THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0018

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Appellant

and

RENOVA HOLDING LIMITED

Respondent

BVIHCMAP2019/0020

EMMERSON INTERNATIONAL CORPORATION

Appellant

and

[1] VIKTOR VEKSELBERG
[2] REN OVA HOLDING LIMITED
[3] BERDWICK HOLDINGS LIMITED
[4] TIWEL HOLDING AG

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:

Mr. Phillip Marshall, KC, with him Mr. Robert Weekes, Mr. Ajay Ratan, Mr. Iain Tucker and Ms. Colleen Farrington for the Appellant
Mr. Paul McGrath, KC, with him Ms. Arabella di Iorio, and Mr. Andrew McLeod for the Respondents

2019:	July 29, 30 and 31;
2023:	February 7.

Interlocutory appeal – Commercial Appeal – Grounds on which appellate court will upset decision of trial judge - Real risk of unjustifiable dissipation of assets – Allegations of dishonesty in proving risk of unjustifiable dissipation – Disclosure – Delay in applying for freezing order – Delay in proving risk of unjustifiable dissipation of assets – Disclosure – Duty to make full disclosure in ex parte application – Rules 7.3 (2) (a) and 7.3(4) of the Civil Procedure Rules 2000 - Service of claim out of jurisdiction

Emmerson International Corporation ("Emmerson") appealed against the order of Jack J made on 19th June 2019 ("the Discharge Order") in which the learned judge discharged freezing orders previously granted by Wallbank J against the respondents. This appeal ("the Discharge Appeal") is one of three related appeals filed by Emmerson. The second is an appeal against the decision of Wallbank J to impose a temporary confidentiality club for documents to be disclosed by Renova Holding Limited ("Renova") pursuant to a freezing order made against it (the "Confidentiality Club Appeal"). The third appeal challenged the decision of Jack J refusing a last-minute request by Emmerson to adjourn the Discharge Hearing (the "Adjournment Appeal").

The main part of the proceedings concerns a joint venture referred to as Integrated Energy Systems ("IES") relating to certain Russian electricity generation and distribution assets. The proceedings are mainly between the Renova Parties (or "RPs") - (various companies within the 'Renova Group' plus Mr. Vekselberg) and the Abyzov Parties (or "APs") - (Mr. Abyzov and companies said to be beneficially owned by him, plus Mr. Titarenko pursuant to certain alleged assignments).

Emmerson advanced 32 grounds of appeal in respect of the Discharge Appeal.

Held: dismissing the Discharge Appeal and the Adjournment Appeal and awarding costs to the respondents to be assessed by a judge of the Commercial Court, if not agreed within 21 days, that:

1. The key principles applicable to the question of risk of dissipation are well established. A claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified risk of dissipation. The risk of dissipation must be established by solid evidence; mere inferences or generalised assertions are insufficient. Further, the risk of dissipation must be established separately against each respondent. It is not enough to establish sufficient risk of dissipation merely to establish a good arguable case that a 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. The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Indeed, businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their

assets. Each case is fact specific and relevant factors must be looked at cumulatively.

Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm) applied.

2. In this case, Jack J did not disregard the allegations of dishonesty against Mr. Vekselberg. Jack J noted that there are many allegations of dishonesty against Mr. Vekselberg and recognised that all of them are disputed and will need to be determined at the trial of the action. He also accepted that they had some weight in assessing the risk of dissipation but stated that the weight to be attributed to them was negligible. Weight being a contextual evaluation for the judge, this Court would not interfere with the judge's attribution of weight unless it is perverse. This standard has not been met in this case. Jack J did not apply a summary judgment test. Further, it is not established that Mr. Vekselberg controls any of the companies in the Renova Group and even if such control is established, it only proves the existence of such control which itself is not indicative of how that control is likely to be exercised.

   Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Comm). applied; **Jarvis Field Press Ltd v Chelton** [2003] EWHC 2674 (Ch) applied; **Thane Investment Ltd v Tomlinson** (No 1 [2003] EWCA Civ 1272 applied; **VTB Capital plc v Nutritek International Corp** [2012] EWCA Civ 808 applied.

3. In the absence of cross-examination, the court is not entitled to reject any written evidence as being untrue, unless on the basis of all the evidence before the court it considers that that written evidence is incredible. This is a strict standard. Jack J was entitled to conclude that that strict standard was not satisfied on the evidence before him; consequently, there was no basis to conclude that any documents falling within the scope of the Asset Disclosure Judgment had been withheld. Jack J also indicated that the lack of documentation concerning the LTI Scheme remained relevant to his assessment of whether there was a real risk of unjustifiable dissipation, but nevertheless concluded that the evidence indicated that the Liwet Transfers were legitimate transactions intended to mitigate against the effect of United States sanctions. Similarly, there was no basis to conclude that the Cypriot trusts to which the Liwet shares had been transferred were shams, as that would have required a finding of dishonesty on the part of all those involved, for which there was no evidence. In the circumstances, Jack J's conclusion that the Liwet Transfers do not provide any evidence, still less solid evidence, of a real risk of unjustifiable dissipation cannot be said to be plainly wrong and does not therefore attract appellate interference.

   Wards Solicitors v Hendawi [2018] EWHC 1907 (Ch.) applied.

4. While Jack J did not think it was necessary to rule on the admissibility of the expert accountancy report produced by Paul Doxey ("the Doxey Report") in relation to the LTI, he had nevertheless read the report *de bene esse* and concluded that it had little relevance to Emmerson's argument. Indeed, Mr. Doxey concluded in his report

that the absence of documents relating to the terms of the LTI Scheme would not have prevented liabilities relating to that scheme being recorded in Renova's audited consolidated financial statements for 2017 ("the 2017 Audited Accounts"). The learned judge's approach was therefore sensible and there was nothing procedurally unfair or irrational about it.

5. Paragraph 1 of the Asset Disclosure Order simply stated that Mr. Vekselberg and Renova must produce documents relating to the Liwet Transfers (or procure Renova Innovation Technologies Ltd ("RITL") or Liwet to produce those documents). The purpose of the Asset Disclosure Order was to ensure that documents relating to the Liwet Transfers were produced. Renova's confirmation that all documents within its control falling within the scope of the Order had been disclosed by Mr. Vekselberg, meant that the purpose of the order was achieved. That being the case, it did not matter who, as between Renova and Mr. Vekselberg, provided those documents to Emmerson. Even assuming that Renova has somehow submitted to the jurisdiction of the BVI Court, that manifestly provided no basis from which to infer a real risk of dissipation. Nor would it provide a basis on which to strike out the discharge application.

   Sans Souci Limited v VRL Services Limited [2012] UKPC 6 applied.

6. The mere fact of delay in bringing an application for a freezing injunction does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay. The delay in Emmerson seeking a freezing order after 16th May 2018 was a relevant factor which Jack J was entitled to take into account. Jack J noted that there was no evidence that any of the respondents had sought unjustifiably to dissipate assets after they had received notice of Emmerson's application for an Asset Disclosure Order, which expressly stated that Emmerson was considering applying for freezing relief. Jack J was clearly entitled to take the view that the absence of any unjustifiable dissipation of assets since May 2018 indicated that there was no real risk of any unjustifiable dissipation of assets in the future and that the delay rendered freezing relief inappropriate in the circumstances. In the circumstances, there is no basis for appellate intervention.

   JSC M P Bank v Pugachev [2015] EWCA Civ 906 applied; **Candy v Holyoake** [2017] EWCA Civ 92 considered; **Madoff Securities International Ltd v Raven** [2011] EWHC 3102 (Comm) applied.

7. A party making an *ex parte* application has a duty to make full and frank disclosure of all the material facts and matters. The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. Material matters include arguments which might be raised by the respondents and any relevant defences. In this case, Emmerson had a duty to disclose the argument raised by the respondent at the hearing of the Asset Disclosure Application, that any application for a freezing order should be heard

inter partes. In the circumstances, Jack J was entitled to reach the conclusion that this was a serious non-disclosure. Similarly, Jack J was correct in his conclusion that Emmerson breached its duty of full and frank disclosure by failing to indicate that Renova may wish to rely on an alternative interpretation of the Asset Disclosure Order, namely, it imposed a joint obligation and did not require Renova to duplicate Mr. Vekselberg's disclosure.

Alliance Bank JSC v Zhunus [2015] EWHC 714 Comm applied; **National Bank Trust v Yurov** [2016] EWHC 1913 applied; **Millhouse Ltd v Sibir Energy Plc** [2008] EWHC 2614 (Ch) applied.

8. The duty to make full disclosure also includes specifically identifying all relevant documents for a judge and taking the judge to particular passages which are material and taking appropriate steps to ensure that the judge appreciates the significance of what he is being asked to read. Jack J was accordingly right in concluding that Emmerson committed a serious non-disclosure at the *ex parte* hearing of 19th November 2018, by failing to explain to the judge the content of the 714 documents disclosed by Mr. Vekselberg pursuant to the Asset Disclosure Order. Jack J was also correct in his finding that Emmerson had committed a "middling breach" of its duty of full and frank disclosure in failing to draw Wallbank J's attention to the absence of a provision for legal expenses in the draft of the freezing order sought against Mr. Vekselberg. By failing to take Jack J to Mr. Michaelides' evidence, Emmerson failed in its duty to make a fair representation of the issues.

   Siporex Trade v Comdel [1986] 2 Lloyd's Rep 428 applied; **Petroceltic Resources Ltd v Archer** [2018] EWHC 671 (Comm) applied.

