Neutral Citation Number: [2024] EWHC 1740 (Ch)

No. BL-2004-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (CHANCERY DIVISION)

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

5 July 2024

B e f o r e :

DAVID BAILEY KC
(sitting as a Deputy High Court Judge)

- -

Between :

(1) KIERAN GALLAHUE (in his personal capacity and as co-trustee with Mary Gallahue of the Kieran and Mary Ellen Gallahue Revocable Family Trust and the Gallahue Irrevocable Trust)
(2) MARY GALLAHUE (as co-trustee with Kieran Gallahue of the Kieran and Mary Ellen Gallahue Revocable Family Trust and the Gallahue Irrevocable Trust)
(3) OLIVER COX
(4) RACHAEL COX
(5) OLIVER COX LIMITED
(6) KARL DEVINE
(7) MICHAEL MOORE
(8) VANESSA MOORE
(9) RICHARD JACKSON
(10) WARREN TAYLOR
(11) KAWT INVESTMENTS LTD
(12) ROBERT O'DONOGHUE
(13) ANNA ALLINGTON (as executor of the Estate of Christopher Allington (Deceased))
(14) ALAN HOWARD
(15) BENJAMIN COLLINS
(16) MARK WEBSTER
(17) ROSS HILL
(18) NICK DAVIS
(19) EGCB HOLDINGS LTD
(20) DCMS HOLDINGS LTD

Claimants

-and-

AKHILESH SHAILENDRA TRIPATHI

First Defendant

-and-

SILVIE KENT

Second Defendant

Mr Tony Beswetherick KC, Mr Matthew Chan and Mr Mark Baldock (Instructed by Proskauer Rose (UK) LLP) for the Claimants

Mr Adam Baradon KC and Mr John Eldridge (Instructed by Mishcon de Reya LLP) for the First Defendant

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Hearing date: 11 April 2024

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APPROVED JUDGMENT

David Bailey KC (sitting as a Deputy High Court Judge):

1. On 22 March 2024, Mr Nicholas Thompsell, sitting as a Deputy Judge of the High Court, made an *ex parte* world-wide freezing order and proprietary injunction against the First Defendant in support of the Claimants' claims. His reasons for making the order are set out in his judgment which is available at [2024] EWHC 725 (Ch).

2. The order, which, for convenience, I shall refer to as 'the Thompsell Injunction', restrains the First Defendant from disposing of his assets both in and outside the jurisdiction up to the value of £14,318,731.36, this being the sum of £4,981,593.36 (which is the amount originally frozen by the order of His Honour Judge Milwyn Jarman KC in a related action) and £9,337,138.00 (the sterling equivalent of part of the damages claimed by the Claimants in these proceedings). The order also prohibits the First Defendant from disposing of or dealing with any proceeds of sale received in relation to the sales of shares that form the subject matter of this action.

3. Given that the Thompsell Injunction was made *ex parte* without notice to the Defendants, paragraph 3 of the order provided for a further hearing (referred to as 'the Return Date'), to take place on 9 April 2024. Among other things, the order also recorded an undertaking given by the Claimants to serve an application notice for continuation of the order upon the First Defendant as soon as practicable. The continuation application was issued on Monday, 25 March 2024 and was served (together with the Thompsell Injunction and other related documents) on the First Defendant on 26 March 2024. The application notice and terms of the draft order attached to the continuation application revealed that, at the Return Date, the Claimants would be seeking: (i) an order increasing the amount of the freezing order by the sterling equivalent of US$1 million to £15,104,239.84; (ii) that the order should continue until further order of the court; (iii) an ancillary disclosure order; and (iv) their costs of both the continuation application and the *ex parte* application before Mr Nicholas Thompsell. Paragraph 16 of the Thompsell Injunction provided that the costs of the *ex parte* application were reserved to the judge hearing the application on the Return Date.

The First Defendant's Application for an Adjournment

4. Late on Friday, 5 April 2024, the Court received a letter from the First Defendant's solicitors (attaching a clip of *inter-partes* correspondence) seeking an adjournment of the Return Date to the first available date, convenient to counsel, after 23 April 2024. The Claimants' solicitors responded later that day, which was followed by a further letter from the First Defendant's solicitors on Sunday, 7 April 2024, re-iterating his request for an adjournment of the Return Date to a date to be fixed after 23 April 2024. Having considered the correspondence, it was unclear what (if anything) remained in issue between the parties or whether an adjournment was justified at all let alone to an uncertain future date without provision being made for a timetable for the exchange of any further evidence that might be required. In the circumstances, by an order dated 8 April 2024, I directed that the First Defendant's application for an adjournment of the Return Date would be listed to be heard by me on 11 April 2024 and I vacated the hearing scheduled to take place on 9 April 2024. Paragraph 3 of my order provided that the Thompsell Injunction would continue until judgment was given on the continuation application or further order.

