin and Mr Bell at a meeting with Ivy in Prague on 1 October 2018.

10. In addition, Ivy alleges against Mr Martin breach of various representations contained in the SPA itself.

11. Ivy's pleaded case against Mr Bell (leaving aside a draft amended claim form to which I was referred but for which I was not asked to give permission to amend) is that Mr Bell:

    i) *"conspired with [Mr Martin] to commit unlawful acts and use unlawful means, namely to make the Representations [i.e. those outlined in the two preceding paragraphs above] to [Ivy] fraudulently and/or negligently and/or within the terms of the Misrepresentation Act 1967 and/or to induce [Ivy] to enter into the [SPA] when [Mr Martin] was in breach of the [SPA] and/or to breach the [non-competition] Covenant"*; and

    ii) *"procured [Mr Martin's] breach of the [non-competition] Covenant"*.

    I consider each of these in turn below.

(1) Conspiracy

12. Conspiracy to injure must be pleaded to a high standard, particularly where the allegations include dishonesty:

    i) Allegations of conspiracy to injure "*must be clearly pleaded and clearly proved by convincing evidence*" (*Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260, 267).

    ii) The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particularity: *Secretary of State for Trade and Industry v. Swan* [2003] EWHC 1780 (Ch) §§ 22-24; CPR PD 16 § 8.2 in respect of the obligations on a party pleading dishonesty; *Mullarkey v. Broad* [2007] EWHC 3400 (Ch), [2008] 1 BCLC 638 §§ 40-47 on the burden and standard of proof for such claims and reiterating the well-established principle that an allegation of dishonesty must be pleaded clearly and with particularity (citing *Belmont Finance Corp v Williams Furniture* [1979] Ch 250, 268).

    iii) Unlawful means conspiracy is a grave allegation, which ought not to be lightly made, and like fraud must be clearly pleaded and requires a high standard of proof: *CEF Holdings v. Mundey* [2012] EWHC 1534 (QB), [2012] IRLR 912 § 74.

    iv) Where a conspiracy claim alleges dishonesty, then *"all the strictures that apply to pleading fraud"* are directly engaged, i.e. it is necessary to plead all the specific facts and circumstances supporting the inference of dishonesty by the defendants: *ED&F Man Sugar v. T&L Sugars* [2016] EWHC 272 (Comm).

    v) As to the substantive elements of the tort:

    > "To establish liability for assisting another person in the commission of a tort [common design], it is necessary to show that the defendant (i) acted in a way which furthered the commission of the tort by the other person and (ii) did so in

> pursuance of a common design to do, or secure the doing of, the acts which constituted the tort.
>
> …
>
> The elements of this tort [conspiracy] are a combination or agreement between the defendant and another person pursuant to which unlawful action is taken which causes loss or damage to the claimant and is intended or expected by the defendant to do so (whether or not this was the defendant's predominant purpose)." (*Marathon Asset Management LLP v. Seddon* [2017] IRLR 503 §§ 132 and 135)

13. The conspiracy allegation in the present case includes, but is not limited to, an agreement to make dishonest misrepresentations. It also includes an alternative allegation of an agreement to make representations negligently and/or within the terms of the Misrepresentation Act 1967. There may be some conceptual difficulty about the idea of an agreement to make representations honestly but negligently or (under section 2(1) of the 1967 Act) without reasonable grounds for believing them to be true. However, for present purposes I think it arguable that such an agreement can exist: at least in theory at least one might make an agreement to make statements without due care, even if in practice such an agreement would be hard to distinguish from an agreement to act recklessly (hence potentially falling within the scope of fraudulent misrepresentation).

14. Another feature of the present case is that the SPA contained at § 15.1 an 'entire agreement' clause indicating that the SPA superseded all prior negotiations and that no representation not set forth in it had been relied on by either party. However, aside from the point that such a clause would probably not prevent liability for fraudulent misrepresentation, clause 15.1 is expressly subject to § 7.28 of the SPA, which contained a warranty by Mr Martin that:

> "… neither this Agreement nor any other agreement, document, certificate, information or statement furnished to the Purchaser by or on behalf of the Companies and/or the Shareholder in connection with the transactions contemplated hereby contain any untrue statement of fact or omit to state a fact (i) necessary in order to make the statements contained herein or therein not misleading, (ii) required for providing a true an[d] accurate status and situation of the Companies, and (iii) related to the transactions contemplated hereby and/or in order to allow the Purchaser to make a decision as to whether to enter into this Agreement."

15. It is therefore possible, depending on the circumstances, for non-fraudulent misrepresentations outside the SPA to give rise to liability.

16. It is relevant to record an issue raised about the adequacy of Ivy's plea of knowledge. The Particulars of Claim include allegations that Mr Bell *"knew or should be taken to know"* that the SPA contained certain provisions, and *"was aware (or must be taken to have been aware)"* that representations alleged to have been made at the Prague

meeting were untrue. These allegations contain an ambiguity which I consider will require clarification. The reference to that which Mr Bell should be *"taken to"* have known may invite an inference of actual knowledge, or it may allege constructive knowledge i.e. that which Mr Bell ought to have known. On the former basis, the words *"or should be taken to know"* and *"or must be taken to have been aware"* are strictly redundant. On the latter basis, the plea is inadequate as a plea of knowledge for the purposes of deceit (see e.g. *Paragon Finance v D&B Thakerar* [1999] 1 All ER 400,407: an allegation that a defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court finds there was actual knowledge), unless perhaps what is intended is a plea of actual knowledge with a separate alternative plea of constructive knowledge. It is notable, however, that the phrases *"taken to know"* and *"taken to have been aware"* differ from the common formulation *"ought to have known"*, and are more indicative of inferred actual knowledge. On that basis, and because I consider it arguable that liability could arise in the absence of dishonesty in the present case (see §§ 13-15 above), I am content to proceed on the basis that this point does not prevent Ivy from having a good arguable case, but Ivy should ensure that it is addressed in the near future.

