Neutral Citation Number: [2020] EWHC 1742 (QB)

Case No: QB-2020-000982

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2020

Before:

MR JUSTICE GARNHAM

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Between:

Murli Mirchandani	**Applicant**
- and -	
Alka Gheewala	**First Respondent**
- and -	
Augusta Ventures Limited	**Second Respondent**

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Mr Geraint Jones QC (instructed by **Rainer Hughes**) for the **Applicant**
Mr Nigel Hood (instructed by **Thakrar & Co Solicitors**) for the **First Respondent**
Mr Paul Fisher (instructed by **Metis Law**) for the **2nd Respondent**

Hearing dates: 10th June 2020

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Approved Judgment

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

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Mr Justice Garnham:

Introduction

1. There are three applications before the Court. First, an application dated 29 April 2020, made by Mr Mirchandani, to discharge a number of freezing orders made by the Court in the summer of 2019 and in March 2020; second, an application by Augusta Ventures Limited, also dated 29 April 2020, seeking to set aside the order of Spencer J, dated 21 April 2020; third an application by Ms Alka Gheewala dated 4 June 2020 which seeks an uplift in the sum set out in the order of 19 August 2019.

2. The factual history of this case is complicated and needs to be set out in a little detail.

The History

3. In about 1999 or 2000, Mr Murli Mirchandani, the applicant in the first application, was the victim of a very substantial fraud perpetrated by a man by the name of Ketan Somaia, the former husband of Ms Alka Gheewala, the first respondent to the first application.

4. In June 2014, Mr Mirchandani brought a private prosecution against Mr Somaia which culminated in Mr Somaia's conviction on 9 counts of fraud. He was sentenced to 8 years imprisonment. On 12 January 2016, in subsequent confiscation proceedings, Mr Mirchandani secured an order (granted by His Honour Judge Hone QC) that Mr Somaia should pay approximately £18 million to Mr Mirchandani by way of compensation ("the Compensation Order"), enforceable against Mr Somaia's assets, and £20 million by way of a confiscation order ("the Confiscation Order"). Those assets included a 50% beneficial interest in Flat 71, 25 Porchester Place, London, W2 2PF ("the PP Flat").

5. On 12 October 2016, an Enforcement Receiver ("the Receiver"), Ms Christine Bartlett, was appointed to enforce both the Confiscation Order and Compensation Order.

6. During 2016 to 2017 Mr Mirchandani pursued civil proceedings against Ms Gheewala claiming that her 50% share in the PP flat was a "tainted gift", caught by section 74 of the Criminal Justice Act 1988 ("CJA Proceedings"). It was argued that that share should be available to the Receiver in satisfaction of both the Compensation Order and the Confiscation Order. That action came on before Jefford J, who rejected the claim (*Re Somaia* [2017] EWHC 2554 (QB)). On 9 November 2017, she ordered an interim payment on account of costs, in the sum of £125,844, to be paid by Mr Mirchandani to Ms Gheewala by 23 November 2017. That sum was not paid, and Ms Gheewala applied for an unless order.

7. Choudhury J made that order. Choudhury J's judgment, at *Mirchandani v Somaia* [2017] EWHC 3766 (QB), included the following passage responding to the contention made by Mr Mirchandani that he simply could not pay:

> "30…There are a number of real concerns about that evidence and that assertion, first of all this contention was not made before Mrs Justice Jefford. Had there been any real difficulty

> anticipated about payments or the ability to pay, Mr Mirchandani would surely have instructed his counsel on that occasion to make those points and to apply for a longer time to pay than the 14 days that was ordered. It does not appear that there were any such submissions. Secondly, if the lack of liquidity has just arisen, since the 9th November, there is no sense of that at all from the evidence. Thirdly, I note the background that Mr Mirchandani has been able to expend very large sums of money on instructing lawyers and leading counsel, these sums appear to have run into the millions. Whilst sums have been recovered from central funds there is no credible evidence before me that there was any substantial difficulty in raising those amounts to pay in the first place.
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> 31. The impression one gets from some of the material before this Court is not just that Mr Mirchandani is a man of means, but he is a man of very substantial means. But most crucially the assertion made by Mr Mirchandani in his statement is not backed up with a shred of evidence. There are no bank statements, no accountant's reports, no accounts of any description of his various companies, not one single document that this Court would expect to see when there is effectively an application to extend time for payment following a Court Order. There are various vague references to attempts to secure litigation funding, once again we see that these are not evidenced, no correspondence is attached, nothing to indicate when these discussions took place or anything of that nature. The test is as I have said, the Court has to be satisfied on the balance of probabilities. Mr Mirchandani's evidence falls short of that by a very considerable margin."