9. A claim form may be served out of the jurisdiction if a claim is made (a) against someone on whom the claim form has been or will be served, and (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to claim. In this case, the declaratory claims sought against Berdwick or Tiwel involve no substantive cause of action and were essentially an attempt to obtain declarations merely in order to assist enforcement of any judgment that may ultimately be obtained against Mr. Vekselberg and or Renova in these proceedings. In the circumstances, Jack J was correct to take the view that this was fatal for Emmerson's attempt to rely on the 'necessary or proper' party gateway in CPR 7.3(2)(a), which is only applicable if a substantive claim is brought against the proposed additional defendant(s) (i.e. Berdwick and Tiwel) in addition to the substantive claim against the anchor defendants (Mr. Vekselberg and Renova). Further, the declaratory claims against Berdwick and Tiwel related solely to assets held outside the jurisdiction of the BVI, and which had no connection with the subject matter of any of the existing claims in these proceedings (ie the IES joint venture). Therefore, there is no basis to suggest that the declaratory claims against Berdwick

and Tiwel are somehow “closely bound up” with the existing claims in these proceedings.

Rule 7.3(2)(a) of the **Civil Procedure Rules 2000** applied; **C v L** [2001] 2 All ER 446 considered.

10. The claimant in an application for permission to serve a foreign defendant out of the jurisdiction must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given (often referred to as “the gateways”. Thirdly, the claimant must satisfy the court that in all the circumstances the ‘BVI’ is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. The claimant must supply a plausible evidential basis for the application of a relevant gateway; if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available, if it can reliably do so. In circumstances where Emmerson conceded that its notice of application and supporting evidence made no reference to the tort gateway in CPR 7.3(4), the consequence is that the tort gateway was unavailable. This ground of appeal must accordingly fail. Further, there is no evidence that Emmerson has suffered any damage as a result of the Liwet Transfers, let alone damage within the jurisdiction of the BVI. Emmerson’s reliance on the tort gateway cannot be sustained. Further, Emmerson has failed to establish that the BVI is clearly and distinctly the most appropriate forum for the determination of any tort claims against Berdwick.

    Rule 7.3(4) of the **Civil Procedure Rules 2000; AK Investment CJSC v Kyrgyz Mobile Tel Ltd** [2011] UKPC 7 applied; **Four Seasons Holdings Incorporated v Brownlie** [2017] UKSC 80 at [71] applied.

JUDGMENT

[1] **BAPTISTE JA:** Emmerson International Corporation (“Emmerson”) advanced 32 grounds of appeal (and 82 pages of skeleton arguments) against the order of Jack J (or “the learned judge”) made on 19th June 2019 (the “Discharge Order”) discharging freezing orders previously granted by Wallbank J against the respondents. This appeal is one of three related appeals that Emmerson has filed. The two others are an appeal against the decision of Wallbank J to impose a temporary confidentiality club for documents to be disclosed by Renova Holding

Limited ("Renova" or "RHL") pursuant to a freezing order made against it (the "Confidentiality Club Appeal"). The third appeal challenged the decision of Jack J refusing a last-minute request by Emmerson to adjourn the Discharge Hearing (the "Adjournment Appeal"). This judgment essentially concerns Emmerson's appeal against the Discharge Order ("the Discharge Appeal"), the most significant of the three appeals.

[2] These proceedings concern a joint venture referred to as Integrated Energy Systems ("IES") relating to certain Russian electricity generation and distribution assets. The main part of the litigation is between on the one hand, the Renova Parties (or "RPs") - (various companies within the 'Renova Group' plus Mr. Vekselberg) and, on the other hand, the Abyzov Parties (or "APs") - (Mr. Abyzov and companies said to be beneficially owned by him, plus Mr. Titarenko pursuant to certain alleged assignments).

[3] As stated, Emmerson advanced 32 grounds of appeal with respect to the Discharge Appeal. Grounds 1 to 13 deal with the risk of dissipation. The central basis for the Discharge Appeal is that Jack J adopted the wrong legal test when assessing whether or not there was a real risk of unjustifiable dissipation of assets by the respondents.

[4] The key principles applicable to the question of risk of dissipation were summarised by Popplewell J in **Fundo Soberano de Angola v dos Santos**[1] at paragraph 86:

(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.

(2) The risk of dissipation must be established by solid evidence; mere inferences or generalised assertions are insufficient.

[1] [2018] EWHC 2199 (Comm).

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

(4) It is not enough to establish 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.

(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.

(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.

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

Ground 1

[5] Emmerson asserted in Ground 1, that Jack J disregarded important evidence as to the risk of dissipation on the basis that he considered that the evidence raised factual issues for trial; he thereby wrongly adopted a summary judgment standard when assessing Emmerson's arguments on dissipation. In the premises, he failed to consider all the evidence bearing on the risk of dissipation. Grounds 2 to 5 repeat the assertion that the learned judge adopted a summary judgment standard, by reference to particular examples.

[6] Mr. Paul McGrath, KC , counsel for the respondent did not dispute that Jack J noted that various factual allegations relied upon by Emmerson were ultimately “matters for trial”. He submitted that the observation was correct and accorded with the observation made by Wallbank J with respect to the same factual issues in the Asset Disclosure Judgment delivered on 29th October 2018. It reflected the fact that Emmerson relied on matters that relate to the substance of its claims in these proceedings. Mr. McGrath, KC contended that it was manifestly incorrect to suggest that after identifying such issues as one ultimately to be determined at trial, Jack J, then disregarded Emmerson’s arguments about them.

[7] Mr. McGrath, KC argued that in relation to each of those disputed factual issues, the learned judge clearly took all of Emerson’s arguments into account when assessing whether or not there was “solid evidence” of a real risk of unjustifiable dissipation, but he made it clear there that those arguments carried very little weight. Mr. McGrath, KC correctly pointed out that this Court is not entitled to interfere with the judge’s judgment on the basis of the weight he attributed to particular evidence or arguments unless his findings were plainly wrong. That test was not satisfied. I agree. Weight is a contextual evaluation for the judge who reads, hears, and sees the evidence of the witness. It is inappropriate for this Court to interfere with that evaluation unless it is perverse.[2] The judge applied the correct legal principles and did not disregard any evidence.

[8] Renova did not file a defence in these proceedings and as a consequence been automatically deemed to admit the claims against it pursuant to rule 18.12 of the **Civil Procedure Rules 2000** (“CPR”). In Ground 1 Emmerson also asserted that as a result of Renova’s deemed admissions, there are no triable issues at all in connection with the liability of Renova. Mr. McGrath, KC submitted that its deemed admissions merely act as a procedural bar preventing it from contesting the merits of the claims against it. The claims are based on the same allegations as the claims against several other parties in these proceedings, and the BVI courts will not be in

[2] See Manzi v King’s College NHS Foundations Trust [2018] EWCA Civ 1882 at paragraph 14.

a position to make any factual or legal findings against Renova until it has resolved those disputed issues at the trial of this action. Pursuant to CPR 18.12, the BVI Court will regard Renova as bound by the legal and factual findings made against those other parties. Accordingly, should Emmerson's allegations against these other parties fail, the same allegations against Renova must also fail. I agree.

Ground 2

[9] Ground 2 averred that Jack J applied the wrong test (the summary judgment standard) to his assessment of contemporaneous email correspondence involving senior personnel in the Renova Group wishing to transfer assets so as to prevent them from being frozen or subject to enforcement to defeat claims by Mr. Abyzov and his companies. In that regard Mr. Marshall KC argued on behalf of Emmerson, that email correspondence between senior personnel in the Renova Group expressly described asset transfers as a "clean-up" carried out "for the purpose of avoiding loss/freezing of assets in relation to the threat of possible legal action from MMA [i.e., Mr. Abyzov]." Mr. Marshall KC submitted on Emmerson's behalf that such explicit statements constituted unequivocal documentary evidence of an explicit intention to dissipate, going well beyond the threshold of solid evidence of a real risk of dissipation.

[10] I note that Emmerson took exception to Jack J's holding that the emails were merely part of the backdrop to the applications for freezing orders and lamented that the learned judge did not find that they are clear evidence of a propensity to dissipate. In his judgment, Jack J referred to Emmerson's arguments about the emails relating to a transfer of assets in May 2011 ("the Starlex Transfer") and noted, quite correctly, that the interpretation of those emails and the purpose of the Starlex Transfer is disputed and can only be resolved at trial. I agree with Mr. McGrath's submission that Jack J did not thereby apply a summary judgment standard, nor did he disregard Emmerson's arguments about those emails, or ignored any evidence. In fact, Jack J expressly stated that the emails "form part of the backdrop" to Emmerson's applications for the freezing orders and said they "potentially cast light"

on more recent events but noted that they "cannot be determinative". Jack J noted that the emails in question relate to a transfer of assets which took place over eight years ago and as a result the weight attributable to them was "very substantially reduced". This Court will not interfere with the judge's attribution of weight unless it is perverse. This standard has not been met.

[11] Emmerson also complained that further or alternatively, Jack J erred in ruling that he was not following Wallbank J on this aspect. Wallbank J had held that the emails point to an intention to move assets to prevent their being reached and the totality of the circumstances present the court with objective facts from which a risk of dissipation could be inferred.[3] Jack J found opposite in his judgment. It was posited that Jack J did not give any or proper reasons for departing from the judgment and approach of Wallbank J. I note here that Jack J was entrusted with the task of deciding the matter himself on the evidence that he received and in light of the submissions on that evidence made to him.