17. Pending disclosure, Ivy pleads a series of matters by way of particulars of the conspiracy allegation referred to in § 11(i) above. No details are provided of the date or place of the alleged agreement or the means by which it is said to have been made, though in submissions Mr Bell's counsel indicated that it must have occurred at some time before the Prague meeting on 1 October 2018. The matters relied on, in Ivy's Particulars of Claim and witness evidence, include that:

    i) no-one has so far disputed that Mr Martin made the representations alleged;

    ii) Mr Bell was the beneficial owner of 50% of the shares in the 21 Bet business;

    iii) Mr Bell has worked closely with Mr Martin for a number of years in the online gambling sector, including a venture known as "*666Bet*", and closely enough for Mr Bell to invest initially £1 million in the 21Bet business;

    iv) Mr Bell also made or facilitated loans to the business totalling £2.5 million, and then made regular further – and regular – cash injections totalling about £670,000 over the period from May 2018 to March 2019;

    v) Mr Bell or a company said by Ivy to be controlled by him, Simplify Business Limited ***"(SBL")***, received a significant part of the pre-payment Ivy made for the purchase of the business. It was strongly in Mr Bell's interests that Ivy should enter into and make payment under the SPA because that payment would enable Mr Bell to be repaid;

    vi) Mr Bell attended the meeting in Prague and "*took part in … discussions and representations*" which proceeded on the basis of the EBITDA figures previously provided;

    vii) Mr Bell *"was aware (or must be taken to have been aware) that [those discussions and representations] were untrue (not least from his regular provision of funds)"*. He provided funds *"on an almost weekly basis to pay*

cash VIP customers, suppliers, outstanding rent and salaries", as well as legal fees, and *"was accordingly aware that the Business was not profitable and self-sustaining"*. Further, Mr Bell was told the purpose for which he was being asked to inject funds, as exemplified by an email of 9 October 2018 to him which requested funds for various specific purposes;

viii) Mr Bell also *"knew or should be taken to know that the [SPA] contained provisions relating to and verifying the financial position of the Business and a provision to the same or similar effect as the Non-Compete Covenant (such being a matter of course in any agreement for the sale of such a business)"*;

ix) after the SPA, Mr Bell took active steps to help Mr Martin and/or Premier Punt find offices for the competing business;

x) Mr Bell was also involved with Mr Martin in planning the purchase of Incentive, whose intended owner and/or CEO was Mr Bell's daughter, a person with no experience in the online gambling industry, leading to the suggested inference that the Incentive business is being carried on by Mr Martin and/or for the benefit of Mr Martin and/or Mr Bell; and

xi) Ivy says it was thus the plan of Mr Martin and Mr Bell to induce it to pay for the 21Bet business while they continued to operate or be concerned in a similar and competing business.

18. Mr Bell strongly denies these allegations. He makes *inter alia* the points that:

i) though he was a 50% beneficial owner of the 21Bet business, he had limited day to day involvement in its management, relying on Mr Martin to keep him informed only at a high level;

ii) he never saw the SPA, did not know enough about the business's finances to be involved in the due diligence process, and was not told Mr Martin had a non-competition covenant;

iii) he declined Mr Martin's offer to become involved in Premier Punt, and had no involvement save for offering office space for five or six employees on a short term basis as a favour;

iv) he did not personally receive anything from the sale of the business; SBL, a company owned by his daughter in which he has no beneficial interest, received a sum as part payment for a business debt owed to it by the 21Bet business; and

v) Ivy's conspiracy allegation fails to state that Mr Bell was aware of the fact of the alleged representations, or that they were false, or how he is said to have known the contents of the SPA.

19. In addition, Mr Bell submits that as a matter of law, there is no authority which establishes that the unlawful means necessary to establish this form of conspiracy can include breaches of contract: see *Digicel (St Lucia) Ltd v Cable & Wireless plc ("Digicel")* [2010] EWHC 774 (Ch) at Annex I § 65, where after an extensive

analysis of the authorities Morgan J declined to decide the point. I return to this issue later in the context of non-disclosure. It does not, however, prevent Ivy from having a good arguable case, since as Morgan J noted at Annex I § 21 (by reference to In *Rookes v Barnard* [1964] AC 1129, 1209), there are dicta suggesting that unlawful means for the purposes of the tort of conspiracy do include breach of contract.

(a) Conspiracy to make misrepresentations

20. So far as concerns the misrepresentations allegedly made, or repeated, at the meeting in Prague on 1 October 2018, Ivy's case is that Mr Bell was aware of those representations because he was present at the meeting and participated in the discussion. Ivy notes that Mr Bell has not addressed the Prague meeting in any detail in his evidence. Ivy's case as to knowledge of falsity is that the cash injections Mr Bell had himself procured to be made by the date of that meeting were obviously inconsistent with the business being profitable and self-sustaining from its revenue and with it having an EBITDA of £1.6 million in 2018. By 1 October 2018, Mr Bell had on Ivy's evidence made or procured cash injections, for the purposes referred to in § 17.vii) above, of:

    i) £9,855 on 24 May 2018;

    ii) £5,000 on 5 June 2018;

    iii) £5,000 on 7 June 2018;

    iv) £9,500 on 2 August 2018;

    v) £10,500 on 3 August 2018;

    vi) £9,500 on 8 August 2018;

    vii) £20,000 on 22 August 2018;

    viii) £12,000 on 23 August 2018;

    ix) £9,500 on 24 August 2018;

    x) £9,500 on 29 August 2018;

    xi) £13,000 on 6 September 2018;

    xii) £10,000 on 7 September 2018;

    xiii) £9,800 on 13 September 2018;

    xiv) £10,000 on 18 September 2018; and

    xv) £9,700 on 20 September 2018.

21. Thus, Ivy says, Mr Bell had caused to be injected more than £150,000 into the business in the 5 months leading up to the meeting. This included about £130,000 injected during the 2 months (August and September 2018) immediately prior to the

meeting, with payments being made every few days to support the business's regular running costs.

22. Whether Mr Bell's knowledge of those payments meant he knew the alleged representations were false will be a matter for trial, but for present purposes the point is in my view sufficiently arguable.