7. On 9 January 2018, the outstanding sum was paid to Ms Gheewala's solicitors from the bank account of Sadin Associates Inc, a Panamanian company, apparently owned or controlled by Mr Mirchandani's brother, through a Swiss bank account. Ms Gheewala's solicitors returned that money, not being satisfied that the payment complied with money laundering regulations. Mr Mirchandani made the payment on account through his solicitors on 26 January 2018.

8. On 25 May 2018, Jefford J determined that both Mr Mirchandani and Ms Gheewala's costs should be paid out of central funds pursuant to section 17 of the Prosecution of Offences Act 1985. However, following an intervention from the Lord Chancellor, on 19 December 2018 Jefford J set aside that costs award.

9. On 21 August 2018, during the period between the costs award being made and set aside, Mr Mirchandani entered into a Facility Agreement with Augusta Ventures Limited ("Augusta"), pursuant to which Augusta provided a loan of £520,000 which was to be repaid within 12 months. The Facility Agreement was intended to fund the enforcement proceedings. The loan was secured by both the costs award and sums received from the sale of the PP Flat.

10. On 5 July 2019, Ms Gheewala's solicitors sought Mr Mirchandani's agreement that Mr Somaia's share of the net proceeds of sale of the PP flat should be retained in the jurisdiction to ensure that she could enforce the costs order in her favour against those monies. That was not agreed by Mr Mirchandani.

11. Mr Mirchandani defaulted on the Facility Agreement by failing to make payment in full by 21 August 2019. (It is said he was also in breach of various representations and warranties including the fact that enforcement proceedings the costs of which the Facility Agreement was intended to cover were never commenced).

12. On 29 July 2019, Ms Gheewala made an application for a restraint order against Mr Mirchandani, in respect of any monies paid or to be paid to Mr Mirchandani pursuant to the Compensation Order. That application was heard by Phillips J. Mr Mirchandani did not attend the hearing but sent a doctor's letter purporting to excuse his attendance. Phillips J treated that as an application for an adjournment, which he considered and rejected. He framed the restraint order by reference to the 'Restrained Asset' up to the value of £200,000. The Restrained Asset was defined as follows:

> "The Restrained Asset is any sum up to £200,000 paid or to be paid to the Respondent, Murli Mirchandani, by the Court or by any other person pursuant to and in part satisfaction of the Compensation Order made by His Honour Judge Hone 12 January 2016 in case T2013/7399"

13. Subsequently, Ms Gheewala made an application for a freezing order against Mr Mirchandani. On 31 July 2019 Phillips J granted an order, ex parte, preventing Mr Mirchandani, until 19 August 2019, from removing from the jurisdiction any of his assets up to the value of £215,000. It also required him to provide by affidavit certain information, including information relating to money lent pursuant to the Facility Agreement.

14. Mr Mirchandani did not attend that hearing and was not represented on the return date. He made no application for an adjournment and adduced no evidence in support of an adjournment. Lambert J, before whom the matter was listed, noted that he was in breach of paragraph 9 of the order of Phillips J. She granted a world-wide freezing order and a further disclosure order.

15. On 2 September 2019, Mr Mirchandani filed an affidavit asserting, in substance, that he had no assets and substantial debts.

16. On 13 September 2019, Ms Gheewala sought a further unless order against Mr Mirchandani. As is recorded in the 3rd recital to that order, Bryan J considered a letter from Mr Mirchandani and a doctor's letter but found that Mr Mirchandani had chosen not to attend, with no good reason. He made an unless order against Mr Mirchandani, obliging him to comply with the orders of Phillips J and Lambert J, by paying the costs he had been ordered to pay, in default of which he would be debarred from participating in the detailed assessment hearing listed for 2 days starting on 10/10/19. Mr Mirchandani did not to comply with that order of the Court.

