Neutral Citation Number: [2024] EWHC 1931 (Comm)

Claim No. LM-2024-000040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Date: 26/07/24

Before :

John Kimbell KC
(sitting as a Deputy High Court Judge)

- -

Between :

APPAREL FZCO	**Claimant/ Applicant**
- and -	
SHEERAZ IQBAL	**Defendant/ Respondent**

- -

MARK CULLEN (instructed by **JMW Solicitors LLP**) for the **Claimant/Applicant**
RICHARD POWER (instructed by **Ronald Fletcher Baker LLP**) for the **Defendant/Respondent**

Hearing date: 2 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

John Kimbell KC sitting as a Deputy High Court Judge:

Introduction

1. On 9 February 2004, the Claimant ('**Apparel**') obtained a freezing injunction ('**the Order**') against the Defendant ('**Mr Iqbal'**). The Order was granted by Mr Justice Knowles CBE following a hearing held in private in which he heard submissions from Mr Rupert Butler ('**Mr Butler**'). Mr Butler is head of legal practice at Leverets Advocacy Limited ('**Leverets**'), Apparel's previous solicitors. The judge also had a skeleton argument from Mr Butler and the affidavit of Mr Vanstone-Hallam, a consultant solicitor, at Leverets.

2. The return date was originally 11 April 2024 but the judge recused herself the day before the hearing so it was stood out of the hearing list. It came before me on 2 July 2024. Counsel for Apparel, Mr Cullen sought the continuation of the Order until trial. Mr Power, counsel for Mr Iqbal, submitted that the Order ought to be set aside because of a failure by Apparel to comply with its duty of full and frank disclosure and that it should not be re-instated or continued.

The evidence

3. By the time of the hearing before me, the evidence set out in the table below had been served:

Item No.	**Evidence (in chronological order)**	**Date**	**Abbreviation**
1	First Affidavit of Owen John Vanstone-Hallam	07.02.24	Hallam1
2	First Affidavit of Sheeraz Iqbal (enclosing a schedule of assets)	26.02.24	Iqbal1
3	First Witness Statement of Sheeraz Iqbal	29.02.24	Iqbal2
4	First Witness Statement of Owen John Vanstone-Hallam	08.03.24	Hallam2
5	Second Witness Statement of Sheeraz Iqbal	09.04.24	Iqbal3
6	Witness Statement of Claire Rose Brown of JMW Solicitors	24.06.24	Brown1
7	Witness statement of Lee Bottomley	25.06.24	Bottomley1
8	Third Witness statement of Sheeraz Iqbal	01.07.24	Iqbal4

Factual Background

4. Apparel is a large fashion and lifestyle retailer in the Middle East and Asia. It sells over 85 brands of clothing in more than 2100 stores in 14 countries. It has its headquarters in Dubai. Among the brands of clothing sold by Apparel is Tommy Hilfiger.

5. Mr Iqbal is, according to Particulars of Claim signed the day before the Order was obtained, a "businessperson based in England concerned with various ventures related to the sale of fashion and lifestyle goods".

6. TK Maxx is the trading name of TJX UK ('**TJX**'). TJX is a private unlimited company incorporated in England in 1995. TJX is a subsidiary of a US company which trades in America as TJ Maxx. TK Maxx has 596 stores in Europe and Australia. It sells designer brands at discounted prices. TK Maxx's stores are sometimes combined with a homewares company called Homesense.

7. On 22 March 2022, someone purporting to be a "senior buying lead" for TK Maxx and Homesense, using the name "Natalie Brown" approached Mr Michael Farah of Apparel by email. The email address used by Natalie Brown was natalie.brown@tk-maxx.co.uk. The email said:

> "Hi Michael,
>
> I am a senior buyer at TK Maxx UK and we are interested in exploring the opportunity to acquire past season/leftover stock of clothing, shoes and accessories from Apparel Group. Please let me know if there is an opportunity."

8. Mr Farrah responded by putting "Natalie Brown" in touch with Vishal Saxena, a planning manager at Apparel. Natalie Brown copied in another person apparently from TK Maxx called Rohan Rai to her reply. Mr Rai's job title as per the footer in his email was "Head Buyer (UK & Ireland) TK Maxx". His email address had the same format as that used by "Natalie Brown". A meeting by MS teams took place between Apparel representatives and "Natalie Brown" and "Rohan Rai" on 31 March 2023, although neither Ms Brown nor Mr Rai is reported to have turned on their video cameras for this meeting.

9. Nothing in the call seems to have aroused any suspicions at Apparel. Had Apparel checked with TK Maxx at this time, they would have discovered that TK Maxx had never heard of Natalie Brown or Rohan Rai. Unfortunately, Apparel only found this out in October 2023. I will refer to Ms Brown and Mr Rai collectively as "the TK Maxx Impersonators".