Ground 3

[12] In Ground 3 Emmerson contended that there was a major change of Mr. Vekselberg's pleaded case in these proceedings, and Jack J erred in rejecting such a change of case as a material factor to the risk of dissipation. The contention is that Mr. Vekselberg changed his case in relation to the nature of certain loans made by the APs in connection with the IES joint venture. His previous case was that the APs cash contributions to the joint venture were documented with reference to non - binding loan agreements. Mr. Vekselberg now alleged the opposite: that the purported loan agreements were legally binding and that the APs' cash contributions were made by way of loan.

[13] Mr. McGrath, KC argued that the judge did not disregard Emmerson's arguments about Mr. Vekselberg's alleged change of case in relation to certain loans made by the Abyzov Parties in connection with the IES joint venture. It was contended that

[3] Paragraphs [106] and [120] of the Asset Disclosure Judgment.

Mr. Vekselberg never accepted that the loans were a sham. When he pled that the loans were not intended to be repayable, that merely referred to the fact that the parties anticipated that the loans would not in practice be repaid but anticipated that they would be replaced in due course by a binding joint agreement. Mr. Vekselberg amended his case in March 2017 to make that clear.

[14] Mr. McGrath KC, posited that this change was addressed in a series of hearings before Wallbank J, who expressed a significant measure of skepticism regarding it. Wallbank J found that this was further evidence of a risk of dissipation.

[15] Although Jack J was skeptical about the explanation for the pleading amendment, he did not disregard it. He held, at paragraph 79 of his judgment, that this factor was "a matter for trial" which only forms part of the backdrop" and concluded: "the importance of this point to an assessment of the risk of dissipation is small. The forensic strengths and weaknesses of a party's case is only tangentially relevant to assessing the risk of dissipation. This is especially so, where the standard for making a summary judgment application is not met." Emmerson submitted that this finding was wrong because the judge explicitly applied the summary judgment standard.

[16] In my judgment, Jack J's skepticism about the change of case did not mean that he disregarded it. He stated that it was relevant, formed part of the backdrop, was not determinative, and could carry very little weight. I agree with Mr. Mc. Grath's argument that it is impossible to see how amendments to the pleadings in March 2017 can carry any real weight when considering whether there is a current risk of dissipation. Jack J simply reinforced his conclusion by noting that the standard for making a summary judgment application was not met. He was not thereby applying a summary judgment standard to the assessment of risk of dissipation.

[17] As Mr. McGrath, KC pointed out, Jack J was emphasising that it could be significant to that assessment if a party's case is so weak that summary judgment could be

granted against it. Jack J was simply noting that no such consideration applied in this case. Jack J's approach accords with the applicable legal principles, that the merit of the underlying claim is rarely relevant to a risk of dissipation. At most, those merits can be relevant where the claim is unanswerable.

Ground 4

[18] Ground 4 raised the issue of dishonesty. The complaint is that in respect of the substantive claims in fraud against Mr. Vekselberg in these proceedings, Jack J erred in law in (i) applying the wrong test - summary judgment standard - and (ii) failed to direct himself that such allegations are a material factor to the risk of dissipation and that it is actually unnecessary to establish any independent risk of dissipation.

[19] Emmerson asserted that it is common ground that there is a good arguable case in fraud against Mr. Vekselberg and that the fraud case goes to the heart of the proceedings. Jack J found that whether Mr. Vekselberg was dishonest or not will be a key issue at the trial. He reasoned that the mere fact that Emmerson reached the threshold of showing that they had a good arguable case against Mr. Vekselberg in fraud, is of negligible weight in assessing the risk of dissipation. Further, having a good arguable case does not mean there is solid evidence of a real risk of dissipation. He stated that the position would be different if Emmerson were able to establish an overwhelming case in dishonesty.

[20] Emmerson's position was that Jack J's finding was wrong in principle in that:

(a) He applied the summary judgment standard or a more onerous standard by requiring it to establish an overwhelming case in dishonesty before the nature of its claim in fraud could be taken into account.

(b) failed to direct himself that a good arguable case of dishonesty is itself a factor going to the risk of dissipation and can be sufficient without more to establish a real risk of dissipation.

(c) Once a good arguable case of dishonesty is made out, the focus of the court's inquiry should be on the substantive nature of the allegation of fraud and whether the dishonest conduct asserted, evidenced a real risk of dissipation.

(d) Had he properly directed himself as to the law, he would have reached the same conclusion as Wallbank J that "… the substantive case of dishonesty being advanced directly indicates the possibility of the VIRPs putting assets beyond the reach of the APs, to advance the financial interests of the VIRPs at the expense of the Aps."[4]

(e) His finding that negligible weight should be given to the fraud claims is irrational.

(f) He erred in not having proper regard to Wallbank J's judgment in this respect and in failing to give any reason for departing from the latter's approach.

[21] Mr. McGrath, KC contended that Emmerson was wrong to assert that Jack J applied a summary judgment standard to the assessment of risk of dissipation. He argued that the learned judge recognised that there were many allegations of dishonesty against Mr. Vekselberg in these proceedings and correctly noted that the allegations are disputed and would need to be determined at trial of the action. Jack J did not then disregard the allegations. He accepted that they had some weight in assessing the risk of dissipation but emphasised that the weight to be attached to them was negligible.

[4] Paragraph [102] of the Asset Disclosure Judgment.

[22] Mr. McGrath, KC argued that Jack J recognised that one of the factors relied on by Emmerson in support of the freezing orders was that it had a good arguable case in relation to the allegations of fraud against Mr. Vekselberg. Jack J, however, correctly stated that a good arguable case is a very low standard; it merely requires a claim to be "one that is more than barely capable of serious argument". Jack J noted that reaching that very low standard by itself carries almost no weight when assessing whether there is a real risk of unjustifiable dissipation. The mere fact that a party has made an arguable allegation of dishonesty is not in itself sufficient, without more, to constitute solid evidence of a real risk of unjustifiable dissipation.

[23] Mr. McGrath, KC stated that Jack J was well aware that the merits of a party's claim may be a significant factor in determining whether there is a risk of dissipation (e.g., if a party has an overwhelming case in dishonesty on the merits). He however submitted that Emmerson's argument was solely based on the fact that the claims against Mr. Vekselberg reached the extremely low threshold of being "good arguable claims". That fact without more, says almost nothing about whether there is a real risk of unjustifiable dissipation.

[24] Mr. McGrath, KC contended that the mere fact that a claimant has established a good arguable case of dishonesty is one factor, as Jack J recognised, to consider together with, *inter alia*, the strength of the claims generally; the extent to which the particular allegation of dishonesty has any relevance to establishing a real risk of unjustifiable dissipation; and any other relevant factors.

[25] Mr. McGrath, KC further argued that the court at an interlocutory hearing is not positioned to conduct a detailed investigation into the merits of allegations of dishonesty; that will need to be determined at the trial. As a consequence, the mere fact that a claimant has satisfied the very low threshold of establishing "a good arguable case" of dishonesty cannot itself constitute "solid evidence" of a real risk of dissipation if (as here) properly arguable defences to the allegations have been

put forward and there is nothing else to suggest that there is a real risk of unjustifiable dissipation.

[26] Further, Mr. McGrath KC submitted that it goes without saying, that allegations of dishonesty against Mr. Vekselberg cannot provide any evidence of a real risk of unjustifiable dissipation of assets by Renova, Berdwick Holdings Limited ("Berdwick"), or Tiwel Holding AG ("Tiwel").

[27] I now summarise the law with respect to dishonesty. The law with respect to dishonesty is settled. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty 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.[5]

[28] It is necessary to have regard to the particular respondents to the application and to ask oneself whether in the light of the dishonest conduct, which is asserted against them, there is a real risk of dissipation: **Jarvis Field Press Ltd v Chelton**.[6] The risk of dissipation must be established against each respondent.

[29] Where the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets.[7]

[30] The mere fact that a party has made an arguable case of dishonesty is not sufficient, without more, to constitute solid evidence of a real risk of unjustifiable dissipation. As Mr. Justice Popplewell said in **Fundo Soberano de Angola v dos Santos:**

> "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

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[5] Thane Investment Ltd v Tomlinson (No 1 [2003] EWCA Civ 1272 at 28.

[6] [2003] EWHC 2674 (Ch) at paragraph 10.

[7] VTB Capital plc v Nutriek International Corp [2012] EWCA Civ 808 Lloyd LJ at 177.

> dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty."

A good arguable case is not a particularly onerous one.

[31] Before the court concludes that there is a real risk of dissipation of assets on the basis of dishonesty, it should scrutinise with care whether the alleged or actual dishonesty justifies the inference of a real risk of dissipation of assets. Such an approach does not justify the conclusion that an arguable case of dishonesty or a proven case of dishonesty cannot give rise without more to an inference, as a matter of fact that there is a risk of dissipation of assets.[8]

[32] Having reviewed the submissions of the parties and the applicable law, I am in agreement with the submissions of Mr. McGrath on the issue of dishonesty and do not find that Jack J erred. Jack J noted that there are many allegations of dishonesty against Mr. Vekselberg and recognised that all of them are disputed and will need to be determined at the trial of this action. He did not disregard the allegations; he accepted that they had some weight in assessing the risk of dissipation but stated that the weight to be attributed to them was negligible. Weight being a contextual evaluation for the judge, this Court would not interfere with the judge's attribution of weight unless it is perverse. This standard has not been met in this case. I am also not of the view that Jack J applied a summary judgment test.

[33] Jack J made his own assessment of the existence or non - existence of a real risk of dissipation of assets. The court should scrutinise whether what is alleged in relation to a good arguable case really justifies the inference of a risk of dissipation. Mr. McGrath, KC submitted, and I agree, that Jack J was aware that the merits of a party's claim may be a significant factor in determining whether there is a real risk of dissipation. He however pointed out, that Emmerson's argument was based

[8] See paragraph 36 and 37 of FM Capital Partners Ltd v Marino & Ors [2018] EWHC 2612 (Comm).

solely on the fact that its claim against Mr. Vekselberg reached the very low threshold of a good arguable claim. That fact, without more, says almost nothing about whether there is a real risk of unjustifiable dissipation.