5. By the time of the hearing on 11 April 2024, other than costs, the only substantive issue which remained in dispute between the parties was whether the amount frozen by the Thompsell Injunction should be increased by the sterling equivalent of US$1 million from £14,318,731.36 to £15,104,239.84. This was because the Claimants indicated that they were not seeking a formal order for disclosure at that hearing and because, shortly after I had adjourned the original Return Date, the First Defendant's solicitors had stated in correspondence that the First Defendant did not intend to contest the Thompsell Injunction and was content for that order to remain in place until further order of the Court.

6. Nonetheless, at the outset of the hearing, the First Defendant maintained his application for an adjournment to a date after 23 April 2024 primarily on the basis that he had had insufficient time to brief counsel to deal with the Claimants' application to increase the amount of the freezing order. The adjournment application was opposed by the Claimants. At one point during his oral submissions (but not in his skeleton argument), Mr Adam Baradon KC intimated that the First Defendant wanted an adjournment in order to serve a witness statement on the issue whether the amount of the Thompsell Injunction should be increased. It was unclear what, if any, factual evidence the First Defendant might be able to give that could be relevant to that issue and no explanation was forthcoming. Furthermore, to seek an adjournment on that unheralded basis during the course of the hearing was likely to have serious implications for the First Defendant in terms of costs. In the event, on further reflection and having taken instructions, this point was not pursued by Mr Baradon.

7. Having heard submissions from both parties on the application for an adjournment I was satisfied that there was no proper basis for a further adjournment of the Return Date and, therefore, proceeded to hear counsel on the merits of the Claimants' continuation application. In my judgment, there was no procedural unfairness in adopting this course and an adjournment would have been inconsistent with the overriding objective. My reasons for refusing to grant a further adjournment may be summarised as follows. First, as Mr Tony Beswetherick KC pointed out on behalf of the Claimants, the First Defendant had been on notice from 26 March 2024 that the question whether the amount of the freezing order should be increased would be in issue on the Return Date. This was apparent from the express terms of the Thompsell Injunction which provided, at paragraph 4(c)(i), that the injuncted sum included £9,337,138.00 "… being the amount of damages claimed by the [Claimants], less the amount of US$1,000,000 claimed at paragraph 75(b)(ii) of the Particulars of Claim (in relation to which the [Claimants] have not yet satisfied the Court that a Freezing Injunction should be granted)…" It was also apparent from Mr Thompsell's judgment (which stated, at paragraph 41, that the Claimants would be able to revisit that issue at the Return Date) and from the terms of the draft order forming part of the continuation application. Secondly, notwithstanding the fact that the Claimants had been unable to satisfy Mr Thompsell that they had a good arguable case in relation to the US$1 million claimed at paragraph 75(b)(ii) of the Particulars of Claim, the Claimants had chosen not to serve any further evidence in support of their continuation application or seek permission to amend their statement of case. Accordingly, the position (in terms of the Claimants' evidence and pleaded case) had not changed since the *ex parte* hearing before Mr Thompsell and the service of the papers on the First Defendant which had occurred on 26 March 2024. Thirdly, the essential issue as to whether the amount of the freezing injunction should be increased

gave rise to a question of law which, in my judgment, the First Defendant had been afforded sufficient time to consider and address. This was, in the event, subsequently borne out by the helpful submissions I heard from Mr Baradon on the merits of the continuation application.

8. I should add that, as at the date of the hearing, the claim form had not been served on the Second Defendant who, so far as I am aware, resides outside of the jurisdiction. She played no part in the proceedings before me.

The Factual Background

9. Before turning to the merits of the Claimants' continuation application, it is necessary to set out the factual background that has given rise to these proceedings. For present purposes that background can, in large part, be taken from the Particulars of Claim, affidavits and skeleton arguments and, as far as material, is as follows. Importantly, however, I should make plain that this brief summary is a reflection of the Claimants' version of events and is not intended to decide any matter which may be in dispute between the parties.

10. In 2020, the Second Defendant ("Ms Kent") was the registered owner of 92,800 ordinary shares in the capital of a company called Signifier Medical Technologies Limited ("the company"). The company was co-founded by the First Defendant ("Mr Tripathi") in 2015 and operates a business selling a medical device which uses electro-therapy to treat obstructive sleep apnoea (which often manifests as snoring) and related conditions. Mr Tripathi is a director of the company and, until August 2023, he was its chief executive officer. The First Claimant ("Mr Gallahue") became the company's chairman on 23 March 2019 and was a director of the company from 10 May 2019 until he was removed by a shareholder vote on 6 September 2023. On 1 June 2020, the company granted Mr Gallahue 60,000 restricted stock units, 25% of which were to vest each year. As at 15 March 2024, 42,681 of those units had vested and are recorded in Mr Gallahue's shareholding in the company's register of members. Mr Gallahue's total shareholding in the company amounts to some 49,064 ordinary shares.

