Neutral Citation Number: [2020] EWHC 1313 (QB)

Case No: QB-2020-000611

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before:

MR JUSTICE FREEDMAN

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Between:

LES AMBASSADEURS CLUB LIMITED	**Claimant**
- and -	
MR SALAH HAMDAN ALBLUEWI (ALSO KNOWN AS SHEIKH SALAH HAMDAN ALBLUEWI and MR SALAH HAMDAN ALBELWI)	**Defendant**

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Paul Burton (instructed by **CANDEY**) for the **Claimant**
James McWilliams (instructed by **Trowers and Hamlins LLP**) for the **Defendant**

Hearing date: 23rd April 2020

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Approved Judgment

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

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MR JUSTICE FREEDMAN

Mr Justice Freedman:

JUDGMENT

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II Introduction

1. On 6 February 2020, Les Ambassadeurs Club Limited ("the Claimant") applied without notice before Cavanagh J for a worldwide freezing order ("a WFO") against Sheikh Salah Hamdan Albluewi ("the Defendant"). The Court duly made a WFO which was continued by Waksman J on 17 February 2020 in a revised form. The Claimant applies for its continuation by application notice dated 17 February 2020 and the Defendant applies for its discharge by application notice dated 9 March 2020. The discharge application is said to be on the basis that (a) there is no real risk of dissipation of assets, (b) it is not just and convenient to have a WFO, and (c) the Claimant failed to make full

and frank disclosure on the without notice application. The Claimant denies each of these matters and says that the continuation of the WFO is necessary in order to continue to prevent the Defendant from dissipating his assets and thereby frustrating the ability of the Claimant to enforce a judgment.

2. The claim is for the sum of £2,000,000 plus contractual interest arising out of the dishonour of 17 cheques and/or a loan for the same sum which was said to be suspended until or unless the cheques were dishonoured. The cheques were dated 7, 8 and 9 September 2019 and the cheques were presented for payment on 23 and 24 September 2019 and returned unpaid on 25 September 2019. There is no issue that the Claimant has a good arguable case, but the proceedings are defended, and the Defendant contends that the debts comprise illegal gambling debts.

3. This judgment will first set out the history of the claim as presented to the Court on 6 February 2020 and the response of the Defendant. It will then identify and consider the issues before the Court.

III The application for a WFO

4. The application was supported by the following affidavits, namely Michelle Elliott of 31 January 2020, Nisrine Mignon of 30 January 2020 and Richard Singleton of 6 February 2020. Pursuant to an undertaking, a supplemental affidavit of Michelle Elliott dated 12 February 2020 was filed. The application was supported by a skeleton argument of Mr Paul Burton of Counsel, who appeared before Mr Justice Cavanagh, and there is a note of that hearing. A revised note was supplied. Although Mr Burton did not require the same, I took the view at the conclusion of the hearing that it would be desirable to have a full transcript of the hearing. When this was not forthcoming despite attempts to procure it, the Court convened a telephone hearing on 5 May 2020 and made a direction to obtain or accelerate the production of a transcript.

5. The Claimant is the owner of a members' club and casino in Mayfair and licensed under the provisions of the Gambling Act 2005. The Defendant is a Saudi national who is ordinarily resident in Saudi Arabia. He was presented to the Court as having been a member of the club for about 26 years and who has participated in gaming to a significant extent on his various visits. His 'traffic card' was exhibited to the evidence of Ms. Elliott: this records transactions prior to the above-mentioned ones giving rise to the instant claim.

6. However, the narrative of the skeleton argument and the evidence did not refer to the previous history, albeit that at paragraph 12 thereof, it was said that the Court would be taken through the print out of his account and that the various transactions would be explained. In fact, at the hearing, there were not explained the previous transactions prior to the instant ones of concern in September 2019 which gave rise to the claim. The affidavit of Michelle Elliott at paragraph 5 read as follows:

"The Defendant became a member of the Club on 19 July 1993. A copy of his customer and credit account details (or "traffic card" as it is known) appears at pages 1-9. The Defendant has been a significant player at the Club throughout the course of his

membership. At pages 10-12 is a summary of the Defendant's playing history for the period 1 November 1993 to 11 September 2019 which includes details of his buy-in and wins/losses. It shows that the Defendant has visited the Club on approximately 155 separate occasions during that period, and that during the course of his membership, he has bought gaming tokens to the value of approximately £14million, with an overall loss of approximately £5million.]"

7. At paragraph 8, the statement continued as follows:

"The Defendant was originally granted a CCF [a Cheque Cashing Facility] *on 6 October 2014 in the amount of £500,000 which was subsequently increased to £1,000,000. On 5 September 2019, the Defendant applied for and was granted an extension of a further £1,000,000 to his CCF in the total amount of £2,000,000 in respect of a "TTO" or "This Trip Only. This is a temporary limit which the Club sometimes grants to customers who are visiting London from overseas, but only once we have carried out enhanced due diligence. The Club knows Mr Albluewi very well, and we were satisfied that he is an individual of considerable wealth, so we were happy to extend his facility to £2,000,000 on a temporary basis."*

8. In the skeleton argument at paragraphs 11 and following, it was set out how his facility worked. Reference is made to winnings of £800,000 from Aspinalls which were used to pay for gaming tokens at the Claimant's Club in the period between 3 September and 9 September 2019. It was stated that the Claimant initially granted an authorisation limit of £500,000 on 28 April 2016, which increased to £1,000,000 on 17 August 2019 and to £2,000,000 on 25 September 2019.

9. It was stated that the Claimant unquestionably had a good arguable case. The submissions as to real risk of dissipation required objective facts from which it can be inferred that there is a risk that the respondent would move or dissipate assets other than in the ordinary course of business in a way which would make enforcement of a judgment impossible or more difficult. It was stated that enforcement in Saudi Arabia of a gambling debt would not be possible, and there was a report of an expert in Saudi law setting out that this was the case.

10. The Claimant stated that it did not allege dishonesty at this stage, and to that extent, did not rely on an allegation of dishonesty at paragraph 12 of the affidavit of Michelle Elliott. The Claimant relied not only on the fact that the cheques had been dishonoured, but also on subsequent assurances that the cheques would be honoured, which had not been fulfilled. The Claimant also referred to repeated attempts to contact the Defendant, which had largely gone unanswered.

11. The chronology appears to be as follows. The cheques were provided between 6 September and 9 September 2019. On 18 September 2019, Ms Mignon wrote to the Defendant to remind him of the dates when they would be presented for payment. Before the time of presentation, she met at what she described as his property at 1 Carlton House Terrace, London in paragraph 8 of her first affidavit. She reminded the Defendant that the cheques were due to be banked. In response, the Defendant said that he would ensure that the cheques would be paid. On 23 September 2019, the cheques were presented for payment and were dishonoured on about 25 September 2019.

12. On 30 September, Ms Mignon sent a text message asking whether he was in London or "home" (in context, meaning Saudi Arabia) and saying that the funds had not been received. In fact, on about 1 October 2019, the Defendant returned to Saudi Arabia. There were further communications by text from Ms Mignon on 8 and 15 October 2019 and a response of the Defendant giving his telephone number in Saudi Arabia. There were further messages from Ms Mignon on 28 October 2019 (the phone number had been used, but she could not get through) and 18 November 2019. The Defendant replied on 19 November 2019 saying that he would take a call, but it seems that there was no call. Accordingly, a letter was sent from the Claimant on 22 November 2019 about the outstanding account. There were further messages and then a further letter from the Claimant was sent on 17 December 2019 referring to the obligation to refer the matter to Central Credit used by casino operators worldwide. There was a communication from Ms Mignon about a settlement meeting that had been agreed in principle during the first week of January 2020, but this did not take place. On 15 January 2020, a letter before action was sent by Candey for the Claimant, but this elicited no response.

13. The matter was summarised in the skeleton argument for the Claimant as follows:

> *"35. There then follows a series of messages, and one phone call, in which Ms Mignon attempts to recover the debt. Firstly, by polite requests and ultimately with a letter from the Club's solicitors. Despite a promise of payment from Mr Albluewi it never materializes and he ultimately goes to ground.*
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> *36. It has also become apparent that Mr Albluewi has run up significant gambling debts with other London casinos and has simply walked away from them; presumably back to the safety of Saudi Arabia, where such debts (and judgments and orders based on such debts) are completely unenforceable.*
>
> *37. It is the combination of Mr Albluewi's failure to pay, coupled with his silence and apparent going to ground in Saudi Arabia, combined with a jurisdiction that is hostile to gaming debts and in which a relevant order of the English court would not be enforced that justifies the making of the order."*

14. The basis for a WFO was said to be that there was no reason to believe that he had sufficient assets within the jurisdiction, and there was a reasonable inference that he had assets outside of England and Wales and not simply in Saudi Arabia. *"He is a man of considerable wealth and in order to indulge his gaming activities around the world would be required to hold funds outside of Saudi Arabia"*: see paragraph 43 of the Claimant's skeleton argument for the without notice hearing. It was said that the Defendant may have interests in SAB Holdings of which he was the chairman and that this group of companies had assets in different jurisdictions including in Hong Kong and New York.

15. On 6 February 2020, Mr Justice Cavanagh substantially accepted the Claimant's case. He found that all elements required for a WFO were satisfied. He found that there was a good arguable case, on the evidence before him there was a real risk of dissipation and it was just and convenient to make an order in the nature of a WFO.

IV The evidence of the Defendant

16. The Defendant takes issue with the existence of a real risk of dissipation. He also says that it has not been shown that it is just and convenient to order a WFO against him. In numerous respects, he says that the Claimant has been in breach of its duty to make full and frank disclosure on the without notice application, particularly as regards matters which relate to whether there is a real risk of dissipation.

17. By an affidavit dated 20 February 2020, pursuant to the order of Waksman J dated 17 February 2020, the Defendant made an affidavit of disclosure of his assets. He referred to an equity portfolio of assets held by himself and his wife charged to Barclays Bank plc for a lending facility to SAB Ventures Limited, a Jersey company. He and his wife were the ultimate beneficial owners of SAB Ventures whose shares were held by two nominee companies for himself and his wife equally, and its value was in excess of £90 million. He is also the ultimate beneficial owner of two other Jersey companies, namely SAB UK Holdings Limited and SAB Constructions with a combined value of in excess of £10,000,000. His bank accounts in London named in the WFO at Barclays and Coutts had less than £10,000 in each account.