17. Mr Mirchandani instructed his solicitors, Thomas Legal, to issue an application to adjourn the detailed assessment hearing. That application was dismissed with costs. The detailed assessment proceeded, and Master Leonard ordered Mr Mirchandani to pay the sum of £311,266.88 to Ms Gheewala together with a further £23,192.16 in costs of the detailed assessment proceedings and the failed application to adjourn. Those costs have not been paid.

18. Mr Mirchandani made an application to the Court of Appeal for permission to appeal the unless order of Bryan J and in December 2019, he was granted conditional permission, limited to one ground of appeal. The condition was that his appeal be stayed unless he paid the sum of £36,000 into Court pending the appeal. The Court of Appeal also noted, that it had not granted Mr Mirchandani a stay of execution. The sum of £36,000 was not paid into Court and his appeal is stayed and has been stood out.

19. The Receiver sought to sell the PP Flat. A Search of Whole (with Priority), filed at the Land Registry on 3 February 2020, identified that there were priority searches and a pending application with the Land Registry in respect of the registered PP Flat title. Augusta's solicitors considered that a sale might be in contemplation. They put both the Receiver and Ms Gheewala on notice of a potential application for injunctive relief. The flat was, in fact, sold by the Receiver for £650,000 on 20 February.

20. Augusta's instructing solicitors issued two urgent applications in the two separate proceedings. The first sought a freezing order against Mr Mirchandani's assets in the value of £890,952.30 in their claim ("the Augusta Claim"). The second sought the addition of Augusta as a party to the CJA Proceedings and a variation to the restraint order, increasing the value of the Restrained Assets to £890,952.30, with an accompanying provision that no payment be made out of the Court Funds Office unless a 'with notice' application be made to the Court (with 7 days' notice being provided to all other parties prior to filing). On 5 March 2020, Saini J made the orders sought.

21. On 6 March 2020, Augusta issued the Augusta Claim in the Commercial Court against Mr Mirchandani for the sums owed pursuant to the Facility Agreement. That claim was subsequently transferred to the general Queen's Bench list. Judgment in default has recently been obtained in these proceedings against Mr Mirchandani.

22. That same day, 6 March, following independent enquiries made with the Land Registry, Augusta's instructing solicitors were informed that the PP Flat had been sold. On 6 March 2020, following the hearing before Saini J, his order in the CJA Proceedings was served on Mr Mirchandani, informing him of the return date hearing to be listed for 10 March 2020.

23. On 9 March 2020, Augusta's solicitors wrote to Mr Mirchandani confirming the listing details of the hearing for the following day. Having received a note of the Saini J hearing served on him by those solicitors, Mr Mirchandani emailed the Court indicating he was unable to attend the hearing but would be reachable on email and mobile.

24. On 10 March 2020, Griffiths J made an order increasing the sum of the Restrained Asset to the value of £1,090,952.30 (thereby incorporating the sum frozen by virtue of the

order of Saini J on 5 March 2020). Mr Mirchandani was ordered to pay Augusta a further sum of £25,000 in costs. He has not paid that sum.

25. The Restrained Asset related only to monies payable to Mr Mirchandani pursuant to the Compensation Order. It is not, therefore, of general application in the nature of the freezing order granted by Saini J.

26. On 19 March 2020, the day before the return date in respect of Saini J's Order, Augusta's solicitors were advised by letter that Saracens Solicitors ('Saracens') had come on record as acting for Mr Mirchandani in respect of Augusta's freezing injunction, and the underlying claim in the proceedings. Mr Adam Chichester-Clark was instructed by Mr Mirchandani as counsel to appear on his behalf, and did so.

27. On 20 March 2020, Morris J continued the freezing injunction ("the Morris J Order") against Mr Mirchandani, and increased the sum frozen to £917,364.24. It was submitted at the hearing that Mr Mirchandani's representatives had not had an opportunity to consider the freezing order in the detail they would have liked.

28. Morris J's Order included the following:

    (i) By paragraph 9, Mr Mirchandani was required to disclose his assets worldwide exceeding £2,000 by 4pm 27 March 2020 and swear an affidavit in support by 4 pm 30 March 2020; and

    (ii) Paragraph 15 entitled Mr Mirchandani to make an application to set aside, vary or discharge the Morris J Order by 5pm on 17 April 2020, failing which Augusta would be entitled to its costs of both freezing order applications, subject to detailed assessment if not agreed in addition to a £15,000 payment on account of those costs, to be paid within 21 days.