11. In October 2020, the Claimants collectively purchased 31,931 of Ms Kent's shares for a total consideration of US$2,935,643.75. Mr Gallahue acquired 2,589 of those shares for some US$238,835.25 and Mr Gallahue, together with his wife, the Second Claimant (on behalf of the Gallahue family revocable trust), acquired a further 1,910 of Ms Kent's shares for US$176,197.50. The next year, in June 2021, a number of the Claimants (including what is described as "the Gallahue Irrevocable Trust") invested in a round of debt financing, known as the Series D Fundraise. The fundraise was structured by way of convertible loan notes, which were automatically to convert into shares in the company on the basis of a US$160 million valuation. The Series D Fundraise provided some US$35 million in cash to the company. The sum invested by the Gallahue Irrevocable Trust in the Series D Fundraise amounted to US$2 million. Shortly thereafter, in July and August 2021, the Claimants collectively purchased a further 6,724 shares from Ms Kent for a total consideration of US$1,345,300.00. 2,500 of those shares were purchased on behalf of the Gallahue Irrevocable Trust for US$500,000.00.

12. Two years later, on 28 June 2023, Mr Gallahue caused the Gallahue Irrevocable Trust to make a further investment into the company, as part of a Series E round of fundraising, in the amount of US$1 million. It is this further investment in the company by Mr Gallahue which has given rise to the issue whether the enjoined amount frozen by the Thompsell Injunction should be increased.

13. The Claimants allege that Mr Tripathi promoted the sale of Ms Kent's shares in 2020 and again in 2021 and that, in doing so, he made a number of statements designed to encourage the Claimants to purchase her shares. In broad terms, it is alleged that Mr Tripathi told the Claimants that Ms Kent was the legal and beneficial owner of the shares being sold and that she wished to sell them for personal reasons and that she would receive the proceeds of the share sales for her own use. The Claimants contend that they relied upon these statements when they purchased the shares from Ms Kent and also when making subsequent investments in the company. Recently, however, in February 2024, the Claimants say that they discovered that Mr Tripathi had been the ultimate recipient of almost all of the proceeds of sale of Ms Kent's shares. On that basis, the Claimants allege that the statements Mr Tripathi made to encourage them to purchase Ms Kent's shares were untrue and were made dishonestly or, at least, negligently. As a result, the Claimants have purported to rescind the 2020 and 2021 share sale transactions with Ms Kent and seek restitution of the purchase price paid. In addition, they have brought a claim in deceit and/or negligent misrepresentation and seek damages from Mr Tripathi and/or Ms Kent in the amount of the share sales and also the sums invested pursuant to the Series D and Series E rounds of fundraising. The sums claimed in relation to these further investments in the company amount to the bulk of the Claimants' total claim.

14. As at the date of the hearing, neither Defendant had served a defence to the Claimants' claims and no witness statement had been served by either Mr Tripathi or Ms Kent or on their behalf. Nonetheless, in his written and oral submissions, Mr Baradon said (I presume on instructions) that, in Mr Tripathi's view, these and various related proceedings constitute part of a wider battle for control of the company, cynically being advanced by the Claimants on multiple fronts. Whether that is the case and where the truth ultimately lies is not a matter for me and will have to await determination at trial.

The Claimants' Statement of Case

15. For present purposes, which concern the merits of the Claimants' continuation application and, in particular, the question whether the sum subject to the freezing order should be increased by the sterling equivalent of US$1 million, it is instructive to have regard to the Claimants' Statement of Case.

16. Brief details of the Claimants' claims are set out in a continuation sheet attached to the Claim Form. That document, in material part, provides as follows:

> "…
>
> 4. Each of the Claimants was induced to purchase [Ms Kent's shares in 2020 and again in 2021] by express, alternatively implied, representations made by

the First and/or Second Defendants on a number of occasions prior to each of the Sales that, inter alia:

4.1 The Second Defendant was the beneficial owner of the Sale Shares; and

4.2 The Second Defendant would receive the benefit of the proceeds of the Sale Shares for her own use and enjoyment.

5. In the event, the Claimants have discovered that the moneys paid for the Sale Shares were transferred to the First Defendant via the Second Defendant such that:

5.1 The Second Defendant did not in fact benefit from the Sales; and

5.2 It is to be inferred that the Sale Shares were in fact beneficially owned by the First Defendant and not the Second Defendant.

6. The Claimants allege that the aforesaid representations were (i) made with the intention that they be relied upon; (ii) were false, and (iii) induced the Claimants to purchase the Sale Shares such that the Claimants are entitled to and have rescinded the contracts effecting the Sales and/or damages for deceit or negligent misrepresentation.

7. Had the aforesaid representations not been made, the Claimants would not have purchased the Sale Shares.

8. Further, the Claimants would also not have invested a further US$8,595,800 into the Company, which sums the Claimants seek as losses consequential on the First and/or Second Defendant's deceit and/or negligent misrepresentation.