18. By an affidavit of 9 March 2020, he referred in detail to previous instances when he had been in default to the Claimant. In February 2015, he dishonoured four cheques to a value of £600,000 in respect of gambling at the Club. The witness statement of Ms Elliott at paragraph 5 points out that at the time, the Club had a different owner and that as part of the sale, the debts including the sum owed by the Defendant were sold to an organisation called Forbury. When the money was collected, the debt collector was on behalf of Forbury, not on behalf of the Claimant. Nevertheless, the indebtedness occurred because of default at the Club, payment being made in instalments and the last one being not until November 2017. In the meantime, the Claimant suspended the Defendant from membership because of the default. The Defendant was reinstated in July 2019 when his authorisation limit was increased to £1,000,000 and with a discount of 20% for losses. In August 2019, he dishonoured 9 cheques to a total value of £1,000,000. The Defendant says that there were insufficient moneys in his account to honour those cheques. He then cleared the debt by winnings of £800,000 from another casino to clear his debt which occurred on 3 September 2020. Whilst that was going on, he arranged for a new facility of £2,000,000 with various inducements including a 20% discount for losses.

19. He accepts that he dishonoured the cheques. He claims that he told the Claimant that the cheques would not be honoured in a conversation with Ms Mignon on 18 September 2019. There is a conflict of evidence as to what was said at that stage.

20. He says that he returned to Saudi Arabia on 1 October 2019. He again spoke with Ms Mignon on 20 November 2019. He said that he was awaiting funds from a debtor with which he was intending to repay the Claimant. He said that he was planning on returning to the UK. He said that he remained in touch, but he did not explain the continued non-payment, nor did he deal other than generically with the communications referred to in detail and exhibited by Ms Mignon. He said that his failure to answer letters was because they were sent by messages to his London number and there was often a considerable delay in his picking up such messages. Other than the reference

to the unpaid debt, he did not address how the debt was not paid for so many months despite his apparent wealth.

21. The Defendant challenged the case about real risk of dissipation. He said that his non-payment did not mean that there was a real risk of dissipation. He did not go to ground in Saudi Arabia but simply returned at the end of his summer trip as he always planned to return. He makes almost annual trips to the UK over the summer. He accepted that he was indebted to a number of other casinos: he did not identify the casinos, when the debts were incurred and why they have not been paid. He relied positively on the fact that he had in the past repaid his indebtedness, he had substantial ties to the jurisdiction especially through 1 Carlton House Terrace (which is at the moment the subject of renovation). He says that he had not taken steps to dissipate assets over the course of the months since the debt was incurred.

V The Claimant's evidence in response

22. In a witness statement of Michelle Elliott dated 1 April 2020, she said that she did not regard the evidence of the indebtedness of £600,000 or its subsequent repayment as material or relevant. It was 5 years ago. The debt had been assigned. The suspension was four years ago. The impression had not been created that the Defendant was a constant member. As regards the £1,000,000 indebtedness, this was promptly repaid and so was demonstrably different from the present circumstances.

23. As regards the assertion that it was not brought to the attention of the Court that the Defendant had very substantial ties and assets in this jurisdiction, in particular 1 Carlton House Terrace, it said that the details of that property were brought to the attention of the Court by providing its address and the fact that the Defendant was the ultimate owner and controller of SAB Ventures. There are some further points of dispute between Ms Mignon in her witness statement made on 1 April 2020 and a witness statement of the Defendant made on 14 April 2020. There was not permission for the further witness statement. There is no indication that it has caused prejudice. In any event, all that has occurred is that there are matters of dispute which do not alter the overall picture or the criticisms which appear below of the way in which the Defendant has failed adequately to engage with the attempts of the Claimant to procure payment.

VI Real risk of dissipation: submissions of the Claimant

24. The Claimant relies on the above matters on risk of dissipation which were placed before the Court on the without notice application. They were encapsulated in six factors relied upon by the Claimant and set out at paragraph 15 of Ms Elliott's first affidavit, namely

    (1) the fact that Defendant provided the Claimant with the dishonoured cheques which were subsequently dishonoured;

    (2) the circumstances surrounding the dishonouring, namely that the Defendant has failed to provide his bank with information required in order for the cheques to be paid;

(3) the fact that, despite assurances, the Defendant has not made any payment to the Claimant in over four months since the debt arose;

(4) the fact that the Defendant is currently indebted to a number of other casinos;

(5) the Defendant is a Saudi national whose assets and business are international. His primary accounts and assets are likely to be in Saudi Arabia or other jurisdictions, and as such it is very easy for him to remove assets from the jurisdiction and to make them unavailable to the Claimant. The unavailability stems from the unchallenged evidence that gambling debts cannot be enforced in Saudi Arabia because that would be contrary to Sharia law;

(6) the Defendant is a prolific, high profile player at casinos around the world and in London spending considerable sums and has failed to repay gambling debts.

25. The Claimant has added various other features in the course of the application on notice. First, it draws attention to the fact that the increase in the level of authorisation to £2 million was obtained on 5 September 2019 with his signing a declaration which stated *"I have the ability and intent to legally pay, through my bank or financial institution, the funds represented by the cheques signed by me and given to Les A."* Despite this, he immediately drew to the entirety of the authorisation, and dishonoured all of the cheques. He does not explain how this came about other than to say that there was a cheque which had not been paid from a debtor.

26. Secondly, despite the information about other gambling debts which he admits, the Defendant has not identified the names of the creditors, the amounts of those debts and when they were incurred and why they have not been repaid. This is said to be lacking in commercial probity, even if it is not evidence of dishonest conduct. This is especially so in circumstances where the Defendant is a very wealthy man.

27. Thirdly, it is also said that the Defendant's failure to communicate when chased by the Claimant is indicative of a person who is lacking in commercial probity. It is not that any one of the above circumstances are necessarily decisive. It is the combination of all these matters together, that is their cumulative effect, which provides solid evidence from which there is to be inferred a real risk of dissipation that his assets will be dealt with in such a manner as to render any judgment more difficult to enforce. It is not necessary to prove an intention to dissipate, but just that the objective effect of what he might do will have that effect.

VII Real risk of dissipation: submissions of the Defendant

28. In respect of the six matters contained in paragraph 15 of the first affidavit of Ms Elliott, the Defendant submits that each one of those matters by themselves does not afford a basis for an inference that the Defendant presents a real risk of dissipation of assets. First, it is not the case that the existence of a debt is a basis for fearing a real risk of dissipation. Otherwise, in every case where there is a claim for a debt, there could be a freezing injunction. Secondly, the statement that the debt would be met does not lead necessarily to a basis for a fear of a real risk of dissipation but might indicate a cash flow difficulty. In this case, it was said that the Defendant was expecting a payment from a debtor which did not materialise. Thirdly, the fact that the debts could not be

enforced in Saudi Arabia would have been something which was known about from the start, and it does not by itself give rise to a risk of dissipation. Fourthly, the fact that there were debts to other casinos does not take the case further but is evidence that the Defendant was a high-profile gambler who might have some cash-flow problems. Fifthly, there is even a question in a case with a cause of action in fraud or based on dishonesty whether without more that provides a basis for a real risk of dissipation. It is a question depending on all the circumstances of each case: see *Thane Investments v Tomlinson* (2004) EWCA Civ 1855. In the instant case, the Claimant has specifically renounced that its case is based on dishonesty, and has in that context specifically withdrawn the evidence of Ms Elliott at paragraph 12 that the Defendant had taken deliberate steps to ensure that the cheques would not be paid. In the transcript of the without notice hearing, Mr Burton is recorded as saying *"I want to make it clear, my Lord, that in our application today we are not making an allegation of dishonesty from which we say the court could draw an inference of real risk of dissipation".*

29. At the heart of the case against the Defendant was that he had a been a customer of good standing since 1993. It was in that context that increases of the authorisation level had been agreed from £500,000 to £1 million to £2 million and no sooner had that been advanced, that the Defendant did not pay and he "went to ground". The Defendant says that this was not the case in that he points to the default in 2015 in the sum of £600,000 (not paid in full until November 2017) and in August 2019 in the sum of £1,000,000 where cheques were dishonoured. The Defendant says that the real relationship was that he had defaulted in the past and he had paid what was due. He did not respond to several communications, but he preferred contact by telephone on his number in Saudi Arabia and there were some communications from him, and he did not 'go to ground'. His return to Saudi Arabia simply was referred to in a communication from him to Ms Mignon and it replicated what he did in most years (summer in London and most of the year in Saudi Arabia). In the submission of the Defendant, none of this was evidence of dissipation.

VIII Real risk of dissipation: the law

30. The relevant principles were brought together usefully by Popplewell J (as he then was) in *Fundo Soberano de Angola v Jose Filomeno dos Santos* (*"FSDA v Dos Santos"*) [2018] EWHC 2199 (Comm) (approved in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 subject to the amendment marked in square brackets below) at [86]:

"The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; Holyoake v Candy [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and Petroceltic Resources v Archer [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

> *(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.*

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
(3) The risk of dissipation must be established separately against each respondent.
(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may] be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
(5) 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."

31. In amplification of the fifth of the above criteria, in *Holyoake v Candy* [2018] Ch 297 at 356C-D, Gloster LJ said the following at [59]:
"ii) However, the mere possibility of a party using a complex corporate structure or corporate reorganisation to dissipate assets, without more, does not equate to a risk of dissipation. Otherwise, the burden of proof would be reversed: parties subject to a freezing order application would be compelled to show that they would not dissipate assets in that way.
iii) This emphasis is important. An applicant must show a risk of dissipation as opposed to it merely being possible (without more) that the respondent could dissipate in that way.
…
(b) Several cases have emphasised that there is nothing implicit in complex, offshore corporate structures which evidences an unjustifiable risk of dissipation. As Arnold J put it in VTB Capital plc v Nutritek International Corpn [2012] 2 BCLC 517, para 233 (approved by the Court of Appeal [2012] 2 BCLC 437, 574–575, para 174)*:*
"It is not uncommon for international businessmen, and indeed quoted UK companies, to use offshore vehicles for their operations, particularly for tax reasons. This may make it difficult to enforce a judgment. But in that respect claimants such as VTB have to take defendants such as Mr Malofeev as they find them. More is required before the court will conclude that there is a risk of dissipation."

