BL-2022-000594

Neutral Citation Number: [2022] EWHC 2324 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

Tuesday 13th September 2022

Before:

MR JUSTICE LEECH

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B E T W E E N:

EVGENY KORCHEVTSEV	**Claimant**
- and –	
(1) MARTIN SEVERA **(2) FATFACADES LIMITED** **(3) F.A.T. STRUCTURES LIMITED**	**Defendants**

MS KENDRAH POTTS (instructed by **PCB Byrne LLP**) appeared on behalf of the Claimant

DR SANDY JOSEPH (instructed by **CLK Legal Services**) appeared on behalf of the First Defendant.

Hearing dates: 1 and 2 September 2022

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APPROVED JUDGMENT

Mr Justice Leech:

I. The Applications

1. By Application Notice dated 6 April 2022 the Claimant, Evgeny Korchevtsev, applies to continue a worldwide freezing injunction granted by Bacon J without notice on 25 March 2022 and continued until the return date by Fancourt J on 8 April 2022 (the "**Freezing Injunction**"). By Application Notice dated 5 April 2022 he also applies for permission to continue the action as a double derivative claim and by Application Notice dated 19 August 2022, he also applies for a proprietary freezing injunction in relation to any funds traceable to the fraud which he alleges that the First Defendant has committed. Finally, the Claimant also seeks an order that the First Defendant should give further disclosure both to enable him to police the Freezing Injunction but also in aid of the proprietary freezing injunction.

2. Ms Kendrah Potts appeared for the Claimant instructed PCB Byrne LLP ("**PCBB**") and Dr Sandy Joseph appeared for the First Defendant instructed by CLK Ltd ("**CLK Legal**") at the hearing of those applications which took place on 1 and 2 September 2022. By Order made on 2 September 2022 I continued the Freezing Injunction until the date on which I handed down this reserved judgment.

II. Corporate Background

3. The Claimant and the First Defendant are directors and each own 50% of the issued share capital of Fassaden Architektur Technik Group Ltd ("**Group**" or the "**Group**"), which has four wholly owned subsidiaries: FATfacades Ltd ("**Facades**"), the Second Defendant; F.A.T Structures Ltd ("**Structures**"), the Third Defendant; Samuel Atkins Asset Management Ltd ("**Samuel Atkins**"); and Vila Ozana d.o.o. (Croatia) ("**VO**"). The Claimant and the First Defendant are the directors of each of the four subsidiaries except VO. The First Defendant is one of two directors of VO.

4. The Claimant is a dual Russian and British national and trained architectural technologist and he specialises in technical building design and construction services. In 2012 he incorporated Facades (then called Kortov Ltd). The First Defendant is a Czech national and in 2014 he joined the business to provide marketing and support services. In 2014 Facades opened a bank account at Barclays Bank plc ("**Barclays**") and in June 2015 the

First Defendant became a director of the company. In November 2015 the Claimant also transferred 50% of the shares in Facades to the First Defendant. In November 2019 the parties incorporated Group as a holding company and in January 2020 they transferred their shares in Facades to Group.

5. In February 2018 the First Defendant incorporated Structures (which was then called FAT Facades London Ltd) and he opened a bank account in its name on Tide Platform Ltd ("**Tide**"), a banking platform or portal. The company remained dormant until May 2020 when the First Defendant transferred the shares to Group as a vehicle for consultancy services on recladding projects. In March 2020 the First Defendant also transferred his shares in VO to Group. That company had been incorporated in October 2015 and the First Defendant had been the sole director and shareholder until July 2018 when Mr Goran Barada also became a director. VO has a bank account at the Raiffeisen Bank International AG ("**Raiffeisen Bank**") in Croatia.

III. Procedural Chronology

6. On 6 April 2022 the Claimant issued a Claim Form asserting a double derivative claim on behalf of Facades and Structures against the First Defendant for dishonest breaches of his duties as a director. It is the Claimant's case that in breach of sections 171 to 177 of the Companies Act 2006 the First Defendant misappropriated in excess of £1,136,000 from Facades and Structures. Subject to one point, concerned with VAT, this remains his case.

7. On 25 March 2022 Bacon J made the Freezing Injunction on a without notice basis restraining the First Defendant from removing his assets from England and Wales up to the value of £1,136,000 and restraining him from disposing of or otherwise dealing with his assets inside or outside the jurisdiction up to the same value. Paragraphs 8, 9 and 11 of the Freezing Injunction provided as follows:

> "8(1) Unless paragraph (2) applies, the Respondent must, within 2 working days of service of this order and to the best of his ability inform the Applicant's solicitors of all his assets worldwide exceeding £5000 in value whether in his own name or not and whether solely or jointly owned, and whether the Respondent is interested in them legally, beneficially or otherwise, giving the value, location and details of all such assets. (2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended

> to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.
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> 9. Within 7 working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information.
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> 11. The Respondent must not take any steps as director of either FATfacades Limited and/or F.A.T. Structures Limited unless such step is explicitly authorised by a board resolution of FATfacades Limited (Co No. 07919190) or F.A.T. Structures Limited (Co No. 11188274) as the case may be, or as agreed in writing with the Applicant's solicitors; and, in particular: a. The Respondent must not contact any client or potential client of FATfacades Limited and/or F.A.T. Structures Limited by email, telephone or any other means without the prior written consent of the Applicant's legal representatives."

8. On 29 March 2022 the First Defendant served an Excel spreadsheet (the "**Spreadsheet**") setting out a list of assets both above and below £5,000 in value. On 5 April 2022 CLK Legal served by email a photograph of the first page of an affidavit sworn by the First Defendant and on 6 April 2022 CLK Legal served another photograph of the first page together with a more detailed summary of the First Defendant's assets headed "**List of Assets**" (which is how I will refer to it).

9. On 8 April 2022 Fancourt J adjourned the return date of the application to continue the Freezing Injunction until the first available date after 16 May 2022 and ordered that the application for permission to continue the double derivative claim should be listed at the same time. He continued the Freezing Injunction until the hearing of those applications. He also gave directions for an IT expert to carry out a forensic examination of seven board minutes (the "**Board Minutes**"), which the First Defendant had produced shortly before the hearing and I will refer to that part of his order as the "**Forensic Examination Order**" or "**FEO**". Finally, he ordered the First Defendant to comply with CPR PD 32 and serve a further affidavit in relation to the List of Assets. On 19 April 2022 the First Defendant swore that affidavit.

10. On 8 May 2022 Fancourt J varied the FEO. Ms Potts was critical of D1's conduct and submitted that he failed to perform his obligations under the FEO. A number of those criticisms are justified but, in my judgment, nothing turns on this because the First Defendant ultimately performed his obligations and the IT expert, Mr Patrick Madden of Right Click Forensic Ltd, was able to carry out his investigation and prepare his report.

On 19 May 2022 Mr Madden made a report in which he considered the authenticity of the Board Minutes. I will refer to it as the "**IT Report**".

IV. The Evidence

11. In advance of the hearing I was asked by Ms Potts to read the first and second affidavits of Mr Jonothan Gould, a Senior Associate at PCBB, which I will call "**Gould 1**" and "**Gould 2**". I add that the version of Gould 2 in the hearing bundle was unsworn but no point was taken by Dr Joseph and Ms Potts confirmed that it had been sworn. I was also asked to read the Fourth Affidavit of the Claimant which I will call "**Korchevtsev 4"**, I was also asked to read the witness statement of the First Defendant dated 14 April 2022. I will call it "**Severa 1**" although the First Defendant had already made a short witness statement before. I was also asked to read the Particulars of Claim, the Defence, the IT Report and the Board Minutes.

12. Dr Joseph confirmed that the First Defendant had not filed an Acknowledgement of Service and Ms Potts took the point that the Defence was dated 14 July 2022 and had been served out of time. She pointed out that no application had been made for an extension of time or for relief from sanctions and she reserved the Claimant's position in relation to late service. I had originally understood Dr Joseph to be challenging the jurisdiction of the Court. But on re-reading her Skeleton Argument, I appreciate that she was only asking me to recognise the multi-jurisdictional nature of the proceedings and in argument she submitted that because the First Defendant was in the Czech Republic and did not have access to documents, he could not provide extensive explanations. In the event, she did not challenge the Court's jurisdiction in her oral submissions and I do not consider this issue further.

13. On 31 August 2022, the day before the hearing began, CLK Legal served three further statements made by the First Defendant and dated 30 August 2022 and I will call them "**Severa 2**", "**Severa 3**" and "**Severa 4**". Ms Potts did not ask for an adjournment to deal with them and the Claimant served a further short witness statement from Mr Gould replying to them (to which Dr Joseph did not object). PCBB also took the opportunity to send the Court a native copy of a report by a firm of accountants called Higgins, Fairbairn & Co ("**H&F**"), a firm of chartered accountants, who had been instructed by the Claimant (the "**H&F Report**"). On 11 March 2022 the report had been sent to the First Defendant

and it formed Appendix 1 to Gould 1. In that affidavit Mr Gould explained the confusion generated by H&F's name and confirmed that H&F had no connection with a client of the Group which had a similar name.

V. The Double Derivative Claim

14. I begin by considering whether to grant permission to the Claimant to continue the double derivative claim on behalf of Facades and Structures against the First Defendant. Logically, this is the right place to begin because if permission is refused, the other applications fall away.

A. The Legal Test

15. It was common ground that a double derivative claim (by which I mean a claim brought by the shareholders of a parent company on behalf of its subsidiaries) is governed by common law rules and not by the Companies Act 2006, Part 11, Chapter 1. Nevertheless, it was also common ground that the Court should apply the Act and CPR Part 19.9A by analogy. There is also clear authority that the Court may grant permission to a shareholder of a holding company to bring a claim on behalf of its subsidiaries: see, for example, *Universal Project Management Ltd v Fort Gilkicker Ltd* [2013] Ch 551 at [21] to [24]. Moreover, in that case Briggs J (as he then was) recognised that the exception to the rule in *Foss v Harbottle* will apply where aggrieved members and the wrongdoers have 50/50 control of the company (or its parent): see [18]. This makes obvious sense because even though they are not a minority, the wrongdoers are able to prevent the aggrieved members from using the organs of the company to bring a claim.

16. In the present case, Mr Gould exhibited the Articles of Association of Group which confirm that the quorum for directors' meetings must never be less than two and that any decision must be taken by a majority: see Articles 8.1 and 15.2. The Articles provide that the directors may appoint a director to chair meetings and that he or she shall have a casting vote but the First Defendant would have been able to frustrate a decision being made either by refusing to attend a meeting or to appoint the Claimant to chair the meeting. In any event, Dr Joseph did not suggest that the Claimant could have used Group to authorise Facades or Structures to bring a claim.

17. There was no dispute between the parties either in relation to the test to be applied. It has been considered in many authorities and Dr Joseph cited the well-known decision of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. I am content to adopt the test set out in the Court's judgment at 221G-222B:

> "In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v. Harbottle. On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of share-holders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting."