…"

17. In the course of their oral submissions, both Mr Baradon and Mr Beswetherick took me through the Particulars of Claim. This is a substantial document consisting of 79 paragraphs, spanning 39 pages together with an 11-page schedule and two annexures. So far as is relevant for present purposes, it contains the following allegations:

"…

32. In entering into the 2020 Share Sale Contracts, each of the aforesaid Claimants relied upon [the alleged representations]…

43. In reliance on [the alleged representations] on or around 13 July 2021 Mr Gallahue signed a share purchase agreement with Ms Kent…

48. On 28 June 2023, Mr Gallahue signed, on behalf of the Irrevocable Trust, a loan agreement with [the company] as part of its Series E fundraise. On 29 June 2023, Mr Gallahue procured the sum of US$1,000,000 to be paid to [the company's] bank account.

…

55. As intended by Mr Tripathi, the Claimants were each induced by the 2020 Representations, which were never corrected, to enter into the 2020 Share Sale Contracts in the manner pleaded at [paragraph 32] above.

56. Mr Tripathi is accordingly liable in deceit in respect of the 2020 Representations. Further, in the premises where the false representations of her agent induced the Claimants to enter into the said transactions, Ms Kent is also liable in deceit.

57. Had the 2020 Representations not been made, the Claimants:

(a) Would not have entered into the 2020 Share Sale Contracts;

(b) Would have become concerned that the shares registered to Ms Kent were being offered at an apparent significant discount and that such sales were being promoted by Mr Tripathi, without there being any satisfactory or cogent explanation for why that was the case and/or they would have been concerned that Ms Kent and/or Mr Tripathi had worries about the future of [the company];

(c) Their ability to place trust and confidence in Mr Tripathi as both a founder and CEO of [the company] would have been significantly impaired as a result of the lack of any (or any satisfactory or cogent) explanation for the 2020 Share Sales.

(d) As a result, none of them would have invested further in [the company]. Further, they would not have invested in the Series D Raise or, in the case of the Irrevocable Trust, the Series E Raise as pleaded [above].

…

64. As intended by Mr Tripathi, the Claimants were each induced in the manner pleaded [at paragraph 43] above to enter into the 2021 SPAs.

65. Mr Tripathi is accordingly liable in deceit in respect of the 2021 Representations. Further, in the premises where false representations of her agent induced the Claimants to enter into the 2021 SPAs, Ms Kent is also liable in deceit for the 2021 Representations made by Mr Tripathi.

66. Had the 2021 Representations not been made:

(a) The Claimants would not have entered into the 2021 SPAs;

(b) The Claimants would have become concerned that shares registered to Ms Kent were being offered at an apparent discount and that such sales were being promoted by Mr Tripathi, without there being any satisfactory or cogent explanation for why that was the case and/or they would have been

concerned that Ms Kent and/or Mr Tripathi had worries about the future of [the company];

(c) The Claimants' ability to place trust and confidence in Mr Tripathi as both a founder and CEO of [the company] would have been significantly impaired as a result of the lack of any (or any satisfactory or cogent) explanation for the 2021 Share Sales;

(d) Further, the Irrevocable Trust would not have invested in the Series E fundraise as pleaded [above].

…

75. As a result of relying on Mr Tripathi and Ms Kent's misrepresentations, the Claimants have suffered and will continue to suffer loss and damage. In particular, had the 2020 Representations and the 2021 Representations not been made:

(a) The Claimants would not have entered into the 2020 Share Sale Contracts and the 2021 SPAs and paid the Share Sale Proceeds to purchase the Sale Shares.

(b) Furthermore, the Claimants would not have invested the further significant sums into [the company] which they did. In particular:

(i) In [the company's] Series D fundraise, the Claimants invested US$7,595,800 as set out [above].

(ii) In [the company's] Series E fundraise, the Irrevocable Trust invested US$1,000,000 as set out in paragraph 48 above.

…"

The Claimants' Evidence

18. The Claimants relied upon some 15 affidavits (with exhibits) in support of their original *ex parte* application before Mr Thompsell and they chose to rely upon the same evidence before me. As I have already mentioned, the Claimants did not seek permission to amend their statement of case or serve any further evidence in support of their continuation application. Accordingly, given that the US$1 million investment in the Series E fundraise was made by the Gallahue Irrevocable Trust, it is sufficient, for present purposes, to refer to Mr Gallahue's affidavit, which was affirmed by him on 15 March 2024.