32. In amplification of the reference to burden of proof, Gloster LJ in *Holyoake v Candy* stated the following at [50-51] (and see also [52-54 and 57-59]):

> *"50.…it is critical to remember that the burden is on the applicant to satisfy the threshold. The court will of course decide on the basis of all the evidence before it. However, in practice, if an applicant has not adduced sufficient evidence, the application will fail. The respondent's evidence will be immaterial – unless, unusually, it lent support to the application.*
>
> *51. Second, it follows that, unless an applicant has raised a prima facie case to support a freezing order, the respondent is not obliged to provide any explanation or answer any questions posed – and nor can a purported failure to do so be held against the respondent. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the respondent will be expected to provide an explanation. Then, in appropriate circumstances, the lack of a satisfactory explanation may give rise to an adverse inference."*

33. The concept of real risk of dissipation was defined by Flaux J (as he then was) in *Congentra v Sixteen Thirteen Marine SA* ('The Nicolas M') [2008] 2 Lloyd's Rep 602. It is not every apprehended dealing which could amount to a real risk of dissipation. It is those steps which are 'unjustifiable', for example, a transfer otherwise than for normal and proper commercial purposes. At [49], Flaux J said as follows:

> *"The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant has shown a sufficient "risk of dissipation" is that the claimant will satisfy that burden if it can show that:*
>
> > *(i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business: The Niedersachsen [1983] 2 Lloyd's Rep 600 per Mustill J as interpreted by Christopher Clarke J in TTMI v ASM Shipping [2006] 1 Lloyd's Rep 401 at 406 (paragraphs 24-27) or*
> >
> > *(ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes: Stronghold Insurance v Overseas Union [1996] LRLR 13 at 18-19 per Potter J and Motorola Credit Corporation v Uzan (No 2) [2004] 1 WLR 113 at 153 (paragraphs 142-146) where the Court of Appeal was applying the same principle in the context of disclosure of assets by the defendant."*

34. The risk of 'dissipation' must involve a risk of impairing the claimant's ability to enforce a judgment or award. It is not necessary to show that dissipation is the purpose or subjective intention of the defendant. It is sufficient that the objective effect of the actions of the defendant would be to make it more difficult to enforce the judgment.

This was made clear by the Court of Appeal in *Ninemia Maritime Corp v. Trave Schiffarhrtsgesellschaft GmbH (The Niedersachsen)* [1983] 1 W.L.R. 1412, 1422 per Kerr LJ. There does not have to be apprehended a dealing with assets with the object of putting them out of the claimant's reach: *"... the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."*

35. The foregoing was also stated by Walker J in *Mobil Cerro Negro Limited v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), Walker J said at [36]:

"A fundamental principle is that freezing orders are not granted in order to provide security for a claim. By procuring an order that assets are frozen an applicant is not put in a better position than any other creditor. The mere fact that a defendant's creditworthiness is in doubt does not justify the making of a freezing order."

36. In the case of *Ivy Technology v Martin and others* [2019] EWHC 2510 (Comm), having quoted from *FSDA v dos Santos* above, Mr Andrew Henshaw QC sitting as a Deputy Judge of the High Court (as he then was) said the following at [44]:

"The following further statements of principle are relevant:

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

ii) Where dishonesty is alleged, it is sometimes possible to infer a risk of dissipation from the fact of the dishonesty (Norwich Union v Eden (25 January 1996, unreported, Hirst and Phillips LJJ), cited in VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808 at § 177; Metropolitan Housing Trust v Taylor [2015] EWHC 2897 (Ch) § 18 per Warren J).

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

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

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

> *vi) Where a defendant knows that he faces legal proceedings for a substantial period of time prior to the grant of the order, and does not take steps to dissipate his assets, that can be a powerful factor militating against any conclusion of a real risk of dissipation (see e.g. Candy v Holyoake [2017] EWCA Civ 92; [2018] Ch 297 § 62 and Petroceltic Resources Ltd v Archer [2018] EWHC 671 (Comm) §§ 58, 64-65).*
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> *vii) "A cautious approach is appropriate before deployment of what has been called one of the court's nuclear weapons", and "the risk is not to be inferred lightly. Bare or generalised assertion of risk by a claimant is not enough." (Tugushev v Orlov et al [2019] EWHC 2031 (Comm)) § 49 and 49(ii).” [This is a quotation from a judgment of Carr J (as she then was)].*

37. Sometimes in cases falling short of dishonesty, the Court has had regard to other conduct as relevant: see *AH Baldwin and Sons Ltd v Sheikh Saud Bin Mohammed Bin Ali Al-Thani* [2012] EWHC 3156 (QB) at [31(4)] per Haddon-Cave J (as he then was) *“… if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly, or with unacceptably low standards of morality giving rise to a feeling of uneasiness about the defendant …”*

38. The Claimant also submitted that it suffices that there is a real risk of disposal of assets where even an apparently financially solid company transfers its assets outside the jurisdiction if enforcement overseas would cause extra costs and delays: *Stronghold Insurance Co. Ltd* v. *Overseas Union Insurance Ltd* [1996] L.R.L.R. 13, 18-19, *per* Potter J and see also the *Mobile Cerro* case cited above at [35-42]. However, the Defendant pointed out that was where it was conceded that a transfer of a London office to a Singapore office would have the effect of the making the enforcement of any judgment more difficult.

IX Real risk of dissipation: discussion

39. In the course of his submissions, Mr McWilliams, Counsel for the Defendant submitted that any one aspect such as the existence of a debt or a promise to pay or the fact that the defendant had returned to his country where enforcement was not possible was not by itself sufficient to amount to a real risk of dissipation. Whilst that is correct, Mr Burton, Counsel for the Claimant, was correct to submit that one has to look at all the circumstances of the case in order to decide whether there is a real risk of dissipation. As Popplewell J put it in the quotation above in *FSDA v dos Santos*, “the *relevant factors must be looked at cumulatively”.* This was the approach of Mr Burton in paragraphs 35-37 of his skeleton quoted above placed before the Court on the application for a without notice injunction.

40. There are certain features which when taken together are unsatisfactory: they were characterised by Mr Burton in his submissions before this Court as showing a lack of commercial probity. In particular, there is the fact that this indebtedness was incurred by a man of evident wealth, his promise to pay and his failure to respond other than in a desultory manner to the repeated attempts of Ms Mignon to make contact with him. The following points are significant in this regard.

41. First, during the period of the four months prior to proceedings being brought, it appears that the Defendant believed that he owed the debt, and so his behaviour is to be seen notwithstanding his apparent belief that he did owe the moneys. Absent evidence to the contrary, the inference is that the idea of running an illegality defence based on an allegation of the supply of credit did not surface until after the commencement of proceedings. Secondly, on the premise that he is a very wealthy man, even allowing for cash flow difficulties, the failure to arrange for payment sounds more like choosing not to pay rather than being unable to pay. If that is not right, then the Defendant has incurred the indebtedness at the time when he had cash flow difficulties in circumstances where he might not be able to discharge them at their due date, albeit that at this stage it is not said that this was with a dishonest intention. Thirdly, the Defendant was indebted to other casinos which he admits: this appears to indicate a lack of probity either in incurring debts where he may not have the cash flow to discharge them forthwith or in withholding payment if he was able to pay for the same. The Defendant has not been frank with the Court by explaining the position as to the amount of these debts despite an admission that he owes them.

42. The question is how far this lack of commercial probity goes and critically whether in all the circumstances it shows a real risk of dissipation of assets. It is to be noted from the section above about the law, even where the cause of action on which the claim is based is one of dishonesty, this may not justify the inference that the defendant has assets which they are likely to dissipate unless restricted. It depends on all the circumstances of the case.

43. Just as dishonesty does not necessarily prove a real risk of dissipation, how much more so where the case is some lack of commercial probity falling short of dishonesty. The further removed one is from dishonesty in terms of a low commercial morality, the more difficult it will be for a claimant to rely upon the instant conduct falling short of dishonesty as giving rise to the inference of real risk of dissipation. No doubt mindful of this, Mr Burton began to characterise the conduct in a way which needs to be considered carefully.

44. The Claimant had renounced at the without notice stage the allegation that the Defendant had taken deliberate steps to ensure that the cheques would not be paid (paragraph 12 of the first affidavit of Ms Elliott) and in the course of the hearing stated that it does not allege dishonesty. On the return date before this Court, there was an element which appeared contradictory. Mr Burton was asked if it remained the case on the return date that he did not allege dishonesty. He confirmed that the Claimant was not alleging dishonesty. However, as noted above, he referred to conduct which appeared to amount to dishonesty by another name. It was said that the fact that there was little money in the English bank accounts calls into question whether the declaration to the Claimant in September 2019 was one which was at least reckless if in fact there was such little money in the accounts. The other alternative is that there were moneys there and they have been dissipated since September 2019 and before the disclosure in February 2020. Either way is said to point to dissipation. The reliance on the declaration about having the ability and intent to pay appeared to come close to alleging a dishonest representation. When asked about this, Mr Burton said that this was not dishonest but may have showed a reckless indifference as to whether the Defendant would be able to honour the cheques. This appears to be a deceit based on recklessness which would comprise dishonesty.

45. Since in fact an allegation of dishonesty was renounced, and even on the return day before me as above, this is not a case where any weight can be given to this allegation because it is dishonesty by another name. In any event, the declaration could be made without moneys in the bank accounts in the UK at the time of the signing of the cheques, particularly where there was a lapse of time between the time when the cheques were signed and the time when they were to be presented. Thus, the making of the declaration and the subsequent dishonour about a fortnight or more later did not show that at the time of the declaration that the Defendant did not believe that he was able to pay or that he lacked an intent to pay.

46. A further allegation which was made on the return day for the first time was that the Defendant did not provide full information in respect of the affidavit of means. In particular, it was contended by Mr Burton that the statement that nominee companies which in turn owned SAB Ventures Limited in Jersey on trust for the Defendant and his wife must be or is likely to be untrue. He said that there was no point in using Jersey vehicles like this other than by using discretionary trusts. The same allegation would apply to the statements relating to SAB UK Holdings Limited and SAB Constructions where the nominee shareholders were said to hold the shares on trust for the Defendant. That was different from the position in respect of SAB Ventures where the shareholding was for him and his wife.