29. On 25 March 2020, Saracens served Mr Mirchandani's affidavit in purported compliance with paragraph 9 of Morris J's Order, listing his assets worldwide exceeding £2,000 in value. Mr Mirchandani claimed to own a total of two assets worldwide exceeding £2,000. They were in value as follows:

    (i) A Natwest Account currently overdrawn in the sum of £4,100; and

    (ii) A property at 1723 World Trade Centre Residences, Jumeriah Living, P.O. Box 116555, Dubai, UAE allegedly valued at AED 3.6m. There is a charge over this property in favour of HSBC which currently stands at AED 7,240.594. As such, Mr Mirchandani claims that the value of the property is in negative equity in the sum of AED 3m.

    In addition, the affidavit referred to the Compensation Order.

30. On 1 April 2020, Augusta's solicitors, Metis Law, wrote to Saracens setting out serious concerns in relation to Mr Mirchandani's affidavit. In particular, they expressed concern regarding how Mr Mirchandani was funding the litigation given that he had engaged solicitors and counsel at the hearing on 20 March 2020. Mr Mirchandani was also put on notice as to his reporting obligations in respect of his day-to-day living expenses and reasonable legal costs. On 3 April 2020, Saracens advised that it was no longer instructed in the matter.

31. On 7 April 2020, Rainer Hughes, solicitors, came on the record as acting for Mr Mirchandani, in relation to both the freezing orders and the underlying Augusta Claim. It was confirmed, in this letter, that Mr Mirchandani was funding the litigation through an unidentified third party and that his legal costs are not being met from any of his assets.

32. On 14 April 2020, Metis Law wrote to Rainer Hughes seeking confirmation that Mr Mirchandani's asset affidavit and Rainer Hughes letter of 7 April 2020 constituted an express assurance that Mr Mirchandani did not possess any assets worldwide exceeding £2,000 in values and seeking confirmation as to who is funding Mr Mirchandani's litigation costs. On 16 April 2020, Rainer Hughes responded confirming that Mr Mirchandani was sustaining himself through the assistance of family, friends or debt.

33. On 21 April 2020, Rainer Hughes applied for a retrospective extension of time on Mr Mirchandani's behalf for the purpose of complying with paragraph 15 of the Morris J Order. That application was made on a without notice basis. Spencer J granted the extension on that basis ("the Spencer J Order"). The effect of the Spencer J Order is that Augusta's costs of the freezing injunction application and the continuation of the injunction are reserved to be determined at the hearing of Mr Mirchandani's application to set aside the freezing orders. The Spencer J Order did not contain the usual statement to the effect that the respondent was entitled to apply to set it aside within 7 days. Nonetheless, on 29 April 2020 an application to set aside the Spencer J Order was made.

34. On 29 April 2020, Mr Mirchandani applied to set aside the following orders:

    (i) The freezing order of Phillips J dated 29 July 2019 obtained by AG, as varied by Griffiths J on 10 March 2020 by an application of Augusta, freezing the sum of £1,090,952.30 pursuant to the sale proceeds of the PP Flat;

    (ii) The freezing orders of Phillips J dated 31 July 2019, continued by an order of Lambert J on 19 August 2019 obtained by AG; and

    (iii) The freezing orders of Saini J dated 5 March continued by virtue of the Morris J Order obtained by Augusta.

35. On 5 May 2020, judgment against Mr Mirchandani in the Augusta Claim was obtained in default of Mr Mirchandani filing an Acknowledgment of Service and a Defence. Augusta, therefore, has a judgment against Mr Mirchandani in the sum of £931,691.06 inclusive of interest, Court fees and fixed costs.

The First Application

The proper approach

36. As regards Mr Mirchandani's application to set aside the freezing orders against him, it is to be noted that his application in the Augusta proceedings to set aside the order of 20 March 2020 follows an inter partes hearing before Morris J on that date. The application to set aside the orders, of 29 July, 31 July and 19 August 2019, obtained on

the application of Ms Gheewala are late applications following hearings of which Mr Mirchandani had notice but did not attend.

37. The proper approach to such applications was considered by the Court of Appeal in *Chanel Limited v FW Woolworth & Co Ltd* [1981] 1 WLR 485. There the court held:

> "The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position.' (492-493)"

38. As Mr Fisher puts it, that was "elaborated" by Popplewell J (as he then was) in *Orb a.r.l v Ruhan* [2016] EWHC 850 (Comm):

> "82… the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions.' (at [82])."