19. Having explained his initial investments in the company and his appointment as chairman and to the board in 2019, in his affidavit Mr Gallahue gives a detailed account of the alleged representations that were made to him by Mr Tripathi in 2020 when promoting the sale by Ms Kent of a proportion of her shares. Then, at paragraph 29 of his affidavit, Mr Gallahue says:

> "In purchasing the Shares, I (and the Family Trust) relied on Mr Tripathi's statements to me… from which I understood that (i) Ms Kent's relative was an early investor in [the company] who had given her the Shares; and (ii) Ms Kent wished to sell her shares quickly due to her personal circumstances… I believed that Ms Kent would receive the proceeds from the sale of the Shares and was selling because she needed those proceeds for her own use…

20. In a passage on which the Claimants place particular emphasis, Mr Gallahue continues (at paragraph 30 of his affidavit) to say: "Mr Tripathi justified and explained the sale of the Shares by reference to Ms Kent's personal circumstances. I relied upon this explanation; if this explanation had not been made, I would not have purchased the Shares nor would I have caused the Family Trust to purchase Shares or the Irrevocable Trust to make any further investments into [the company] (which it did, as is describe (sic) below)… I also would not have bought the Shares had I not believed that Ms Kent herself would be the beneficiary of the Share sales unless a clear and credible explanation was given as to why this would be the case." Mr Gallahue adds that he would have considered resigning from the board had he known that Mr Tripathi would benefit personally from the sale of Ms Kent's shares.

21. Mr Gallahue addresses his 2021 share purchase at paragraph 39 of his affidavit. He explains that, when he caused the Gallahue Irrevocable Trust to purchase a further tranche of Ms Kent's shares in July 2021, he believed that this was an arm's length transaction facilitated by Mr Tripathi because Ms Kent needed to sell the shares for personal reasons. Mr Gallahue adds that he believed Ms Kent would benefit personally from the proceeds of sale and that, had he been told otherwise, the transaction would not have gone ahead.

22. Mr Gallahue's evidence as to the circumstances in which he came to invest a further US$1 million in the company (by participating in the Series E fundraise in June 2023) is contained in paragraphs 43 to 50 of his affidavit. He explains that, from the autumn of 2022 onwards, it was apparent that the company needed significant further investment to continue in business. Mr Tripathi provided a bridging loan to the company of some US$2.5 million in February 2023 and, by June 2023, an investor consortium was conducting due diligence with a view to making a substantial investment in the company. By 25 June 2023, it was apparent that the due diligence exercise would not be completed before the company ran out of money so one member of the investor consortium proposed to make a short-term investment of US$1 million on the condition that an existing board member made a matching (or greater) investment. The board of the company met twice on 27 June 2023 and Mr Gallahue explains that the board approved this proposal and, consequently, he signed a loan note agreement on behalf of the Irrevocable Trust and invested a further US$1 million into the company on 29 June 2023. At paragraph 50 of his affidavit, Mr Gallahue says: "… I would not have caused the Irrevocable Trust to invest this additional US$1 million had I known then, as I know now, that Mr Tripathi's explanation as to the reasons for Ms Kent's sale of the Shares in 2020, including that she would be the ultimate beneficiary receiving the proceeds of sale were untrue."

The Claimants' Continuation Application

23. There was no dispute between the parties that the Thompsell Injunction should be continued. The focus of the argument was on the question whether or not the enjoined sum should be increased by the sterling equivalent of US$1 million. It was common ground that this issue turned on whether the Claimants could establish a good arguable case that they were entitled to damages in that sum.

24. At the hearing of the Claimants' *ex parte* application, the Claimants failed to satisfy Mr Thompsell that they had a good arguable case that they were entitled to recover the sum of US$1 million that Mr Gallahue (on behalf of the Gallahue Irrevocable Trust) had invested in the company's Series E fundraise in June 2023 as damages for deceit. The judge dealt with this issue in his judgment, at paragraphs 30 to 31 and 39 to 41, where he said:

> "…
>
> 30. I have found the Claimants' case that they were also relying on allegedly false representations in applying for the Series D and in particular the Series E fund-raisings less persuasive, particularly in relation to the Series E fund-raising which occurred something like two years after the last of the relevant representations.
>
> 31. As far as I can tell, it is not specifically pleaded that the investment in these later tranches was made in reliance on the alleged misrepresentations or that the representations were made for the purpose of inducing these investments. The Claimants have averred only that they would not have invested further in the Company had they known these representations were false. This is a slightly different matter, as this might mean they would not have invested had they known that Mr Tripathi had lied to them, rather that they were relying on these representations as such. Also, it is less credible in relation to the Series E fund-raising, which was some two years after the last of these misrepresentations, that they were still relying on those representations or indeed that the representations had been made for the purpose of inducing this further subscription…
>
> 39. … as regards the Series E investment I think it is much less clear that there was reliance, and in the absence of reliance being specifically pleaded or expressly evidenced, I am not, at present, satisfied that the test of good arguable case is met on either of the explanations given in *Unitel SA v Unitel International Holdings BV* [2023] EWHC 3231 (Comm).
>
> 40. For this reason, I will not, in calculating the quantum for the freezing order, take into account the potential damages in relation to the Series E investment.
>
> 41. I am very aware that there has not been the chance for that point to be fully argued before me today and certainly there has been very limited argument on the relevant test to be applied. Taking the balance of the understanding I have today, I do not think it is safe for me to include the damages in relation to the Series E investment in my judgment, but the result of the order I am going to

make is that there will be a return date very soon and the Claimant will be able to revisit this issue on that occasion, as will the First Defendant.