10. Apparel shared its inventory of Tommy Hilfiger and Calvin Klein items with Ms Brown and Mr Rai by email. Mr Rai sent to Apparel by email the Annual Report for TJX for the year ended 29 January 2022. Mr Rai later sent the VAT registration document for TJX and company incorporation documents. All of these documents appear to be genuine.

11. On 2 May 2023, Ms Brown sent an email to Mr Saxena saying that she and Mr Rai were interested in purchasing both inventories which they had been sent. Mr Rai

claimed that TK Maxx standard terms of payment to were “30 days from receipt of goods in our EU warehouse”. On 9 May 2023, Ms Lavina

12. Pinto, of Apparel, informed Ms Brown by email that they had received approval to offer a 30-day credit as long as the total value of the items in the order was less than EUR2 million.

13. Apparel requested a "customer information sheet" for TK Maxx. This was provided by email by "Natalie Brown" as a pdf document. It included "her" mobile telephone number, "her" electronic signature and company stamp apparently for TJX. It also provided contact details for a "Jane Marsh" at TK Maxx and bank account details. It stated that TK Maxx was established in 1905. This ought to have rung alarm bells at Apparel because TK Maxx was not established until 1995.

14. On 6 June 2023, Mr Rai sent a TJX Purchase Order to Apparel for 23,298 items of Tommy Hilfiger clothing and footwear ('**the Goods**'). The agreed purchase price for the Goods was AED6,2 million (approximately £1.2 million). The buyer was stated as being Natalie Brown.

15. The Goods were shipped in two containers on a Maersk Vessel, the "SEASPAN SANTOS", at Jebel Ali, UAE, on 26 June 2023. The Waybill refers to Triburg Freight Services ('**Triburg**') as the shipper, Antwerp as the port of discharge and names a forwarding company in Antwerp as the consignee. On 21 June 2023, Mr Rai sent an email to Apparel saying that the Goods were expected to arrive in Antwerp in mid-July.

16. On 16 July 2023 Ms Pinto, of Apparel, received an email from Mr Rai saying that the Goods were now "expected in Cape Town (via EU)". On 26 July 2023 and 28 July 2023 Ms Pinto chased for payment for the Goods. On 28 July 2023 Natalie Brown copied into an email to Apparel a "Malcolm Yani" with an email address in the same format as that used by Ms Brown and Mr Rai and asked him to update Apparel.

17. On 1 August 2023, Mr Yani sent Apparel an email saying that the goods were being held by South African Customs.

18. On 16 August 2023, Mr Yani asked Apparel for documents to show to South African customs. There was a further MS Teams meeting between Mr Rai and Apparel on 23 August 2023 to discuss what documents were required. Following that call, on 29 August 2023, a document in the requested form was sent by Apparel.

19. Apparel then chased Mr Rai, Ms Brown and Mr Yani for payment again but communications ceased from 10 October 2023. Hallam1 states that on 23 October 2023, Apparel learned that TK Maxx had never heard of Mr Rai, Mrs Brown, Jane Marsh or Mr Yani.

20. As to events thereafter Hallam1 states that Apparel then made enquiries of Triburg who revealed that the Goods had in fact arrived in Antwerp on 24 July 2023 and had not gone to South Africa. Hallam1 also exhibits a "machine translation" of a letter from a Dutch lawyer acting for the purchasers of the Goods, LGD Import Export BV ('**LGD**'). The letter states (in summary) that:

    a. LGD was founded in 2013 and trades in unsold / residual stock of well-known brands;

b. LGD had been informed by Mr Iqbal ("call sign[1] Sam") of the UK company Red Global Ventures Ltd that a batch of Tommy Hilfiger branded clothing/shoes i.e. the Goods might be available.

c. Red Global and LGD have been doing business "to everyone's satisfaction" since 2016.

d. Mr Iqbal is also associated with Oryx Retail Group ('**Oryx**').

e. The Goods were to be acquired by LGD from TK Maxx.

f. LGD had agreed to buy the Goods from TK Maxx for EUR353,475 and this sum was paid to a bank account apparently in the name of TJX Ltd (said to be a parent company of TK Maxx).

g. LGD had been fooled by "fictitious employees" of TK Maxx but had purchased the Goods in good faith and sold them on to their clients.

21. On 16 October 2023, Ms Pinto received an email from LGD stating that LGD had bought the Goods from "TK Maxx with all the right documents". This email was copied to stockoffershk@gmail.com. No explanation was given by LGD for copying that email address in.

22. On the same day, Ms Pinto received an email from a "Sam" at stockoffershk@gmail.com saying that the problem "has nothing to do with my client" and suggesting that Apparel take the matter up with TK Maxx direct. Sam provided the contact details for Rohan Rai and Natalie Brown.