[34] Having regard to the law that the risk of dissipation of assets must be established against each respondent, allegations of dishonesty against Mr. Vekselberg, cannot constitute evidence of unjustifiable dissipation of assets by Renova, Berdwick or Tiwel.

Ground 5

[35] Ground 5 dealt with the issue of Mr. Vekselberg's alleged control of the Renova Group. Emmerson contended that the judge erred in applying the wrong test (the summary judgment standard) and failing to appreciate that Mr. Vekselberg's change of case in this regard is a factor supporting a finding of a real risk of dissipation. Emmerson asserted that Mr. Vekselberg's control of the Renova Group is one of the central substantive issues in these proceedings; in his pleaded case and witness statement he denied owning or controlling any of the companies in the Renova Group.

[36] Mr. McGrath, KC argued that the judge did not adopt a summary judgment standard when assessing Emmerson's arguments concerning Mr. Vekselberg's alleged control of the Renova Group (i.e. RHL and its subsidiaries). Mr. Vekselberg denied that he controlled the companies within the Renova Group. Emmerson asserted that Mr. Vekselberg's case on control was contradicted by certain documents. Renova contended that that assertion was incorrect, as the documents in question related to a separate group of companies based in Russia (LLS Renova and its subsidiaries). Mr. McGrath argued that Mr. Vekselberg's pleaded case in these proceedings has never denied that he owned and controlled that separate Russian corporate group. In the circumstances, he submitted that there is no basis for Emmerson's concluding that Mr. Vekselberg had knowingly pleaded a false case.

[37] Mr. McGrath, KC referred to Emmerson's argument that Mr. Vekselberg's witness statement for trial denied control, not only of the Renova Group (RHL and its subsidiaries) but also of the Russian corporate group. Mr. McGrath, KC however stated that Jack J correctly recognised that this was an obvious drafting error in the definition of the Renova Group used in the witness statement.

[38] I agree that Jack J correctly stated that the allegations concerning Mr. Vekselberg's alleged control of RHL and its subsidiaries are matters to be determined at trial. He did not disregard Emmerson's arguments about these matters; he accepted that they were relevant but correctly stated that they had little weight in assessing whether there is a real risk of unjustifiable dissipation. There is no basis for appellate intervention.

[39] Emmerson argued that the ability to control assets through complex offshore structures that 'disguise the identity of the owner or controller' is a basis for inferring a real risk of dissipation. This brings me to the applicable principles.

[40] In **Fundo Soberano de Angola v Dos Santos** at paragraph 86, the court said: "The respondent's former use of offshore structures is relevant but does not itself equate to the 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."

[41] In **Candy v Holyoake**[9] at paragraph 59, the court dealt with the judge's conclusion that the corporate structure of the appellant's companies was (at least) capable of contributing to evidence of risk. Gloster LJ stated:

> "I agree that if the appellant had shown that there was a risk of the appellants dissipating their assets - the appellants' links to complex offshore corporate structures could contribute to that risk. This is because a complex

[9] [2017] EWCA Civ 92 at 233.

> corporate structure or corporate reorganization could enable a party who is minded to dissipating assets to do so."

Lady Gloster pointed out that:

> "However, the mere possibility of a party using a complex corporate structure or corporate reorganization 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."

The court emphasised that:

> "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."

[42] Gloster LJ pointed out that several cases have emphasised that there is nothing implicit in complex, offshore corporate structures which evidences an unjustifiable risk of dissipation. As Arnold J said in **VTB v Nutritek:**[10]

> "It is not uncommon for international businessmen … to use offshore vehicles for their operations, particularly for tax reasons. This may make it difficult to enforce a judgment …. More is required before the court will conclude that there is a risk of dissipation."

[43] Mr. McGrath, KC submitted, and I agree, that Emmerson's argument is flawed for the reasons that:

(1) It has not established that Mr. Vekselberg controls any of the companies in the Renova Group; and Jack J rejected the suggestion that Emmerson gained any real support from the documents Emmerson relied on in supporting its assertion.

(2) The argument is directly contrary to the well - established principle that "There is nothing implicit in complex off – shore corporate structures which evidences an unjustifiable risk of dissipation."

(3) Even if such control is established all that proves is the existence of such control; which itself says nothing about how that control is likely

[10] [2011] EWHC 3107 (Ch).

to be exercised. It does not suggest that the only sensible conclusion is that such control will be used unjustifiably to dissipate assets. The court still requires "solid evidence" of a "real risk" that such control will be exercised in order wrongfully to dissipate assets. There is no such evidence in this case.

Ground 6

[44] In Ground 6 Emmerson complained that Jack J erred in finding that the Liwet Transfers did not show solid evidence of a real risk of asset dissipation. The Liwet Transfers had two elements: (i) an asset swap with certain minority shareholders in the Renova Group, and (ii) a transfer of shares (the "LTI Transfer") designed partially to satisfy Renova's pre-existing obligation to fund a long-term management incentive scheme which had been established in January 2016 for the benefit of certain senior executives. Jack J recognised that there was nothing improper about these transfers.

[45] Emmerson complained that Jack J's finding that the Liwet Transfers did not establish a risk of dissipation is wrong because: (i) he misdirected himself and failed to take account of the fact that the Liwet Transfers go to the risk of dissipation in two respects. The first is that the transactions are dissipatory; secondly, in breach of the Asset Disclosure Order, the respondents have failed to provide disclosure in relation to those transactions. Emmerson posited that Jack J only considered the first matter, and had he considered the second matter, he ought to have held that there was a risk of dissipation because:

(a) The judge had himself held that "the absence of documentation is highly suspicious."

(b) It is inconceivable that such substantial commercial transactions would not be the subject of written communications and written records.

(c) It is incredible that a long-term incentive plan would not be written down anywhere.

[46] Emmerson contended in the alternative, among other things, that if the judge did consider the second matter, then his finding that there was no risk of dissipation is irrational. In that regard Emmerson argued, inter alia, that a real risk of dissipation ought to be held to exist where there are solid grounds for believing that a party has deliberately breached an injunction requiring it to give disclosure. Emmerson further contended that Jack J erred in his approach to the Liwet Transfers; that is, whether they were an attempt to conceal the beneficial ownership of Mr. Vekselberg and Renova, of the Liwet shares.

[47] Mr. McGrath, KC argued that Emmerson's complaints focused almost entirely on what it says are missing documents concerning the Liwet Transfers. He pointed out that at the Discharge Hearing, it was explained that those missing documents either did not exist or did not fall within the scope of the Asset Disclosure Order. Mr. McGrath, KC submitted that in the context of Emmerson's Unless Order Application, Jack J considered and rejected the allegation that Mr. Vekselberg had failed to disclose certain documents concerning the Liwet Transfers (see Ground 29). Jack J also considered and rejected the allegation that Renova had breached the Asset Disclosure Order merely by reason of its decision not to duplicate the disclosure provided by Mr. Vekselberg (see Ground 14).

[48] Although Jack J regarded the absence of additional documents relating to the LTI Scheme as "highly suspicious" he recognised that he was not in a position to reject the respondents' evidence on that issue in the absence of cross-examination unless it was incredible. In my view, the judge was correct. It is established that: "In the absence of cross - examination, the court is not entitled to reject any written evidence as being untrue, unless on the basis of all the evidence before the court it considers that that written evidence is simply incredible." The court, therefore,

cannot reject written evidence as being untrue, unless it is simply incredible.[11] That is, of course, a strict standard. I agree with Mr. McGrath, KC that Jack J was entitled to conclude that that strict standard was not satisfied on the evidence before him; consequently, there was no basis to conclude that any documents falling within the scope of the Asset Disclosure Judgment had been withheld.

[49] Emmerson also argued that having concluded that there was no breach of the Asset Disclosure Order, Jack J then disregarded the lack of documentation concerning the LTI Scheme. As Mr. McGrath pointed out, Jack J indicated that this point remained relevant to his assessment of whether there was a real risk of unjustifiable dissipation, but nevertheless concluded that the evidence indicated that the Liwet Transfers were legitimate transactions intended to mitigate the effect of United States sanctions. I agree that these transactions could not therefore be characterised as unjustified and could not qualify as a relevant act of unjustifiable dissipation for the purposes of a freezing order.

[50] Jack J also correctly recognised that there was no basis to conclude that the Cypriot trusts to which the Liwet shares had been transferred were shams, as that would have required a finding of dishonesty on the part of all those involved, for which there was no evidence. Jack J further noted the absence of evidence that the value of the LTI Scheme (although large) was out of the ordinary compared to the levels of renumeration of senior executives in the industry. In the circumstances, I agree that Jack J's conclusion that the Liwet Transfers do not provide any evidence, still less solid evidence, of a real risk of unjustifiable dissipation. That conclusion cannot be said to be plainly wrong and does not therefore attract appellate interference.

Ground 7

[51] In Ground 7, Emmerson contended that Jack J ignored the figures in Renova's interim consolidation financial statements for the six months up to 30th June 2018 which were disclosed pursuant to the Renova freezing order. Emmerson posited

[11] See Wards Solicitors v Hendawi [2018] EWHC 1907 (Ch.) at paragraph 3.

that they were highly relevant to the risk of dissipation of assets because on the respondents' case, these records provided the only documentary evidence in support of its case that the LTI was a genuine liability.