…"

25. Mr Beswetherick's primary submission was that I should take a different view. He submitted that, on a closer and more considered appraisal of the Claimants' statement of case and evidence, the necessary elements of the tort of deceit, including reliance, have been sufficiently pleaded and evidenced to satisfy the merits threshold of a good arguable case in relation to the Series E investment on either of the formulations of that test discussed in *Unitel*. Alternatively, and in any event, Mr Beswetherick submitted that the relevant touchstone here was causation rather than reliance, and that the Claimants have a good arguable case that they are entitled to recover the US$1 million invested in the Series E fundraise as consequential damages. In that regard, he pointed to the evidence of Mr Gallahue to the effect that he would not have invested the Gallahue Irrevocable Trust's money in the Series E fundraise if he had known that the representations that Mr Tripathi had made in 2020 were untrue. He also relied upon *Smith New Court Securities v Citibank N.A.* [1997] AC 254 and the decision of Arnold J in *Invertec Limited v De Mol Holding BV* [2009] EWHC 2471 (Ch) where the victim of a fraud, who had been induced to purchase shares in a company, was entitled to recover the amount of subsequent loans made to the company while in ignorance of the fraud as consequential damages.

26. Mr Baradon submitted that, as a matter of judicial comity, I should follow the decision of Mr Thompsell and that, given that the Claimants had not adduced any further evidence or sought to amend their pleaded claim, the application to increase the enjoined sum on account of the additional investment made in 2023 must be dismissed. He maintained that reliance had not been pleaded and that there was what he described as 'an evidence gap' in the Claimants' case. So far as the Claimants' claim to recover the investment in the Series E fundraise as consequential damages was concerned, he submitted that Mr Gallahue's evidence and what he called the Claimants' 'domino' plea of causation at paragraphs 57, 66 and 75 of the Particulars of Claim were insufficient to establish the requisite causal nexus and failed to address the correct counterfactual. He relied upon certain passages in Grant & Mumford, *Civil Fraud* (1st ed.) including the following passage at paragraph 21-039:

> "…the courts, even in a case in fraud, are anxious to place some limits on the ambit of recovery. The fraudulent misrepresentor is not to be treated as an insurer of all losses flowing from the decision to enter into the transaction which was induced by the deceit. Entry into the transaction said to be induced by the defendant's fraud may well set the claimant on a path which leads to further decisions and further expenditures over a very protracted period of time. It does not follow that all such payments can simply be placed at the door of the original misrepresentor: at some point, which is necessarily hard to pin down in the abstract, the causative potency of the fraud wanes and the law treats the supervening decision of the claimant as the 'true' cause of the loss."

Good Arguable Case

27. Before considering these arguments in any detail, it is necessary to say something about the merits threshold applicable to interlocutory applications for world-wide freezing orders. It was not in dispute that, in order to succeed in their application to increase the enjoined sum, the Claimants had to establish that they had a good arguable case that they would recover at trial the amount invested in the Series E fundraise. However, both parties brought my attention to *Unitel* in which Bright J discusses a controversy that has arisen in a recent series of first instance decisions as to what the good arguable case test requires in this context.

28. As long ago as 1983, when what was then referred to as the 'Mareva jurisdiction' was in its relative infancy, in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The 'Niedersachsen')* [1983] 2 Lloyd's Rep 600 Mustill J considered the question: what probability of success at the ultimate trial is the plaintiff required to demonstrate, before an injunction can be properly granted or maintained? His answer, following the judgment of Lord Denning MR in *Rasu Maritima S.A. v Pertamina* [1977] 2 Lloyd's Rep. 397 at 404 was a 'good arguable case' (which Lord Denning had said was the same as the test applied by Lord Simonds in *Vitkovice v Korner* [1951] AC 869 in applications under the old RSC Order 11 for permission to serve out of the jurisdiction). However, as to the meaning of the test in the context of a freezing injunction, Mustill J described the analogy with the evidential standard to be applied to the applicability of the jurisdictional gateways as being "rather distant" and explained (at 605) that the merits threshold of a 'good arguable case' for the purposes of a Mareva (now 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 per cent. chance of success." The Court of Appeal in that case (at 613) endorsed Mustill J's formulation as being the correct.

29. The meaning of 'good arguable case' in the context of jurisdictional disputes has, of course, been the subject of extensive judicial clarification since the phrase was first adopted from counsel by Lord Simonds in 1951. The test as to the applicability of the jurisdictional gateways is essentially a relative one that requires a claimant to show that it has the "better argument on the material available" by reference to the three-limbed approach first propounded by Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 as endorsed by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 and explained by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514. While the relevant enquiries may overlap (as was the case in *Vitkovice*), the requirement that a claimant must have a good arguable case that a jurisdictional gateway applies is distinct from the separate, lesser requirement on the claimant to overcome the merits threshold. The merits threshold is an absolutist or non-relative hurdle which only requires a claimant to establish a serious issue to be tried. In other words, a claimant must demonstrate that the merits of its claim are strong enough to resist an application for reverse summary judgment.