18. On an application for permission the Court has to be satisfied that there is a prima facie case of wrongdoing. This test is not precisely the same as the test for a "good arguable case" on an application for an interim injunction and Ms Potts suggested that the threshold might be a lower one. I accept that this might be so in some cases. But in my judgment, there is no practical difference between the two tests in the present case where there are heavily contested issues of fact. I explain briefly why I take this view.

19. A good arguable case for the purposes of a freezing injunction is one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success: see *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm) at [145]. Moreover, it is trite that the Court must not try to resolve conflicts of evidence on the affidavits or decide difficult questions of law which call for detailed argument and mature consideration. In *Bhullar v Bhullar* [2016] 1 BCLC 106 Morgan J set out the test to be applied in deciding whether to grant permission to continue a derivative claim at [25] (in very similar terms):

> "It is one thing to ask whether the claimant has shown a prima facie case in the absence of an answer from the defendant and another thing to ask whether the claimant has still shown a prima facie case when one takes into account the suggested answer. If the facts relied upon by either the claimant or the defendant are not disputed, there may be little difficulty. But what if the claim and the suggested answer depend, as they often will, on disputed facts? Further, what if the resolution of that dispute will in due course require the trial judge to reach conclusions as to the credibility of witnesses? I consider that the court has to recognise that it cannot resolve disputes of fact at a hearing which does not involve any cross-examination

> of witnesses and which takes place in advance of any formal disclosure of documents. It will not be unusual to find that the claimant can establish a prima facie case, if one ignores the evidence relied upon by the defendant, but yet the claimant would fail at trial if the defendant's evidence were to be accepted. In such a case, I consider that it is still open to the court to hold that the claimant has made out a prima facie case because it would be wrong to assume that the defendant's evidence will be accepted at the trial and it may simply not be possible to predict with any degree of confidence whether the defendant's evidence will be so accepted."

B. The Claimant's Case

20. The Claimant's case is pleaded in refreshingly simple terms in the Particulars of Claim. He alleges that the First Defendant has stripped value from Facades and Structures over the prolonged period during which he has had effective control over their finances: see paragraph 5. In reliance on the First Defendant's journal for the relevant period, he also alleges that in the period January 2018 to August 2018 the First Defendant formed the intention to siphon of assets from Facades: see paragraph 6.

21. In paragraph 4 the Claimant pleads that the First Defendant owed the statutory duties set out in sections 171 to 177 of the Companies Act 2006 and in paragraph 7 he alleges that the First Defendant committed the following breaches of those duties:

> "7. In breach of one or more of the duties identified above, the First Defendant:
>
> a. Has, between 1 February 2017 and 31 January 2022, made payments to himself from Facades and/or used Facades' monies and/or cards for non-business expenses, such payments and expenses totalling, to the best of the Claimant's current knowledge, £587,645.18. The First Defendant was, during this same period, entitled to £144,287.43 in salary and dividend payments, leaving misappropriations in the sum of £443,357.75;
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> b. Has, between 1 February 2017 and 31 January 2022, made payments to himself from FAT Structures and/or used FAT Structures' monies and/or cards for non-business expenses, such payments and expenses totalling, to the best of the Claimant's current knowledge, £81,110.12;
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> c. Has, between 12 January 2022 and 14 February 2022 withdrawn from FAT Structures' Tide bank account the sum of £243,036.77 contrary to the interests of FAT Structures, and paid it into a personal account.
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> d. Has transferred investments of gold and silver bars said to be worth £31,505.42 from Facades to the inter-company balance of SAAM without good reason.
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> e. Has, further, subsequently written off any consequential debt and/or obligation to return the investments, to the profit and loss account in YE

January 2021, thus effecting the transfer out of Facades of valuable assets for no consideration.

f. Has, in relation to transfers from Facades to VO:

i. In respect of loans totalling £70,000 made by Facades to VO on 5 January 2016 and 10 March 2016 purported to reclassify this and/or write it off (in sum of £72,800) as interim dividends to Fassaden in the draft accounts for the YE January 2021, apparently to avoid having to repay the monies from VO to Facades, thus depriving Facades of its repayment of those funds and/or effecting a misappropriation out of Facades for no consideration.

ii. Transferred and/or caused to be transferred a further £263,683.29 (with transaction costs of £150) from Facades to VO in circumstances where:

1. No loan documentation was entered into, nor other justification and/or consideration given for the transfer, nor terms agreed for its repayment;

2. There was a verbal agreement to the effect that the maximum amount which would be lent to VO by Facades would be £200,000;

3. The lack of loan documentation and the First Defendant's actions in respect of the £70,000 loan indicate that the First Defendant did not intend the transfers to be pursuant to a loan and instead transferred and/or effected the transfer of those monies out of Facades to VO for no consideration contrary to Facades best interests; and

4. There was in fact, no consideration paid by VO."

22. The claims set out in paragraph 7a to 7f (above) total £1,136,643.30. Dr Joseph did not submit that these claims, if made out, did not fall within the exception to the rule in *Foss v Harbottle* or challenge the proposition that the exception applies where there is deadlock because the aggrieved members and the wrongdoers have 50/50 control of the company (or its parent). But for the avoidance of doubt I am satisfied that a claim against a director of both a parent company and its subsidiaries for the deliberate misappropriation of the assets of the subsidiaries falls within the exception to the rule in *Foss v Harbottle* (if made out). The fact that the company has only two shareholders who each own 50% of the shares may, however, be relevant at a different stages of the test.

C. The Merits

23. I turn to consider whether the Claimant has demonstrated a prima facie case on the merits and, in doing so, I bear in mind that my conclusions will also determine whether the Claimant is able to establish a good arguable case for the purposes of continuing the

Freezing Injunction. Dr Joseph submitted that the Claimant was unable to demonstrate a prima facie case and that I should also discharge the Freezing Injunction because there was no evidence to support the allegations of misappropriation at all. I must, therefore scrutinise the individual claims with care. But before I do so I deal with three issues which are of general application.

(1) The H&F Report

24. The Claimant's claim was primarily based upon the H&F Report and I must evaluate the strength of that evidence and the weight which I should attach to it. In Gould 1, paragraphs 47 to 49 Mr Gould summarised H&F's instructions and their findings as follows:

> "47. On 4 February 2022, Mr Korchevtsev instructed H&F to review: i. The Quickbooks bookkeeping records for each company, which included annual general ledgers; ii. Bank statements for the Barclays Account with accompanying analysis prepared by the Accountant and Mr Korchevtsev; and iii. The available transaction history for the Tide Account.
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> 48. On 8 March 2022, H&F produced its report ("**H&F Report**"), which identified **[610]**: a. £524,467.87 as having been transferred from the bank accounts for FAT Structures and FAT Structures to Mr Severa or spent by Mr Severa on non-business-related expenses without authorisation or justification; b. £336,633.29 as having been transferred by Mr Severa to Vila Ozana or otherwise writing off debts due from Vila Ozana to FAT Facades; and c. £31,505.42 in purported investments in precious metals as having been transferred by Mr Severa from the balance sheet for FAT Structures to Samuel Atkins in the financial year end ("**FYE**") 2020 before being written off without explanation in the profit and loss account for Samuel Atkins in FYE 2021.
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> 49. The H&F Report also identified £207,272.00 as having been paid from FAT Facades to Mr Korchevtsev without specific authorisation or otherwise spent by Mr Korchevtsev on non-business-related expenses. This is addressed in Part E below as a matter of full and frank disclosure."

25. Ms Potts took me through the H&F Report in its native Excel form and satisfied me that Mr Gould had accurately summarised H&F's investigation and findings. Moreover, in tab C of the Excel spreadsheet, H&F set out the detailed accounting information upon which they had relied in arriving at their conclusions. Ms Potts accepted that this analysis involved some questions of judgment in assessing whether the expenses which the First Defendant had claimed were justified but that this was limited to a relatively small figure.

26. Dr Joseph challenged H&F's independence. She also submitted that their conclusions could not be justified because the First Defendant had provided no input or explanations to H&F whereas the Claimant had done so. Ms Potts confirmed that the Claimant had instructed H&F on the recommendation of his former solicitors and that there was no prior connection between them. She also accepted that the First Defendant had not provided any input. However, by email dated 31 August 2022 Mr Gould wrote to the Court in response to the late evidence of the First Defendant stating that the H&F Report had been provided to the First Defendant on 11 March 2022.

27. I am satisfied that the H&F Report provides prima facie evidence that the First Defendant made the payments to himself or used the funds of Facades and Structures to pay the expenses pleaded in paragraphs 7a, 7b and 7f.ii. of the Particulars of Claim. I am also satisfied that it provides prima facie evidence that the First Defendant arranged for the transfer of assets set out in paragraph 7d and for the write off of the debts or obligations set out in paragraph 7f.i.

28. Although the H&F Report was not in the form required by CPR Part 35 and Ms Potts did not ask me to admit it as expert evidence, I am not satisfied that H&F lacked independence and their instructions were in substance to provide factual evidence, namely, to summarise or distil the accounting information with which they were provided and to present it in a way which was accessible to the Court. Where they had made a judgment (e.g. in relation to the First Defendant's expenses), I have scrutinised the evidence more carefully.

29. Even though I am satisfied that the H&F Report provides prima facie evidence of the relevant payments and accounting treatment, I may refuse permission if I am satisfied that the First Defendant's explanations for them would be accepted at trial. If, however, it is not possible to predict that those explanations would be accepted with any degree of confidence, then it is open to me to hold that the Claimant has made out a prima facie case: see *Bhullar v Bhullar* (above). I, therefore, consider in more detail below the First Defendant's explanations for the various payments and transfers.

(2) The Journal

30. The Claimant also relies on the First Defendant's journal as evidence that he misappropriated the funds and assets pleaded in paragraph 7 (above). The journal

provides evidence in the First Defendant's own words that between March 2018 and September 2018 he conceived a plan to misappropriate assets from the Group. Mr Gould has set out the relevant extracts in Gould 1, paragraph 44 and I will not repeat them here. But a good example is provided by the entry for 5 April 2018 in which the First Defendant identified the following objective: "I would siphon assets off FAT in order to stay in control".

31. In the Defence, the First Defendant explains the journal entries by describing them as "a string of unconscious thoughts" and asserts that diary entries "cannot be considered as evidence of intention given that these thoughts could easily switch and/or be contradictory if putting forward '*what if*' scenarios": see paragraph 8. Dr Joseph also submitted that I should give limited weight to the journal because English was not the First Defendant's first language. She also submitted that the First Defendant misunderstood the meaning of the words "siphon off" and did not appreciate that they may have implied wrongdoing on his part.

32. I am satisfied that the First Defendant's journal provides prima facie evidence that the First Defendant intended to misappropriate the sums and assets set out in paragraph 7 from the Group. He chose to keep a journal in the English language and this is the obvious interpretation of the entries in English to which Mr Gould drew attention. I accept that after cross-examination the First Defendant may satisfy the Court to attribute limited weight to the journal entries. However, this is a good example of the kind of evidence which Morgan J was considering in *Bhullar v Bhullar* and it would be wrong to assume at this stage that the First Defendant's evidence will be accepted at the trial.