[52] Mr. McGrath, KC submitted that Jack J clearly considered Emmerson's arguments about those accounts and recognised that they provided little support for Emmerson's assertions concerning the Liwet Transfers. In fact, he found that the accounts were "very peripheral to the issues for me to decide". In my view, it was a finding that was open to the judge.

[53] With respect to Emmerson's complaint that Jack J failed to give proper reasons for his conclusions, it is clear that adequate reasons were given; it is also noted that Emmerson made no complaint to Jack J about the alleged failure to give reasons after the Discharge Judgment was handed down in draft.

Ground 8

[54] In Ground 8, Emmerson complained that Jack J erred in not admitting the expert accountancy report produced by Paul Doxey ("the Doxey Report") in relation to the LTI. Emmerson relied on the evidence in order to suggest that the consolidated financial statements of Renova did not provide evidence of the existence of the LTI Scheme and or that there must be additional documents relating to that scheme which had not been disclosed. Emmerson pointed out that Jack J accepted that the Doxey Report "supports Emmerson's primary case that there was no long-term incentive program" but concluded that: "it can be seen that, even if I admitted Mr. Doxey's evidence, it would not change my conclusions in this matter".

[55] Emmerson posited that Jack J was wrong on a number of different grounds, including procedural unfairness and irrationality, because Jack J recognised, among other things, that the Doxey Report was relevant evidence which supported its primary case. Further or in the alternative, Jack J failed to give reasons for his

conclusion, and wrongly excluded highly material evidence on the issue of the existence of a real risk of asset dissipation from his analysis.

[56] As Mr. McGrath, KC pointed out, Emmerson ignored the fact that Jack J stated that while he did not think it was necessary to rule on the admissibility of the Doxey Report, he had nevertheless read the report *de bene esse*, and explained that the report added nothing to Emmerson's argument. In the circumstances, I accept Mr. McGrath's submission that the judge's approach was sensible and pragmatic and there was nothing procedurally unfair or irrational about it. Mr. McGrath, KC also submitted, and I agree, that Jack J was entitled to take the view that the Doxey Report had very little relevance. Mr. Doxey concluded in his report that the absence of documents relating to the terms of the LTI Scheme would not have prevented liabilities relating to that scheme being recorded in Renova's audited consolidated financial statements for 2017 ("the 2017 Audited Accounts").

Ground 9

[57] In Ground 9, Emmerson complained about Jack J's assessment of a transfer of shares in CJSC KES -HOLDING ("KES") from IES (Cyprus) to Merol Trading Limited ("Merol") on 7 September 2018 ("the T Plus Transaction"). Jack J concluded that the T Plus Transaction provided no evidence of a real risk of unjustifiable dissipation at all. Although Emmerson submitted that Jack J's conclusion was wrong, no proper basis for appellate interference was provided.

[58] Mr. McGrath KC rejected as incorrect, Emmerson's assertion that the T Plus Transaction involved IES Cyprus losing US $ 54 million. Mr. McGrath posited that the T Plus Transaction involved a share swap whereby IES Cyprus transferred shares in KES to Merol (a third party); and in exchange, Merol transferred shares of equivalent value in PAO T Plus ("T Plus") to IES Cyprus, it was neither a dissipation, nor was it on terms other than at arm's length, as Jack J recognised.

[59] Mr. McGrath, KC submitted that as the transaction involved IES Cyprus receiving assets (i.e., shares in T Plus) which were worth the same total value as the assets which it transferred to Merol (i.e., shares in KES), it was neither a dissipation, nor was it on terms that were anything other than arms' length, as Jack J recognised. Further Jack J was entitled to accept the respondents' unchallenged evidence that the purpose of that transaction was entirely legitimate, i.e., to mitigate the effect of US Sanctions. In the premises, I agree with the respondents' submission that even if the transaction could be described as dissipation, it could not be said to be unjustifiable, and consequently would fall out with the ambit of conduct meriting freezing relief.

[60] Jack J correctly stated that the respondents did not need to adduce evidence of the liabilities which encumbered the shares in T Plus held by KES. Jack J referred to **Candy v Holyoake** at paragraph 50, where the court stated that the legal burden of proof is on an applicant seeking to satisfy the requirements of a freezing order. At paragraph 51 the court stated:

> "… 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 question posed. 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."

In the circumstances Jack J was entitled to form the view that Emmerson had not established a sufficient case to answer in respect of the T Plus Transaction.

Ground 10

[61] Ground 10 concerned the issue of deemed admission pursuant to CPR 18.12 by reason of Renova's failure to file a defence to the claims against it. Emmerson contended that Jack J erred in concluding that Renova's deemed admissions provided no basis from which a real risk of unjustifiable dissipation could be inferred. Emmerson posited that Jack J ought to have directed himself that there were several facts which are not in dispute and from which a risk of dissipation could be inferred: (1) Renova had decided not to challenge claims made against it in fraud; (2) had no

prospect of avoiding judgment being entered against it; and (3) had no intention further to participate in the proceedings. Further, a freezing order against a defendant who has made such an admission is effectively a post - judgment freezing order because their liability has already been determined.

[62] Emmerson stated that the facts admitted by Renova included that Mr. Vekselberg managed and controlled Renova at all material times and he and other senior individuals within his organization made a series of fraudulent misrepresentations to Mr. Abyzov and Emmerson. Those fraudulent representations by Mr. Vekselberg were made on behalf of Renova and are attributable to Renova. Renova was therefore liable in deceit and conspiracy to cause loss by unlawful means.

[63] I accept Mr. McGrath's submission that Jack J was entitled to conclude that the deemed admissions were irrelevant. They do not on any view constitute evidence of fraud. They merely constituted a procedural bar preventing Renova from contesting the merits of the claims against it. Further, despite its assertions to the contrary, Emmerson had not established that it is entitled to any judgment against Renova. In the circumstances, the freezing order cannot be described as a post judgment freezing order.

Ground 11

[64] In Ground 11 Emmerson complained about Jack J's approach to the Asset Disclosure Judgment handed down by Wallbank J on 29th October 2018, and which concerned an application seeking a disclosure of assets by, among others, Renova and Mr. Vekselberg. Wallbank J had given three judgments in the same proceedings addressing a number of the same issues that arose before the judge on these applications: being Wallbank J's Asset Disclosure Judgment of 29th October 2018 (granting an asset disclosure order against two of the respondents) and his judgments of 19th November and 31st December 2018 (granting the Freezing Orders).

[65] In the Asset Disclosure Judgment, Wallbank J said:

> "The totality of the circumstances, which include the revelation of an apparent plan to 'clean up' IES Belize in anticipation of legal action by the APs and the alleged use of at least one nominee to hold assets, presents the Court with objective facts from which a risk of dissipation can be inferred."

[66] Emmerson argued that Jack J's approach that it was common ground that he should only give such weight as "he thought appropriate" to the Asset Disclosure Judgment was wrong in law. Rationality and comity required that a first instance court will follow an earlier decision at the same level unless convinced that it was wrong. Further, Jack J failed to consider the relevant reasoning and conclusion of Wallbank J and or give reasons for departing from them. Also, Jack J failed to take into account that Wallbank J had already found a real risk of asset dissipation.

[67] In considering the matter, I am guided by the principle that fairness requires that the court must decide on the basis of the evidence before it, rather than simply adopting the opinion of another court. Findings of fact by another decision maker are not to be admitted in a subsequent trial because the decision in that trial is to be made by the judge appointed to hear it and not another. The decision maker must decide the case for himself on the evidence that he receives and in the light of the submissions on that evidence made to him.[12]In that regard, as the relevant decision maker, Jack J was tasked to decide the case for himself on the evidence that he received and in the light of the submissions on that evidence made to him.

[68] I therefore accept Mr. McGrath's argument that it was proper for Jack J to take his own course, and he was not bound by observations made by Wallbank J in the Asset Disclosure judgment. In any event, the Asset Disclosure judgment was based on a very different test from that which applies to applications for freezing relief.

[12] Rogers v Hoyle [2014] EWCA Civ 257 at 39.

[69] Mr. McGrath submitted, and I agree that Ground 11 is essentially about the weight which Jack J attached to the Asset Disclosure Judgment; and this is not a basis upon which an appellate court will interfere with the Discharge Order, unless Jack J's approach was plainly wrong. Further, Jack J did not dismiss Wallbank J's finding as being irrelevant. Jack J conducted a detailed examination of the judgment. He recognised that Wallbank J was familiar with the proceedings and expressly agreed with his views on a number of issues. Jack J clearly took the view that Wallbank J's findings were relevant, but not decisive. Jack J's approach cannot be faulted.

[70] Jack J would have recognised that Wallbank J had stated at a hearing of 12th December 2018 (shortly after the discharge application had been filed) that there existed a "reasonable prospect that the freezing order may be discharged". I accept Mr. McGrath's argument that this indicated that Wallbank J did not consider his views in the Asset Disclosure Judgment constituted binding or conclusive findings supporting or somehow requiring relief. In any event, it however fell to Jack J as the presiding judge at the Discharge Hearing, to consider the evidence and submissions and reach his own conclusion.