23. More difficult is the question whether Ivy has shown a good arguable case (in the *Ninemia* sense) that Mr Martin and Mr Bell *agreed* that Mr Martin should make the alleged misrepresentations. In principle it is possible to infer from other facts and circumstances that an agreement must have been made. Such an inference may sometimes arise where, for example, a significant transaction is entered into by a company ultimately beneficially owned by a single individual who has no executive position with the company but in practice instigates all of its important commercial decisions. The present case is different in that Mr Bell was only a 50% owner of the 21Bet business and, it appears, was content to let Mr Martin run the business at least from day to day, albeit with very regular funding provided by Mr Bell.

24. Nonetheless, the combination of Mr Bell's 50% ownership of the business, his history of working with Mr Martin, his very regular cash injections into the 21Bet business, the fact that the sale resulted in a payment to a company (SBL) owned by his daughter and the fact that he attended and took part in the discussions in the meeting in Prague, arguably constitute material from which an inference could be drawn at trial that Mr Martin and Mr Bell had agreed that Mr Martin should make the alleged representations at the Prague meeting. At least to that extent, therefore, I consider that Ivy claim of conspiracy to make representations satisfies the good arguable case criterion.

25. A second facet of Ivy's claim for conspiracy to make misrepresentations is that Mr Bell *"knew or should be taken to know that the [SPA] contained provisions relating to and verifying the financial position of the Business and a provision to the same or similar effect as the Non-Compete Covenant (such being a matter of course in any agreement for the sale of such a business)"*. On the basis that the word *"such"* refers to both of the types of provision referred to in the preceding wording (another ambiguity which Ivy should resolve), Ivy's case is that even if Mr Bell did not see the SPA or a draft of it, he must have realised that it would contain warranties in relation to the financial position of the business.

26. It certainly seems arguable that, as an experienced businessman, Mr Bell would have realised that the SPA would contain some financial warranties, and that these would include standard provisions such as confirmation of the accuracy of the companies' financial statements. However, whether the fact that the business was needing regular cash injection from Mr Bell rendered untrue any such financial warranty would depend on the content of the warranty. For example, the EBITDA figure of £1.6 million provided in August 2018 is said to have been based on income stream figures rather than necessarily being derived from or reflected in the companies' financial statements or even their management accounts. There is no allegation that Mr Bell must have realised that that figure would be warranted in the SPA, nor (for example) that there would be a warranty to the effect that the business was profitable and self-sustaining. It could not be said to be obvious that a warranty of those figures would be included in the SPA. Ivy does not allege any specific respect in which a financial

warranty Mr Bell must have realised would be given in the SPA was, to his knowledge, untrue. As a result, I do not consider that this facet of Ivy's case, at least as it currently stands, passes the good arguable case test.

(b) Conspiracy to breach non-competition covenant

27. Ivy's case in this regard is primarily based on inferences to be drawn from Mr Bell having:

    i) participated in discussions before the SPA was concluded about the proposed Premier Punt business;

    ii) taken steps, after the SPA was concluded, to help Mr Martin and/or Premier Punt find offices for a competing business; and

    iii) planned, with Mr Martin, the purchase of Incentive.

28. In relation to Premier Punt Ivy places particular stress on an email of 9 October 2018 from Mr Martin to Mr Bell which includes the following passages:

> "Morning mate.
>
> As discussed here is the to do list:
>
> 1. Tabella [Ivy] offer/Other Options.
>
>   a. Lets keep all these plates spinning for the moment and see what comes in.
>
> 2. Premier Punt
>
>   a. Create offshore entity for all contracts for PP (let me know if you need me to do that as we will need something in the next 48 hrs for Hill Dick to place within the contract)
>
>   b. Consilium UK bank for office/PAYE/settlements etc
>
>   c. You want to change Richard Ward as Director or leave him on it?
>
>   d. £65k payment to Incentive Games for purchase of PP and database/app etc (can come from anywhere)
>
>   e. £20k for Ameico to set up sportsbook/casino platform for PP (can come from anywhere)
>
>   f. £15k for new Curacao License for PP for all the non UK biz (can come from anywhere)
>
>   g. We will build a Consilium Solutions website for recruitment biz

> …
>
> 7. Plan going forward
>
> If we are to go again and really step this up using all the facets of the business, I would see it looking like this:
>
> a. Staff …
>
> b. Marketing spend …
>
> 7. UK license
>
> a. If we are going ahead with this, getting our own UK license is not only going to save us 15% off the bat on UK revenues, but also gives us lots of latitude in managing our players and their balances.
>
> b. A new application is straightforward with a cost of around £25k …"

29. Mr Bell says this was no more than a proposal, and that he declined Mr Martin's offer to become involved in Premier Punt and had no involvement in it save for offering office space for five or six employees on a short term basis as a favour.

30. Mr Bell provides no details of how and when he declined the proposal, nor any documentary evidence. It is well arguable that, on a fair reading of the 9 October 2018 email, it goes beyond a mere proposal and (on the contrary) implies that Mr Bell has already been involved in discussions of the Premier Punt project and has some form of decision-making role in relation to it. For example, point 2(a) of the email in substance seeks Mr Bell's decision about whether to keep Mr Ward as a director of Premier Punt. Point 2(c) asks Mr Bell whether Mr Martin should deal with the setting up of the *"offshore entity"*.

31. Ivy's allegations in relation to the non-competition covenant depend on the premise that Mr Bell realised that the SPA would contain a covenant that would prevent Mr Martin from setting up a competing business. In the event, clause 9.6 of the SPA contained very wide restrictions precluding Mr Martin for two years from:

i) participating or being involved in any identical, similar or competing business;

ii) interfering with any client, employee or supplier relationship; or

iii) soliciting for employment or hire any employee or consultant.

32. Ivy's witness evidence is to the effect that anyone in the online gambling business, *"or indeed any experienced businessman"*, would know that a sale and purchase agreement such as the SPA would contain non-competition provision in these or equivalent terms.

33. Mr Bell makes the point that such clauses take many forms, and it cannot be said to have been obvious to Mr Bell that there would be a provision restricting competition

(as opposed to, say, merely solicitation of customers and employees). Mr Hooja's evidence on behalf of Ivy is, as noted above, to the contrary effect. It is not possible to resolve this difference on current evidence, and whilst Mr Bell's point may have force, I do not consider Ivy's allegation fails the good arguable case test on this basis.