47. The Claimant is critical of the evidence for two reasons, namely (a) the absence of supporting valuation evidence, and (b) disbelief that he is the beneficial owner of the Jersey companies in that in the submission of Mr Burton it would be expected that such assets would be held on a discretionary trust and not on a fixed trust. That submission might have carried greater weight if it had been made in the two months since the time when the evidence was provided on affidavit dated 20 February 2020 by the Defendant. In fact, there has been no request for further documentation, the affidavit does not appear to be in breach of the order of Waksman J pursuant to which it was made and it is highly significant that the Defendant has admitted the existence of the fixed trusts. In my judgment, the evidence was not as described in the Claimant's skeleton argument *"entirely opaque"* (paragraph 41c) or *"woefully inadequate to comply with the very important provisions of the asset disclosure provisions of a freezing order"* (paragraph 53). Had there been discretionary trusts, he could have identified the same and used that to be able to avoid enforcement of any judgment and/or to have contended that there were no assets outside Saudi Arabia on which any WFO can fasten. Whilst the Court can take judicial notice that discretionary trusts are very common in Jersey, this does not prove that the Defendant's evidence is false. There is no reason to treat as false the evidence that the various shares were held on trust for him or him and his wife, let alone that the Defendant was perjuring himself in this evidence. It should also be noted that at the without notice stage, Ms Elliott said (paragraph 20 of her first affidavit) that she believed that SAB Ventures was ultimately owned and controlled by the Defendant, which is consistent with the Defendant's evidence (save only that the Defendant says that he was the ultimate owner and controller with his wife). In the circumstances, it was not established that the affidavit was false, and the Claimant's suspicion to this effect when it has not been developed in inquiries or in correspondence is not a basis for the Court treating the Defendant's affidavit as to means as false.

48. Thus, discounting for the above reasons the suggestions amounting to dishonest behaviour such as reckless indifference in respect of the cheques and providing a false

affidavit of means, and removing the withdrawn allegation that the Defendant had deliberately taken steps or not taken steps to ensure that the cheques would not be paid, the alleged lack of commercial probity not amounting to dishonesty is at a lesser level. It is of someone who does not pay their debts (including debts to other casinos) and makes informal promises to pay which are not honoured and is largely unresponsive to attempts to make contact with him. If in some cases, conduct amounting to dishonesty does not necessarily give rise to an inference of a real risk of dissipation, then the question whether the conduct lacking in commercial probity gives rise to an inference of real risk of dissipation needs to be considered with particular caution. The Court has to consider the particular conduct lacking in commercial probity as well as all the other circumstances of the case and put them all into the balance. In this case, there are several features which go the other way.

49. First, although the Defendant does not have assets which he owns in this jurisdiction, as he stated in his affidavit of means, he has very substantial assets in a closely related jurisdiction where there is reciprocal enforcement, namely Jersey. Reference is made to his first affidavit referred to at paragraph 17 above, and to his evidence that SAB Ventures Limited owned ultimately by him and his wife has a value of over £90 million. In terms of value, these assets comprise a large multiple of the instant indebtedness. The relevance of this is that the strategy of a defendant in respect of these assets worth so many times more than the indebtedness of £2 million is unlikely to be conditioned by an indebtedness of a debt or debts of a much lesser magnitude. In my judgment, this is a factor which goes against a case based on a real risk of dissipation. Of course, this value of SAB Ventures Limited incudes 1 Carlton House Terrace.

50. Secondly, although the Defendant does not own that property, it is owned through SAB Ventures Limited. Its freehold interest in that property appears from the proprietorship register to have been acquired for a sum of £45 million, on 10th February 2017. There is a charge against that property in favour of Barclays Bank PLC, and there is no evidence before the Court as to the extent of that charge. It seems unlikely that it has no equity bearing in mind the fact that it seems to have been acquired in 2017. The significance of this property, in my judgment, is that it shows a very close link with the jurisdiction of this Court. Added to this is the information to the effect that he has not been living there because of refurbishment work being carried out to the property at a cost of about £5.5 million (as the Defendant says in his second affidavit of the Defendant at [40-42]). The work is not due to be completed until 2021. The acquisition of and works being carried out to, that property would appear to indicate that the Defendant is very much connected with London, and is not likely to disappear or go to ground other than in the sense of being in Saudi Arabia and failing to communicate as he did. The onset of proceedings and the possibility of a judgment has forced him to communicate and the Defendant has submitted to the jurisdiction of the Court.

51. Thirdly, the Defendant has significant business interests and connections with London in addition to the above property. He has spent most summers in London, although for fiscal reasons he would not wish to spend more than 90 days per annum in London. His company SAB Holdings based in Jeddah has an office in London according to its website (in addition to offices in Dubai and Cairo).

52. Fourthly, there is no evidence of any dissipation of assets in the period between the incurring of the instant debt in September 2019 and the making of the WFO in February

2020, a period of about 5 months. Hence, the Defendant and his wife have large assets through Jersey companies to a value of about £100 million (including 1 Carlton House Terrace). He would have had a substantial amount of time to seek to divest himself in those 5 months. It is right to qualify this to the extent that there is only a snapshot of the Defendant's position at the time of his affidavit of assets in February 2020. However, the order for disclosure did not require the Defendant to identify his assets at an earlier stage. He says in his second affidavit at [32.4] that he has not transferred assets to Saudi Arabia since being told of the problem. There is no evidence that the Defendant has dissipated assets, and as Gloster LJ emphasised in the above mentioned case of *Holyoake v Candy* at [50-54, 57(vii), 58 and 59], the burden of proof is generally on the claimant to make the case. This is quoted in part at paragraphs 31 and 32 above. Further, at [62] Gloster LJ said that a powerful factor militating against any conclusion of a real risk of dissipation is that assets were not dissipated despite months of advance notice of the Claimant pressing for payment and eventually threatening court action.

53. In the instant case, there is no evidence of dissipation having taken place between the time of the issue of the dishonoured cheques and the making of the WFO/the affidavit of means of 17 February 2020. In particular, there are very considerable assets as noted above in Jersey. The Claimant must have known at the time when it gave its authorisations to the Defendant, and especially the last one of £2 million, that he had assets in Saudi Arabia which would not have been amenable to enforcement, but must have apprehended that he had his assets elsewhere with which to pay his debts. As shall be referred to below in the section about full and frank disclosure, the possibility of the Defendant defaulting must have been considered by the Claimant at the time when the new authorisation of £2 million occurred in September 2019. It is here that there is resonant the citation in *Holyoake v Candy* above of that which was said by Arnold J in *VTB Capital v Nutritek* and approved by the Court of Appeal as regards the operation of off-shore vehicles. It was that the claimants in that case had *"to take defendants such as Mr Malofeev as they find them. More is required before the court will conclude that there is a risk of dissipation."* This is quoted more fully at paragraph 31 above.

54. Further, the Claimant did not and continues not to attribute significance as regards real risk of dissipation of the defaults in 2015 and July 2019. The reasons given were that the default in 2015 was historic and the default in July 2019 was swiftly put right. As regards the default in 2015, it is said in the Claimant's skeleton (paragraph 41h) that the default was to the previous owner of the Club and that this was not transferred to the Claimant when it purchased the Club, and that the collection was by a debt collector. This is not an answer for two reasons, namely (i) the evidence put before the Court was about the Defendant's record at the Club since 1993 irrespective of when the Claimant came to own it, and (ii) the Claimant suspended the Defendant from membership referable to this default, and he was not restored to membership until July 2019. Central to the decision of Cavanagh J, following the way in which the case was presented, was the decision that the risk of dissipation was evident since "*the respondent has been a member of this casino for many years, indeed since 1993, and so far as I am aware, this is the first time that the casino has had problems with gambling debts, but nonetheless the evidence before me so far makes it clear that he has, as counsel put it, gone to ground and that there are gambling debts outstanding which have not been paid."*: see paragraph 11 of the approved judgment of Cavanagh J. Although in her first witness statement dated 1 April 2020, Ms Elliott says that neither she nor Ms Mignon suggested that this was the first time that the Defendant had been indebted to

the Claimant, nor did they suggest the contrary, and in the circumstances, Cavanagh J's statement that it was the first time as far as he was aware was an accurate account of the way in which the case had been presented on the without notice application. I shall return to this in the section about non-disclosure.

55. In fact, the history is that there have been three CCFs, and each of them has been dishonoured. The first one was not honoured in 2015 and led to an interruption of more than 2 years before it was paid and an interruption of four years until 2019, when the Defendant applied to be and was readmitted by the Claimant. The second CCF was not honoured in August 2019 but was paid by 3 September 2019. The third CCF was not honoured and the indebtedness has still not been satisfied. Thus, this was in reality a case where the Claimant knew about the unreliability of the Defendant, and yet appears to have taken the view when giving each CCF that there was a greater gain about having the business of the Defendant than not having his business. This was to the extent that the Claimant was prepared to increase the authorisation each time following default and to give greater incentives including discounts and the like. The prospects of getting money from him must have been regarded as greater than of his defaulting, perhaps because of a conviction that if he defaulted, he would eventually pay. It is possible that the Claimant did not think that this default would arise. It is more likely that the Claimant thought that it would in the end be paid. This preparedness to do business with a person not of good standing with the Claimant, and with a record of default, is a significant factor against a real risk of dissipation. It indicates that that was not the conviction of the Claimant at the time of the increase in authorisations, and it begs the question as to how a defaulter went from being a person with whom an authorisation could be increased twice to a person in respect of whom there was a real risk of dissipation of assets.

56. Could the case have been presented in a different way of a history of default rather than compliance, and to erect through that a case of real risk of dissipation? The problem with this is that it would have put centre stage the commercial decision of the Claimant to deal with a man with a history of default. This has not been dealt with in the evidence, and so it cannot form some new basis for looking at the case. Even on the substantive contested hearing and with additional evidence, the Claimant has not sought to put it this way. Had it been, it is likely to have led to a focus on the decisions to increase the authorisations and the fact that at that time, it was not perceived that there was a real risk of dissipation raising the issues referred to in the preceding paragraph.

57. Looking at the case as a whole, there is a weighing up exercise. The burden is on the Claimant to demonstrate that there is sufficient evidence of a real risk of dissipation, and the question is whether the Claimant has satisfied that burden. It has to prove its case by solid evidence. Bringing together the above matters, the following conclusions arise:

(1) This is not a case which is founded on dishonesty, and to the extent that it is founded on conduct said to show a lack of commercial probity, it is not paying debts and making promises which have not been honoured and not engaging with the Claimant in its attempts to receive payment as well as incurring liabilities to other casinos which have not been discharged. There is the possibility that there is missing information such as the sum charged against the London property and/or the size of the gambling debts which alter this picture, but it seems unlikely that it would alter it fundamentally. This

is bearing in mind the Defendant's relatively recent acquisition of the property and the absence of information whether from the Central Credit database or the 'grapevine' (from where the debts to other casinos were found out) to the effect that the other debts come anywhere near the assets disclosed in Jersey. It is not only a grapevine, but the casino operators operate a worldwide database called Central Credit: this is referred to in the letter of the Claimant to the Defendant dated 17 December 2019.