The competing cases

39. In advancing his case on behalf of Mr Mirchandani, Mr Geraint Jones QC points to the fact that the orders of Lambert J and Phillips J contained wording to the effect that Mr Mirchandani could apply to have the relevant order varied or discharged "at any time". He says that on such an application, the Court should consider the case afresh. He says that "save for the hearing on 20 March 2020 (this) is the first time (Mr Mirchandani) has been represented and advanced arguments to the Court in respect of any of these orders. Plus, although the Court was under a duty to be satisfied that the orders should properly be made, nonetheless the earlier ones were made without any argument or position being put forward or taken into account by the Court. This arose as a result of the Applicant's impecuniosity and inability to find representation".

40. In response, Mr Nigel Hood, for Ms Gheewala, and Mr Fisher for Augusta, point to the principles identified by the Court of Appeal in *Chanel* and repeated in *Tibbles v SIG plc* [2012] 1 WLR 2591. They argue that the jurisdiction of the Court under CPR Rule 3.1(7), to vary or revoke its own orders, will only be exercised where there has been a material change of circumstances since the order has been made, where the facts on

which the original decision had been made have been misstated, innocently or otherwise, or where there had been a manifest mistake on the part of the Judge in the formulation of his order.

41. Mr Jones responds that these were not interlocutory hearings. He says that the orders in question were granted after the final orders in the relevant litigation. In any event, he says there has now been material changes of circumstance. He identifies three such changes. First, he says, there is now available to the Court, hard evidence of Mr Mirchandani's assets in the form of his affidavit sworn for this application. Second, he says, Mr Mirchandani has now offered an undertaking that 50% of the net sale proceeds of the PP flat due to him from the Receiver will be retained by his solicitors in their client account pending any further order of the court. Third, he says, the fact that the orders have followed final judgment in the relevant proceedings is a material change of circumstance.

42. Mr Mirchandani suggests that he now has no unencumbered assets. He says his property in Dubai is heavily mortgaged and the Compensation Order is subject to claims by both Augusta and Ms Gheewala. As such, he says, there is no real risk of dissipation of his assets; he has no assets. He says that accordingly, the grounds for a freezing order are no longer made out. He asserts a willingness to give an undertaking that any funds obtained by the virtue of the Compensation Order, in other words, the sale proceeds of the PP flat, will remain in the UK and could be deposited in his solicitor's client account pending the outcome of these proceedings.

Discussion

43. In my judgment, Mr Jones argument that none of the relevant orders were interlocutory and that the freezing orders cease to bite the moment judgment is obtained, so as to entitle his client to have them discharged, is misconceived.

44. The injunctions granted by Phillips J on 29 July and 31 July 2019, and the worldwide freezing order granted by Lambert J on 19 August 2019 were plainly interlocutory in nature. They were granted to prevent Mr Mirchandani disposing of assets so as to defeat Ms Gheewala's attempts to enforce the court orders made in her favour. Those orders were never appealed, they remain in force, and the amount due remains outstanding.

45. The orders made by Saini J on 5 March 2020 were also interlocutory. They were granted to prevent Mr Mirchandani disposing of assets so as to defeat Augusta's claim based on the Facility Agreement. Griffiths J increased the sum subject to the July 2019 order to incorporate the sum frozen by the order of Saini J on 5 March 2020. Morris J continued the freezing order and increased the sum protected. At that hearing, on 20 March 2020, Mr Mirchandani was represented. None of those orders were appealed. Judgment in default in favour of Augusta was obtained, but not until 5 May 2020 by which time this application had been launched by Mr Mirchandani.

46. In any event, in my judgment, Mr Mirchandani's entitlement to seek an order for setting aside the injunction is not materially improved by the fact that default judgment is entered against him but remains to be enforced. The freezing order subsists until judgment is enforced or the orders are set aside. If a claimant obtains judgment, a freezing injunction ensures that once the mechanisms of enforcement are set in motion,

there is something physically available upon which they can work (see *Mercedes-Benz A.G. v Leiduck* [1996] 1 A.C. 284; [1995] 3 All E.R. 929 at 941, PC, per Lord Mustill).