30. Given the origins of the good arguable case test, it is perhaps not altogether surprising that in *Harrington & Charles Trading Co. Ltd v Mehta* [2022] EWHC 2960 (Ch) and again in *Chowgule and Co Private Ltd v Shirke* [2023] EWHC 2815 (Comm), it was held that the merits threshold for a freezing order had moved on since 1983 and now required a claimant to demonstrate a good arguable case on the merits to the same evidential standard required to establish the applicability of a jurisdictional gateway.

However, in *Magomedov v TPG Group Holdings (SBS) LP* [2024] 1 WLR 2205 Butcher J (at [21]) held that both *Harrington* and *Chowgule* were wrongly decided insofar as they apply the three-limb test derived from *Brownlie* in the context of applications for freezing orders. Bright J reached the same conclusion (at [36]) in *Unitel*.

31. While Bright J is undoubtedly correct to say that this controversy and divergence of opinion cannot be resolved short of a definitive answer from the Court of Appeal, for my part I have no doubt that Butcher J was correct for the reasons he gives in holding that Mustill J's formulation of the merits threshold in the context of freezing orders remains good law. Indeed, it seems to me that the contrary view involves a reversion to the mistaken belief that the 'good arguable case' test (as first established in *Vitkovice* and explained in *Kaefer*) is as applicable to the merits of a claimants' case as it is to the applicability of a jurisdictional gateway. That error was exposed by Lord Goff in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 at 545D in a speech with which Lord Mustill agreed. In my view, Mustill J's judgment in *The Neidersachsen* should be read in that light. On the other hand, whether the merits threshold for a freezing injunction should be aligned with the merits threshold for permission to serve out (i.e. a serious issue to be tried) is an altogether different matter which will have to await the clarification from the Court of Appeal to which Bright J referred.

32. Accordingly, it follows that for the purpose of the Claimants' continuation application I have approached the issue of good arguable case by asking myself the question: have the Claimants established that their claim in relation to the further sum invested in the Series E fundraise is more than barely capable of serious argument, even if not necessarily one that I believe has a better than 50 per cent chance of success?

33. Given the conclusion I have reached in answer to that question, I should add, for completeness, that the outcome of the continuation application would have been no different had I applied the three-limb test and asked myself the relative question whether the Claimants had the better of the argument on the materials presently available. Indeed, if that is, in fact, the correct test to apply as the merits threshold in the context of an application for a freezing order, then the answer would have been all the more conspicuous.

Analysis

34. Given that this is an *inter partes* hearing of the Claimants' continuation application at which I have had the benefit of written and oral submissions from both the Claimants and the First Defendant, I am not bound by the conclusions that Mr Nicholas Thompsell reached at the *ex parte* hearing. Judicial comity does not require otherwise. In the event, it transpires that I have reached the same ultimate conclusion, albeit that I have looked at the matter completely afresh (with the added benefit of having time for reflection) and based my decision upon the evidence so far adduced by the Claimants and the current formulation of their case. In my judgment, for the reasons I will endeavour to explain, as matters stand the Claimants do not have a good arguable case that their entitlement to damages extends to the recovery of the additional US$1 million invested in the Series E fundraise in 2023.

35. A victim of fraud is undoubtedly entitled to compensation for all the loss directly flowing from the transaction or transactions that were induced by the fraudulent representation(s). In addition, the damages recoverable for the tort of deceit extend to consequential losses caused by the induced transaction(s). Moreover, the moral considerations that arise in the context of fraud mean that the usual control-mechanism of remoteness does not apply to limit the compensation to which a victim of deceit is entitled. These basic principles are apparent from the decision of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 and the passage in Lord Browne-Wilkinson's speech (at 266H-267D) to which I was taken in the course of oral submissions:

> "… the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: (1) The defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

36. An important distinction which emerges from Lord Browne-Wilkinson's seven principles is between direct losses (which flow directly from the fraudulently induced transaction) and consequential losses (which are caused by the fraudulently induced transaction). Hence, as Lord Browne-Wilkinson explained (at 264G-H), in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 Mr Doyle recovered £2,500 by way of direct damages (being the price paid pursuant to the fraudulently induced transaction less the benefits received) and £3,000 by way of consequential damages (being subsequent expenses incurred as a result of the fraudulently induced transaction).