(2) The fact that the Defendant went to Saudi Arabia in the middle of his default is not probative because he spent his summers in the UK and almost invariably returned to Saudi Arabia at the end of the summer. Nor does it lead to a conclusion by itself of a real risk of dissipation that the Defendant is a Saudi national who has assets there against which enforcement is not possible. The Claimant chose to deal with him and, without more, it must take him as it finds him.

(3) The Defendant is a person who has very substantial assets outside Saudi Arabia. The fact that they are held in offshore structures is relevant but does not equate itself to a risk of dissipation. There is no reason to believe that they are other than a normal and legitimate way in which to deal with his assets. Critically, the assets are amenable to enforcement through reciprocal enforcement between the UK and Jersey. They are said to be held in trust for the Defendant or the Defendant and his wife, and there is no evidence to contradict this. If he wished to divest himself of these assets, he would be expected to have settled them into discretionary trusts. The evidence that they were not held in discretionary trusts and that on the contrary they remained in fixed trusts and were disclosed as such is all inconsistent with a real risk of dissipation.

(4) There are particular features in respect of these assets which are indicators against a conclusion of a real risk of dissipation. This includes the evidence that the assets are held through Jersey companies comprise many tens of millions of pounds of assets which are a multiple of many times larger than the instant debt. It also includes that there is no evidence of dissipation of these assets in the period of several months between the issue of the cheques and the affidavit of means, despite the Claimant pressing for payment and latterly threatening proceedings.

(5) The Defendant has very substantial connections with London: hence spending summer months in London, having a home acquired for £45 million and a building project in respect of the same at a cost of about £5.5 million. He also has a business office in London. All of this is contrary to a conclusion that he will remove all his assets to Saudi Arabia.

(6) Prior to the instant default, the Defendant has a history of not paying cheques to the Claimant which he has eventually paid and has returned to the Claimant. The Claimant took the decision to authorise the CCFs with the inference that the Claimant believed that despite the residence of the Defendant in Saudi Arabia, his interests in offshore structures and his history of defaults that he would eventually pay his debts.

58. The analysis above started with Mr Burton's submission, which is correct, that all the circumstances of the case have to be considered, or returning to the above cited words of Popplewell J in *FDSA v dos Santos* of looking at the specific and relevant factors cumulatively. When the evidence is assessed as a whole and these factors are considered cumulatively based on the evidence as it is before this Court on the effective

return date, in my judgment, the Claimant has failed to establish a real risk of dissipation.

59. It is important to note that the evidence has to be assessed not at the time of the without notice application, but on the inter partes hearing. That was emphasised in *The Niedersachsen* in the Court of Appeal at the bottom of page 1425 and the top of page 1426 as follows:

"…the judgment correctly stated that "the judge who hears the proceedings inter partes must decide on all the evidence laid before him," and this is clearly what the judge did in this case. Whether the inter partes hearing takes the form of an application by the defendants to discharge the injunction…or…. an inter partes hearing as to whether or not it should be continued, the judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary, the order previously made."

60. That is what has happened in this case. This Court has had a considerable amount of evidence not made available before Cavanagh J. This is particularly so as regards the evidence of the defaults and the evidence as to the location, nature and extent of the assets of the Defendant in Jersey amenable to enforcement in this Court and the value of the property at 1 Carlton House Terrace. The Court now has evidence of a fuller and different complexion from that which was before the Court at the without notice stage. A part of that difference in complexion is referred to in the section about non-disclosure below.

61. Based on all the evidence at the inter partes hearing and after taking into account the full submissions of both Counsel, the Claimant has not satisfied the burden of showing that there is a real risk that a judgment will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the Defendant will dissipate or dispose of his assets or that unless the Defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult. In my judgment, in this case, a real risk of dissipation has not been established.

X Is it just and convenient that there should be a WFO?

62. A freezing injunction involves *"a draconian interference with the rights of businessmen or corporate entities to deal with their personal or business assets. Both also carry a reputational stigma"*: per Gloster LJ in *Holyoake v Candy* [2018] Ch 297 at 348 at [36 (ii)]. Returning to the judgment of Carr J in *Tugushev v Orlov* above, a cautious approach is appropriate before deployment of one of the court's nuclear weapons. That is true in respect of all freezing injunction applications and it has a particular application in respect of a WFO.

63. It therefore follows that the Court will consider carefully whether it is just and convenient to grant the relief. As is reflected in Gee on Commercial Injunctions 6th Ed. at paragraph 12-042, *"The court should be satisfied before granting the relief that the likely effect of the injunction will be to promote the doing of justice overall, and not to work unfairly or oppressively. This means taking into account the interests of both parties and the likely effects of an injunction on the defendant."* In this case, there is evidence from the Defendant to the effect that the WFO has caused an event of default in respect of his

guarantee of the lending to SAB Ventures Limited. Barclays Bank has advised that it will now be difficult to provide additional financing for an approved sub-basement: see the Defendant's second affidavit at [40]. He also says that it has caused significant reputational damage in front of Barclays and that he will need to find the additional finance of £5.5 million elsewhere with delay in the works and an increase in costs: see the Defendant's second affidavit at [41-42].

64. There are aspects of the order where it is not apparent what attention, if any, had been given to its form and effect. First, it extended in its original form to Saudi Arabia, but at the instigation of the Defendant, this was excluded in the order of Waksman J because it was futile to have an injunction in respect of assets against which no enforcement was possible. Secondly, as noted at the hearing, the WFO may not have prevented assets being transported to Saudi Arabia. It is not clear if this would require a modification to prevent that from occurring, or whether such act would be treated as a dissipation or dealing with the assets. Thirdly, despite the order being almost three months old at the time of the inter partes hearing, there had not been attention as to where and how it was intended to domesticate the order abroad. When asked if it was intended to obtain an order in Jersey where the substantial assets were identified, Mr Burton accepted frankly that he was not aware as to whether attention had been given to this. On one level, this might have been because the concentration has been on defending the order on the return day. On another level, it would be expected for the Court to have evidence of the utility of the injunction going forward. This would include either an application in accordance with the *Dadourian* guidelines (see *Dadourian Group International Inc v Simms and others* [2006] EWCA Civ 399) for permission to enforce in Jersey with evidence from a Jersey lawyer, or at least some intimation as to the intended strategy going forward to put to practical use the WFO.

65. If it were considered that it would be appropriate for a WFO to be continued because the questions as regards real risk of dissipation and disclosure had been answered satisfactorily for the Claimant, it would be necessary to consider whether a full WFO was appropriate at all or in some modified form. There are shortcomings in the evidence in my judgment in not having information particularly as regards the Jersey element and how, if at all, any injunction could work going forward such that it could operate with less prejudice to the Defendant. It follows that on the information before the Court at present, the picture is incomplete, and if it were the case that the other elements considered in this judgment were positive to the Claimant, it would be necessary to give further consideration as to the considerations of justice and convenience. In this case, the Defendant has given evidence of difficulties caused to him by the Order at paragraphs 38-42 of his second affidavit. The question would then arise as to whether it was just and convenient to have a full WFO of the kind ordered, or a significantly modified injunction or any injunction.

XI Full and frank disclosure: the law

66. There was no dispute as to the relevant law. The starting point is the summary of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350 at 1356-1357. The first part of this oft cited judgment is about the principles relevant to the duty of full and frank disclosure and the second part is about the consequence which the Court should attach to any failure to comply with the duty.

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

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

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

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

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

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

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the

> *fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*
>
> *(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded". per Lord Denning M.R. in Bank Mellat v Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.*
>
> *When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed" per Glidewell L.J. in Lloyds Bowmaker Ltd. v Britannia Arrow Holdings Plc., ante, pp. 1343H-1344A."*
> *…"*

67. In *Brink's Mat*, Balcombe LJ added the following two points at p.1358, namely that *"(1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon LJ in [another case] that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction.'*

68. In *Brink's Mat*, Slade LJ referred to a practice of applying the principle of the duty to give full and frank disclosure to extreme lengths. He said at p.1360:

"I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v. Kensington Income Tax Commissioners [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

69. In *FSDA v Dos Santos* above, Popplewell J stated the following at [52]:

"…although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in Memory Corporation v Sidhu (No 2) [2000] 1 WLR 1443, citing formulations from, amongst others, Slade LJ in Bank Mellat v

Nikpour [1985] FSR 87, 92, Bingham J in Siporex Trade v Comdel Commodities [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in Marc Rich & Co Holding v Krasner (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision."

70. The reference to Bingham J in *Siporex Trade v Comdel* [1986] 2 Lloyd's Rep 428 at p. 437 included the following:

"Such an Applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. ***He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents****."* (emphasis added)

71. There is a need for an advocate to present to the Court the standard form of freezing order, and, if there are departures from it, to identify the same and any reasons for departing from the same: see *Memory Corporation v Sidhu (No.2)* [2000] 1 WLR 1443. In that case, there were departures from the standard order which did not give the full protection required in respect of the privilege of self-incrimination to defendants ordered to provide information to the person serving the order. It did not in the end lead to a discharge of the order, but Mummery LJ was particularly critical of the breach in the case. In *Frenkel v Lyampart* [2017] EWHC 3121 (Ch), Ms Amanda Tipples QC (as she then was) at [90-91] referred to the need to draw to the attention of the judge hearing the without notice application any departures from the standard wording and adverted to the best practice of providing a judge with a tracked version of any departures from the standard form or simply a list of any departures and the justification for the same.

72. In *Kazakhstan v Kagazy plc v Arip* [2014] EWCA Civ 381 at paragraph 36, there was reference to a judgment of Toulson J (as he then was) in *Crown Resources AG v Vinogradsky* (15th June 2001) who referred to limitations on the principle including:

"... issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily

established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (pages 4-5 of the transcript).

Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion (page 6).

I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees (page 7).

In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion (page 22)."