34. Secondly, Mr Bell argues that clause 9.6 is in such wide terms as to be void, citing the concession in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 that a clause precluding holding a shareholding, however small, in a competing company would be unenforceable. The Supreme Court held that the offending wording in that case could be severed, since (a) it was capable of being removed without the necessity of adding to or modifying the wording of what remained, (b) the remaining terms continued to be supported by adequate consideration and, (c) the removal of the unenforceable provision would not generate any major change in the overall effect of all the post-employment restraints in the contract. Mr Bell submits that those criteria could not be satisfied in the present case. However, I consider the contrary to be reasonably arguable and do not view this point as precluding Ivy from having a good arguable case.

35. Viewing this part of Ivy's case in the round, I consider that it has an arguable case.

36. The second limb of Ivy's case in relation to non-competition concerns Incentive, which was the holder of the UK Gambling Commission licence under the auspices of which both 21Bet and Premier Punt operate. There is some evidence dating from February 2019 that Mr Bell was intended to be a 50% owner of Incentive, and Mr Bell accepts that he has taken steps to acquire it for and on behalf of his daughter. Ivy says Incentive too was to be a competitor of 21Bet, and there is evidence that pursuing the Incentive business was regarded as being dependent on the sale of the 21Bet business. Ivy makes the point that a licence holder such as Incentive undertakes a range of activities and regulatory responsibilities for companies such as Premier Punt (known as 'white label' companies) who operate under the licence. Thus, Ivy says although Incentive is the licence holder for 21Bet, it is at the same time facilitating and permitting the competing business of Premier Punt; and Premier Punt's website states that it is *"operated by Incentive Games Limited"*. Mr Bell denies that Incentive is a competing business of 21Bet. However, whether it is or is not a competitor seems likely to be a complex factual question for trial, and I take the view that this facet of Ivy's claim also passes the good arguable case test.

(2) Procuring breach of non-competition covenant

37. Ivy alleges that Mr Bell procured Mr Martin's breach of the non-competition covenant. By way of particulars it simply repeats the particulars of its conspiracy allegations.

38. In *OBG Ltd. v. Allan* [2007] UKHL 21, [2008] 1 AC 1 § 39 it was stated that in order to be liable for inducing a breach of contract:

> *"you must know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so."*

39. In *Meretz Investments NV v ACP Ltd* [2008] Ch 244 § 114 Arden LJ stated the essential elements of the tort as:

    i) knowledge of the contract;

    ii) intention to induce a breach of the contract; and

    iii) actual breach of the contract.

40. Mr Bell points out that conspiracy and inducing breach of contract are separate torts, the former being a form of primary liability and the latter a species of ancillary liability (*Meretz* § 114). He submits that it is not proper for the same facts merely to be repeated in support of the separate torts. However, it is arguable that the matters alleged by Ivy summarised in § 17(viii), (ix), (x) and (xi) above do include the essential elements referred to in *Meretz.*

41. Mr Bell also submits that Ivy's case requires it to demonstrate his knowledge of the specific terms of the non-competition covenant. This point was not explored in detail before me. However, I note that the summary of the relevant law in *Clerk & Lindsell on Torts,* 22nd ed. § 24-15, includes the statements that:

> "The defendant must be shown to have knowledge of the existence of a contract; but *"in many cases a third party may be deemed to know of the almost certain existence of a contract and indeed of some of its likely terms"*. The defendant need not know of the precise terms to be liable, for given that he knew of the existence of the contract, the test of his intention is objective." (footnotes omitted).

It seems to me arguable that the question at trial may well be whether or not Mr Bell must have realised that the SPA would contain a non-competition covenant substantially to the same effect of clause 9.6, a matter on which as indicated earlier there is a conflict of evidence on which I consider Ivy has a good arguable case.

42. Accordingly, I consider that Ivy has a good arguable case on this aspect of its claim too.

(D) RISK OF DISSIPATION

43. The considerations relevant to risk of dissipation were summarised by Popplewell J in *Fundo Soberano de Angola v Jose Filomeno dos Santos* [2018] EWHC 2199 (Comm) § 86 as including the following:

> "(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
>
> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

> (3) The risk of dissipation must be established separately against each respondent.
>
> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
>
> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
>
> (6) What must be threatened is unjustified dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
>
> (7) Each case is fact specific and relevant factors must be looked at cumulatively."

44. The following further statements of principle are relevant:

i) The claimant should depose to objective facts from which it may be inferred that the defendant is likely to move assets or dissipate them; unsupported statements or expressions of fear have little weight (*O'Regan v Iambic Productions* (1989) 139 N.L.J. 1378 (per Sir Peter Pain)).

ii) Where dishonesty is alleged, it is sometimes possible to infer a risk of dissipation from the fact of the dishonesty (*Norwich Union v Eden* (25 January 1996, unreported, Hirst and Phillips LJJ), cited in *VTB Capital plc v Nutritek*

International Corp [2012] EWCA Civ 808 at § 177; *Metropolitan Housing Trust v Taylor* [2015] EWHC 2897 (Ch) § 18 per Warren J).

iii) However, it is appropriate in each case for the court to "*scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the Order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted*" (*Thane Investments Ltd v Tomlinson (No.1)* [2003] EWCA Civ 1272 § 28; *VTB v Nutriek International* § 177 citing *Jarvis Field Press v Chelton* [2003] EWHC 2674 (Ch)).

iv) For example, in *VTB* the Court of Appeal concluded at § 178 that it would have been right to take into account a finding of a good arguable case that a defendant had been engaged in a major fraud, and that he operated a complex web of companies in a number of jurisdictions which enabled him to commit the fraud and would make it difficult for any judgment to be enforced: such factors would be capable of providing powerful support for a case of risk of dissipation.

v) Relevant factors include the nature, location and liquidity of the defendant's assets, and the defendant's behaviour in response to the claim or anticipated claim; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held (*National Bank Trust v. Yurov* [2016] EWHC 1913 (Comm) §§ 69-70 per Males J).

vi) Where a defendant knows that he faces legal proceedings for a substantial period of time prior to the grant of the order, and does not take steps to dissipate his assets, that can be a powerful factor militating against any conclusion of a real risk of dissipation (see eg. *Candy v Holyoake* [2017] EWCA Civ 92; [2018] Ch 297 § 62 and *Petroceltic Resources Ltd v Archer* [2018] EWHC 671 (Comm) §§ 58, 64-65).

vii) *"A cautious approach is appropriate before deployment of what has been called one of the court's nuclear weapons"*, and *"the risk is not to be inferred lightly. Bare or generalised assertion of risk by a claimant is not enough."* (*Tugushev v Orlov et al* [2019] EWHC 2031 (Comm)) § 49 and 49(ii).