Ground 12

[71] Ground 12 asserted that Jack J misdirected himself by considering factors relevant to the risk of dissipation in isolation from each other, thus failed to take into account the circumstances of the case as a whole. Mr. McGrath KC rejected this criticism of Jack J. He noted that at the Discharge Hearing, Emmerson had identified seven distinct factors which were said to give rise to a real risk of unjustifiable dissipation. The judge analysed each factor, then considered the cumulative effect of Emmerson's arguments and the evidence as a whole and concluded that Emmerson had not satisfied the strict test of establishing "solid evidence" of a real risk of unjustifiable dissipation. This is borne out by the fact that Jack J stated that a number of the factors were "relevant" but not "determinative." Further, when Jack J considered "factor 4" the Liwet Transfer, he referred back to Emmerson's

arguments concerning factors 1 and 2 (i.e., the emails concerning the 2011 Starlex Transfer and Mr. Vekselberg alleged change of case). Moreover, Jack J quoted the passage from the Asset Disclosure Judgment, where Wallbank J had stressed the need to consider the "totality of the circumstance". In my view, for these reasons, there was no error of principle in Jack J's approach to Emmerson's arguments on the risk of dissipation.

Ground 13

[72] Ground 13 alleged that Jack J erroneously sought to confine the matters relevant to the risk of dissipation to seven matters, even if it did not rely on these matters alone, but on a number of further matters. In my view, this does not have much traction for the reason that, as Mr. McGrath contended, the further matters identified by Emmerson (example, arguments about the Liwet Transfers and alleged dishonesty of the respondents) were merely aspects of its arguments concerning the seven factors identified in its skeleton arguments for the Discharge Hearing. Further, as Mr. McGrath pointed out, Jack J considered all of the further matters when considering Emmerson's arguments in relation to the seven factors. Jack J was entitled to find that on the evidence as a whole, the requirement of solid evidence of a real risk of unjustifiable dissipation had not been satisfied.

Ground 14

[73] Ground 14 concerned Jack J's construction of the Asset Disclosure Order. The Asset Disclosure Order provided that Mr. Vekselberg and Renova shall produce and or cause Renova Innovation Technologies Ltd and Liwet Holding to produce to the applicant all documents relating to the transfer of shares in Liwet Holding AG to persons or entities associated with the Mr. Vekselberg made since 6th April 2018.

[74] Mr. Vekselberg disclosed 714 documents pursuant to the Asset Disclosure Order. Renova did not disclose any documents pursuant to the order, on the bases that it did not wish to be seen to be submitting to the BVI court's jurisdiction and because it considered that the Asset Disclosure Order did not require it to disclose the

relevant documents itself, if they were in fact disclosed by Mr. Vekselberg. Renova confirmed that all of the documents within its control falling within the scope of the Order had already been disclosed by Mr. Vekselberg.

[75] Emmerson argued that Jack J wrongly construed the Asset Disclosure Order to mean that Renova's obligation could be satisfied by Mr. Vekselberg providing disclosure; and wrongly held that disclosure by Mr. Vekselberg automatically discharged the obligation on the part of Renova. Emmerson submitted that Jack J's finding constituted an erroneous construction of the Order; was made on the basis of three irrelevant or erroneous matters and was contrary to Wallbank J's interpretation of his own order. Essentially, Emmerson argued that Jack J was wrong to conclude that the Asset Disclosure Order imposed a joint obligation on Mr. Vekselberg and Renova, and therefore did not require Renova to duplicate the disclosure provided by Mr. Vekselberg.

[76] Emmerson relied on **Sans Souci Limited v VRL Services Limited**[13] at paragraph 13. The Board stated that the construction of a judicial order is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. The real issue is whether the meaning of the language is open to question.

[77] Mr. McGrath, KC argued in favour of the correctness of Jack J's interpretation of the Asset Disclosure Order. Paragraph 1 of the Asset Disclosure Order simply stated that Mr. Vekselberg and Renova must produce documents relating to the Liwet Transfers (or procure Renova Innovation Technologies Ltd or Liwet to produce those documents). Mr. McGrath KC stated that is prima facie a joint obligation.

[78] Jack J stated that a requirement for 'A and B' to make a payment of $1000.00 to C, without more, would be a joint obligation (which could be satisfied by either A or B

[13] [2012] UKPC 6.

making the payment). Mr. McGrath, KC submitted, and I agree, that this obligation could be satisfied by either party and that there is nothing in the Asset Disclosure Order to displace this interpretation.

[79] The purpose of the Asset Disclosure Order was to ensure that documents relating to the Liwet Transfers were produced. Renova's confirmation that all documents within its control falling within the scope of the Asset Disclosure Order had been disclosed by Mr. Vekselberg, meant that the purpose of the order was achieved. That being the case, I accept Mr. McGrath's submission that it did not matter who, as between Renova and Mr. Vekselberg, provided those documents to Emmerson.

[80] Significantly, in its skeleton arguments for the Discharge Hearing, Emmerson conceded that if the documents had been provided directly by Renova Innovation Technologies Ltd or Liwet, the Asset Disclosure Order would not have required either Mr. Vekselberg or Renova to provide any disclosure themselves. Given that concession, Emmerson's argument that under the Asset Disclosure Order, it was "plainly necessary" for both Renova and Mr. Vekselberg to provide disclosure, is not sustainable.

[81] Mr. McGrath, KC argued, quite correctly, that Jack J's indication during the ex parte hearing on 18th November 2018 that he thought RHL had breached the Asset Disclosure Order shed no light on the proper construction of that order. Mr. McGrath, KC further posited that any alleged technical breach of the Asset Disclosure Order by reason of RHL failing to duplicate the disclosure provided by Mr. Vekselberg is irrelevant and provides no basis from which to infer a real risk of unjustifiable dissipation. I agree. Mr. McGrath, KC submitted that "these matters are important because the false allegation that RHL had deliberately breached the Asset Disclosure Order was the principal basis upon which Wallbank J granted the RHL freezing order.

Ground 15

[82] Ground 15 alleged that the judge erred in finding that Renova had not abused the court's process. Emmerson alleged that the judge misdirected himself by wrongly characterizing the issue as whether Renova was legitimately refusing to submit to the court's jurisdiction. The issue was whether it was an abuse of process for Renova to adopt the position that it would not comply with any future order or judgment that the court may make against it but nevertheless ask the Court to grant relief in the proceedings as and when it suited Renova. By mischaracterizing the issue and misdirecting himself the judge failed to consider the real issue which engaged the proper administration of justice. If the judge had properly directed himself, he would have determined that: (a) By making the Discharge Application (rather than by not submitting to jurisdiction) Renova abused the process of the court; (b) Even if Renova's application was not an abuse of process, the court should exercise its discretion as to whether to hear the application as this was an issue that went to the administration of justice and ought to have exercised its discretion to refuse relief.

[83] Essentially, Emmerson criticised the judge for his approach to the allegation that Renova is abusing the process of the court by refusing voluntarily to submit to the BVI Court. Mr. McGrath, KC submitted that the argument is unmeritorious, and Jack J was correct in suggesting that whether or not Renova had submitted to jurisdiction is a matter for a foreign court at the enforcement stage.

[84] I accept Mr. McGrath's submission that even assuming that Renova has somehow submitted to the jurisdiction of the BVI Court, that manifestly provided no basis from which to infer a real risk of dissipation nor would it provide a basis on which to strike out the discharge application.

Ground 16

[85] Ground 16 asserted that the judge erred in finding that Emmerson had delayed in the period after May 2018 in applying for the Freezing Order against Mr. Vekselberg

and Renova and that such delay would in itself render the granting of the freezing order inappropriate. Emmerson posited that Jack J misunderstood and misapplied the dicta of Gloster LJ concerning the relevance of delay in **Candy v Holyoake**.

[86] Mr. McGrath, KC disagreed with the notion that Jack J misunderstood and misapplied the dicta of Gloster LJ concerning the relevance of delay. He posited that Gloster LJ emphasised that delay in applying for a freezing order can be a powerful factor militating against the conclusion of a real risk of dissipation. Mr. McGrath, KC asserted that the proceedings had commenced five years prior and the respondents were expressly put on notice six months prior to the ex -party application against RHL that Emmerson was likely to make an application for a freezing order.

[87] It is well established that delay is an important factor in determining whether there is a real risk of unjustifiable dissipation, and whether, even if such a risk exists, it is appropriate for the court to exercise its discretion to grant a freezing order. It is not generally the rule that delay in applying for a freezing injunction is a bar in itself for the obtaining of relief. The relevance of delay is that it may show that the claimant actually never believed that there was a real risk of dissipation and that if the claimant had seriously thought that there was, an application would have been made earlier.[14] Delay may also mean that the assets sought to be restrained have already moved.

[88] In **Madoff Securities International Ltd v Raven[15]** Flaux J observed:

> "The mere fact of delay in bringing an application for a freezing injunction … does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay …".

[14] JSC M P Bank v Pugachev [2015] EWCA Civ 906 at paragraph 34.
[15] [2011] EWHC 3102 (Comm).

[89] Mr. McGrath submitted that there is no difference between the approach adopted by Wallbank J in the Asset Disclosure Judgment and that of Jack J in the Discharge Judgment; both judges considered that Emmerson had been guilty of prolonged and unexplained delay in seeking freezing relief.

[90] Jack J concluded that Emmerson's delay in seeking freezing relief was an independent reason why the freezing order needed to be discharged. That conclusion was based on the period of delay between Emmerson's application for the Asset Disclosure Order filed and served on 16th May 2018 and its ex - parte applications for the freezing orders in November and December 2018. Jack J considered that Emmerson had been guilty of culpable delay, which in itself, justified discharging the freezing orders. Further, Jack J considered the overall ambit of the delay, including the period of almost five years between the commencement of the proceedings and Emmerson's decision to apply for a freezing order, and how that delay generally impacted on the criteria for freezing relief (including the existence or otherwise of a real risk of unjustifiable dissipation).