73. Despite the foregoing, the question of whether there is material non-disclosure does not depend on whether the non-disclosure has been innocent. That may be relevant to the issue as to re-grant or continuation of the injunction. Further, the question of material non-disclosure does not depend on whether the Court would have made a different order if the disclosure had been made. It may be material and not make a difference: the Court should not be deprived of the opportunity to assess it, and this is the task for the Court rather than the claimant or the claimant's adviser in any case: see *Behbehani v Salem* [1989] 1 WLR 723 at 728, 729 per Woolf LJ (as he then was)

"…Mr. Burton submitted that a failure to disclosure is not innocent, but deliberate, if the situation is one where material which ought to have been disclosed is not disclosed deliberately, and it is not disclosed in circumstances where it was known to be material or it ought to have been known that it was material. I am not happy about the suggestion that it is appropriate to regard a disclosure as not innocent when the facts not disclosed were not known at the time to be material, albeit that it ought to have been known they were material. In practice in most cases it will be extremely difficult for a defendant who is applying to discharge injunctions which have been granted ex parte to show that the matters which were not disclosed, but which should have been disclosed, were the subject of any decision not to disclose which was made in circumstances where it was appreciated that there should have been disclosure. ***In the majority of cases the matter has to be approached on the basis of considering the quality of the material which was not disclosed without making any final decision as to whether or not there has in fact been bad faith.*** *If, of course, it can be established that there has been bad faith, either on behalf of the parties or their legal advisers, that will be a most material matter in considering whether injunctions which have been granted should be discharged, and, if they are discharged, whether it is appropriate in the circumstances to re-grant injunctions either in the same terms or in similar terms.*

…

It is preferable, in my view, for each case to be considered on its own merits taking into account the public interest which exists in protecting the administration of justice from the harm that will be caused if applicants for the draconian relief of Mareva and Anton Piller orders do not, on an ex parte application, make disclosure of all the material facts, whether or not the non-disclosure is innocent….

In this connection Mr. Brodie at one stage of his argument submitted that the acid test was whether or not the original judge who granted the injunction ex parte would have been likely to have arrived at a different decision if the material matters had been before him. I do not regard that as being the acid test. Indeed, although I regard it as a relevant matter when considering the question of discharge and re-grant of injunctions, I do not regard it as a matter of great significance unless the facts which were not disclosed would have resulted in the refusal of an injunction." (emphasis added)

74. In addition to the matters set out in the numbered paragraphs (5)-(7) of the quotation above of Ralph Gibson LJ in *Brink's Mat* as regards the discretion to discharge and regrant after material non-disclosure, assistance is to be found from the judgment of Carr J in *Tugushev v Orlov* above. An extract from 13 numbered points is as follows:

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

...

"xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts."

"xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

XII The Defendant's case on non-disclosure

75. The Defendant's allegations as to non-disclosure are that the Claimant did not give a fair presentation of the case particularly on the evidence as to real risk of dissipation of assets in the following respects:

(1) It misled the Court by referring to the playing history of the Defendant at the club for the period between 1993 and 2019 without any reference to the dishonoured cheques on the CCF1 in 2015 or the suspension thereafter until 2019 or on the CCF2

in August 2019. As regards the CCF history, Ms Elliott stated at paragraph 8 of her first affidavit: *"The Defendant was originally granted a CCF on 6 October 2014 in the amount of £500,000 which was subsequently increased to £1,000,000. On 5 September 2019, the Defendant applied for and was granted an extension of a further £1,000,000 to his CCF in the total amount of £2,000,000 in respect of a "TTO" or "This Trip Only"".* The impression which this gave to the Judge as is apparent from page 4 of the transcript referred to below, in the words of the Judge: *"Yes, one of the surprising things about this case is that he was a member of good standing for 20 years or more."* This led to Mr Burton agreeing that the Defendant had been a member of good standing. The precise interchange will be referred to below. This gave a false picture because in fact the Defendant had defaulted on previous CCFs and so he had not been a member of good standing in the period from 2015 onwards. By not disclosing this history, the Court was not apprised of the fact that the Defendant had defaulted and made good (on the first occasion after more than 2 years). The decision of the Claimant to continue to deal with the Defendant was therefore a risk which it understood presumably on the basis of an assessment that there might be difficulties in obtaining payment, but that he would pay.

(2) The characterisation at paragraphs 35 to 37 of the skeleton argument of the Claimant was an unfair presentation referring to walking away from the casinos back to the safety of Saudi Arabia and both in paragraphs 35 and 37 "going to ground" for the following reasons. It did not highlight the fact that the Defendant almost invariably returned to Saudi Arabia at the end of the summer season where he generally resided. The suggestion that he had gone to ground therefore created the impression that he had gone to Saudi Arabia to hide from his creditors, which did not highlight the fact that his movement reflected his normal way of operating.

(3) The evidence and presentation were unfair in that they failed to describe the extent of the Defendant's connection with the jurisdiction. It pointed to his ownership of 1 Carlton House Terrace in London through a Jersey company, but it failed to draw attention to its purchase price of £45 million. This can be found in an exhibit, but attention was not drawn to this. The Court suggested in the hearing to Mr Burton that one might think from the tenor of the evidence that this was no more than some London pied-a-terre, whereas in reality it was a prestigious, impressive and expensive property in Central London. This was not pointed out to the Court. Ms Mignon had been there, according to paragraph 8 of her first affidavit, when she met the Defendant in late September 2019, and she would have been able to have described the property. By failing to draw attention to the nature of the property and its purchase price, the Claimant failed to mention the true nature and extent of the association of the Defendant with this jurisdiction.

(4) There were not set out potential weaknesses in the argument that there was a real risk of dissipation. This is in part overlapping with the facts and matters above, but it goes a little further. There was, in particular, no section in the evidence or in the skeleton argument or in the oral submissions drawing attention to potential weaknesses in the argument about real risk of dissipation. For example, there was not simply the absence of the facts about the history of default or the worth or value of the London property, but no statements setting out the significance of these points to the real risk of dissipation argument, as they might have been explained by the

Defendant if he had been present. One point of weakness was specifically identified, but that was the point of delay.

(5) It was also submitted that the Claimant failed to draw to the attention of the Court that a case relied on heavily by it, namely*: Stronghold Insurance v Overseas Union [1996] LRLR 13 at 18-19,* could be distinguished from the instant case. *Stronghold* was relied on for the proposition that a real risk of dissipation could exist if the effect of a transfer of assets to another jurisdiction would make enforcement more difficult. However, that was a case where it was common ground that there would be such a transfer. In the instant case, there was no such common ground.

76. The other instances of non-disclosure/misrepresentation were as follows:

(1) departures from the standard order without pointing them out and telling the Judge that the order did follow the standard form;

(2) failing to draw attention to the fact that the normal living expenses of £10,000 were too low for the Defendant; and

(3) failing to take into account the discount which had been agreed by a lesser maximum sum or to alert the Court to the possible defence based on the discount.

XIII The Claimant's response on non-disclosure

77. The Claimant's arguments were as follows. In respect of the above five points on risk of dissipation and following the numbering, the Claimant said as follows:

(1) It did not mention the 2015 default because it regarded this as historic and unnecessarily prejudicial. The prejudice outweighed any probative value of mentioning it. Further, the sum of £600,000 was small relative to the current £2 million sum. It was a conscientious decision not to mention it in order to have a balanced presentation. As regards the 2019 default in respect of the August cheques issued pursuant to CCF2, the Claimant thought that it had been mentioned. It had a relevance, from the perspective of the Claimant, namely to draw attention to how quickly matters were corrected as regards these cheques relative to the nature and extent of the default in respect of the September cheques pursuant to CCF3. It was not mentioned according to the solicitor's note, but although the Claimant's solicitor had no recollection of this default being mentioned, Mr Burton believed that he may have mentioned it. He was careful to say that he was prepared to accept the note and was not insisting that he did mention it. Even if it was not mentioned, Mr Burton submitted, the default in respect of the August cheques was not material in view of the fact that it was rectified so quickly, which was wholly different from the history of the September cheques. It was correct to say that this was the first time that the Defendant had gone to ground in this way, this default being different from the previous defaults.

(2) The expression "going to ground" did not bear the meaning contended for by the Defendant. The authorisation was recorded as 'This Trip only'. It was clear that this was referring to a person who was only visiting the UK. It also did not mean that he had fled to Saudi Arabia. The expression was used to describe the failure of the

Defendant to engage with the Claimant. There was a context of defaulting on debts to a number of casinos and then going home leaving these debts.

(3) It was recognised that it might have been better to have drawn attention to the value of the property. However, it was still immaterial because it was not owned by the Defendant, but by a Jersey company with a complex structure involving nominee companies. It would still be difficult to enforce a judgment against the indirect interest of the Defendant in the flat, and it was doubtful if he had any, bearing in mind the submission that it would be more likely to be a discretionary trust. The property was in any event charged, and the Defendant had not identified the extent to which it was charged.

(4) This criticism is not well made. There was a risk of dissipation particularly bearing in mind the points contended for by the Claimant and referred to in the section about real risk of dissipation. Even if the Court in the event did not accept the Claimant's points, that did not mean that there was no full and frank disclosure because the Claimant had conviction in its arguments. The fact that a court might accept arguments subsequently raised by a defendant would not render the Claimant in breach of its duty to the Court.

(5) The Defendant's analysis of the case of *Stronghold* may be a possible one. However, there is no reason to believe that the Claimant ought to have been alive to that argument such that it would be in breach of its duty by not adverting to it. In any event, in the context of the case as a whole, such non-disclosure was not material.

78. As regards the other three matters not connected to risk of dissipation, the following points were made by the Claimant, following the numbering, as follows:

(1) Mr Burton told the Court that the last two paragraphs of the undertakings had not been copied into the order in error. In the circumstances, there was no prejudice because there was no attempt to enforce the WFO in a foreign country and there was no attempt to use any information obtained other than for the purpose of the instant action. The non-disclosure was not material.

(2) The normal living expenses always involved an informed guess in the knowledge that the Defendant could ask for an increase. When the Defendant sought an increase, that was agreed.

(3) The discount was lost because there was a non-payment of the cheque. It was obvious that the honouring of a cheque was the pre-requisite of having the discount.

XIV Non-disclosure: the transcript

79. In the light of the argument, I decided that it was desirable for this matter to be decided with the benefit of a transcript of the without notice hearing. The reasons for this were as follows:

(1) allegations were made of non-disclosure, and it was therefore important for the Court to have the best evidence available of what was disclosed and what was not disclosed;

(2) this need for the best evidence was especially acute because of the possibility that Mr Burton had said something of the previous history of default at the hearing, as was asserted at paragraph 41j of the Claimant's skeleton argument. In fact, the amended note did not indicate that this was said, and Mr Burton in the course of argument stated that he was prepared to be bound by the note. However, against the background of the assertion to the contrary in the skeleton argument, the Court did not wish to act on a possibly inaccurate premise in respect of what was and was not disclosed.