47. In those circumstances, the crucial questions in this case are whether Mr Mirchandani can show that he had no opportunity to advance his case at the hearings that led to the making of the orders, or whether he can show a material change in circumstances since the orders were made.

48. The underlying principle, which determines the approach the Court should adopt on an application to set aside an interlocutory order, is that a party must advance all points reasonably open to him at the first opportunity. If a party has contested the grant of the interlocutory order, or had the chance to do so and did not take it, the Court will only set aside the order where there has been a material change in circumstances, where the facts on which the original decision had been made had been misstated or where there is a manifest error on the part of the Judge. That is the effect of the Court of Appeal's judgments in *Chanel* and *Orb*. The only one of the three factors in play in the present case, on Mr Jones's case, is the material change of circumstances.

49. I am not here determining a contempt application based on allegations of failure properly to give disclosure of information required by the various orders, although such allegations are made. I am deciding whether to set aside those orders. The adequacy of Mr Mirchandani's disclosure as to his financial position, however, is relevant to the issues I have to decide and much of the submissions I have heard were addressed to that point. In particular, it is relevant to whether he was prevented by impecuniosity from ensuring he was represented at the relevant hearings and advancing arguments properly open to him.

50. At the forefront of Mr Mirchandani's arguments as to his ability to attend or be represented at the hearings is his alleged impecuniosity. He said in his affidavit of 29 April 2020:

> "I am or at least was, a self-made man, who did hold substantial means, until the frauds committed against me by the Defendant. I lost all my wealth in those frauds and I am living at the moment hand to mouth."

51. In a footnote to his second witness statement he said that "the news report stating that I had said that I 'was down to my last £160m' is false."

52. It is not necessary for present purposes for me to resolve all of the issues raised on the issue of Mr Mirchandani's financial position but the following three seem to me particularly pertinent. First, the apparent disappearance of Mr Mirchandani's wealth as it had been described in 2014. Second, Mr Mirchandani's interest in Flacourt Finance S.A. Third, Mr Mirchandani's interest in Aveem Group companies.

53. Both the assertion that Mr Mirchandani lost all his wealth as a result of the fraudulent conduct of Mr Somaia, and the assertion that the newspaper account about his wealth was untrue, are entirely inconsistent with what he told the jury in the trial of Mr Somaia. That account, which is recorded in the transcripts of the judge's summing up, was to the effect that after the fraud he was still worth something in the region of £160 million. Nowhere in any of his evidence in this case is there any explanation for that conflict of

evidence nor any explanation as to how he has lost so substantial a sum of money over the six years since the trial.

54. It became apparent during the course of the hearing that Mr Jones was previously unaware of what his client had said in evidence at the criminal trial. When first addressing the issue of the lost £150 million, Mr Jones, appeared to believe that the only evidence that he had told the jury he was "down to his last £160 million" was a report in the Mail Online. When it was pointed out to him that there was reference to that fact in the transcript of the criminal trial, he was able to submit, only, that there was no evidence that he *remained* so wealthy.

55. Mr Mirchandani's evidence on his finances is not corroborated at all, whether by eyewitness statements or through documentary evidence. And Mr Jones was able to offer no explanation for the changes in his fortunes since the criminal trial, beyond pointing to Mr Mirchandani's bald assertions. I accept that the burden is on the Respondents to make out their case in support of the orders obtained but I am entitled to draw obvious inferences, and I do. Given the different accounts of his financial circumstances in 2014, affecting, as it does, a central element of this case and concerning, as it does, an enormous sum of money, I conclude that I can place very little reliance on anything Mr Mirchandani says about his finances, unless it is corroborated elsewhere.

56. I will consider the question of Mr Mirchandani's interests in Flacourt Finance S.A. ("Flacourt") and Aveem Group companies ("Aveem") together.

57. Mr Jones does not accept that his client has any pecuniary interest in either company. He acknowledges that Mr Mirchandani signed a finance agreement on 16 June 2008 as "100% shareholder" of Flacourt but says that there is "no evidence to contradict what Mr Mirchandani has said about his sole assets and certainly no evidence to demonstrate that he still holds any such shareholding." He points out that Aveem Property Development Ltd is in liquidation. He says that if Ms Gheewala wishes to allege and prove that Mr Mirchandani has some kind of proprietary interest or shareholding in the Aveem Group, that should be set out explicitly with supporting evidence. He says that the two respondents' cases are based on nothing more than unsubstantiated innuendo and assertion.