[91] The delay in Emmerson seeking a freezing order after 16th May 2018 was a relevant factor which Jack J was entitled to take into account. Jack J noted that there was no evidence that any of the respondents had sought unjustifiably to dissipate assets after they had received notice of Emmerson's application for an Asset Disclosure Order, which expressly stated that Emmerson was considering applying for freezing relief. Jack J was clearly entitled to take the view that the absence of any unjustifiable dissipation of assets since May 2018 indicated that there was no real risk of any unjustifiable dissipation of assets in the future and that the delay rendered freezing relief inappropriate in the circumstances. In the circumstances, I see no basis for appellate intervention.

[92] As Mr. McGrath, KC pointed out, the only allegation of dissipation relating to the period after 16th May 2018 was Emmerson's assertion regarding the T - Plus Transaction in September 2018, which the judge correctly rejected as without any

foundation. The Liwet Transfers were completed two days after Emmerson filed its application for the Asset Disclosure Order, but there was no suggestion that the transfers were a reaction to that application.

[93] Emmerson sought to rely on the need to await receipt of documents under the Asset Disclosure Order made by Wallbank J on 29th October 2018 as a justification for delay in seeking freezing relief in the period after May 2018 against Renova. Mr. McGrath KC submitted quite properly, that, that's a bad point, in circumstances where Emmerson in fact failed to do precisely that and applied for freezing relief against Renova without waiting to see what disclosure would be provided by Mr. Vekselberg.

Ground 17

[94] In Ground 17 it is asserted that Jack J erred in finding that Emmerson should have made the application for the freezing orders on notice to the respondents at an *inter partes* hearing, and it was a quintessential example of a case which should have been heard *inter partes*.

[95] Mr. McGrath, KC stated that it is well established that *ex parte* applications should be exceptional; they should only be made "where there is positive evidence that to give notice would lead to irretrievable prejudice being caused to the applicant." A party will rarely be justified in making an application for a freezing order on an *ex parte* basis if proceedings against the respondent have already been commenced.

[96] Mr. McGrath, KC argued that the criticism of Jack J is unfounded. In support thereof he submitted that the application for the Asset Disclosure Order was made on an *inter partes* basis and expressly stated that its purpose was to enable Emmerson to decide whether it needed to apply for freezing relief. It was therefore inappropriate for Emmerson to make its subsequent application for freezing orders without notice. I accept Mr. McGrath's submission that Jack J was perfectly entitled to reach that conclusion.

Ground 18

[97] Grounds 18 to 22 addressed the issue of material non - disclosure. The relevant principles pertinent to full and frank disclosure are well - established. The duty of full and frank disclosure on an *ex parte* application is of great importance. The duty of the applicant is to make "a full and fair disclosure of all the material facts." The material facts are those which it is material for the judge to know in dealing with the application as made. The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made. The question of materiality is a matter for the court and not the subjective judgment of the applicant or his lawyers.[16]

[98] If the court finds there have been breaches of the duty of full and fair disclosure on the *ex parte* application, the general rule is that it should discharge the order obtained in breach. The court however does have a discretion to continue the order despite the failure of disclosure. That jurisdiction should be exercised sparingly and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.[17] There is no hard and fast rule as to whether the discretion to continue or regrant the order should be exercised, and the court must take into account all relevant circumstances.[18]

[99] Ground 18 asserted that the judge erred in finding that Emmerson made a serious non - disclosure in not referring the court to the suggestion made by the respondents' counsel at the hearing of the Asset Disclosure, that any application for a freezing order should be heard *inter partes*. In my judgment, and as Mr. McGrath, KC submitted, it was material factor for the judge to know in dealing with the application. A party making an application without notice must disclose all material

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16 See Alliance Bank JSC v Zhunus [2015] EWHC 714 Comm at [65].
17 National Bank Trust v Yurov [2016] EWHC 1913.
18 See Millhouse Ltd v Sibir Energy Plc [2008] EWHC 2614 (Ch) at 102.

relevant matters to the court. This includes arguments which might be raised by the respondents and any relevant defences. Emmerson had a duty to raise this point at the *ex parte* hearing. Jack J was entitled to reach the conclusion that this was a serious non-disclosure.

Ground 19

[100] Ground 19 asserted that the judge wrongly decided that at the hearing on 19th November 2018, at which Emmerson applied for a freezing order against Renova, it should have asked for the hearing to be adjourned to allow time to review Mr. Vekselberg's disclosure. Emmerson contended that the decision was wrong for the reasons that:

(a) The application for the freezing order was urgent because there was a real risk of Renova dissipating its assets.

(b) At the hearing of 19th November 2018, Emmerson informed the judge that Mr. Vekselberg 's disclosure had only just been received; provided the court with a copy of his disclosure affidavit and invited the court to read it. The court did not consider that the adjournment was required. This was a decision that was made by the court.

(c) The judge was wrong to characterise this complaint as material non-disclosure. It is a complaint about a decision made by Wallbank J not to adjourn a hearing.

(d) The judge had no jurisdiction to consider this complaint, as it should have been brought by way of appeal and not by way of application to discharge the order.

(e) The finding that the failure to inform Wallbank J of the documents was a material non -disclosure is contradicted by the judge's own finding that the extent of that disclosure was "highly suspicious".

[101] Jack J concluded that Emmerson committed a further serious non - disclosure at the *ex-parte* hearing of 19th November 2018, by failing to explain to the judge the content of any of the 714 documents disclosed by Mr. Vekselberg pursuant to the Asset Disclosure Order. Jack J recognised that when those documents were received during the course of that hearing, Emmerson should have requested a short adjournment in order to review the documents and explain them to Wallbank J. Emmerson did not do so but pressed ahead with its application for the freezing order regardless of the content of those documents. I accept Mr. McGrath's submission that Jack J was entitled to regard this as a serious breach of Emmerson's duty of full and frank disclosure.

[102] In that regard, I find **Siporex Trade v Comdel**,[19] to be useful. Bingham LJ addressed the issue of material non - disclosure in respect of an applicant for a without notice freezing order. Such an applicant must disclose his case fully and fairly; summarise his case and the evidence in support of it; identify the crucial points for and against the application and not rely on general statements "and the mere exhibiting of numerous documents."

Ground 20

[103] Emmerson stated in Ground 20 that the judge wrongly decided that it should have drawn to Wallbank J's attention a potential argument of construction of the Asset Disclosure Order, to the effect that Renova could rely on Mr. Vekselberg's compliance with the Asset Disclosure Order, so as to satisfy its own obligations.

[104] Jack J concluded that Emmerson breached its duty of full and frank disclosure at the 19th of November hearing by failing to indicate that Renova may wish to rely on an alternative interpretation of the Asset Disclosure Order, namely, it imposed a joint obligation and did not require Renova to duplicate Mr. Vekselberg's disclosure.

[19] [1986] 2 Lloyd's Rep 428 at 437.

[105] As Mr. McGrath, KC correctly contended, even if the court agreed that this was not a correct interpretation of the Asset Disclosure Order, it was a reasonable and obvious possible interpretation of that order (as demonstrated by the fact that it was adopted by Jack J after hearing the submissions of both parties on the issue). In the circumstances, Emmerson should have brought it to the attention of Wallbank J. Jack J was entitled to regard it as a serious non -disclosure.

Ground 21

[106] In Ground 21, it is alleged that the learned judge erred in finding that Emmerson had committed a "middling breach" of its duty of full and frank disclosure in failing to draw Wallbank J's attention to the absence of a provision for legal expenses in the draft of the freezing order sought against Mr. Vekselberg.

[107] This ground concerned the absence or omission from the freezing order against Mr. Vekselberg, the standard exception for legal expenses. Mr. McGrath submitted that there is no basis for this court to interfere with Jack J's conclusion. He argued that even if Emmerson took the view that no exception for legal expenses was required, it was incumbent upon it to bring this unusual feature of the freezing order to the attention of Wallbank J at the *ex parte* hearing. It failed to do so, and as such Jack J was entitled to conclude that this constituted a "middling breach" of the duty of full and frank disclosure. I accept Mr. McGrath's submission that this is a conclusion the judge was entitled to reach. Mr. McGrath, KC pointed out that Emmerson agreed on 24th January 2019 to amend the freezing order against Mr. Vekselberg to incorporate a legal expense exception, thus highlighting that such exception was appropriate and should have been included from the outset.

Ground 22

[108] Ground 22 alleged that Jack J erred in finding that Emmerson breached its duty of full and frank disclosure, albeit a modest breach, in failing properly to bring to the judge's attention the detailed explanation of the Liwet Transfers contained in the first

affidavit of Mr. Michaelides, which was filed and served over three weeks before the *ex parte* hearing.

[109] At that hearing, Emmerson relied heavily on assertions concerning the Liwet Transfers. It was, therefore, highly relevant that Renova had already filed evidence providing a detailed explanation of the transfers. Emmerson failed to take Wallbank J to the paragraphs of the affidavit which explained the transfers. Mr. McGrath, KC submitted, and I agree, that Jack J was entitled to take the view that the high-level summary of Mr. Michaelides' evidence provided by Emmerson at the *ex parte* hearing was not sufficient. Given the importance of the issue, Emmerson had a duty to take Wallbank J specifically to the paragraphs of the affidavit dealing with this issue. In that regard, Mr. McGrath relied on **Petroceltic Resources Ltd v Archer**[20] at paragraph 79, where Cockerill J said at paragraph [79]:

> "… the duty to make proper disclosure goes beyond merely including relevant documents in the court bundle. It means specifically identifying all relevant documents for a judge and taking the judge to particular passages which are material and taking appropriate steps to ensure that the judge appreciates the significance of what he is being asked to read."