45. Ivy submits that the following factors evidence a risk of dissipation of assets by Mr Bell:

i) Neither Mr Martin nor Premier Punt has responded to the allegations made against them. If Ivy's case is correct, Mr Bell is also involved in the fraud.

ii) Mr Bell has "*a record that should attract very considerable suspicion particularly where disclosure of assets is concerned*", by reason of:

a) having been arrested (though not charged) in the UK and the Isle of Man in 2015 in connection with an investigation into a £21 million VAT fraud and money laundering investigation;

b) an article from April 2015 reporting that the gambling licence of 666Bet, a company in which Mr Martin and Mr Bell previously worked together, had been suspended and that its customers were demanding refunds; and

c) a confiscation order made in 2017 by the Deputy High Bailiff of the Isle of Man after cash sums had been found of approximately £484,000 at Mr Bell's home there and £16,000 at his business premises, whose origin Mr Bell had failed to explain. Ivy points out that Mr Bell does not address this matter in his evidence on the present application.

iii) Mr Bell is "*prepared to play games with the distinction between himself and the Simplify companies, even where it is plain that he controls or is able to procure payment by those companies*". Mr Bell in his evidence has accepted that his daughter is the sole shareholder of SBL, and that in or around 2016 he *"facilitated"* a loan of £1 million from SBL to the 21Bet business. Ivy says SBL has disclosed few assets, and infers that Mr Bell must have funded the payment. Two days before the hearing before me Ivy served a supplement to its skeleton argument attaching a letter from the Registrar of Companies to SBL dated 3 September 2019 notifying it that, unless cause is shown to the contrary, it will be struck off the register and dissolved after 2 months. Ivy submits that the repayment SBL received from 21Bet must have been paid out, otherwise its owner would not allow it to be struck off, and that by allowing SBL to be dissolved Mr Bell seeks to conceal the origin and destination of the funds paid (respectively) by and to SBL.

iv) Mr Bell's intention that his daughter be the owner of Incentive suggests a willingness to have someone else act as a front for his businesses. So does his use of companies to hold his interest in the 21Bet business itself.

v) Mr Bell has significantly overstated the value of his house at W5 1SJ by estimating its value at £4 million. A Zoopla search suggests that the value is between £2.6 and 2.9 million.

46. Taking these in turn, Ivy's factor (i) is that its good arguable case of conspiracy, including conspiracy to make fraudulent misrepresentations, and of and procuring a breach of contract, itself supports an inference of a sufficient risk of dissipation.

47. It is not always easy to decide whether a given allegation of dishonesty points to the conclusion that assets are likely to be dissipated. However, I note that in the present case:

i) The alleged dishonesty is not in the nature of a dissipation or concealment of assets.

ii) There is no evidence of any actual dissipation of assets by Mr Bell, nor or any threat to dissipate assets. (See further § 55 below as regards the repayment to SBL.)

iii) There is no evidence that Mr Bell has changed his behaviour following the assertion of a claim in such a way as might justify an inference of risk of

dissipation. On the contrary, the claim against Mr Bell was asserted in a letter before action dated 19 June 2019, following which further correspondence ensued, but it was only on 29 July 2019 that Ivy applied, without notice, for a freezing order. There is no suggestion that Mr Bell dissipated or attempted to dissipate any assets during the intervening six week period.

iv) There is an arguable case that Mr Bell did *not* act dishonestly. As regards the financial representations, whether he did so depends on whether the cash injections he had been making into the business were inconsistent with the representations made (in particular, the claimed £1.6 million EBITDA and general profitability), and whether Mr Bell knew that to be the case or was reckless in that regard. The cash injections certainly may have indicated cash flow difficulties, but whether such difficulties were inconsistent with a £1.6 million EBITDA or with the business being profitable is a more complex question, as is the question of whether any inconsistency was (in all the circumstances) so obvious that Mr Bell must have appreciated it.

v) Mr Bell has disclosed substantial assets taking varying forms and including a house and other assets in the UK. According to his affidavit of means he owns:

a) shares in England and the Isle of Man (valued at £60-80 million), with the companies in which he holds shares themselves said to employ many people and have significant assets;

b) bank accounts held worldwide amounting to many millions, including in England and Wales £1,742,729 with Investec Private Bank and £905,005 with HSBC;

c) £18,760,746 in stocks/bonds/gilts/cash;

d) a £2,100,000 unit investment held at Friends Provident in the Isle of Man;

e) real property in this jurisdiction said to be worth £4,000,000 and in the Isle of Man said to be worth £1,500,00; and

f) various cars (a Ferrari, various Range Rovers and BMWs, and a Porsche).

In order to defeat a judgment for £4 million in Ivy's favour Mr Bell would have to dissipate almost all of these assets.

48. In these circumstances, whilst the allegations against Mr Bell are a factor to be taken into account, I am not persuaded that they provide solid evidence of a risk of dissipation.

49. Factor (ii) referred to in § 45 above is the one which has given me the most pause for thought. The first two aspects of it involve no more than allegations, but the third involves a finding against Mr Bell by the Deputy High Bailiff of the Isle of Man. The Bailiff's decision is detailed, and includes the following passages:

"2. … The [forfeiture] application is made pursuant to sections 48(1) and 50(1)-(2) of the Proceeds of Crime Act 2008 (POCA).