58. In my judgment, however, there is a great deal more than innuendo and assertion in support of the assertion that Mr Mirchandani has a significant beneficial interest in the two companies.

59. In his second witness statement, when dealing with the payment of the outstanding sum of costs due to Ms Gheewala in January 2018, Mr Mirchandani said this:

> "Although, as I say, it is not clear to me whether Thakrar & Co were entitled to refuse the funds paid to them by Sadin on my behalf, it seemed to me that I must arrange an alternative payment in case they were. In desperation, I decided to raise funds by arranging for the company I own, Aveem Securities Limited, to liquidate some of its equities in its investment portfolio. This was at a significant loss to Aveem Securities Limited and was effectively a last resort" (emphasis added).

60. Implicit in that statement is that further equities in a company he owns were not liquidated and remained available to him.

61. Mr Mirchandani asserts, in his affidavit, that he holds directorships in Aveem Property Development Limited and Paragon Holdings Limited. As is set out in the witness statements of Jordan Leech of Metis Law, and Jitesh Thakrar of Thakrar & Co Solicitors, Aveem Property Development Limited (in liquidation) includes Aveem Group in its list of creditors. Mr Mirchandandi is said to be chairman of that company. His address is given as Flat 41, Prince Regent Court, 8 Avenue Road, London NW8 7RB ("the PRC flat"). That flat was valued at £2,950,000 in 2018 and its registered proprietor is Flacourt. Mr Mirchandani was 100% shareholder in Flacourt in 2008 and remains a director, as do other members of his family.

62. It is apparent that Mr Mirchandani's interest in that flat is not wholly historical. He is registered on the electoral roll at that property and still uses the PRC flat as his home address. Mr Thakrar, Ms Gheewala's solicitor, points out in his sixth affidavit that, on 19 August 2019, he received a letter from Mr Mirchandani's doctor, in relation to these proceedings, describing Mr Mirchandani's poor health. That letter referred to Mr Mirchandani's address in the UK as being "Flat 41, Prince Regent Court". There is no evidence from Mr Mirchandani to explain this further.

63. In my judgment, absent any evidence from Mr Mirchandani as to what happened to the £160 million he was worth in 2014, absent any explanation as to his past interest in Flacourt and Aveem, and absent any explanation of his interest in the PRC flat, I am entitled to draw the inference that he remains a wealthy man, well able to meet his liabilities and well able to instruct solicitors to defend these proceedings. In my view, it is perfectly plain that Mr Mirchandani was in a position to contest the hearings that led to the orders now under discussion. All the hearings of significance were on notice to him and he could have attended in person or instructed solicitors or counsel to act for him. In fact, he did instruct counsel for the crucial hearing before Morris J 20 March 2020.

64. It follows from my findings as to his financial circumstances that he was able to make submissions as he wished at all the relevant hearings.

65. The question, therefore, in respect of the orders obtained both by Ms Gheewala and Augusta is whether Mr Mirchandani is able to show a change of circumstances, or fresh knowledge of relevant facts, or error of the Judge. He does not suggest the second or third apply here. In my judgment, he cannot establish the first.

66. The new evidence as to Mr Mirchandani's assets is only contained in the affidavit sworn in support of this application; it did not exist until this application was launched. And it is evidence that was always available to Mr Mirchandani. In any event, for the reasons I have explained, the crucial element of the new evidence, namely his account of his impecuniosity, is simply not credible.

67. Second, in my judgment, the undertaking Mr Mirchandani has offered is wholly inadequate. The Court cannot rely on Mr Mirchandani's word given his conduct to date and in particular, his failure properly to explain his financial position.

68. Third, the fact that the claim by Ms Gheewala is based on an order that Mr Mirchandani pay her costs or that Augusta has obtained a judgment in default, cannot possibly be said to justify any change to these orders.

69. In those circumstances, the first application fails.

The Second Application

70. As regards the application made by Augusta, it is to be noted that CPR 23.10 provides:

> "(1) A person who was not served with a copy of the application notice before an order was made under rule 23.9, may apply to have the order set aside or varied.
>
> (2) An application under this rule must be made within 7 days after the date on which the order was served on the person making the application."