23. The next day, 17 October 2023, Mr Iqbal (again referring to himself simply as "Sam") sent to Apparel some email correspondence which on its face appeared to be between him and Ms Brown and Mr Rai. According to this email correspondence Ms Brown and Mr Rai had approached Mr Iqbal via LinkedIn (using the name Sam) and had engaged him as a broker or agent for the sale of the Goods to LGD. Mr Iqbal's commission from TK Maxx , according to this email correspondence, was 7%.

24. On 19 October 2023, the Head of Legal at Apparel sent a cease and desist notice to LGD.

25. On 20 October 2023, Mr Iqbal (using the name Sam again) sent another email to Apparel. In this email he claimed (falsely) that TK Maxx sold the Goods to "our Kong Kong entity", "HK Stocklot Trading Co. Ltd" ("**HKS**"), who then sold it to LGD. Attached to the email was a purchase order naming HKS which was almost identical to the purchase order sent to Apparel by LGD in June. The only difference is the buyer details say HKS rather than LGD. The price is the same. The document is not genuine and was in fact created by Mr Iqbal.

26. Hallam1 states that the purchase price paid by LGD (EUR353,475) was paid into an account of a company linked to Mr Iqbal and that the same company paid Triburg US6,296 to transport the Goods to Antwerp.

[1] "call sign" is what the machine translation has produced but this seems to be a doubtful translation in this context. The original Dutch letter uses "roepnaam" which possibly just mean "usual name" or "everyday name".

27. Under the heading "full and frank disclosure" Hallam1 states:

> "My firm has explained to the Claimant the requirement for an applicant for a freezing order to give full and frank disclosure in any application that is made without notice to the opposing party. The Claimant had confirmed in writing that it considers it has given full and frank disclosure. My firm believes that through this Affidavit and the Exhibit hereto, the Claimant has given full and frank disclosure"

Full and frank disclosure: the law

28. Mr Power referred me to Lloyds Bowmaker Ltd v Britannia Arrow PLC [1998] 1 WLR 1337. In that case, (at 1343H) Glidewell LJ accepted the following two submissions:

> "A party who seeks relief ex parte is under a duty to the court to make the fullest disclosure of all material facts. He must disclose any defence he has reason to anticipate may be advanced. If he does not comply, he will be deprived of the fruits of his order without consideration of the merits and irrespective of whether, had he made such disclosure, he would or would not have obtained the order. It matters not whether the non-disclosure is deliberate or innocent. The court may allow a limited latitude for a slip, but only where the party seeking relief has corrected the error quickly."

> "…even if an injunction is discharged, the court should be ready to consider a further application for an injunction based upon facts as they appear at the time of the application to discharge the first injunction"

29. In his concurring judgment Dillon LJ said this:

> "As I said in a judgment given in this court only last week, I would endorse as emphatically as I can the views expressed by Lord Denning MR and Donaldson LJ in Bank Mellat v Nikpour [1985] FSR 87 that the making of an application for a Mareva injunction requires the fullest and frankest disclosure to the court on the part of the applicant."

30. The phrase "fullest and frankest disclosure" comes from the judgment of Donaldson LJ in the Bank Mellat v Nikpour case:

> "This principle that no injunction obtained ex part shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well established in the law that it is difficult to find authority for the proposition: we all know it; it is trite law"

31. Neither Mr Cullen nor Mr Power was able to direct me to any authority in which the phrase "fullest and frankest disclosure", as used by the Court of Appeal in the Bank Mellat and Bowmaker cases has been explicitly criticised or disapproved. However, the phrase does not appear in any of the more modern formulations of the duty. The modern formulation of the duty appears to derive from the seven principles set out in Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 at 1356F – 1357F:

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486 , 514, *per* Scrutton L.J.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners* , per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231 , 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289 , 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87 . The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson [1987] Ch 38* ; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87 , 92–93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v. Nikpour* , at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'; case* [1917] 1 K.B. 486 , 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87 , 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

32. Mr Cullen additionally drew my attention to the following passage from the decision of Lawrence Collins J in Konamaneni v Rolls Royce Industrial Power (India) Ltd. [2002] 1 WLR 1269 at [180]

> On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) 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; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: *Brinks Mat Ltd v. Elcombe* [1988] 1 WLR 1350 at 1356–7. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present.

33. The 2024 White Book (at 25.3.5) says:

> "It is well established that on all applications without notice it is the duty of the applicant (including an applicant in person) and those representing the applicant to make full and frank disclosure of all matters relevant to the application; this includes all matters of fact or law which are or may be adverse to the applicant. An applicant must disclose to the judge "any fact known to him which might affect the judge's decision whether to grant relief or what relief to grant"

34. The White Book in the same section goes on:

> "Although often expressed in terms of a duty of disclosure, the "ultimate touchstone" is whether the presentation of the application is fair in all material respects: per Popplewell LJ in Fundo Soberano De Angola v Jose Filomeno dos Santos [2018] EWHC 2199 (Comm). See also Hunt v Ubhi [2023] EWCA Civ 417; [2023] 4 All E.R. 530; [2023] Bus L.R. 1827 at [41] (Newey LJ)."