(3) The Minutes

33. On 7 April 2022 the First Defendant filed a draft or unsigned copy of Severa 1 together with the Board minutes. Copies were served on PCBB shortly after midday. Although the Claimant had less than a day to respond, he made his third affidavit that day challenging the authenticity of the Board Minutes and stating that the meetings did not take place, that he had not signed the minutes and that he had never seen them before. In those circumstances Fancourt J made the FEO and on 14 April 2022 the First Defendant served an amended witness statement (which complied with CPR Part 32 and PD 32).

34. It was Mr Gould's evidence that the First Defendant gave only very limited co-operation to Mr Madden. Nevertheless, the First Defendant finally provided him with a USB stick containing the Board Minutes and on 28 April 2022 he made a separate witness statement for Mr Madden stating that the files on the USB stick had been created on a MacBook device, that he had made back-up files before he sold it and that the data had been uploaded to the Group's Yandex server. By email dated 29 April 2022 CLK also provided the following clarification:

> "Our instructions are that the files were created on the MacBook, then dragged and dropped onto the server which moved the files so the files were no longer on the MacBook but only on the server. Later on the files were copied from the server onto the USB drive, thus creating a backup of the files on the USB drive. There is no backup of the MacBook."

35. In the IT Report Mr Madden recorded the date and time stamp for each Board Minute and those dates and times spanned the period from 1 October 2018 to 6 November 2020: see paragraph 19. He stated that the absence of the MacBook or any draft versions of the Board Minutes meant that it was not possible for him to determine whether the time and date stamps were genuine or whether they had been manipulated: see paragraph 22. However, he was able to draw the following conclusions for the following reasons:

> "32. I have found that the File date and timestamps for the 7 Purported Board Minutes are out of character with the rest of the extant user documents found on the USB drive: a. Of the 7,608 extant user documents on the USB drive, 7,600 (99.89%) have file creation and file last written date and time stamps of 18/01/2019 between 08:37:43 and 16:10:41. Only the 7 Purported Board Minutes and 1 other, seemingly unrelated, document have alternate date and time stamps. This 1 other document has other characteristics differentiating it from the 7 Purported Board Minutes; b. From a rudimentary assessment of the internal metadata properties of the 7,601 documents, excluding the 7 Purported Board Minutes, the most recently modified document is recorded as being updated on 29/03/2017, which predates the earliest of the Purported Board Minutes by approximately 17 months; c. The folder structure in which the user documents are stored on the USB drive have created and last written date and timestamps of 09/01/2021 between 10:20:10 and 11:08:26. This is almost 2 years later than the date and timestamps for the majority of the files on the USB drive.
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> 33. These irregularities are not in accord with the explanation provided by Mr Severa that he used the MacBook computer and the standard "copy and paste" or "drag and drop" process to migrate the data from the Yandex server to the USB drive.

> 34. When asked for further clarification, I have been informed that "*the Respondent believes that the backup was indeed directly from the server onto the USB. However, the passage of time and the mundane nature of the operation prevent the Respondent from being absolutely certain as the process might have been from the server onto the MacBook and ultimately onto the USB*"
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> 35. While this would be more in keeping with the evidence, it would require that the copy from the server to the MacBook was undertaken on 18/01/2019 and only later copied from the MacBook to the USB drive on 09/01/2021. a. This, however, does not account for how and why the 7 Purported Board Minutes and 1 other document have retained their file date and time stamps; b. It also does not explain how 6 of the 7 Purported Board Minutes postdate 18/01/2019, but have been included in the transfer.
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> 36. The Yandex Disk history log was examined for copies of the 7 Purported Board Minutes, or trace evidence thereof. No indications were found to indicate that the files or folder "Minutes" ever existed on the Yandex Disk. a. From testing performed on the Yandex Disk history log, and verification checks performed on the live Yandex Disk account of Mr Korchevstev, I would have expected to have seen evidence of the creation and subsequent deletion of the 7 Purported Board Minutes and the "Minutes" folder had they ever been uploaded to the Yandex Disk."

36. Ms Potts took me to other evidence to show that the meetings recorded in the Board Minutes dated 31 January 2020, 28 February 2020, 4 April 2020 and 6 November 2020 could not have taken place at the locations and dates which they bear, because either the Claimant or the First Defendant was out of the jurisdiction at the time. She also took me to evidence which showed that the Board Minute dated 31 January 2020 was inconsistent with emails passing between the First Defendant and the Group's accountant, Mr Hossein Himel ("**Mr Himel**"). I deal with this evidence in more detail below.

37. Dr Joseph did not challenge Mr Madden's evidence or even seek to persuade me that the meetings in the Board Minutes must have taken place on the date or dates which they record on their face. Instead, she suggested that the Claimant must have access to the minutes of all meetings of the boards of directors and had failed to produce them because they would have shown that the Board Minutes were genuine. In reply, Ms Potts drew my attention to the Claimant's evidence that the Group did not routinely produce internal minutes for board meetings and that when formal minutes were required for external purposes, they were drafted by Mr Himel and sent through to both the Claimant and the First Defendant to sign using the application Adobe Sign. She also referred me to an example.

38. I deal with a number of individual Board Minutes below. But I am satisfied that the IT Report, the evidence about the location of the parties and the evidence about the subject matter of the Board Minute dated 31 January 2020 disclose a prima facie case that the meetings which the Board Minutes purport to record did not take place and do not record resolutions taken by the Claimant and the First Defendant. I am also satisfied that this evidence discloses an arguable case that the First Defendant has deliberately created or fabricated false Board Minutes in order to excuse his conduct and to provide a defence to the claim.

39. I add that it is unnecessary for me to decide at this stage whether the Claimant's evidence about the taking or keeping of minutes more generally should be accepted. The evidence upon which Ms Potts relied in support of her case that the Board Minutes were not authentic and were fabricated by the First Defendant was sufficiently strong enough whether or not the Claimant is able to access a folder or physical minute book containing minutes. I place particular reliance on Mr Madden's conclusion that there was no evidence that the Board Minutes were ever uploaded to the Yandex server and the inconsistency between this evidence and the First Defendant's own evidence about their creation.

(4) Paragraph 7(a): £443,357.75

40. H&F found that the total sums transferred by Facades to the First Defendant or which he claimed for non-business expenses amounted to £587,645. After adjustment for dividends and salary to which he was entitled, the net amount which Facades transferred to him was £443,357.75. It is the Claimant's evidence that he did not authorise these payments or expenses and I have found that there is a prima facie case that the First Defendant arranged for these transfers and the payment of these expenses and that he did so with the intention to misappropriate these sums.

41. In the Defence, the First Defendant asserted that "all funds removed or purchases made were taken with the approval of the Claimant and by the resolution of the Company": see paragraph 19. I asked Dr Joseph to state (if she could) how much the First Defendant admitted removing and the amount of any purchases which he admitted making but she was unable to do so. In the absence of any evidence to the contrary, I am satisfied that

there is a prima facie case that he arranged for transfers and payments totalling £587,645 and £443,357.75 net of salary and dividends.

(a) Expenses

42. The First Defendant challenges a number of entries in the H&F Report on the basis that they are legitimate expenses and that H&F have relied solely on the Claimant's evidence in categorising them as personal rather than business expenses. In Severa 1 the First Defendant identified five expense claims which were legitimate and in Severa 4 he identified a large number of entries although their combined total was only £45,887.55 (as calculated by Dr Joseph).

43. I have examined the entries which the First Defendant has challenged and I cannot predict with confidence from the nature of the expenses or his explanations that he will be able provide a defence at trial to this part of the claim even after the Court has heard his evidence. Many of the entries relate to flights and car rental (which may or may not have been for business purposes) and other entries relate to the works carried out at the Vila Ozana: see further below. Moreover, I found much of the First Defendant's evidence in relation to these entries opaque and confusing. Finally, the First Defendant has had access to the H&F Report since 11 March 2022 and could have put forward for scrutiny a clear and comprehensive narrative for these entries but chose not to challenge them or provide any explanation at all until the day before the hearing of the applications.

(b) Vila Ozana

44. The First Defendant also asserts that the Claimant authorised him to spend substantial sums in constructing the Vila Ozana. He relies on the Board Minute dated 28 February 2022 which purports to record that the Claimant and he had authorised the construction of the villa for two years and at a cost of £450,000. For the reasons which I have set out above, it is not possible for me to decide at this stage whether the Board Minute is authentic or whether the First Defendant has fabricated it in order to provide a defence to the claim. Moreover, the Claimant has produced evidence to show that on 28 February 2020 he took a flight to Minsk checking in at Gatwick Airport and blocking out his diary as unavailable. This issue must go to trial.

(c) Porsche Macan

45. The First Defendant also asserts that the Claimant authorised him to use Facades' funds to purchase a Porsche Macan Turbo 2015 on behalf of the Group. In the List of Assets he gave disclosure that it was registered in his name and he admitted that the invoice was sent to Facades. In Severa 1 he relied on a Board Minute dated 1 October 2018 as evidence that Facades had authorised the purchase. Again, for the reasons which I have set out (above), it is not possible for me to decide at this stage whether the Board Minute is authentic or whether the First Defendant has fabricated it in order to provide a defence to the claim. I also add that there was considerable force in Ms Potts' submission that the form of the resolution is itself suspicious. It is highly detailed and looks more like an attempt to justify the use to which the First Defendant has put the car rather than a forward-looking resolution. But this must also be a matter for cross-examination.

46. Dr Joseph sought to rely on an email dated 5 June 2014 in which the Claimant had written to Mr Himel in support of the First Defendant's case that the Board Minute was authentic and that the Claimant had authorised the purchase of the car. In that email the Claimant had stated: "We probably will have to buy a car for our business." It is the Claimant's case that he was not referring to the Porsche Macan Turbo but to a Nissan Qashqai which has now been sold. Moreover, as Ms Potts pointed out, the invoice for the purchase was dated 25 October 2018, over four years later. In my judgment, the First Defendant's reliance on email correspondence in 2014 only serves to demonstrate that the Claimant has made out a prima facie case because it highlights the absence of any email correspondence at about the time of the invoice or the date shown on the Board Minute.

(d) Porsche Boxter

47. Finally, the First Defendant also asserts that the Claimant authorised him to use Facades' funds to purchase a Porsche Boxter GTS4 as an investment. In the List of Assets he gave disclosure that this vehicle was also registered in his name and admitted that the invoice was sent to Facades. In Severa 1 he relied on a Board Minute dated 24 January 2020 as evidence that the Facades authorised the purchase. Again, for the reasons which I have set out (above), it is not possible for me to decide at this stage whether the Board Minute is authentic or whether the First Defendant has fabricated it in order to provide a defence to the claim.