…

16. The searches were made under warrant and related to investigations in the Isle of Man concerning Mr Bell, an Island resident suspected of money laundering and offences against public justice in the Isle of Man. There are other investigations on foot in England and Guernsey relating to Mr Bell's activities and of companies associated with him. In England he is suspected of cheating the Revenue and VAT offences. In Guernsey he is suspected of money laundering. Mr Bell has not been charged with any offence.

…

19. During an appearance before Deputy High Bailiff on 23 March 2015, Mr Bell stated that the cash is his property. The Attorney General alleges amongst other things that Mr Bell is suspected of large scale VAT fraud in England and that he has, despite being invited to do so, declined to explain the provenance of the cash or to comment on the evidence implicating him in the VAT fraud. Mr Bell contends that this would prejudice him in any subsequent criminal trial. Indeed, an earlier application by Mr Bell for an adjournment of these proceedings until after any criminal trial took place was heard by me this year and was declined for the reasons contained in my judgment delivered on 27 January 2016.

…

24. … Mr Moore [a financial investigator retained by the Financial Crime Unit, on whose evidence the bailiff relied] conceded that he had not received full disclosure of the original documents from HMRC and that he had not inspected the original documents … Further, although he had attended inter-agency briefings he was unable to identify any particular HMRC officer and the source of the material was not identified. Nevertheless, Mr Moore confirmed that Mr Bell was suspected of, and indeed arrested in relation to, offences in the UK of conspiracy to cheat the public revenue, conspiracy to evade VAT and conspiracy to launder the proceeds of crime. Further, Mr Bell was suspected of committing the offences of money laundering and conspiracy to do an act against public justice and conspiracy to money launder in the Isle of Man.

25. Mr Moore stated that Mr Bell is believed to preside over the OCG [an organised crime group]; is suspected of being responsible for a highly organised attack on the UK tax system,

including the evasion of VAT, and the failure, properly, to account for Pay As You Earn (PAYE) and National Insurance Contributions (NICs) and Construction Industry Scheme (CIS) through UK based payroll and labour provider companies. He claims that between 30 January 2009 and January 2013 this OCG successfully evaded VAT amounting to, in the region of, £21 million. It is believed that the fraud is ongoing.

…

27. It is further believed that Mr Bell and his organisation acquired several genuine payroll companies. The workers employed by these companies are, it is said, being used as the commodity for a "missing trader style VAT fraud." …

…

69. Section 3 provides that a person obtains property through unlawful conduct (whether that person's own conduct or another's) if the property is obtained by or in return for the conduct; there needs to be established a link between the unlawful conduct and the obtaining of the property. Section 3(2) provides that it is not necessary to show that the conduct was of a particular kind, if it is shown that the property was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct. …

…

99. I am satisfied that the Applicant has established to the civil standard of proof, even applying *"anxious and critical"* scrutiny, that the cash has been obtained from unlawful activity and that the circumstances of the obtaining and holding of the cash at Mr Bell's house and business premises satisfies me to the required standard that the cash was intended for use in unlawful activity.

100. I accept that no criminal charges have been brought against Mr Bell in relation to the alleged VAT offences but there is sufficient evidence of such offences having been committed by Mr Bell and companies associated with him. He has benefitted directly from the alleged fraud and has derived the cash from activities related to the fraud. Mr Bell has provided no explanation of the alleged VAT fraud or why he has accumulated from several sources such large amounts of cash at the two premises.

101. The argument that the evidence of VAT fraud is all hearsay is well made but hearsay evidence is admissible and, in any event, the Applicant does not have to prove a specific crime in order to succeed.

> …
>
> 103. With these comments in mind I have considered the evidence of Mr Moore of a widespread organised assault on the UK VAT regime and of Mr Bell being at the centre of it. It is true that the evidence could have been improved had the investigating officers of HMRC given direct evidence of the fraud but in my view Mr Moore's evidence, often hearsay, is sufficient to establish to the required standard that a VAT fraud has occurred. Mr Moore has been briefed by officers of HMRC as to the nature of the fraud and has examined most of the bank accounts in the Isle of Man of the companies used to carry out the Four Sequences. The evidence pieces together to create a picture of the complex arrangements entered into and the charging and collection of large amounts of VAT which has not ben accounted for and paid over to HMRC.
>
> 104. … The unlawful conduct is the deliberate evasion of VAT. I consider it to be at least arguable but I can go further and find that it is probable, on the evidence, that the cash has been derived from the unlawful activity of Mr Bell and the companies associated with him to evade a large amount of VAT.
>
> 105. The second test is to consider whether the cash seized represents property originally sourced from the unlawful activity and again I consider it to be probable that it does."

50. Viewed at a high level of generality, the Deputy High Bailiff's findings may be taken as indicating that Mr Bell has been involved in criminal conduct, and that such conduct has involved the attempt to evade legal obligations (specifically, VAT) and/or to misappropriate funds. A propensity to evade legal obligations may suggest that he is likely to evade any obligations he incurs in the present case, by dissipating assets.

51. Against that, Mr Bell makes the points that:

    i) the Bailiff's findings, though made in 2017, related to events in 2015;

    ii) Mr Bell declined to seek to explain the origin of the funds to the Bailiff because he was exercising his privilege against self-incrimination;

    iii) it remains the case that Mr Bell has not been charged with, still less convicted of, any crime;

    iv) the alleged criminal conduct was not dissipation of assets, and the facts were unrelated to the present case; and

    v) in the present case Mr Bell would in effect need to dissipate about £100 million of assets in order to avoid liability for a £4 million claim.

52. These considerations are in my view finely balanced. It is relatively infrequently that a freezing order is sought in circumstances where there has been an actual prior finding of criminal conduct, and this must be a significant factor to weigh in the balance when considering risk of dissipation. Its significance in the present case is tempered by the factors set out in § 51 above, as well as the more general circumstances set out in § 47 above. Whilst the Deputy High Bailiff's conclusions, as well as the other matters Ivy relies on as part of factor (ii), leave at least a strong suspicion that Mr Bell has been involved in organised criminal activity, it must nonetheless be significant for present purposes to bear in mind that he has even now never been the subject of a criminal charge or conviction, that the matters Ivy refers to are some four years old and unrelated to the present case, and that those matters do not directly indicate a propensity to dissipate assets.