80. In my judgment, there is a lesson to be learned in this case as regards the supply of transcripts. It applies to both parties. It should be good practice in most cases for a transcript to be obtained by a party making an allegation of material non-disclosure so that the Court is well equipped to deal with it. It is in most cases, absent particular urgency, not an answer to say that the Claimant's note will do. In my judgment, the Defendant ought to have sought a transcript in this case because it was raising an issue of non-disclosure, and there was adequate time to do so. Further, it should be good practice in cases where the non-disclosure is denied for a claimant to seek a transcript, even where a defendant is proceeding without a transcript. The failure to seek a transcript was that also of the Claimant. Since the Claimant was challenging that the non-disclosure in respect of the CCF2 cheques, the Claimant ought to have sought a transcript irrespective of the fact that the Defendant had not sought a transcript. If a transcript had been sought by either party in advance of the hearing, the Court would have been properly equipped to deal with the non-disclosure allegation. This then led to the decision of the Court to seek through the parties that they obtain a transcript. Regrettably, there was a delay in the context of the current emergency of processing the request of the transcript to the transcribers.

81. This difficulty having been resolved, the Court has been able to consider the transcript and the note. Although there was reference to the traffic card, there was no explicit reference to the dishonour of the CCF2 cheques. There were references to particular previous cheques, but not to a history of dishonoured cheques. On the contrary, reference was made to Ms Elliott's first affidavit at paragraph 5 and the history of gambling in the period between 1 November 1993 and 11 September 2019. The traffic cards were exhibited, but there was no reference to the dishonour of cheques before the September 2019 cheques which are the subject of this claim. On the contrary, the concentration was on the length of the relationship at p.4F-5B:

> "MR BURTON: …*She first of all gives evidence in paragraph 5 of a summary of the defendant's playing history and she notes, for example, my Lord, that over the course of his membership that he has visited the club on approximately 155 separate occasions and during that period and during the course of his membership, he has bought gaming tokens to the value of approximately 14 million with an overall loss of approximately 5 million.*
> *MR JUSTICE CAVANAGH: Yes, one of the surprising things about this is that he was a member of good standing for 20 years or more.*
> *MR BURTON: Indeed, my Lord, indeed. At (sic) that point*[1]*, in many ways is a point perhaps on one side that Mr Albluewi could take and he could say, "Well, hang on a minute, I've been a member of your casino for 25/26 years,*

[1] It appears that what is meant are the words "And that point…"

> *not paid like this before*[2]*, why are you acting in this way? It's not as though I'm a new person, you don't know me". But of course, my Lord, we would formulate it in a slightly different way and we would say, "Well, precisely, you have been a member of this club for a period of time and this is the first time we say you have gone to ground in this way. We suppose you to be back in Saudi Arabia. You are not engaging, you are not paying your debts and this is what takes it out of the norm". We will come onto that, my Lord, in due course, but it is certainly the case that he has been a member for a significant period of time and I think the turnover of his gambling is something around – well, my Lord will have seen it from the exhibit, it is many tens of millions of pounds.*

82. When Mr Justice Cavanagh said that the Defendant was a member of good standing for 20 years or more, he was not referring to the period of 1993 to 2015, but to the period to 2019. This is apparent because there was no reference to the default in 2015. Further, it was understood by Mr Burton as being longer than 20 years, because he went on to refer to the Defendant being a member of the casino for 25/26 years. The Judge understood the point to be about a member of good standing, that is not becoming a person of bad standing before the dishonour of the instant CCF3 cheques in September 2019. Mr Burton at that point grasped the possible point for the Defendant asking why a WFO was being obtained when he had been a member of 25/26 years, showing that 20 years or more was meant and was understood to mean a reference to 25/26 years. Mr Burton then made the point quoted above from the transcript in the passage beginning "Indeed, my Lord, indeed".

83. Although the transcript has confirmed substantially the note of the hearing, the points about non-disclosure are made more effectively through the transcript because of its fuller nature, albeit that the note has been shown to be a reliable document. A transcript often provides to the Court the full flavour of how a case was put in a fuller form than is available even from a well-prepared note of a legal representative. In this case, the ability to deal with the non-disclosure allegations has been enhanced by having the transcript.

XV Non-disclosure: discussion

84. In my judgment the first, third and fourth of the five factors relating to failing to give full and frank disclosure are established. The second and the fifth matters are not instances of non-disclosure, to which the Court will return after considering the matters of material non-disclosure. Of the other three matters, the first two could not by themselves or cumulatively have any effect of leading to a discharge of the order without a re-grant. The third matter does amount to material non-disclosure point, but by itself would not justify the discharge of the order without a re-grant.

85. The first matter was the non-disclosure of the defaults in 2015 on CCF1 (which default lasted for over two years until payment in full and gave rise to a suspension, there was an interruption in membership for more than four years) and in 2019 on CCF2 (which involved the dishonour of cheques to a value of £1,000,000 shortly before the Claimant provided authorisation of £2 million in CCF3 which gave rise to the instant claim). This non-disclosure was material because the clear impression given to the Court was that

[2] Mr Burton says that the sense of "not paid like this before" is "as he was currently acting": see paragraph 92 below.

after 25 blameless years, the Defendant had obtained very substantial increases in his authorisation levels and then gone to ground. As set out in the transcript extract above, it was put that after being a member of the club for a period of time, this was the first time that he had *"gone to ground"* in this way, not engaging and not paying his debts. This was a misrepresentation because of the default on CCF1 which led to a suspension and an interruption in his being a member for over four years and the default on CCF2. This went to the heart of the reason why the Court was satisfied about a real risk of dissipation, namely the sudden default and going to ground of the Defendant after being a reliable customer since 1993.

86. The other side of the same coin was that if the defaults had been spelt out, the Court would have had available information to the effect that the Defendant had defaulted but come back, which would have been capable of casting a different complexion of risk from the one portrayed. Further, it would have put centre stage the rationale of the Claimant for renewing and increasing the facility after the defaults, and would have forced the Claimant to explain why it did not regard there being a real risk of dissipation at that stage. All of this begs the question what had changed between the previous defaults and the instant default, such that by the time of the application before Cavanagh J, there was in its estimation a real risk of dissipation. This would have been a position that required careful explanation to the Court, and the Court would have had to test this in the light of all the circumstances of the case. In the event, the true position about the defaults was not disclosed to the Court.

87. The question then arises as to whether it could be said that this non-disclosure was immaterial. Could it be said that if the true position had been disclosed, it would have led to a picture of a customer who had a history of default and had abused the trust of the Claimant in forgiving his previous defaults? Might this show at least as much lack of commercial probity as a customer who had suddenly defaulted? Indeed, the transcript refers to Mr Burton saying that a point that could be taken on behalf of the Defendant is that he has been a member of the casino for 25/26 years. That argument has a number of problems. First, the Claimant countered the point about a member of good standing being a point for the Defendant by contending the reverse in the quotation above. Mr Burton turned the point on its head by saying that it was precisely the fact that the Defendant had been a member of the club for all this time and this was the first time that he had defaulted and then was not engaging that took the case out of the norm. Secondly, information about the previous defaults were not disclosed. That is not the way in which it was even expressed in the evidence before the Court and so these points were not developed evidentially. If they had been, the Claimant would have had to deal with the matters raised at the end of the last paragraph about the impact of the defaults on the Claimant and the reasoning of the Claimant in extending authorisations following default. Without evidence to deal with these matters, there is nothing to negate the materiality of the non-disclosure.

88. The Defendant submits that the non-disclosure was deliberate in the sense that there was a decision at least in respect of the 2015 default to omit reference to it. The conviction of the Claimant was that the default in 2015 was considered historic and not relevant. Whilst the decision to omit this was deliberate in the sense that its relevance was evaluated, there was not an intention to mislead: there was no bad faith. Mr Burton has said that the 2015 default was treated as more prejudicial than probative. There is no reason to doubt that that was the evaluation that was made in good faith. However, for

the reasons set out above, it would have been probative as to the issue of real risk of dissipation and it ought to have been disclosed.

89. As regards the default in August 2019, it was believed according to the Claimant's skeleton argument that this had been disclosed. It was said at paragraph 41j: "*the Defendant's assertion that his July/August 2019 debt of £1 million was not drawn to the Court's attention is simply wrong"*. This was because the Claimant wished to advert to the difference between the relatively early payment of the dishonoured cheques on CCF2 and the duration of default and lack of engagement in respect of the dishonoured cheques on CCF3. The transcript shows that the dishonoured cheques on CCF2 were not disclosed, but here too, there was no bad faith. It is evident that there was a failure of recall, and there is no reason to believe that this was anything other than an innocent mistake.

90. However, for the reasons given, it was nonetheless a material non-disclosure by not providing evidence relating to defaults. In this regard, Woolf LJ in *Behbehani v Salem* in the part of his judgment quoted above referred to the fact that in the majority of cases where material non-disclosure is established, this is without a consideration of whether bad faith is established. In the instant case, I bear in mind that there was no bad faith, but that is primarily relevant to the question of sanction, and it does not provide an answer to material non-disclosure.

91. At highest, an argument that the position might have been worse for the Defendant if the prior breaches had been disclosed amounts to saying that there would have been an injunction even if disclosure of the defaults had been given. Given the fact that the nature of the disclosure which would have had to be given as to the rationale of the Claimant at the time has not been provided, the Court cannot conclude on the evidence that an injunction would in any event have been granted. (This is leaving aside the wider question considered above to the effect that there was not established a real risk of dissipation). Even if, contrary to the foregoing, it had been the case that a WFO might still have been ordered, this is not an answer to material non-disclosure. It is in this context that the judgment of Woolf LJ in *Behbehani v Salem* cited above is resonant. It is not the acid test, or indeed a matter of great significance, that an injunction would or might have been granted with the disclosure. It was for the court on the without notice hearing to have the relevant material and to make the decision for itself, and not for the claimant to say on a discharge application what might have happened if the court had been afforded that advantage at the without notice hearing.