(5) Paragraph 7(b): £81,110.12

48. H&F found that the total sums transferred by Structures to the First Defendant amounted to £81,110.12. It is the Claimant's evidence that he did not authorise these payments or expenses. In the Defence and in his evidence the First Defendant did not distinguish between sums paid by Facades and sums paid by Structures and for the reasons which I have set out in relation to paragraph 7(a) I am satisfied that the Claimant has made out a prima facie case in relation to the payments made by Structures to the First Defendant.

(6) Paragraph 7(c): £243,036.77

49. Paragraph 7(c) was not the subject matter of the H&F Report and I must, therefore, consider it separately. It is Mr Gould's evidence that £243,036.77 was held in an account on the Tide portal in the name of Structures (the "**Tide Account**") to which only the First Defendant had access. By email dated 11 February 2022 the First Defendant admitted to Mr Himel that he had withdrawn the money in the account and by email dated 14 February 2022 he confirmed that he had made withdrawals totalling £220,000. These withdrawals included a sum of £52,580 which he identified for the payment of VAT to HMRC.

50. Dr Joseph did not challenge the evidence that the total amount held in the account was £243,036.77 or that the First Defendant had sole access to the account. She informed the Court on instructions that the First Defendant had paid the sum of £52,580 to HMRC, that £40,000 was paid out of the First Defendant's bank account and that the balance was paid out of company funds. She did not suggest that any other withdrawals were authorised by the Claimant. But she submitted that the withdrawals could be justified on the basis that the First Defendant was protecting these funds from the unlawful activity of the Claimant. Finally, she relied on the First Defendant's statement in the email dated 14 February 2022 to Mr Himel that he intended to restore the funds once the dispute had been resolved.

51. I am satisfied that the Claimant had made out a prima facie case that the First Defendant has withdrawn the sum of £243,036.77 without the authority of the Claimant and in breach of his statutory duties. I deal with the Claimant's own conduct below and its effect on the application for permission. But I am not satisfied that as a matter of law the First Defendant was acting within his powers as an individual director to authorise the withdrawals even if his evidence is accepted that he was acting to preserve the funds. But

in any event, I have already found that there is a prima facie case that he intended to misappropriate funds from the Group and if the Claimant makes out his case at trial, it is unlikely that the Court will accept the First Defendant's explanation for the withdrawals from the Tide Account. Ms Potts fairly accepted that the Claimant would not pursue the claim for £52,850 if the Court was satisfied that the First Defendant had paid the debt due to HMRC. But in the absence of any documentary evidence (and there was none), I am not prepared to accept that he has done so.

(7) Paragraph 7(d): £31,505.42

52. H&F found that £31,505.42 in precious metals had been transferred by the First Defendant from the balance sheet of Facades to Samuel Atkins in the year ended 31 January 2020 and that this sum was written off without explanation in the profit and loss account of Samuel Atkins for the year ended 31 January 2022.

53. In Severa 1 the First Defendant relied on a Board Minute which purports to record that on 31 January 2020 the Claimant and he had authorised the transfer of ownership of gold coins and silver bars and foreign currency to Samuel Atkins. Again, it is not possible for me to decide at this stage whether the Board Minute is authentic or whether the First Defendant has fabricated it in order to provide a defence to the claim. But in any event, the contemporaneous documents are inconsistent with this Board Minute being an authentic record of a meeting which took place on that date. In particular:

(1) The Claimant has produced documents to show that on 31 January 2020 he was flying from London Stanstead to Plovdiv and that the time of his departure was 15.30.

(2) By email dated 28 September 2020 the First Defendant wrote to Mr Himel stating that: "The gold coins and silver bars – We will pass a board resolution to agree the transfer of assets. Please send me their valuations as at 31 January 2020."

(3) On 28 September 2020 Mr Himel prepared draft minutes which he had back dated to 31 January 2020 and sent them to the First Defendant and on 29 September 2020 the First Defendant reviewed and signed the minutes.

54. Given the time of his flight, it is of course possible that the Claimant attended a board meeting in the morning. However, the board minutes which Mr Himel prepared and which the First Defendant signed provide clear evidence that the meeting could not have taken place. It would have been wholly unnecessary for Mr Himel to prepare minutes of a meeting which took place on 31 January 2020 if it had already taken place, the transfer had been authorised and the minutes had been signed by the Claimant and the First Defendant.

55. Moreover, the Adobe Sign application recorded the history of when the minutes were prepared, circulated and signed and Ms Potts was able to take me to similar histories which related to company resolutions and a stock transfer form dated 10 January 2020 and 14 January 2020 respectively. This begs the question why the First Defendant was unable to produce a similar history for any of the Board Minutes upon which he relied. It also provides additional evidence that the First Defendant was prepared to sign back-dated minutes without any consultation with the Claimant.

56. I am satisfied that the Claimant has made out a prima facie case that the First Defendant misappropriated gold coins and silver bars which were initially valued at £31,505.42. Given the obvious evidential difficulties relating to the Board Minute, Dr Joseph sought to persuade me that the Claimant had been in possession of the gold coins and silver bars all along and had kept them in his personal safe. She relied upon emails dated 26 August 2015 and 28 August 2015 and a number of text messages. I am satisfied that none of these documents was sufficiently compelling to displace my conclusion that the Claimant had a prima facie case which should go to trial. In particular, Dr Joseph had to accept that the delivery note was addressed to the First Defendant (although it went to the Claimant's personal and business address). Moreover, Dr Joseph could provide no explanation for writing off the value of the assets in the accounts of Samuel Atkins if they were retained by the Claimant himself.

(8) Vila Ozana: £336,633.29

(a) The Loan of £70,000

57. The Claimant accepts that he agreed that Facades could make a loan of £70,000 to VO to acquire the Vila Ozana. He also accepts in the Particulars of Claim that he orally agreed with the First Defendant that Facades would lend up to £200,000 to VO. However, in the

H&F Report, H&F record that the original loan of £70,000 together with interest of £2,800 was reclassified and treated as interim dividends distributed to Group. The First Defendant did not suggest that VO paid the interim dividends of £72,800 to Facades and in substance, therefore, Facades wrote off the loan for no consideration.

58. In Severa 1 the First Defendant claimed that he could produce documents to show how the funds were spent. He also justified the write down of the loan on the basis that the Group had in effect acquired the plot for £1 by acquiring the shares in VO itself. He did not suggest that the Claimant had authorised the write down of the loan or the payment of interim dividends. In Severa 3 he repeated this explanation. But Dr Joseph did not draw my attention to any of the documents which the First Defendant had offered to produce in Severa 1. Nor did she suggest that he had produced them.

59. I am satisfied that the Claimant has made out a prima facie case that the First Defendant caused Facades to re-classify the loan of £70,000 together with interest of £2,800 as interim dividends and to write these sums off for nil consideration. I am also satisfied that the Claimant has made out a prima facie case that this was a breach of the First Defendant's statutory duties. There is no suggestion in any of the First Defendant's witness statements that it was in Facades' interests to write off these sums. It may be that the First Defendant will be able to call expert evidence at trial to justify this accounting treatment but one inference which the Court may draw is that this was no more than a device by the First Defendant to prevent VO from having to repay the loan (and interest).

(b) The Transfers of £263,683.29

60. H&F also identified transfers of funds totalling £263,683.29 from Facades to VO. In their build-up of this sum, they also identified a bank transfer for £49,000 which had been booked as a loan to VO but then transferred to the First Defendant's personal account and an inter-company loan of £149,262.81, which was owed by VO to Facades but was also reclassified and written off at the year end. It is the Claimant's evidence that he authorised none of these actions.

61. In Severa 3 the First Defendant gave evidence that the Claimant was fully aware of the sums spent on the construction of the Vila Ozana and he produced correspondence between himself, the Claimant and Barclays to show that the Claimant was aware of individual items of expenditure. However, he produced no evidence to suggest that the

Claimant authorised expenditure above £200,000 or, equally importantly, agreed to write it off. Indeed, he produced a document (Exhibit 26) to show that he only ever told the Claimant that VO had spent £200,000.

62. I am satisfied that the Claimant has established a prima facie case that the First Defendant authorised the payment of £263,683.29 by Facades to VO and that he misapplied those sums without the knowledge or authority of the Claimant. I am also satisfied that the Claimant has established a prima facie case that the First Defendant authorised Facades to write off the inter-company debt of £149,262.81 and that this amounted to a breach of his statutory duties. The First Defendant has provided no explanation for this accounting treatment and I note that the inter-company debt included a transfer of £49,000 into the First Defendant's personal account.

63. Dr Joseph submitted that Facades had no claim against the First Defendant for misappropriation because VO owned the Vila Ozana and was retained within the Group structure. It is possible that I set this particular hare running by raising it with Ms Potts. However, I am satisfied that it is no answer to the claims in relation to VO for the following reasons:

    (1) The First Defendant remains in control of VO with his co-director, Mr Barada, and although it has been a wholly owned subsidiary of Group since March 2020, the Claimant is not a director and has no control over the company. For example, on 29 April 2022 the First Defendant applied to the Commercial Court in Split to change VO's name to Vila Severa. One inference which the Court may draw is that the First Defendant was attempting to disguise VO's activities from the Claimant.

    (2) The Claimant's complaint against the First Defendant relates not only to the authorisation of payments by Facades to VO but to the accounting treatment of those payments for which the First Defendant was responsible. If the Court accepts the Claimant's evidence at trial, then Facades has written off £72,500 and £149,262.81 at the instigation of the First Defendant and without his authority. Whether or not VO remains part of the Group and retains the relevant funds, Facades has suffered a loss and has a claim against the First Defendant in relation to these actions.

(3) But in any event, an obvious motive for writing off these sums was to disguise the fact that these sums had been withdrawn from the Group altogether and that the First Defendant had not spent them on the Vila Ozana at all. Indeed, the First Defendant exhibited the payment instruction showing that £49,000 of the sums transferred by Facades to VO was paid into his bank account (and this is confirmed by the H&F Report). The Court will have to consider at trial, therefore, whether the First Defendant used VO as a vehicle to "siphon off" a total of £263,683.29 from the Group using the construction of the Vila Ozana as an excuse. This must be a matter for trial.

D. Section 263

64. Dr Joseph relied upon section 263(2)(a) of the Companies Act 2006 which provides that the permission must be refused if the Court is satisfied that a person acting in accordance with section 172 would not seek to continue the claim. Because of its relevance to this issue I set out the whole of section 263:

> "(1) The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.
>
> (2) Permission (or leave) must be refused if the court is satisfied- (a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or (c) where the cause of action arises from an act or omission that has already occurred, that the act or omission- (i) was authorised by the company before it occurred, or (ii) has been ratified by the company since it occurred.
>
> (3) In considering whether to give permission (or leave) the court must take into account, in particular- (a) whether the member is acting in good faith in seeking to continue the claim; (b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it; (c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be- (i) authorised by the company before it occurs, or (ii) ratified by the company after it occurs; (d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company; (e) whether the company has decided not to pursue the claim; (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

> (4) In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter."