35. In Marc Rich & Co Holding GmbH v Krasner [1999] C.L.Y. 487, the Court of Appeal said the duty was clearly described by Bingham J in Siporex Trade SA v Comdel Commodities [1986] 2 Lloyd's Rep. 428 at 437 as follows: (1) The applicant must show the utmost good faith and disclose their case fully and fairly. (2) They must, for the protection and information of the respondent, in the evidence in support of the application summarise their case and the evidence on which it is based. (3) They must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. (4) They must investigate the nature of the claim asserted and the facts relied on before applying and must identify any likely defences. (5) They must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application."

36. Carr J (as she then was in) in Tugushev v Orlov [2019] EWHC 2031 (Comm) (at [7]) reviewed the case law set out above and distilled 13 general principles from it:

> (1) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
> (2) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course

adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;

(3) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

(4) 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;

(5) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

(6) 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;

(7) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

(8) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

(9) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

(10) 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;

(11) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
(12) 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;
(13) 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.

37. This thirteen-point summary was cited with approval and applied by the Court of Appeal in Derma Med v Ally [2024] EWCA Civ 175. Accordingly, it is these principles which I propose to apply.

38. However, I also remind myself of two grounds for caution contained in the White Book 2024 (in particular the second):

    a. There is case law warning of a tendency "to allege material non-disclosure on rather slender grounds" (*Brink's-MAT Ltd v Elcombe* [1988] 1 W.L.R. 1350 at 1359, above per Slade LJ) and to seek discharge "on the grounds of the most trifling errors" (*Worldcom International v Home Communications Ltd*, 16 September 1998, unrep., per Timothy Walker J).

    b. Generally, it is inappropriate to seek to set aside a freezing order for nondisclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (*Crown Resources AG v Vinogradsky*, 15 June 2001, unrep. (Toulson J)).

The Submissions

39. Mr Power made four submissions. His first three concerned matters which were not drawn to the Judge's attention at the hearing of the application which ought to have been (set out below in para. 41). His fourth submission was that the affidavit and skeleton both contained unqualified statements which were liable to mislead the Court.

40. Mr Cullen's overall response was that while the Claimant's presentation of the evidence may not have reached the gold standard for a without notice application, there

was no failure to give full and frank disclosure in any material respect and, even if there had been, the order should be re-made on the evidence now available.

41. Mr Power highlighted that Knowles J. asked no less than three times to have any matters of full and frank disclosure highlighted to him. The third occasion came in the following exchange:

> "JUDGE: "*You do need, if you do not mind, just to headline to me if there is any other matter of full and fair disclosure, any other matter which if the defendant was here they would be saying "Hey, look at thi*s".
>
> COUNSEL: "*Yes, well, I do not think there is my Lord. We cannot find anything that we ought to draw to your attention to say there is a gaping hole in the story, or even a bit of a tear in the cloth …that means it could unravel*"

42. Mr Power submits that this answer was misleading and wrong. The three things Mr Power says fell into the category of material facts or matters which the judge's attention should have been specifically drawn to and commented upon as being favourable to the Defendant are:

    a. The e-mail correspondence between Mr Iqbal on the one hand and "Natalie Brown" and "Rohan Rai" on the other which starts with an approach by Ms Brown on 18 April 2023, evidence an apparent agency agreement between Mr Iqbal and TK Maxx and ends on 5 October 2023 with a complaint about faulty stock ("**the Agency Emails**").

    b. The fact of LGD's longstanding business relationship with Mr Iqbal

    c. The potential defence available to Mr Iqbal that he believed that the transaction being presented by the TK Maxx Impersonators was a genuine one (i.e. that he had himself been duped into acting as an agent).

43. I accept Mr Power's first and third submissions without any hesitation. In my judgment, it is plain and obvious that the Agency Emails should have been specifically drawn to the attention of the judge in both the skeleton and at the hearing and along with its potential to provide an answer to the claim. The point that should have been made by Mr Butler (after taking the judge to the Agency Emails and ensuring that it had been read and its context understood) was that if this exchange was genuine, it suggested that Mr Iqbal had been approached by the TK Maxx Impersonators him via LinkedIn and duped into acting as an agent in what was presented as a genuine transaction between TK Maxx and LGD. Moreover, in my judgment, the point ought to have been made that this email correspondence was on its face consistent with what LGD had independently told Apparel had happened.