53. It might be argued that the Bailiff's findings indicate that Mr Bell has committed VAT frauds using a complex web of companies, so that the present case is analogous to *VTB* (see § 44.iv) above). Though the comparison is not without some force, there are differences, in that there is no suggestion that the alleged conspiracy in the present case involved any complex international web of companies into which the funds at issue disappeared rendering the enforcement of any judgment difficult. There is no suggested nexus between Ivy's allegations and the alleged VAT frauds described in the Bailiff's decision, either in terms of direct connection or as regards *modus operandi* (contrast the assumed facts outlined in *VTB* at § 172). Further, the evidence indicates that Mr Bell has substantial assets both in the Isle of Man and the UK against which a judgment might be enforced. Overall, and not without some hesitation, I have concluded that this group of the matters relied on by Ivy does not provide solid evidence of a risk of dissipation in the present case.

54. Factors (iii) and (iv) referred to in § 45 above do not in my judgment advance matters very far, if at all. It is arguable that Mr Bell has in effect placed his daughter in charge of SBL and Incentive in circumstances where in reality he is their directing mind and will. There may be regulatory reasons why Mr Bell felt it necessary to do so. Although Mr Bell *may* have been disingenuous in stating in his witness statement that Ivy was wrong to describe SBL as *"one of my companies",* there is no evidence before me that Mr Bell has made any attempt to conceal his daughter's ownership of, and his own practical involvement in, the company. He has been open about the fact that he personally had lent money to the 21Bet business as well as injecting cash into it for working capital *("I explained [to the Claimant] that I inject funds into the business on an ad hoc basis for working capital purposes"* (my emphasis)) notwithstanding the fact that, as the account statements show, the payer of those injections was a Simplify company. In my view the matters Ivy relies on here do not evidence a propensity to use corporate bodies to conceal or dissipate assets, or to evade liabilities. Similarly, the responses (apparently completed by Mr Martin) to the Due Diligence Questionnaire dated 26 July 2018 in relation to the proposed sale of the 21Bet business made clear that the companies constituting the business were legally owned by a Mr Richard Hogg but that the true owners were Mr Martin and Mr Bell in 50/50 shares.

55. It might conceivably be inferred from the fact that SBL is threatened with striking off that (a) SBL has already paid to or at the direction of Mr Bell the repayment it received from 21Bet and (b) Mr Bell has dissipated that money, as opposed to paying

it into one of the well-funded bank/investment accounts he has disclosed. Inference (a) depends on whether, and if so why, Mr Bell and/or his daughter are willing to contemplate SBL being dissolved – a matter on which Mr Bell could in theory have sought to adduce late evidence after the point arose two days before the hearing before me. It is not clear why I should draw inference (b). There is no evidence that any payment Mr Bell may have received from SBL has been dissipated, and against the background of the substantial assets Mr Bell has disclosed it is difficult to see any motive for dissipating this one particular sum of £1,019,106.

56. Equally, I do not consider that factor (v), relating to the value of Mr Bell's house in London, has any great merit. The copy Mr Bell exhibits of the official copy Land Register as at 6 August 2019 indicates that the house was stated to have been bought for £2,250,000 in August 2013. Mr Bell's evidence is that there is no mortgage of the property, and that he has spent about £600,000 on the house since he bought it. The copy Land Register does not refer to any mortgage or charge, but it does record that a restriction was registered on 26 March 2013 to the effect that under a Restraint Order made under the Proceeds of Crime Act 2002 on 24 March 2015, no disposition by the proprietor of the registered estate (Mr Bell) is to be registered except with the consent of the Proceeds of Crime Division of the Crown Prosecution Service or further order of the court (a fact which must significantly reduce the risk of dissipation of this particular asset). No evidence was provided of the reliability of Zoopla estimates, and on the basis that Mr Bell has spent £600,000 on the property since purchasing it for £2,250,000 in August 2013, I do not consider it possible to conclude that Mr Bell has materially overestimated its value.

57. Viewing the matter in the round, taking account of all the factors Ivy advances as discussed above, I have come to the conclusion that Ivy has not demonstrated solid evidence of a risk of dissipation of assets such as to justify the continuation of the freezing order against Mr Bell.

(E) NON-DISCLOSURE/MISREPRESENTATION

58. In the light of my conclusion on risk of dissipation, it is not strictly necessary to consider Mr Bell's submissions in this regard. However, for completeness I address them briefly below.

59. Mr Bell contends that Ivy's presentation of the case at the without notice hearing was incomplete or misleading in seven respects.

60. First, Ivy's affidavit in support of the freezing order application incorrectly stated that as of April 2019, 666Bet's gambling licence was still suspended and customers were demanding refunds. The correct date was April 2015. This may have been inadvertent, though it is notable that Ivy has not to date explained or corrected it. Ivy makes the point that this matter was not explicitly relied on or mentioned in its skeleton argument before the judge. However, it was set out in the affidavit in support of the application, which the judge would have read. It was materially misleading because it gave the impression that there had been recent wrongful activity by Mr Bell and that he was currently failing to meet obligations to customers.

61. Secondly, Ivy's evidence before the judge also asserted that its solicitors had asked for confirmation that Mr Bell has sufficient assets to return the sum of £3.2 million if

ordered to do so, but that they had received no response to that request. That assertion was plainly wrong, because in the relevant correspondence Ivy's solicitors had sought such a confirmation from Mr Martin but not Mr Bell. Ivy again says it did not rely on this point in its skeleton argument before the judge. That is not in my judgment a sufficient answer. The point was relied on in Ivy's evidence as a factor showing a risk of dissipation by Mr Bell, but (whether deliberate or not) was incorrect and misleading.

62. Thirdly, Mr Bell says Ivy was wrong to state in its evidence that SBL was *"one of his [Mr Bell's] companies"*, enabling it to assert that Mr Bell received payment from Mr Martin. Mr Bell says it is clear from the SBL's filings at Companies House that SBL is in fact owned by Mr Bell's daughter, and he states that he has no beneficial interest in SBL. I agree it should have been made clear to the judge that Mr Bell was not a registered shareholder of SBL, though in the light of the evidence discussed above about Mr Bell's facilitation of loans by SBL it is arguable that he controls SBL and may have a beneficial interest in it. In the circumstances I would regard this as one of the less serious errors.