65. Dr Joseph relied upon *Iesini v Westrip Holdings Ltd* [2011] 1 BCLC 498 where Lewison J (as he then was) dismissed an application for permission to continue a derivative claim against the board of directors of a company. In doing so he considered the application of section 263(2)(a) in the following passage at [85] and [86]:

> "85. As many judges have pointed out (e.g. Warren J in *Airey v Cordell* [2007] EWHC 2728 (Ch); [2007] BCC 785, 800 and Mr William Trower QC in *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch); [2008] BCC 885, 893–894) there are many cases in which some directors, acting in accordance with s.172, would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with s.172 , would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with s.172, would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.
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> 86. In my judgment therefore (in agreement with Warren J and Mr Trower QC) section 263(2)(a) will apply only where the court is satisfied that no director acting in accordance with section 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of section 263 (3)(b). Many of the same considerations would apply to that paragraph too."

66. Dr Joseph relied on the fact that the present claim involves a dispute between two shareholders who hold the same number of shares and that the First Defendant has complaints about the Claimant's conduct which mirror the Claimant's complaints against him. She submitted that the Claimant has received unauthorised sums totalling £291,491.78 and that the Group has paid £6,190 in expenses for him which did not relate to company business. She submitted that in the light of this conduct an independent director would not seek to continue the claim and that permission should, therefore, be refused.

(1) Payments to the Claimant

67. In the H&F Report, H&F recorded that the Claimant had received £351,599.43 which included £207,272 in excess of his salary and dividends. The Claimant had disclosed this information for the hearing before Bacon J and Mr Gould gave the following explanation in Gould 1:

> "99. The H&F Report also identifies £207,272 as having been paid from FAT Facades to Mr Korchevtsev in excess of authorised dividends and or his director's salary. This figure includes the £112,000 withdrawn to preserve the Companies' assets, leaving £95,272 as "unexplained" withdrawals. It may therefore be said that Mr Korchevtsev has engaged in the same wrongdoing alleged against Mr Severa (i.e. misappropriating the Companies' assets). However, Mr Korchevtsev had previously trusted Mr Severa and the Accountant to ensure that correct accounting practices were followed for directors' loans, dividends and salaries.
>
> 100. The Accountant had explained to Mr Korchevtsev that dividends for the Company would be issued retrospectively on an annual basis. Withdrawals in excess of directors' salaries would be retrospectively offset with dividend payments. In FYE 2020 these payments totalled approximately £40,00 and in FYE 2021 totalled approximately £50,000. Mr Korchevtsev incurred further personal expenses across the two years of around £5,000. Mr Korchevtsev therefore had no intention of receiving excessive withdrawals, and had understood that he would have received: a. a dividend in FYE 2021 of approximately £40,000 in respect of his withdrawals in FYE 2022; and b. a dividend of approximately £55,000 in FYE 2022 in respect of his withdrawals in FYE 2021.
>
> 101. However, instead, Mr Severa ultimately purported to document withdrawals in FYE 2020 by combining both his own withdrawals over this period (approximately £96,000) and Mr Korchevtsev's (approximately £40,000), averaging that figure (£68,000) and purporting to issue it as a dividend in November 2021. Mr Korchevtsev now understands that Mr Severa had been using this mechanism to systematically underreport his own withdrawals for several years. Mr Korchevtsev now understands from H&F that this was a flawed approach to dividends."

68. Moreover, Ms Potts took me to an email dated 17 January 2022 in which the Claimant wrote to Mr Himel with a copy to the First Defendant informing them both about the withdrawals and that the funds would be used to cover business expenditure:

> "I'm writing to inform you that after I started raising my concerns about some of those transactions in writing to Mr Severa, he revoked my reading access to the Tide Bank Account of F.A.T Structures Ltd. Due to that incident, I have transferred £60,000.00 and £52,000.00 from FAT Facades

> Barclays bank account to my personal bank account as an urgent measure to protect the operation of holding company and its subsidiaries.
>
> These funds will be used exclusively to continue business operations of Fassaden Architektur Technik Group LTD and its subsidiaries to cover business expenditure such as: Insurance premium payments, Consultants' fees and software subscriptions, Salaries to employees, Accounting and legal fees."

69. It is not possible for me to determine on this application whether the Claimant was acting in breach of his statutory duties in authorising transfers or the payment of expenses to himself. Dr Joseph did not provide me with a breakdown of the sum of £291,491.78 and I was initially prepared to accept that H&F's figure was correct. I was also prepared to accept the Claimant's explanation for the payments of £112,000. He informed both Mr Himel and the First Defendant about the transfers and Dr Joseph did not suggest that he had not used that sum for the payment of business expenses. However, it is not possible for me to decide whether his explanation for the balance of £95,272 should be accepted without disclosure and cross-examination. I therefore approach the application of section 263 on the basis that it is arguable that the Claimant has misapplied somewhere between £95,272 and £291,491.78 of Facades' funds.

(2) Expenses

70. Dr Joseph also submitted that the Claimant had used company funds totalling £6,190 to pay travel expenses for himself and his partner. The First Defendant had earlier alleged that the total in question was £9,139.35 and Mr Gould dealt with this in Gould 1 as follows:

> "107. On 26 January 2022, Mr Severa alleged that Mr Korchevtsev had used company funds to purchase hotels and flights for himself and Ms Shevchenko totalling £9,139.35 for which there was no business justification. However, Mr Severa was fully aware of the trip. The relevant invoices were submitted to him as expenses, and in turn submitted to the Accountant. It is therefore inappropriate for Mr Severa to subsequently assert these expenses must be returned. Nevertheless, in the interests of avoiding unnecessary dispute, Mr Korchevtsev is prepared to treat these costs as personal and correct the Companies' accounts accordingly."

71. Again, it is not possible for me to decide whether this explanation should be accepted without disclosure and cross-examination. The First Defendant may satisfy the Court that he did not approve these expenses and I approach the application of section 263 on the

basis that it is arguable that the Claimant has misapplied £6,190 of company funds (even though he is now prepared to treat them as personal expenses).

(3) The Hypothetical Director

72. In *Iesini* (above) Lewison J considered the merits of the claim relevant both to the application of section 263(2)(a) and to section 263(3)(b) and after assessing the merits he concluded that no hypothetical independent director would continue the claim: see [88] to [102]. It seems to me that the appropriate course in the present case is to compare the merits of the claim made by the Claimant with the allegations made against him by the First Defendant to decide whether such a director would have been prepared to continue the claim.

(a) Section 263(2)(a)

73. I cannot be satisfied that *no* director would continue the claim. I have analysed the claims made by the Claimant in detail and I am satisfied that there is a prima facie case that the First Defendant has misappropriated £1,136,643.30. Although I am satisfied that there is an arguable case that the Claimant may have misapplied approximately between £100,000 and £300,000, I consider the First Defendant's case to be considerably weaker than the Claimant's case and that an independent hypothetical director would be satisfied that the Claimant had much the better of the argument (to adopt a phrase from jurisdictional challenges).

(b) Section 263(3)

74. I must therefore go on and consider whether to give permission after taking into account the factors set out in section 263(3). The factors set out in paragraphs (c), (d) and (e) are not relevant and I, therefore, focus on paragraphs (a), (b) and (f). After taking into account those factors, I am satisfied that it is appropriate to give permission to the Claimant to continue the double derivative claim for the following reasons:

(1) *Paragraph (a)*: Dr Joseph submitted that the Claimant was acting for a collateral purpose and she relied on the evidence of the First Defendant in Severa 2, paragraph 8 that the Claimant had told him that he was intending to dissipate the

funds of the Group himself, so that he would own the whole company by himself or, alternatively, that he was prepared to destroy it.

(2) I am not prepared to find that the Claimant was acting in bad faith on the basis of a single paragraph in Severa 2 or not, at least, without having seen the First Defendant give evidence himself. Dr Joseph did not provide any documentary support for his evidence and, in my judgment the Claimant was reasonably entitled to form the view that the Group had been stripped of very substantial sums and that unless the derivative claim was brought, it might be left with few assets or none at all. As Ms Potts put it in oral argument, the present claim is "not about a fight between shareholders but about hundreds and thousands of pounds gone missing". I accept that characterisation of the claim and I am satisfied that it has been brought in good faith.

(3) *Paragraph (b)*: I have assessed the merits of the claim and held that the Claimant has much the better of the argument. I am satisfied that a hypothetical, independent director would consider it to be a relatively strong claim on the facts given that before disclosure the Claimant's evidence is supported by the analysis of H&F, the First Defendant's own journal and the IT Report (together with key items of correspondence which tend to support the conclusion that the Board Minutes are false). I am also satisfied that a hypothetical director would consider it important to continue the claim given its value of £1,136,000.

(4) *Paragraph (f)*: Dr Joseph submitted that the Claimant had an alternative remedy and although she did not articulate it, it is clear that the remedy which she had in mind was an unfair prejudice petition under section 994. In *Barrett v Duckett* [1995] 1 BCLC 24 Peter Gibson LJ suggested that the availability of an alternative remedy was an absolute bar to a derivative claim. But in *Iesini* Lewison J held that it was not an absolute bar to a claim under the statute: see [123]. Moreover, in *Fort Gilkicker* Briggs J granted permission to bring a double derivative claim even though the claimant could have brought an unfair prejudice claim: see [56].

(5) In my judgment, it might result in a significant injustice if I were to refuse permission and leave the Claimant to bring an unfair prejudice claim. The Claimant has expressed no desire to have his shares bought by the First Defendant and may

well want to bid for control of the Group if its assets are restored. Moreover, even though the Court could grant relief to the Claimant by ordering the Group to commence proceedings against the First Defendant, it will take far longer for the Group to recover its assets than if I permit the double derivative claim to continue immediately.

(6) Finally, I have considered whether it is appropriate to order the Company to indemnify the Claimant against the costs of the action. Having reached the conclusion that it is appropriate to do so on a limited basis (see below), the potential liability is not a factor which would lead to me refusing permission.

E. Discretion

75. The Court retains a discretion to grant or refuse permission even after taking into account the factors set out in section 263(3). Having considered the submissions of both parties I consider that it is appropriate to exercise the discretion to permit the Claimant to continue the claim.

VI. The Freezing Injunction

F. Continuation

76. There was no dispute about the principles applicable to the continuation of the Freezing Injunction itself. The Court must be satisfied that: (1) the Claimant has a good arguable case, (2) assets exist upon which the injunction will bite, (3) there is a risk of dissipation and (4) it is just and convenient to continue the injunction. In relation to risk of dissipation Ms Potts relied upon *Fundo Soberano De Angola v Dos Santos* [2018] EWHC 2199 (Comm) in which Popplewell J (as he then was) distilled the following principles from the authorities:

> "(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.
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> (3) The risk of dissipation must be established separately against each respondent.

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

(1) Good Arguable Case

77. I have found that the Claimant has established a prima facie case that the First Defendant has dishonestly misappropriated £1,136,000 and that a hypothetical independent director would have considered this a relatively strong case and one which justified continuing the claim. I am satisfied that these conclusions comfortably exceed the threshold for a good arguable case.