44. Mr Power's second submission is, in my judgment, more marginal. The judge's attention was in fact drawn to the part of LGD's letter where the longstanding business relationship between LGD and Mr Iqbal's company was mentioned but the point in Mr Iqbal's favour which was not made was that the nature of the relationship might be said to support the potential defence (as disclosed in the Agency Emails) that Mr Iqbal believed that he was bringing (to <u>his</u> long-standing client) a genuine transaction to LGD rather than a fraudulent one.

45. I also accept Mr Power's fourth submission. In my judgment, neither the affidavit nor the skeleton presented the evidence in a fair, objective or even-handed manner.

46. There are a number of problems with Hallam1. It failed in numerous places to distinguish between assertions of fact on the one hand and submissions or inferences on the other. It contains highly prejudicial statements apparently of fact which are not backed up by documents or by any attempt to identify a source of knowledge as required by paragraph 4.4 of the PD to CPR Part 32. In one respect, highlighted in oral submissions by Mr Power, the affidavit was positively factually misleading. It asserted that Mr Iqbal had passed himself off in correspondence as "Sam Lee" when in fact it was the Claimant's assumption based on an a LinkedIn entry (not exhibited to Hallam1 but only to Hallam2) that Sam/Mr Iqbal was Mr Sam Lee. The table below summaries the passages in the affidavit which were, in my judgment, misleading and/or failed to comply with paragraph 4.4 of the PD to CPR Part 32:

Item No.	**Passage (with emphasis added)**	**Problem**
1	"It has emerged that the Claimant was subject to a straightforward but highly organised fraud at the hands of Defendant" (para 11)	This is a submission. It should have been qualified in some ways such as: "It is the Claimant's case that it was …" or "the Claimant believes" and the source of that belief identified.
2	"It transpires that the fraudsters were the Defendant and those acting at his direction" (para 17)	This passage is misleading because it suggests that the Claimant has firm evidence which demonstrates that the Defendant had masqueraded as the TK Impersonators. At best this was a belief, submission or inference which the Claimant contended ought to be drawn based on other bits of evidence.
3.	"The Defendant has already disposed of the Stock which he fraudulently acquired from the Claimant by selling it on to LGD for cash consideration of EUR353,475"	Same problem as No. 1 above.
4	"Various documents were provided to the Claimant by the Defendant posing as Mr Rai and Ms Brown". (para. 38).	Same problem as in No.2 above
5	"On 6 June 2023, the Defendant posing as the fictitious Mr Rai issued a purchase order" (para. 43).	Same problem as in No.2 above

6	"as he [the Defendant] was the person behind the fictional aliases of Ms Brown and Mr Rai" (para 44).	Same problem as in No.2 above
7	"Mr Yani is also understood to be an alias of the Defendant. In early August, the Defendant and/or his associates, posing as Mr Yani and Ms Brown continue to say there was no change in the status of the shipment." (para. 49).	Pursuant to para. 4.2 of the PD to CPR Part 32, the person who believed this to be the case should be identified and the source of that knowledge stated. In reality this is a submission or a suggested inference based on other evidence
8	"in the interests of full and frank disclosure, the facts are straightforward: the Defendant posing as TK Maxx and intermediaries sold the stock to LGD…" (para 54).	The introductory words suggest that the concept of full and frank disclosure was not understood by the deponent. Rather than being an attempt to give full and frank disclosure, the passage simply summarises the Claimant's own case but mispresents it as being a matter of "straightforward fact". In fact, the Claimant had no direct evidence that the Defendant posed as the TK Maxx Impersonators. This assertion needed to be appropriately qualified or rephrased as a submission
9	In an effort to cover his tracks, on 16 October 2023, the Defendant emails the Claimant claiming to be Sam Lee.	This factually incorrect and highly prejudicial. The email is signed simply as "Sam" (which LGD had informed Apparel was the name used by Mr Iqbal) not "Sam Lee". The use of "in an effort to cover his tracks" needed to be qualified and identified as being a belief or submission.
10	"When the Claimant first made enquiries in October, the supposed intermediary was referred to as "Sam Lee" from "Stock Offers HK"".	There is no document or other source for the assertion that the Defendant referred to himself as "Sam Lee". This matters because the Claimant goes onto say that that it "understands that Sam Lee was an alias used by the Defendant" and in para. 61 to the "supposed Mr Lee". The intention seems to have been to suggest that because the Claimant had concrete evidence the Defendant had posed as one other person, namely "Sam Lee" this supported the Claimant's case that

		he had also posed as the TK Maxx Impersonators.