63. Fourthly, Ivy's evidence was that Mr Bell's daughter was party to certain emails about slogans that could be used to market Premier Punt. However, it is clear on the face of the exhibit that this is incorrect. This point appeared in Ivy's skeleton argument as well as its affidavit, although in the skeleton argument it was relied on only as against Mr Martin. It was in my view a further material misrepresentation, whether or not it was made inadvertently.

64. Fifthly, in the context of risk of dissipation, Ivy made the point in its skeleton argument before the judge that Mr Martin had disbursed the funds paid to him to Mr Bell as well as to other creditors of the business. Ivy's witness statement stated a belief that *"Mr Martin has already dissipated the Pre-Payment received in April. I understand that he paid £1,019,106 to Mr Bell as well as £701,400 to Mr Alan Spence, as described above."* Ivy's evidence indicated that the payment to Mr Spence was to settle a debt owed as a result of a winning bet. It did not make clear that the payment to SBL (attributed to Mr Bell) also reflected a payment of a *bona fide* debt. I do not understand Ivy necessarily to have accepted that the payment to SBL was of that nature, but in the light of the substantial advances apparently made to 21Bet by SBL it seems likely that it was. By mentioning the payment in the context of risk of dissipation without referring at least to the possibility that the payment was to satisfy a *bona fide* debt, Ivy evidence was liable to give a misleading impression.

65. Sixthly, the judge was not taken to the law on non-competition covenants, or informed that clause 9.6 of the SPA might not be enforceable. Ivy points out that this is not a point raised by Mr Bell's solicitors in correspondence during the six-week period between the letter before claim and the without notice application. Whilst that mitigates the matter to a degree, in principle the matter ought to have been drawn to the judge's attention as a potential argument available to the absent respondents to the application.

66. Seventhly, the Judge was not informed that there is no authority establishing that the unlawful means necessary to establish a claim for conspiracy could include breaches of contract. Again, although the point is legally arguable, it represented a potential

argument available to the absent respondents which in my view should have been drawn to the judge's attention.

67. It is of course well established that an applicant for without notice relief must disclose to the court all matters that are material to the application. The test of materiality is an objective one. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed: see Gee, *Commercial Injunctions* § 9-003, White Book, vol. 1, note 25.1.25.4.

68. This requirement of full and frank disclosure has been described as a "*heavy duty of candour and care*": *Brink's Mat v. Elcombe* [1988] 1 WLR 1350, 1359C, per Slade LJ. It is the *quid pro quo* for an applicant inviting the court to proceed in the absence of another party. Scrutton LJ observed that the duty was "*of the greatest importance to maintain*": *R v. Kensington Income Commissioners, ex p de Polignac* [1917] 1 KB 486, 514. As indicated by the judgment of Morris J in *Rogachev v Goryainov* [2019] EWHC 1529 (QB) § 93, given the duty to make proper inquiries, a material misrepresentation, even if inadvertent, may justify the setting aside of a freezing order if it shows a high degree of lack of care or recklessness.

69. Where there has been a failure by an applicant to give full and frank disclosure, the general rule is that the injunction obtained must be discharged: *Brink's Mat* per Balcombe LJ at 1358C (with whom Slade LJ agreed); and *Millhouse Capital UK Ltd v. Sibir Energy plc* [2010] BCC 475 §§ 102(1) and 103, per Christopher Clarke J, who added at § 104:

> "The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. 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. This is particularly so in the case of freezing and seizure orders".

70. The court in *Millhouse Capital* recognised that if there has been culpable non-disclosure, the court nonetheless has a complete discretion and should also consider the prejudice that will occur if the injunction is not renewed. Christopher Clarke J said at § 106:

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

See also *Congentra AG v Sixteen Thirteen Marine* [2008] 2 Lloyd's Rep. 602 § 64.

71. The purpose of this rule is to act "*as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences … if they fail in that duty*": *Brink's Mat*, at 1358D. As Bingham J commented in *Siporex Trade SA v. Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, 437:

> "If the duty of full and frank disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure."

72. Carr J in *Tugushev v Orlov et al* [2019] EWHC 2031 (Comm) § 7 recently summarised the law in thirteen propositions, including the following of particular relevance to the present case:

> "iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on"

> "vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect"

> "x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged"

> "xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to

> disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts"
>
> "xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

73. In the present case, I would (had the issue arisen) have concluded that the misrepresentations described above when taken as a whole were sufficiently serious to justify the discharge of the freezing order, even on the footing that they were all inadvertent, and even though each one individually may not have been sufficient. In combination, they resulted in my view in the judge being given a misleading impression of the considerations relevant to whether a freezing order was appropriate against Mr Bell. Whether the freezing order would have been re-imposed is hypothetical, because that would have been influenced to a significant degree by whether sufficient risk of dissipation existed to make that the just course of action. In the event, I have concluded that no sufficient evidence of risk of dissipation has been shown in any event.

(F) IVY'S FALLBACK POSITION

74. Ivy submits that if the court considers that Mr Bell has sufficient assets that the risk of his reducing these below the maximum sum is so limited that the balance of convenience requires discharge in relation to that sum, then the court should, as suitable protection for Ivy, require Mr Bell to pay funds into his own solicitors' client account or, as a minimum, notify Ivy of any steps he may take to deal with his fixed assets in the jurisdiction.

75. However, a notification injunction is not a lesser form of relief, but a version of a freezing order, and the test for granting such an order is the same as would be required in order to obtain a conventional freezing order: Ivy must show a real risk, supported by solid evidence, that a future judgment would not be met because of unjustifiable dissipation (see *Holyoake and another v Candy and others* [2017] 3 WLR 1131 §§ 34-42). I do not consider that requirement to be satisfied here.

(G) CONCLUSION

76. For the reasons given above, the freezing order should be discharged as against Mr Bell on the ground that although Ivy has a good arguable case against Mr Bell on the

merits, it has not provided solid evidence of a risk of dissipation of assets such as to justify the continuation of the freezing order.