(2) Existence of Assets

78. I am also satisfied that there are assets upon which the injunction will bite. Although I will have to consider the adequacy of the First Defendant's disclosure in greater detail, the First Defendant disclosed assets to the value of £594,000 in the Spreadsheet and the

List of Assets. They include the Vila Ozana, a substantial sum in one bank account, crypto-currency and two valuable motor vehicles. The First Defendant contends that all of these assets belong to Group or its subsidiaries but since the First Defendant has personal control over all of them, this justifies the continuation of the Freezing Injunction.

(3) Risk of Dissipation

79. Ms Potts submitted that the following evidence demonstrated that there was a real risk (judged objectively) that a future judgment would not be met because of an unjustified dissipation of assets:

(1) The evidence of the First Defendant's intention to siphon off assets in the First Defendant's journal;

(2) The unexplained transfers of funds by the First Defendant from the bank accounts of Facades and Structures;

(3) The evidence of attempts to conceal these transfers in the First Defendant's journal;

(4) The First Defendant's failure to disclose assets in accordance with the Freezing Injunction and, in particular, the failure to disclose that he held shares in a company called SBR Properties Ltd (Tanzania) ("**SBR**");

(5) The evidence that the First Defendant fabricated the Board Minutes and, in particular, the contents of the IT Report; and

(6) The First Defendant's conduct in relation to the Claimant's former wife.

80. I accept that submission. I accept that the journal provides solid evidence that the First Defendant intended to misappropriate funds from the Group and to conceal this fact for as long as possible from the Claimant. I also accept that there is a good arguable case that the First Defendant also fabricated the Board Minutes in order to cover his tracks. Finally, I also accept that the First Defendant has failed to date to provide an adequate explanation for the transfers or payments in the H&F Report. As I have recorded (above), I asked Dr Joseph to confirm the amounts which the First Defendant admitted that he had removed

and the total amount of the purchases made but she was unable to do so and, presumably, had no instructions to do so either.

81. Mr Gould exhibited a number of messages on Facebook Messenger (together with their translations) which indicates that the First Defendant offered to pay the Claimant's former wife to give evidence that their marriage had been "fake" and that the Claimant had been able to obtain British citizenship as a consequence. The messages also indicate that she was not prepared to give what she described as "some kind of false statement". I accept that this episode casts further doubt on the honesty and integrity of the First Defendant although I am not satisfied that it adds much weight (if any) to the evidence which I have already considered.

(4) Just and Convenient

82. Dr Joseph submitted that the Freezing Injunction was oppressive and drew my attention to the First Defendant's evidence that the injunction was draconian, that it posed great difficulty for him and that he was left under difficult conditions. I accept that a freezing injunction can be a powerful and intrusive order to make but I am satisfied that it is appropriate to continue it in all the circumstances of this case. Moreover, the First Defendant has been able to fund his defence of the claim without recourse to the frozen assets and CLK Legal have stated on instructions that his ordinary living expenses are being covered by family friends. I am satisfied that it is just and convenient to continue the Freezing Injunction.

G. Acting as a Director

83. Paragraph 11 of the Freezing Injunction restrained the First Defendant from taking any steps as a director of Facades or Structure unless that step was explicitly authorised by a board resolution or agreed in writing by PCBB and, in particular, restrained him from contacting any of their clients. Ms Potts confirmed that Bacon J was addressed separately on this issue and Fancourt J also accepted that it was appropriate to continue the injunction.

84. I am satisfied that the Court has power to restrain directors from committing future breaches of their statutory duties and that it may grant an interim injunction to restrain directors from taking unauthorised steps on behalf of a company where there is a serious

risk of harm to the Company. Mr Potts drew my attention to *Findmylaims.com v Howe* [2018] EWHC 1833 (Ch) where Zacaroli J granted such an injunction. Moreover, it is clear that he applied the *American Cyanamid* test in deciding whether to make the Order: see, in particular, [26] and [27].

85. I am also satisfied that it is appropriate to continue paragraph 11 of the Freezing Injunction (which was continued by Fancourt J in paragraph 9 of his Order dated 8 April 2022). In Gould 1, Mr Gould has given evidence that the First Defendant has taken steps to undermine the Group and in the light of the findings which I have already made, I consider there to be a serious issue to be tried whether the First Defendant intends to cause further and serious harm to the Group unless he continues to be restrained by injunction. I am also satisfied that damages would not be an adequate remedy if the effect is to damage the Group's reputation or put it out of business. Finally, I am satisfied that in all the circumstances the balance of convenience favours the continuation of this injunction.

H. Proprietary Freezing Injunction

86. The Claimant also asked the Court to make a proprietary freezing injunction in relation to a range of the First Defendant's assets. Although I have continued the Freezing Injunction and it should have had the effect of freezing those assets, the grant of proprietary relief has different consequences both in relation to disclosure and in relation to the use to which the First Defendant may put those funds. The test for proprietary relief is also different and was set out by Hildyard J in *Sukhoruchkin v Van Bekestein* [2013] EWHC 1993 (Ch) at [7]:

> "The established view is that the requirements for a proprietary injunction are not identical to those for a freezing injunction. The principles to be applied are the normal *American Cyanamid* principles. These are that the Claimants must show that there is a serious issue to be tried, that damages would not be an adequate remedy for the Claimants and that the balance of convenience or balance of justice favours the grant of an injunction. This formulation of the relevant principles refers to a claimant showing a serious issue to be tried rather than showing a good arguable case. It is generally understood that a requirement to show a good arguable case is more onerous than showing only a serious issue to be tried. Nonetheless, it has been said in relation to the *American Cyanamid* principles that where the scales are evenly balanced in relation to the balance of convenience, one can take into account the relative strengths of the parties' cases."

(1) The Personal Account

87. The Claimant has adduced evidence that £134,312 was transferred from Facades' Barclays business account to the First Defendant's personal current account at the same bank (sort code 20-10-53, account no. 13339726) (the "**Personal Account**"). He has also adduced evidence that £6,000 was transferred from the Tide Account to the Personal Account. H&F identified the first payment and Mr Gould exhibited a list of transactions from the Tide Account to verify the second payment. Mr Gould also invites the Court to draw the inference that a payment of £14,000 made from the Facades' business account with the narrative "Directors Loan BBP" and "Directors Loan FT" was made to the Personal Account.

88. I am satisfied that there is a serious issue to be tried whether £154,312 was transferred by the First Defendant from Facades' business accounts into the Personal Account. I am also satisfied that damages would not be an adequate remedy and that the balance of convenience or justice favours the grant of a proprietary injunction in relation to the balance of funds on the Personal Account up to a limit of that figure. If the balance exceeds £154,312, I have considered whether I should grant proprietary relief in relation to any funds held on the account (as Ms Potts asked me to do). But in my judgment, it is not appropriate to do so at the present time.

89. On the other hand, it is appropriate in my judgment to grant a proprietary freezing injunction in relation not only to the balance on the account up to a limit of £154,312 but also to the traceable proceeds of those funds. In the List of Assets the First Defendant asserts that he does not have access to the Personal Account and states that he assumes that the balance is less than £5,000. I deal with the question of disclosure below. But if the balance is less than £5,000, it follows that the First Defendant has transferred Facades' funds into another account and (subject to the tracing rules applicable to funds passing through a bank account) the Claimant ought in principle to be entitled to trace those funds into any other accounts to which the First Defendant has transferred them.

(2) The Ceska Sporitelna Accounts

90. In the List of Assets the First Defendant disclosed three personal accounts at Česká spořitelna, a.s. ("**CS**"), an internet bank headquartered in the Czech Republic. He also admitted that there was a balance of £119,000 in one of those accounts: account no.

0905015063 (the "**CS Account**"). By letter dated 29 April 2022 PCBB wrote to CLK Legal complaining that the First Defendant had failed to disclose the £243,036.77 transferred from the Tide Account and CLK Legal answered this query by stating that the First Defendant had disclosed the £119,000 held in the CS Account.

91. I am satisfied that there is a serious issue to be tried whether the personal account to which the First Defendant was referring in his email to Mr Himel dated 14 February 2022 was the CS Account and whether he transferred the sum of £220,000 to that account. I am also satisfied that damages would not be an adequate remedy and that the balance of convenience or justice favours the grant of a proprietary injunction in relation to the balance of funds on the CS Account up to a limit of that figure. I have also considered whether I should grant proprietary relief in relation to the other CS accounts. But in my judgment, it is not appropriate to do so at the present time. On the other hand, it is appropriate in my judgment to grant a proprietary freezing injunction in relation not only to the balance on the CS Account up to a limit of £220,000 but also to the traceable proceeds of those funds for the same reasons which I have given in relation to the Personal Account.

(3) The Wise Accounts

92. In the List of Assets the First Defendant also disclosed a personal account at Wise Payments Ltd ("**Wise**") (formerly TransferWise), a payments platform. He asserted that the balance on his account "is probably something miniscule like £100". It is Mr Gould's evidence that H&F have identified transactions with the payment references "TransferWise" or "Wise" totalling £57,874.53 from the Barclays Account and £10,841.16 from the Tide Account.

93. I am satisfied that there is a serious issue to be tried whether the First Defendant transferred £68,715.69 from the Barclays Account and the Tide Account to an account or accounts at Wise (which I will call for convenience the "**Wise Accounts**"). I am also satisfied that damages would not be an adequate remedy and that the balance of convenience or justice favours the grant of a proprietary injunction in relation to the balance of funds on the Wise Accounts up to a limit of that figure. It is also appropriate in my judgment to grant a proprietary freezing injunction in relation to not only to the balance on those accounts up to a limit of £68,715.69 but also the traceable proceeds of

those funds for the same reasons which I have given in relation to the Personal Account. I return to the Wise Accounts (below) in the context of disclosure.

(4) The KuCoin Account

94. In the List of Assets the First Defendant disclosed an account at Mek Global Ltd, trading as the KuCoin crypto currency exchange, held under his name (the "**KuCoin Account**"). He also admitted that it was used to hold crypto currency bought by the Group. In the light of that clear admission, it is appropriate to grant a proprietary freezing injunction in relation to the assets or balance held on the KuCoin Account and the traceable proceeds of those assets.

(5) The Coinbase Account

95. In the List of Assets the First Defendant also disclosed an account at CB Payments Ltd, trading as the Coinbase crypto currency exchange, also in his own name (the "**Coinbase Account**"). It is Mr Gould's evidence that by email dated 4 November 2015 Coinbase wrote to the First Defendant notifying him that he had made a successful purchase of eight Bitcoin for £2,48.25 and that by email dated 7 March 2016 the First Defendant wrote to Mr Himel including this purchase in a list of company transactions and that Mr Himel included the purchase on the draft balance sheet for Facades.

96. I am satisfied that there is a serious issue to be tried whether the First Defendant acquired the Bitcoin and any other crypto assets on the Coinbase Account using Facades' money. I am also satisfied that damages would not be an adequate remedy and that the balance of convenience or justice favours the grant of a proprietary injunction in relation to the assets held on the Coinbase Account. It is also appropriate in my judgment to grant a proprietary freezing injunction in relation to not only to the assets but their traceable proceeds because I am satisfied that there is a real risk that the First Defendant has dissipated those assets.