71. That rule provides the Court with a very wide discretion. At paragraph 69-70 in *Mackay v Ashwood Enterprises* [2013] EWHC Civ 959, Lloyd LJ (with whom Jackson and Ryder LJJ agreed) said this:

> "69 The same, as it seems to me, can be said of rule 23.10. In the cases to which that rule applies the order will have been made without the party affected having had any opportunity to present a case to the judge. The rule ensures that there is such an opportunity. The making of orders by way of substantive relief (as distinct from case management) without notice to one party is exceptional. If such an order is made, the party affected should have the right to a first instance hearing at which arguments can be presented that would have been relevant if the original hearing had been on notice and attended by the party affected.
>
> 70. Mr Justice Peter Smith said at paragraph 27 that the affected party in such a situation "has an absolute unfettered right … at least once to come back to court to challenge the making of the order". I agree that there is and must be such a right. In general, it seems to me, that right is conferred by, and confined to, rule 23.10. In a case in which the party affected can fairly say that seven days from being given notice of the order is too short, it is likely to be possible to obtain an extension of the time, so long as the party has acted reasonably promptly. I am not sure that I would recognise the existence of a free-standing right to apply, outside the scope of the rule 23.10 or whatever express provision is made in the original order by way of liberty to apply. I do, however, agree with the underlying point, that a party affected by an order made without notice must have a right to apply back to the first instance court, and not merely a right to appeal. That applies to the order for costs, as it does to other aspects of the order made without notice."

72. Mr Fisher, for Augusta, contends that the order of Spencer J, dated 21 April 2020, should be set aside. He points out that Morris J's Order of 20 March 2020 included a provision that Mr Mirchandani could make an application to set aside, vary or discharge

the order by 5pm on 17 April 2020, failing which Augusta would be entitled to its costs of both the freezing order applications, subject to a detailed assessment if not agreed, in addition to a £15,000 payment on account of those costs.

73. Mr Jones responds that the application was only made four days late and the delay was indeed explained by the effect of the coronavirus pandemic on Mr Mirchandani and his solicitors. But neither in writing nor in his oral submissions does he offer a convincing explanation for the failure to give notice of the application, the effect of which was that Spencer J only heard one side of the story.

74. In my view, it is of significance that Morris J did not adjourn the return date for the freezing order and made it clear that the onus would be on Mr Mirchandani to make out his case to set aside the order in the event that he made such an application. Morris J's Order set out the date by which the application had to be made and spelt out the consequence if no such application was made in time.

75. The question for me is whether the Court, having heard the argument now advanced, would have granted the order Spencer J in fact granted.

76. It is apparent from his order that, when granting Mr Mirchandani his extension, Spencer J had particular regard to Practice Direction 51ZA. That requires the Court to take account of the impact of the Coronavirus epidemic in so far as that is consistent with the proper administration of justice in considering applications for relief from sanction. However, as Mr Fisher submits, Mr Mirchandani's solicitors had made no attempt to contact Augusta's solicitors to agree an extension by consent, and the retrospective extension of time had a direct prejudicial impact on Augusta which otherwise would have been entitled to an interim payment on account of costs in the sum of £15,000 within 21 days of 17 April 2020.

77. Because Augusta were not represented before Spencer J, they were not able to make representations about any of these matters. And in my judgment, none of that is excused by the Coronavirus outbreak. Mr Mirchandani had from 21 March 2020 to 17 April to ensure an application could be made in accordance with Morris J's Order. That was all the more important in circumstances where, for no good reason, the order had been obtained ex parte. In my view, there was no satisfactory explanation for Mr Mirchandani's conduct of this application.

78. Had Spencer J had the benefit of Mr Fisher's arguments he would have been aware of all of these points. He would have been aware of the background to this case which is canvased in this judgment. I have no doubt that, in those circumstances, he would not have made the order he did. Accordingly, in the exercise of my discretion, I set aside the Spencer J Order and Augusta becomes entitled to its payment on account in the sum of £15,000 and interest.

Conclusions

79. For those reasons, I dismiss Mr Mirchandani's application and allow Augusta's application.

80. I indicated during the course of argument, that I would consider Ms Gheewala's application when this judgment is handed down. As anticipated, however, it has proven

possible for the parties to agree the appropriate outcome for that application in the light of this judgment.