47. It is right to say though that Hallam1 is far from being all bad. The vast majority of statements in Hallam1 are correctly supported by identified sources of knowledge - usually an exhibited document. It is nevertheless very unfortunate that interwoven in that otherwise correctly referenced narrative are a whole series of highly prejudicial factual assertions about the Defendant (including those identified in the table above) for which no source of knowledge was provided or for which the Claimant had no direct evidence. What the deponent was required to do in the interests of "objectivity" and "fair presentation" and in compliance with para. 4.2 of the PD to CPR Part 32 was set out what he (or others) knew in neutral terms, the source of that knowledge and then identify, any weaknesses or problems with that evidence and, finally, what inferences it was reasonable to draw about the role of Defendant in light of that evidence.

48. The skeleton argument might have been used as a means to mitigate the problems with Hallam1 identified above e.g. alerting the court that some of the statements in Hallam1 needed to be qualified and generally by presenting a more balanced account of the evidence and case. However, the skeleton did not do this. It too contained the assertions which were, in my judgment, submissions on material points dressed up as factual matters and in the case of (c) repeated the statement about the Defendant posing as Sam Lee which was straightforwardly wrong:

    a. "The Respondent made contact with the Applicant in March 2023, representing himself as staff from the retailer TK Maxx (para. 32-33 1st Affidavit OVH) – these were fictional identities".

    b. "In August 2023, still posing as staff from TK Maxx, the Respondent attempted to misdirect the Applicant into believing that the Stock had ultimately made its way to South Africa (para. 47-53 1st Affidavit OVH"

    c. "To aid the deception, in October 2023, the Respondent added a further character to his deception to as the middleman. The Respondent claimed to be Sam Lee of HK Stocklot Trading Company Limited (para 59-63 1st Affidavit OVH)".

49. It was of course open for Mr Butler to say in the skeleton that it was the Claimant's case that the Respondent had posed as both of the TK Maxx Impersonators and Malcom Yani but the evidence on which those submissions were based should have been properly and fairly summarised.

50. The skeleton contained no section on full and frank disclosure. It is almost universal practice for a skeleton for a without notice application to contain such a section to demonstrate that to the Court that counsel has (i) considered the application from the perspective of the person against whom the freezing injunction is sought; (ii) considered specifically what evidence ought to be highlighted to the court on his or her behalf; and (iii) what weaknesses there are in the Claimant's evidence and/or case. It is no doubt precisely because the skeleton contained no such section that that Knowles J asked for assistance on the point during the hearing.

51. I accept Mr Power's submission that Mr Butler's answer to the judge's question in the passage cited in paragraph 40 above, was a failure to provide full and frank disclosure. It will be a rare case in which there is literally nothing which can be said against the application or for the Defendant. There may be some cases where the evidence is so clear and overwhelming that the advocate can properly say "there is nothing I can think of which if the Defendant were he here would want you to know". However, in my judgment, this was certainly not such a case for the reasons already given. This is not a case where the Claimant is being criticised for failing to think up a highly abstract or theoretical defence. The Agency Emails plainly disclosed a clear and obvious potential defence.

52. I reject Mr Cullen's submission that there was no need to take the judge to the "Agency Emails" because he had indicated that he had "read the materials". Even though the Agency Emails were referred to in Hallam1 and exhibited to Hallam1, it remained, in my judgment incumbent upon Mr Butler in the interests of fair presentation to take the judge to the Agency Emails and to make the point that if they are genuine, they suggest Mr Iqbal may himself been duped into acting as an agent. It was all the more important to do so at the hearing because this point had not been made in the skeleton.

53. In the interests of fair presentation, in my judgement, the following points should also have been highlighted in answer to the judge's question: (i) that as matters stood Apparel had no direct evidence to suggest that the Agency Emails had been fabricated (ii) there was no direct evidence that Mr Iqbal was the TK Impersonators (iii) if LGD were telling the truth when they said that Mr Iqbal had been trading successfully with them since 2016 and was well known to them (as Sam), then it might appear somewhat odd that Mr Iqbal should have chosen to involve them in the fraud.

54. Standing back and looking at matters in the round, the affidavit, the skeleton and the oral presentation of the case at the hearing, in my judgment, all fell significantly short of what is required in terms of overall fair and objective presentation of the evidence and the strength of the Claimant's case in material respects. I am satisfied that the Order should be set aside as a result, essentially for the reasons submitted by Mr Power.

Should the Order be continued or re-instated?

The relevant principles

55. There was no dispute as to the test to be applied in respect of either "good arguable case" of a "real risk of dissipation".