(6) Motor Vehicles

97. The First Defendant admits that he bought the Porsche Macan Turbo and the Porsche Boxter using Facades' funds. However, he relies on the Board Minutes dated 1 October 2018 and 24 January 2020 to assert that the Claimant and Facades authorised those

transactions. I am satisfied that there is a real issue to be tried whether the First Defendant fabricated those minutes and whether the Claimant or Façades did authorise his actions. I am also satisfied that damages would not be an adequate remedy and that the balance of convenience or justice favours the grant of a proprietary injunction in relation to both vehicles.

(7) Other Assets

98. Ms Potts submitted that I should make proprietary freezing injunction in relation to two other crypto currency accounts, a trading account at IG Index Ltd (which operates a spread betting service). I am not satisfied that there is sufficient evidence at this stage to raise a serious issue to be tried whether those assets belong to Facades or Structures or that either company is entitled to trace into them and assert a beneficial interest. Those assets remain, however, subject to the Freezing Injunction.

VII. Disclosure

99. The Claimant also seeks an order for further disclosure and, in particular, that the First Defendant should provide account statements showing the account history of the assets which he has disclosed. Following the hearing and under cover of a letter dated 6 September 2022 PCBB submitted a revised draft Order to the Court in which they clarified the accounts for which the Claimant was seeking further disclosure. The draft Order included the Personal Account, the CS Account, the Wise Accounts, the KuCoin Account and the Coinbase Account (which I will call together the "**Proprietary Accounts**").

100. The draft Order also included the following accounts (which I will call the "**Non-Proprietary Accounts**"):

(1) A second CS current account and a CS savings account;

(2) All accounts held or controlled by the First Defendant at Wise, all accounts affiliated with the account reference P450684 and account no. 79428995;

(3) The Tide Account;

(4) VO's account at the Raiffeisen Bank;

(5) A crypto currency account at Binance Markets Ltd trading as Binance ("**the Binance Account**"); and

(6) A crypto currency account at Block Fi Trading LLC trading as (the "**BlockFi Account**").

101. The legitimate purpose of a disclosure order in aid of a freezing injunction is to police the injunction and to ensure that it is effective. It is not to enable the applicant to obtain information to use for a collateral purpose or to justify committal proceedings. Further, the Court will only make a further disclosure order where further evidence is necessary to make the freezing injunction more effective and there is a practical utility in requiring the respondent to give such evidence: see *JSC Mezhdunarodniv Promyshlenniy Bank v Pugachev* [2015] EWHC 1694 (Ch) at [38] and [39] (Hildyard J). The Court may order the respondent to disclose entries in bank statements: see *A v C* [1981] 1 QB 956 at 960G (Robert Goff J). But the applicant is not entitled to ask the Court to order "tracing disclosure": see *Kazakhstan Kagazy PLC v Zhunus* [2018] EWHC EWHC 369 (Comm) at [168] (Picken J).

102. Where the Court has granted or proposes to grant a proprietary freezing injunction, the purpose of a disclosure order is different, namely, to enable the applicant to trace the whereabouts of the relevant assets to which it has a proprietary claim. Ms Potts cited *Mediterranea Raffineria Siciliana Petroli SpA v Mabanaft GmbH* (CA, unreported, 1 December 1978), where the judge granted a proprietary freezing injunction against a Panamanian company and ordered the respondent to swear an affidavit setting out both the whereabouts of the funds and also who controlled the company. The Court of Appeal dismissed an appeal against his decision. As Templeman LJ stated, a court of equity had never hesitated to use the strongest powers to protect and preserve a trust fund "to see that the stable door is locked before the horse has gone".

I. The Proprietary Accounts

103. I am satisfied that it is necessary to make an order requiring the First Defendant to provide bank statements and other account statements showing the transaction history of the Proprietary Accounts both to enable the Claimant to establish the whereabouts of the funds which the First Defendant transferred into those accounts from the bank accounts of Facades or Structures and also to protect and preserve those funds (or their traceable

proceeds) until the trial of the claim or further order in the meantime. It is impossible to tell from the List of Assets what the First Defendant has done with the bulk of those funds (apart from the £119,000 paid into the CS Account). It is also impossible to tell what crypto currency the First Defendant acquired with Facades' money and to estimate its current value.

J. The Non-Proprietary Accounts

104. I deal first with the Non-Proprietary Accounts more generally before addressing some of the individual accounts. I am not satisfied that it is necessary to make the same order in relation to the Non-Proprietary Accounts in order to police the Freezing Injunction or to make it more effective. I am, however, prepared to order the First Defendant to swear a further affidavit setting out the current balance on each of those accounts and to provide a current statement from the bank (or other entity) to verify the First Defendant's evidence. I prepared to make such an order for the following reasons:

(1) To comply with paragraphs 8 and 9 of the Freezing Injunction, the First Defendant was required to take reasonable steps to investigate the truth or otherwise of any answer which he gave with regard to the assets in which he had an interest: see *JSC Mezhdunarodniv Promyshlenniy Bank v Pugachev* (above) at [42].

(2) I am not satisfied that he has taken reasonable steps to investigate the assets in which he has an interest and state the true position in the List of Assets. In relation to the Personal Account (and other accounts) he stated that he did not have access to it (or them) but assumed that the balance was less than £5,000. I do not accept that the First Defendant could not have obtained access to this account or other accounts which he controls either online or by asking the bank to send him a paper copy of the balance.

(3) The First Defendant has disclosed an account at the Emirates NBD Bank in Dubai in the name of F.A.T. Facades Middle East FZE but he has failed to provide the full account details or a current balance. In the List of Assets he states that the company failed in 2019 and that he does not know the balance or whether the account is still open. However, in a journal entry dated 30 May 2018 he stated: "*I will start sending circa £6k every month to NBD*". In a journal entry dated 15 August 2018 he also stated: "*I have FAT Dubai, I just need to keep on transferring*

£12k a month there!" This casts considerable doubt on the accuracy of the List of Assets and whether the First Defendant was telling the truth when he verified it on affidavit.

(4) The First Defendant did not disclose his interest in SBR Properties in the Excel spreadsheet which he served on 29 March 2022. In the List of Assets he disclosed a bank account in its name at the CRDB Bank in Tanzania but he asserted that the company was dormant, it never traded and that it has now been dissolved. Mr Gould has exhibited email correspondence and bank statements which show that the company was paying rent and trading in October 2020 and that First Defendant was seeking to acquire a property on behalf of the company in February 2022. Again, this casts considerable doubt on the accuracy of the of the List of Assets and whether the First Defendant was telling the truth when he verified it on affidavit.

(5) The First Defendant disclosed four crypto currency accounts in the List of Assets (including both the KuCoin Account and the Coinbase Account) but stated that the assets held had a total value of US $38,388. However, the Claimant calculated that they were worth up to £625,000 using the available transaction history. In Severa 4 the First Defendant continued to maintain that the value of the crypto assets on the KuCoin Account was US $36,500. He also asserted that the Claimant had effectively taken over the account and changed the credentials. When I was taken to the relevant email correspondence, it was clear that the First Defendant had himself changed the credentials for the KuCoin Account from his Facades email account to his personal email account. He had also changed the credentials for the Binance Account.

(1) Wise

105. I will order the First Defendant to disclose all accounts held or controlled by him at Wise and to identify the specific Wise Account or Wise Accounts into which he transferred £68,715.69 from the Barclays Account and the Tide Account. I will also order him to disclose bank statements showing the transaction history of the relevant account or accounts. I will also order him to set out in his affidavit the current balance on any other

Wise Accounts and to provide a current statement from Wise for each one to verify that evidence.

106. I make this order in relation to Wise because H&F have not been able to identify the Wise Account or Accounts into which the First Defendant transferred the sums totalling £68,715.69 from the Tide Account and the Barclays Account and the Claimant will be unable to do so until the First Defendant has given disclosure. But the relevant account or accounts into which those sums were paid are Proprietary Accounts and the Claimant is entitled to tracing disclosure in relation to them. Any other accounts are Non-Proprietary Accounts and are not subject to the proprietary Freezing Injunction. Accordingly, the Claimant is only entitled to the more limited disclosure which I have ordered in relation to the Non-Proprietary Accounts.

(2) The Tide and Raiffeisen Accounts

107. I have considered whether I should make similar orders in relation to the Tide Account and the Raiffeisen Account because both accounts are held in the name of Group companies and *ex hypothesi* the credit balances on those accounts are Group assets. However, I am not prepared to do so at this stage. Neither account was the subject matter of the application for the proprietary freezing injunction and such orders are not required to police the Freezing Injunction.

(3) The Crypto Currency Accounts

108. Ms Potts submitted that it was necessary for the First Defendant to provide the full transaction history for the crypto currency assets to establish their value. I am not satisfied on the evidence that this is necessary. However, this point only arises in relation to the Binance Account and the BlockFi Account. In relation to those two accounts I will order the First Defendant to disclose the account information, the assets held on the account and their value together with all documents necessary to verify that information. If Ms Potts is correct and it is only possible to assess the value of the assets by reference to the transaction history, then the First Defendant will have to disclose this information.

VIII. Indemnity

109. The Claimant also applied for an order that he should be indemnified against the costs of the claim out of the assets of Facades and Structures and Ms Potts submitted that if I permitted the double derivative claim to continue, an order for an indemnity should follow. She relied on the dictum of Lewison J in *Iesini* (above) at [125]:

> "Thus in my judgment Mr Michael Wheeler QC was right in *Jaybird Group Ltd v Greenwood* [1986] BCLC 319, 327 to say that an indemnity as to costs in a derivative claim is not limited to impecunious claimants. The justification for the indemnity is that the claimant brings his claim for the benefit of the company (and ex hypothesi under the new law the court has allowed it to proceed). Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs."

110. In that case, however, Lewison J was not considering whether to grant an indemnity but whether an alternative remedy was more appropriate because the company might be asked to provide an indemnity to fund the litigation: see [126]. In deciding that question, he made the realistic assumption that if permission was granted the Court would order an indemnity. In *Bhullar v Bhullar* (above), however, Morgan J had to decide whether to grant an indemnity. In doing so, he considered all of the authorities in detail and considered that the Court should exercise considerable care when deciding whether to grant a pre-emptive indemnity. He reached the conclusion that he should not grant an indemnity for the following reasons (at [69] to [71]):

> "69. The later authorities show that the court should exercise considerable care when deciding whether to order a pre-emptive indemnity. The court should have a high degree of assurance that such an indemnity would be the proper order to make following a trial on the merits of the claim. In the present case, Jat will plead a defence of limitation to the claim to recover the payments made to Torex. Inder will allege that Jat was dishonest. I have held that Inder has shown a prima facie case of dishonesty but the claim might fail. If it emerges at the trial that Jat was not dishonest and an order for costs is made in favour of Jat against Inder, it is not obvious that in all cases the trial judge would award Inder an indemnity in relation to the adverse order for costs. Similarly, it would not be obvious in such a case that Inder should have an indemnity for his own costs. Conversely, if the claim succeeded and Jat was held to have been dishonest, then Inder could expect to obtain an order for costs against Jat and an indemnity from the relevant company in relation to any reasonably incurred costs which for some reason were not recovered from Jat. Inder would have that expectation even without the certainty which he would have pursuant to a pre-emptive order for an indemnity.