37. A further example of the distinction between direct and consequential damages in the context of deceit is to be found in *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch) on which Mr Beswetherick relies. In that case, Invertec recovered £1,512,113 by way of direct damages (being the initial consideration paid for the entire share capital of Volante pursuant to the fraudulently induced share purchase agreement) and £532,000 by way of consequential damages (being loans extended to Volante after the purchase as a result of the fraudulently induced transaction). Causation is the touchstone of liability for both direct and consequential damages in the tort of deceit but it gives rise to two separate causal enquiries. To recover direct damages the requirement of causation is ordinarily satisfied by a claimant establishing

that it was induced by the fraudulent misrepresentation to enter into a given transaction. By contrast, to recover consequential damages, the claimant must show that the later losses were caused by the earlier fraudulently induced transaction. A causal link between the fraudulently induced transaction and the consequential loss claimed is what has to be established. This is clear from point (6) of Lord Browne-Wilkinson's seven principles.

38. It follows, therefore, that to have a good arguable case that the funds invested by the Gallahue Irrevocable Trust in the Series E fundraise in 2023 are recoverable by the Claimants as direct losses, they must plead and seek to prove that the transaction was induced by the First Defendant's fraudulent misrepresentations. I have already set out the relevant paragraphs in the Claimants' statement of case. It is clear from the brief details of the claim set out and attached to the Claim Form (at paragraph 6) that the only two transactions that are alleged to have been induced by the First Defendant's fraudulent misrepresentations are the share purchase agreements entered into in 2020 and 2021. By contrast, the sums invested in the Series E fundraise two years later are expressly claimed (at paragraph 8) as consequential losses. This way of putting the case is carried through to the Particulars of Claim; although perhaps not with the same precision. Nonetheless, while the first line of the compendium plea at paragraph 76 alludes to reliance in general terms, it is clear (from paragraphs 55 & 56 and 64 & 65) that the only transactions which are alleged to have been induced by the First Defendant's fraudulent misrepresentations were the 2020 and 2021 share purchase agreements with Ms Kent. Looking at the Claimants' statement of case as a whole, there is no pleaded case to the effect that the sums allegedly lost by reason of the investment in the Series E fundraise are recoverable as direct losses. That, to my mind, is fatal to any attempt seriously to argue that the Claimants can recover those sums in damages for the tort of deceit as direct losses. I should add that the evidence so far adduced by the Claimants from Mr Gallahue does not support such a claim either. There is no suggestion, for example, that the representations allegedly made to him by the First Defendant in 2020 and/or 2021 were present in his mind (and induced him to invest in the Series E fundraise) two years later in 2023.

39. That brings me to Mr Beswetherick's alternative submission that the monies invested in the Series E fundraise are arguably recoverable by the Claimants as consequential losses. On a fair reading of the Claimants' statement of case, it seems to me to be right to say that such a claim has been pleaded, at least in general terms. That said, it is not expressly pleaded that the later (2023) investment in the Series E fundraise was caused by the earlier (2020 and 2021) fraudulently induced share purchase transactions. That deficiency may, of course, be a reflection of the evidence on which the pleading was based but I do not regard it as fatal in itself. In my judgment, the real difficulty facing Mr Beswetherick's argument is that it does not have a sufficiently plausible evidential foundation in the affidavit of Mr Gallahue, which is the only relevant evidence presently before the Court.

40. The necessary causal connection between the fraudulently induced transaction and any subsequent transactions which give rise to consequential losses will often be self-evident. Such was the case in *Doyle v Olby* and *Invertec* where the victims of fraud had been induced to purchase a business with which they had no previous or other involvement. For instance, in *Invertec*, the claimants made a series of loans to the company which they plainly would not have made had they not been fraudulently

induced to purchase the company in the first place. The present case is different or, at the very least, much more complicated by reason of the fact that Mr Gallahue was a member of the board, had a pre-existing substantial share interest and, by 2023, was desperately searching for additional investment in order to avoid the company running out of cash. As I read his affidavit, the reason he caused his trust to invest US$1 million in the Series E fundraise was to meet the condition that the investor consortium had imposed on their own matching investment. Given his position in the company, his substantial existing shareholding and previous participation in funding rounds, he had every reason to make this additional investment in 2023 in any event; irrespective of the fact that he had purchased a comparatively small tranche of shares from Ms Kent in 2020 and 2021. While I appreciate that the fraudulently induced transaction does not have to be the sole cause, it is also noteworthy that he does not expressly say in his affidavit that the purchase of Ms Kent's shares in 2020 and 2021 led him to cause the Gallahue Irrevocable Trust to make the investment in the Series E fundraise two years later. I do not regard his evidence to the effect that he would not have made the Series E investment in 2023 if he had known that Mr Tripathi had lied to him in 2020 as sufficient to establish the necessary causal nexus between the fraudulently induced transactions and the subsequent investment in the Series E fundraise.

Conclusion

41. While I appreciate and am prepared to accept that the Claimants' claim for consequential damages will have to be investigated and determined at trial by reference to all the evidence then available, I am not satisfied that the Claimants have established a good arguable case in relation to the US$1 million investment in the Series E fundraise on the basis of the materials presently before the Court. Accordingly, the Thompsell Injunction will continue until further order but the Claimants' application to increase the enjoined sum is dismissed.