92. Since receiving the draft judgment, Mr Burton, entirely properly, has sought a clarification that the Court has not approached the matter on what is said to be the Defendant's wrong suggestion that the application was put to Mr Justice Cavanagh on the basis that there had been no previous default. It is said that the transcript shows that what was being put forward to the Court was not that this was the first default or that the Defendant's membership had been previously blameless, but that he had "not paid in this way before" (i.e. as he was currently acting"). In my judgment, the transcript shows that there was endorsed the statement of the Judge that the Defendant was previously a person of good standing, when he was not. It was not a statement that the default was of a different kind from previous defaults because the previous defaults had not been disclosed. This is reflected in paragraph 11 of the judgment of the Judge quoted above that this was the first time so far as the Judge was aware that the Claimant had a problem with the gambling debts of the Defendant. I am satisfied that the non-disclosure of the

previous defaults was not in bad faith, and likewise here in a dialogue with the Judge, Mr Burton's endorsement of what the Judge had said was inadvertent. Nevertheless, this was a statement to the Court that the Defendant, immediately before the default on CCF3, was a person of good standing. In the context of the original non-disclosure of the previous defaults, this mis-stated the position.

93 In fact, the non-disclosure in the instant case was particularly material because it went to the issue of whether a real risk of dissipation was made out. As noted above, in my judgment, there was not sufficient evidence of a real risk of dissipation. This non-disclosure was a factor which led the Court to conclude that there was a real risk of dissipation. Regrettably, this was not the sole non-disclosure as becomes apparent when the Court now turns to the third of the five matters identified above.

94. As for the third matter, there was identified in the first affidavit of Ms Elliott the ownership of the property at 1 Carlton House Terrace, but not its purchase price. The purchase price is in an exhibit about the property. It is a long exhibit and the information about price is rather buried in the middle of a dense document in an exhibit of numerous documents. The price was not referred to in the body of the affidavit or in the written submission or in the hearing, based on the transcript of the hearing. The judgment of Bingham J in *Siporex Trade v Comdel* above is germane here to the effect that disclosure is not achieved by having something in general statements or in an exhibit of numerous documents. Without more, the Court might have inferred that the property was nothing more than a London pied-a-terre, and not a property purchased for such a large price. In a fair presentation, it was incumbent on the Claimant to draw specific attention to the cost of £45 million even without knowledge of the level of the charge against the property.

95. Even if the price escaped the attention of the Claimant in the exhibit, it cannot have escaped the attention of Ms Mignon on her visit to the property in September 2019 that it was imposing and valuable. It therefore behoved the Claimant to draw to the attention of the Court that in a consideration of whether there was a real risk of dissipation of assets, and particularly to Saudi Arabia, that this was a very tangible connection with the jurisdiction. It should have been said that the Defendant would be likely to make this point that so substantial was his connection with this jurisdiction that there was no real risk of dissipation. This was a necessary part of a fair presentation of the without notice application for a WFO.

96. The Claimant could still have made its points about ownership by a Jersey company through nominee companies, but that point would have had to be tempered. The authorities quoted above are to the effect that it is frequently the case that reputable individuals and institutions use offshore structures, particularly in the Channel Islands. Further, the Claimant recognised that the property was owned by SAB Ventures Limited which Ms Elliott believed to have been ultimately owned and controlled by the Defendant: see paragraph 20 of her first affidavit. The value of the property, or at least that it was likely to have a very high value ought to have been disclosed, and the points should have been made explicitly to the effect that the Defendant would rely upon this to show how tangible was his connection with the UK. Further, the interest in shares in Jersey in SAB Ventures Limited would in principle be available to reciprocal

enforcement of a judgment of this Court. In my judgment, in respect of the property, the allegation of non-disclosure is established.

97. The fourth point is an expansion of the above. It is a good practice to include in the skeleton argument and in the affidavits reference to the potential non-disclosure points. The advantage about including it in the affidavits is that the primary duty is that of the client and this is the place where the client can remind itself about the duty and then set out facts and matters and arguments against the application which might be made. Mr Burton is correct to comment that sometimes this is done either defensively or worse where numerous points are identified to prove or pretend that the duty of full and frank disclosure was observed. He said that that practice is undesirable, namely putting forward a blanket of indiscriminate points which will not inform the Court about what are the key points which might realistically arise against the making of the order. Mr Burton stated that in this case, the Claimant conscientiously considered the duty, and thus majored on the potential delay point. He also referred to what the Defendant would say was no real risk of dissipation because of his previous good record, but as noted above, that was not the correct position and the point was countered in the way set out above. There was also disclosed the law to the effect that freezing injunctions were not intended to provide security for unpaid debts. In the light of the presentation, Cavanagh J believed (paragraph 3 of the Judgment) that the presentation had drawn to the attention of the Court any arguments that counsel for the Defendant might have advanced had one been there.

98. In my judgment, that was not adequate in this case. The other points were not of the kind referred to by Slade LJ in *Brink's Mat* of parties having nothing to put forward but bad points on non-disclosure. These were real points which were not addressed by the Claimant, whether in writing, through evidence or skeleton argument, or orally in submission, in respect of the above points. This included relating the history of default and the extent of the connection with the jurisdiction through the very valuable property. This then feeds itself into the judgment of the Court, where the result of the non-disclosure was that the Court did not consider the impact of the defaults or the complexion of the assets of the Defendant and particularly of the value of the property at 1 Carlton House Terrace.

99. The other point which is of concern is about the discount. There was no reference to the discount in the application either in the affidavit evidence or in the skeleton argument or apparently in the oral submissions. The Claimant says that this was not a material matter in that it contends that the discount was lost due to the dishonour of the cheques. However, this is not what seems to have happened in respect of CCF2 where a payment of the sum after the discount was accepted by the Claimant. In my judgment, the problem here was that the Claimant did not give the story about the default followed by the negotiations including enticements by the Claimant to have the Defendant accept a higher authorisation level. The materiality of the disclosure is that the claim may not succeed as to 20%, even if the Claimant is confident that it will be able to meet the point. The disallowance of a discount does not appear to be set out in the terms and conditions, and so it will depend on evidence as to what was agreed expressly or by implication. In my judgment, the Claimant should have drawn this to the attention of the Cavanagh J, albeit that if this were the sole non-disclosure, the Court may be able to take a lenient approach to not discharging the injunction and/or regranting it.

100. Returning to the points where the allegation of non-disclosure is rejected. As to the second of the five points, the expression *"gone to ground"* used by the Claimant before the Judge was imprecise which has caused difficulties. In the circumstances, it does at least bear the meaning of returning home and not being easily contactable as opposed to disappearing to escape the jurisdiction. It was not intended as such, and the meaning of returning home and then barely communicating is more logical given that the authorisation was for the trip only, and the evidence that the Defendant is resident in Saudi Arabia. In my judgment, the non-disclosure allegation in this regard is not established. However, the expression *"gone to ground"* added to the transformation of the customer of good standing to defaulter which was not in fact a fair or accurate characterisation since the Claimant increased the authorisations to a person with a customer with a record of default.

101. As regards the fifth point, the *Stronghold* case, there is a duty to present a case fairly as regards the law as well as the facts. The Defendant submits that *Stronghold* was based on a concession which does not apply in the instant case, and yet *Stronghold* formed an important part of the submissions for the Claimant. Whilst the submission of the Defendant is a legitimate one, the failure to advert to the particular facts of *Stronghold* is not sufficiently clear to amount to a non-disclosure. The particular interpretation of the case by the Defendant may turn out to be correct, but it does not mean that the failure of the Claimant to apprehend or to draw the attention of the court to it is a breach of a duty of fair presentation.

102. As regards the other two matters, a departure from a standard order without telling the Court about the departure was a potentially serious matter and particularly here where the Court was informed that the standard order had been followed: see *Memory Corporation v Sidhu (No.2)* [2000] 1 WLR 1443. At the without notice hearing, Mr Burton indicated that it was a standard form of order and it was not. On the inter partes hearing, Mr Burton explained that the omission of the two undertakings was a clerical or administrative error in failing to copy out the last two paragraphs of the standard form of undertaking. This was not deliberate. Mr Burton did not realise the mistake when he told the Court that the order was in standard form. Nothing occurred subsequently to take advantage of the error whether in the nature of the misuse of information obtained or the commencement of process outside the jurisdiction. Although it would have been better for this to have been set out in evidence, in this case, the Court is able to accept the explanation. If the omissions of the undertakings did amount to a material non-disclosure, then there would be no sanction. The failures in *Memory Corporation* were more serious, yet there was no sanction. There should not be in the instant case.

103. I therefore conclude that there were two highly significant breaches of the duty of full and frank disclosure which were directly relevant to the risk of dissipation (the first and third points of five), and that these matters were not drawn to the attention of the Court with an explanation as to how the Defendant would have put them if he had been present (the fourth point of five). Since this is a case where no real risk of dissipation has been established, it becomes hypothetical to consider whether there would be a regrant if there was a discharge.

104. Based on those breaches amounting to material non-disclosure, the question would have arisen as to whether to discharge the WFO or to discharge the WFO and regrant a WFO or other injunction or to continue the WFO. It is artificial and hypothetical to consider

each of the factors such as those listed in the twelfth point of Carr J in her judgment in *Tugushev v Orlov* above. This is because the WFO will not be continued because there is not sufficient evidence of real risk of dissipation. Further, the material non-disclosure went mainly to the issue of real risk of dissipation. Its character is intimately connected with the reasons why this Court has rejected the Claimant's case on real risk of dissipation.

105. It was suggested for the Claimant that this is a case of the principle of full and frank disclosure being taken to extreme lengths as per the judgment of Slade LJ in *Brink's Mat,* nor is it a case like *Crown Resources AG v Vinogradsky* above, where there was a danger of the principle not being confined within sensible limits. The non-disclosures found (save the one about discounts) go to the heart of the issue of the real risk of dissipation. It was an area where particular caution was required because, as Carr J said in *Tugushev v Orlov "the risk [of dissipation] is not to be inferred lightly"* and so it was important that as far as reasonably possible all relevant factors were put before the Court. This did not happen in this case.

106. In my judgment, the non-disclosures were of a material nature. They justify the discharge of the WFO. There should not be a regrant, bearing in mind the fact that the real risk of dissipation has not been established.

XVI Conclusions

107. It therefore follows that the Claimant's application to continue the WFO should be dismissed. There has been a failure to establish a real risk of dissipation of assets. The Defendant's application to discharge the WFO should be allowed. There has been found material non-disclosure. Since the Claimant has not established a real risk of dissipation, there is no reason to regrant the WFO. In these circumstances, it has not been necessary to make a separate finding about justice and convenience, but various concerns about the WFO have been expressed in the section above considering that subject. The consequential matters to which this judgment gives rise are matters on which the parties can now address the Court.