> 70. There is a further consideration in this case. If Inder brought section 994 proceedings against Jat, both Inder and Jat would be in the same position in that they would both be on risk as to costs. Based on my earlier findings, this is a case where Jat positively wished there to be a formal split between himself and Inder and Inder accepts that a formal split is desirable. Inder has explained in his evidence that the justification for derivative proceedings is that those proceedings will determine certain points in dispute between himself and Jat and then Inder and Jat can negotiate (or litigate under section 994) so as to bring about a formal split between them. Viewed in that light, these derivative proceedings are a stepping stone towards a negotiation for a formal split or for section 994 proceedings. I consider that the costs position in relation to these derivative proceedings should be the same as the costs position in relation to section 994 proceedings generally. Inder and Jat should be treated equally and each of them should be on risk as to costs. I do not consider that I should make an order which gives Inder a considerable advantage at the possible expense of Jat.
>
> 71. Accordingly, I have reached the conclusion that I should not make a pre-emptive order for an indemnity in favour of Inder. I now need to return to the question as to whether to permit Inder to continue a derivative claim, if he still wishes to do so without the benefit of a pre-emptive indemnity."

111. I have carefully considered all the circumstances and, in my judgment, this is an appropriate case to order a pre-emptive indemnity for costs. I accept that it is unusual to order an indemnity in circumstances where the Claimant and the First Defendant are equal shareholders. See, in particular, *Bhullar* (above) at [61], where Morgan J considered *Halle v Trax BW Ltd* [2000] BCC 1020 in which Scott J (as he then was) refused an indemnity for that reason. However, against that consideration I balance the fact that I have reached the conclusion that an independent director would have considered it important to continue the claim to recover the Group's assets. I have also granted a proprietary freezing injunction in relation to substantial assets and held that the First Defendant has not complied with the Freezing Injunction.

112. However, I also consider it appropriate to limit the indemnity in two ways. First, it is appropriate to impose a monetary cap and I will limit the indemnity to £100,000 although I will give the Claimant permission to apply to increase the cap and the Court will be able to consider the matter again and, in particular, to decide whether to extend the indemnity when the First Defendant has given further disclosure. Secondly, I only consider it appropriate to order an indemnity in relation to the Claimant's own costs at this stage and not to any adverse order for costs: see *Bhullar* (above) at [66].

IX. Fortification

113. On 8 April 2022 Fancourt J ordered the Claimant to fortify the undertaking in damages which he gave in the Freezing Injunction by lodging £20,000 at Court. The order made it clear, however, that at that stage the fortification only applied to paragraph 11 of the Freezing Injunction (and paragraph 9 of his own Order) which prevented the First Defendant taking any steps as a director of Facades and Structures and provided that if the Claimant failed to lodge £20,000 by 14 April 2022 (or any extended time limit), paragraph 9 would cease to have effect.

114. At the hearing before me, Dr Joseph applied to increase the amount by which the Claimant was required to fortify his undertaking. I was taken to *PJSC National Bank Trust v Mints* [2021] EWHC 1089 (Comm) in which Calver J set out the relevant principles: see [23] to [29]. I need only cite the passage at [26] to [27](ii)(a) and (iii):

> "26. It was common ground between the parties that it is a matter for the Court's discretion as to whether or not to order fortification of an undertaking given by a claimant as the price for it obtaining freezing injunctive relief. In exercising that discretion, the Court will have regard to the principles set out in *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2015] 1 WLR 2309 (CA) at [52]-[54] (" *Malabu Oil* ") as follows:
>
> i. The applicant for fortification must show a good arguable case for it, and does not have to prove the need for fortification on a balance of probabilities (*Malabu Oil* at [52]-[53]).
>
> ii. In considering whether to exercise its discretion to order fortification, the Court will take the three criteria – which are inextricably linked factors – into account (*Malabu Oil* at [53], applied in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at [14] ("*Phoenix Group*")):
>
> (a) Can the applicant show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that effect?
>
> (b) Can the applicant show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction?
>
> (c) Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?
>
> 27. As for the correct approach in relation to the three criteria:
>
> **Can the applicant show a sufficient level of risk of loss?**
>
> i. In showing a sufficient level of risk of loss, the mere assertion of risk is insufficient. As *Gee on Commercial Injunctions* (7th Ed.) puts it,"there must be some real evidence, which objectively establishes that risk" (paragraph 11-029), citing *JSC Mezhdunarodniy v Pugachev* [2015]

> EWCA Civ 139 at [98]-[99], to which I would add Popplewell J in *Phoenix Group* at [18] and Mr. Briggs QC in *Harley Street Capital Limited v Tchigirinski* [2005] EWHC 2471 (Ch) at [33] ("*Harley Street Capital*"). I consider that there does indeed have to be a solid, credible evidential foundation that the claimed loss has been or will be suffered, particularly where the loss is said to be that of a third party.
>
> **Is the loss caused by the grant of the injunction?**
>
> ii. In relation to the causation element:
>
> (a) It is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the order/injunction: *Air Express v Ansett* (1979) 146 CLR 249 per Mason J at [325]; Saville J in *Financiera Avenida v Shiblaq*, transcript, 21 October 1988 (unreported) and SCF *Tankers Ltd v Privalov* [2017] EWCA Civ 1877 at [43] ("*Privalov*")….
>
> *Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?*
>
> iii. Again, in my judgment, there must be some solid, credible evidence of future losses (or of losses having been suffered). I would adopt the general approach to this issue of Popplewell J in Phoenix Group at [18]. The claim to have suffered loss ought ordinarily to be supported by some underlying material and ought not to be speculative. Without documentary evidence, a mere generalised assertion of loss will be scrutinised carefully by the Court and is unlikely to be sufficient."

115. Dr Joseph did not take me to any passages in Severa 1 to Severa 4 in order to satisfy me that there was a real risk that either Facades or Structures or the First Defendant himself have suffered or will suffer loss as a consequence of the Court continuing paragraph 11 of the Freezing Injunction (and paragraph 8 of the Order dated 8 April 2022). I say this for the following reasons:

(1) The purpose of paragraph 11 was to prevent the First Defendant from taking unauthorised or unlawful steps as a director of Facades or Structures. I would need some persuasion to find that the First Defendant could recover substantial damages for breach of the undertaking if he took unauthorised steps on behalf of either company in breach of his statutory duties.

(2) But there is nothing to stop the First Defendant exercising his powers as a director with the authority of either company. Paragraph 11 expressly contemplates him continuing to take steps as a director if those steps are authorised by a board resolution or agreed in writing by PCBB. This was a point which Zacaroli J identified in *Findmylaims.com v Howe* (above).

(3) Again, if there is a pressing need for the First Defendant to take action, I would need some persuasion to find that he could recover substantial damages for breach of the undertaking if he did not propose a meeting of the board of directors or ask the Claimant for his authority (either directly or through PCBB).

(4) But in any event, the First Defendant did not identify any need for action. He did not suggest that the Group would lose any lucrative contracts or customers if he was no longer able to act as a director. Indeed, the only evidence of loss which he gave was that he had been prevented from instructing solicitors to recover a debt of £16,920. He also gave evidence in Severa 4 that Facades had very little cashflow and only one remaining client. He also exhibited emails and other correspondence in which he told Hossain and others that Facades was insolvent.

(5) Finally, I am not satisfied that there is a real risk that the First Defendant will suffer any personal loss (as opposed to the Group companies themselves). He did not give any evidence about the value of his shares in Group or suggest that they would be reduced in value by the Claimant's conduct. Moreover, in the Spreadsheet and the List of Assets the First Defendant admits that he holds very substantial assets in his own name on behalf of Facades or Structures or controls those assets. I am satisfied that the Freezing Injunction has had the effect of preserving important assets of the Group which should also preserve the value of the First Defendant's shares in the company.

116. Dr Joseph did not invite the Court to extend paragraph 9 of the Order dated 8 April 2022 and order the Claimant to provide fortification for either the worldwide freezing injunction or the proprietary freezing injunction. In the absence of such an application, I do not consider further whether there is a real risk that the First Defendant will suffer any losses as a consequence of the continuation of the freezing relief and the grant of proprietary relief.

X. Disposal

117. I have directed that a further hearing should take place to consider any outstanding or consequential matters and I have invited Ms Potts to circulate a revised form of order which reflects the following orders which I propose to make on the handing down of this judgment:

(1) I will grant permission to the Claimant to continue the claim and order that he be prospectively indemnified against his own costs of the claim (but not adverse costs) to a limit of £100,000.

(2) I will continue the worldwide freezing injunction in paragraphs 4 to 7 of the Order dated 8 April 2022 and the injunction to restrain the First Defendant acting as a director in paragraph 9.

(3) I will grant a proprietary freezing injunction in relation to the Porsche Turbo Macan, the Porsche Boxter and the funds or assets on the Proprietary Accounts or their traceable proceeds up to the limits specified above (where applicable).

(4) I will order the First Defendant to give further disclosure in aid of the proprietary freezing injunction by providing bank statements and other account statements showing the transaction history of the Proprietary Accounts.

(5) I will order the First Defendant to give further disclosure in aid of the worldwide freezing injunction by swearing a further affidavit setting out the current balance on each of the Non-Proprietary Accounts and by providing a current statement from the bank (or other entity) at which the account is held to verify his evidence.

(6) I will make the following specific orders in relation to three categories of assets, namely, the Wise Accounts, the Binance Account and the BlockFi Account:

    (a) I will order the First Defendant to specify in his affidavit all accounts held or controlled by him at Wise, the specific accounts into which he transferred £68,715.69 from the Barclays Account and the Tide Account and the current balance on any other Wise Accounts in his name or which he controls.

    (b) I will also order him to exhibit bank statements showing the transaction history of the relevant Wise Accounts into which the total sum of £68,715.69 was paid and to provide a current statement from Wise for each of his other accounts.

    (c) I will also order him to specify in full in his affidavit: (i) the account information for the Binance Account and the BlockFi Account and (ii) the nature, identification codes and value of the assets held on those accounts.

(d) I will also order him to exhibit all documents necessary to verify that information including (if necessary) documents evidencing the transaction history.

(7) I dismiss the First Defendant's application to increase the fortification of the Claimant's undertaking in damages in relation to paragraph 9 of the Order dated 8 April 2022.

(8) I will give permission to both parties to apply.

118. At the consequential hearing, I will hear from counsel in relation to the time periods for compliance with the various orders which I propose to make, whether I should limit the tracing disclosure which I propose to order to specific periods of time and the scope of the permission to apply. I will also deal with the question of costs.