56. In respect of the good arguable case threshold, Mr Cullen made the following submissions, which I accept:

    a. A good arguable case means a case which is "*more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success": Kazakhstan Kagazy plc & Ors v Arip* [2014] 1 CLC 451 at [66]. In endorsing that test, the Court of Appeal also rejected the suggestion that the applicant is required to show that it has "*much the better of the argument*": see [66]-[68] per Elias LJ and see also Longmore LJ at [25].

b. When applying the good arguable case test, the court should not attempt to try the issues but should only consider the apparent strength or weakness of the respective cases to decide whether the claimant's case, on the merits, is sufficiently strong to reach that threshold. That may include assessing the apparent plausibility of statements in the affidavits: see *Alternative Investment Solutions (General) Ltd v Valle de Uco Resort & Spa SA* [2013] EWHC 333 (QB) at [7] and *Kazakhstan Kagazy plc & Ors v Arip* [2014] 1 CLC 451 at [23] per Longmore LJ

c. The test for 'good arguable case' in the context of freezing injunctions is not a particularly onerous one"; In *Lakatamia Shipping Company Ltd v Moritomo* [2019] EWCA Civ 2203; [2020] 1 C.L.C. 562 at [35], Haddon-Cave LJ said that and at [38], that *"[t]he central concept at the heart of the test [is] 'a plausible evidential basis'*" (Emphasis added).

57. As to risk of dissipation, Mr Cullen cited the following principles, taken from the judgment of Haddon-Cave LJ in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203; [2020] 1 C.L.C. 562 at [34]:

(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 may 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) […]

(6) What must be threatened is unjustified dissipation. The purpose of a WFO 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..."

(7) Each case is fact specific and relevant factors must be looked at cumulatively."

58. Mr Power did not dissent but highlighted the following factor from Candy v Holyoake [2018] Ch 297 at [62] which he submitted applied on the facts here:

> "The fifth evidential factor, (namely the "stable door" point) was in my view (and contrary to the judge's view) a powerful factor militating against any conclusion of a real risk of dissipation. If there had been a real risk of the appellants unjustifiably dissipating their assets, it would have materialised by the time of the application. The first intimation of what became the present proceedings occurred in May 2014. There was then a detailed letter of claim, with draft particulars of claim, in December 2014. A revised claim was ultimately issued in August 2015. The respondents repeatedly threatened to seek a freezing order (or similar relief) from September 2015. The application for an initial notification was made in February 2016, resulting in the 7-8 April hearing. In my view it was inherently unlikely that the appellants would unjustifiably dissipate their assets in the future, having not done so by this point."

59. Finally, as this is a case in which the Court is being asked to re-instate or continue a freezing injunction order in circumstances where the original order was obtained in breach of the obligation to provide full and frank disclosure, I bear in mind (11) – (13) in the passage from Tugushev v Orlov cited above.

60. I am not persuaded that this a case where the Order should be continued or re-instated for the following reasons:

    a. Although none of the failures in presentation of the Claimant's case were intentional, there was, as I have held, nevertheless a pervasive overselling of the Claimant's evidence in material respects at all stages of the application (affidavit, skeleton and oral argument) and a failure to draw the court's attention to material evidence which pointed away from the Defendant being the instigator of the fraud.

    b. The Claimant's case does not reach the threshold of good arguable case. The Claimant has a case which is capable of serious argument but not more. The Defendant has now put before the Court a significant body of WhatsApp messages and emails which strongly support the Defendant's case that he was himself duped by the TK Impersonators. For the Claimant's case that Mr Iqbal is behind the scam and impersonated Ms Brown, Mr Rai and Mr Yani, to be correct all of theses emails and all of the WhatsApp messages which Mr Iqbal has produced in evidence (including those retrieved by an independent expert from his broken phone) have to be fabricated. It is of course possible that they are and that will be a matter for trial. Mr Cullen submitted that there was some evidence to support the case that all the emails and WhatsApp messages are fabricated. He pointed to some discrepancies between the native versions of the emails (in particular in respect of whether "Sam" appeared in them or not) and the versions produced in pdf. Some of these discrepancies Mr Iqbal could explain and others he could not. However, most of the discrepancies were it seemed to entirely inconsequential, for example, "20222" instead of "2022" and a difference in unit price. More significantly, as Mr Power submitted, despite the fact that the Claimant now has the native emails, Mr Cullen has not able to point to anything in the meta data of the emails themselves which would suggesting that they were all fabricated. The emails and WhatsApp messages also have a level of everyday detail that lend them an apparent plausibility. They are consistent with each other in showing how Mr Iqbal was slowly drawn in and then became more and more

uncomfortable as the money goes out of his company's account and his commission is not paid. It is not appropriate for me to descend into the minutiae of this evidence or to make even provisional findings. That is a matter for the trial judge. Mr Cullen could also point to one admitted lie and one fabricated purchase order by Mr Iqbal. However, as the evidence stands, the highest I consider it can be put is that it arguable and properly pleadable inference that Mr Iqbal is somehow involved in the fraud but no direct evidence that he was or that he has fabricated all the emails and WhatsApp messages he has exhibited in evidence. The fact that admitted that he gave a false account of the transaction to Apparel and falsified one document is capable of supporting such an inference but I am not fully persuaded that on the material currently available the Claimant's case meets the threshold of a good arguable case.

c. Even if I am wrong about that and the case crosses the threshold on the evidence presently available, there is in my judgment no evidence of a real risk of dissipation of assets. The Applicant must demonstrate a current risk of dissipation of assets now held: see point (4) of the summary on p. 2924 of the White Book 2024 drawn from *Gulf Air BSC v One Flight Ltd* [2018] EWHC 1019 (Comm at [17] – [20]). I accept Mr Power's stable door submission for the following reasons:

    i. On the evidence now available, the proceeds of the sale were originally paid into the accounts of a company owned by Mr Iqbal. On his evidence and on the basis of the WhatsApp messages he has produced, he was taken by surprise by this and did not want the money in those accounts.

    ii. The money was then transferred out to 11 companies said by the TK Maxx Impersonators to be companies who were suppliers to TK Maxx and who were owed money by TK Maxx.

    iii. There is no evidence that the companies which received the money have any link to Mr Iqbal such that the money should today be considered as being an asset of his.

d. It follows that on the basis of the evidence now available both the Goods themselves have gone (first into the hands of LGD and then sub-purchasers) and the proceeds of the sale to LGD have gone. Any freezing injunction today would therefore be nothing more than an attempt to shut the stable door after the horse has bolted. The position is very different to that before Knowles J. because at that stage the evidence was that the proceeds of the sale to LGD remained in the hands of a company controlled by Mr Iqbal.

e. As to the other factors, relevant to the threat of dissipation, Mr Cullen submitted that there are doubts about the veracity of Mr Iqbal's statements about his assets, in particular his assertions about his wife's interest in a cryptocurrency account and their family home and the lack of any obvious source of income to support his lifestyle (including two expensive cars). However, none of these points in my judgment rose above the level of general suspicion or assertion and did not really bear directly on the issue of whether there was solid evidence of risk of a dissipation of assets.

f. As to dishonesty, Mr Cullen understandably emphasised that Mr Iqbal has now admitted that he lied to Apparel when he said that HKS had purchased the Goods and sold them to LGD and that he had falsified one document (the HKS purchase order). He says he lied under pressure from LGD to put some distance between them and TK Maxx. I am in no position to assess the credibility of that explanation. However, the false statement in the email to Apparel does not strike me as the work of a calculating fraudster who has carefully laid a trail of emails and WhatsApp messages. The message obviously made things worse for Mr Iqbal because it contradicted the email correspondence he had sent to Apparel which on its face suggested that he was just a broker or agent. In any event the admitted dishonesty in question, is not sufficiently closely linked to any risk of dissipation of current assets to weigh heavily in the balance in favour continuing / re-instating the Order.

g. As to Mr Iqbal's reaction to the claim, he has put in a full defence and very detailed witness statements explaining how he came to be involved and exhibiting comprehensive chains of emails and WhatsApp messages and other documents, such as his LinkedIn profile, which are consistent with his being duped. His initial response to the queries from Apparel was I accept slightly odd and defensive. It is possible that what he most feared (at that time) was losing the trust of LGD and that was more important to him than being open with Apparel. However, in my judgment, there is nothing overall in his reaction to the claim such as to weigh significantly in favour of continuing or re-instating the Order.

h. Mr Iqbal has in open correspondence offered an undertaking in respect of his largest declared asset namely the equity in his house.

i. There is nothing in the evidence relevant to good arguable case on the merits which is of sufficient strength as support the inference that there is a real risk of dissipation. I was referred in this context to the comments of Henshaw J in ArccelorMital v Ruia and Others at [2020] EWHC 740 (Comm) [213] and those of Gloster LJ in Holyoake v Candy [2018] Ch 297 at [61]

j. In summary, approaching the matter holistically, for the reasons given above, I do not consider that the Claimant has established there is a real risk of a future unjustified dissipation of assets which is supported by solid evidence, even if the Claimant has contrary to my conclusion above a good arguable case on the merits.

61. As to there is no real risk of dissipation of assets, the ultimate question (as it was described by Gloster LJ in Holyoake v Candy [2018] Ch 297 at [65]) of whether it necessary just or convenient to continue or re-instate the Order must be answered in the negative. However, I note that the toll on the Defendant caused by the Order is said to have been heavy.

62. The Claimant may have a case which it can ultimately prove against the Defendant when all the evidence is considered at trial but in all the circumstances, in my judgment, there is no injustice in declining to continue or re-instate the Order. The appropriate response to both the way in which the matter was presented to Knowles J and on the evidence now before the court is to put Claimant back in the normal position of a litigant having to take the Defendant as it finds him and to restore to the Defendant

the position where he can carry on his life without the restrictions of a freezing injunction.

Conclusion

63. The Claimant's application to continue or re-instate the Order is accordingly dismissed and the Defendant's application to discharge the Order succeeds.