[110] I agree with Mr. McGrath, KC that by failing to take Jack J to Mr. Michaelides' evidence, Emmerson failed in its duty to make a fair representation of the issues. Jack J adopted a careful and balanced approach to the allegations of non-disclosure as reflected in the fact that he noted that this breach was only "modest" and on its own would not have justified discharging the freezing orders.

Ground 23

[111] Ground 23 is not an independent ground of appeal. It alleged that by reason of the matters stated in Grounds 1 to 22, the judge's approach to the Discharge application was wrong and he misdirected himself and erroneously exercised his discretion in not discharging the freezing order. Emmerson invited this Court to set aside the order and consider the application afresh. This Court is not persuaded by this

[20] [2018] EWHC 671 (Comm).

invitation. For the reasons given, Jack J was entitled to conclude that the freezing orders should be discharged for several independent reasons. His conclusion was not plainly wrong; therefore, it does not attract appellate interference.

[112] Grounds 24 to 28 concerned the jurisdictional challenge by Berdwick and Tiwel. Emmerson asserted that Jack J erred in holding that the BVI court had no jurisdiction to determine the claims against Tiwel and Berdwick, and there was no basis to grant Emmerson permission to serve the 'Chabra' order on those companies out of the jurisdiction.

[113] Mr. McGrath, KC contended that the judge was fully entitled to reach those conclusions. It is also instructive to bear in mind Jack J's holding that, even if the jurisdictional challenge had failed, they would still have had "a good case for seeking the discharge of the freezing orders against them on grounds of non - disclosure", for the same reasons as RHL. Mr. Vekselberg and ABC.

[114] Grounds 24 and 25 dealt with the 'necessary or proper party' gateway in CPR 7.3(2)(a). Ground 24 complained that the judge erred in finding that Berdwick and Tiwel were not "proper parties" within the meaning of CPR 7.3 (2) (a) (ii) and in declining permission to serve out of the jurisdiction on that basis. Emmerson argued that the decision was wrong on several bases including:

(1) the judge wrongly relied upon **Convoy Collateral Ltd v Broad Idea Investment Ltd**,[21] a decision that was irrelevant to the question of whether Berdwick and Tiwel are necessary or proper parties;

(2) the judge erred in failing to apply the correct test for whether a party is a 'necessary or proper party'.

[115] Ground 25 asserted that further or alternatively, the judge erred in holding that there was no issue between Emmerson on the one hand, and Berdwick and Tiwel, on the

[21] (BVI HC (Com) 0019/ 2018.

other, which it was reasonable for the court to try and therefore CPR 7.3 (2) (a) (i) was not satisfied.

[116] Emmerson submitted that **Convoy Collateral Ltd.** was irrelevant to the application and the judge should not have relied on it. **Convoy Collateral Ltd**. is authority for the proposition that the BVI Court will not grant an injunction in support of substantive proceedings in a foreign court, where the BVI Court has no personal or territorial jurisdiction over the respondent. **Convoy Collateral Ltd.** concerned a factual situation which was converse to what was before the judge on the Berdwick and Tiwel Jurisdiction Application, where the substantive proceedings are already on foot in the BVI Court.

[117] Emmerson contended that CPR 7.3 (2) (a) (i) is concerned with whether there is an issue between the anchor defendant (such as Mr. Vekselberg and Renova) and the respondent which is sought to be served (Berdwick or Tiwel). It is not concerned with whether there is an issue between the applicant for service out and the respondent which is sought to be served. Alternatively, Emmerson asserted that there is in any event an issue concerning the beneficial ownership of assets between itself and Berdwick and Tiwel which is reasonable for the court to try; and or personal claims as against Mr. Vekselberg and Renova to which Berdwick and Tiwel are also a party.

[118] In responding to grounds 24 and 25, Mr. McGrath KC pointed out that Jack J held that Emmerson could not rely on the jurisdictional gateway in CPR 7.3 (2) (a) (the 'necessary or proper party gateway') in order to obtain permission to serve the Schedule 6 Claims and the 'Chabra' order on Berdwick and Tiwel out of the jurisdiction because: (i) no cause of action was alleged against them; and (ii) in any event , Berdwick or Tiwel are not necessary or proper parties to any of the existing claims in these proceedings.

[119] In relation to the first of these two issues cited, Mr. McGrath, KC argued that the judge correctly noted that no substantive claim was brought against either Berdwick or Tiwel. Moreover, Emmerson never applied for nor had been granted permission to bring the substantive Schedule 6 Claims against Berdwick. In those circumstances the substantive claims against Berdwick were struck out pursuant to Jack J's order dated 9 May 2019. As a consequence, the only claims against Berwick and Tiwel were Emmerson's claims for declarations that those companies hold various Swiss shares (the shares to which the freezing orders were directed) on behalf of Mr. Vekselberg or Renova.

[120] Mr. McGrath, KC submitted that there was no basis for the assertion that either Berdwick or Tiwel held any assets on behalf of Mr. Vekselberg or Renova. In any event the declaratory claims involved no substantive cause of action. They were essentially an attempt to obtain declarations merely in order to assist enforcement of any judgment that may ultimately be obtained against Mr. Vekselberg and or Renova in these proceedings. In the circumstances, and as submitted by Mr. McGrath, Jack J was correct to take the view that this was fatal for Emmerson's attempt to rely on the 'necessary or proper' party gateway in CPR 7.3 (2) (a), which is only applicable if a substantive claim is brought against the proposed additional defendant (s) (i.e. Berdwick and Tiwel) in addition to the substantive claim against the anchor defendants (Mr. Vekselberg and Renova). Having failed to satisfy that requirement, I agree that Emmerson could not rely on CPR 7.3 (2) (a) in order to serve Berdwick and Tiwel out of the jurisdiction.

[121] Jack J was also correct to take the view, as submitted by Mr. McGrath, KC, that Berdwick and Tiwel were not 'necessary or proper' parties to any of the existing claims in these proceedings. The judge cited **Convoy Collateral Ltd**, which correctly noted the need for caution when applying the 'necessary or proper party gateway' especially in relation to claims with little or no connection with the jurisdiction. Mr. McGrath, KC cited **Altimo Holdings and Investment Ltd v Krygyz**

Mobil Tel Ltd[22] at paragraph 73, where Lord Collins stated that that gateway is anomalous because, unlike other heads of jurisdiction, "it is not founded on territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the [local court]."

[122] Mr. McGrath further submitted that the question of whether Berdwick and Tiwel are necessary and proper parties to any of the existing claims in the proceedings required consideration of whether any of those claims are "closely bound up" with the claims against Berdwick and Tiwel, such that they would involve "one investigation". Jack J was entitled to take the view that this requirement was not satisfied. The declaratory claims against Berdwick and Tiwel related solely to assets held outside the jurisdiction of the BVI, and which had no connection with the subject matter of any of the existing claims in these proceedings (ie the IES joint venture). The ownership of the Swiss shares is irrelevant to those existing claims. Jack J noted that the claims against the existing parties to this action can and will proceed without any need for Berdwick and or Tiwel to have any involvement in the proceedings.

[123] Mr. McGrath, KC submitted, and I agree, that therefore, there is no basis to suggest that the declaratory claims against Berdwick and Tiwel are somehow "closely bound up" with the existing claims in these proceedings. Jack J recognised that those declarations serve no purpose unless Emmerson obtained judgment against Mr. Vekselberg or RHL after trial of the action. Any questions concerning enforcement of such a judgment in relation to foreign assets held by Berdwick and Tiwel raise entirely separate issues from those raised by the existing claims in these proceedings, and such issues would only need to be considered by a foreign court at the enforcement stage if necessary.

[124] I accept Mr. McGrath, KC's submission that Jack J's approach was consistent with existing authority. A claim for ancillary relief in the form of "Chabra" relief does not

[22] [2012] 1 WLR 1804.

constitute a real (in the sense of substantive) issue which satisfies the requirement of CPR 7.3 (2) (a). Emmerson relied on **C v L**[23] for the proposition that 'the necessary or proper party' gateway is available in respect of freezing relief; this decision has however been doubted in recent English cases.

Ground 26

[125] In Ground 26, it is averred that Jack J erred in holding that if he had held that the necessary or proper gateway were satisfied, he would have nevertheless exercised his discretion to refuse permission to serve out of the jurisdiction. Emmerson complained that Jack J relied upon the very same factors upon which he relied in finding that the gateway was not satisfied, making the decision irrational and tainted by irrelevant considerations. Further, the judge failed to apply the correct test; and also, in exercising his discretion he failed to have regard to the relevant consideration that the BVI was clearly the appropriate forum for the trial of the dispute; and the personal claims made against Mr. Vekselberg and Renova to which Berdwick and Tiwel were also a party.

[126] Mr. McGrath, KC argued that Jack J accepted the respondents' submission that even if Emmerson's claim for declaratory relief fell within the 'necessary or proper party' gateway, Emmerson had not discharged its burden of demonstrating that the BVI was clearly and distinctively the appropriate jurisdiction in which those claims ought to be determined. In so doing, Jack J was entitled to take into account the matters which led him to conclude that no jurisdictional gateway was available. In particular, he was entitled to take account of the fact that Berdwick (a Cypriot company) and Tiwel, (a Swiss company) have no assets or business within the BVI, and the claims against them have no connection with either the BVI or the subject matter of these proceedings (the IES joint venture). In addition, the shares in Liwet, which are in part, the subject of the Schedule 6 Claims are held by discretionary trusts which are established in Cyprus and governed by Cypriot law.

[23] [2001] 2 All ER 446.

[127] I accept Mr. McGrath's submission that these were not irrelevant considerations, nor was it irrational for the judge to take them into account. Given the absence of any substantial connection between the Schedule 6 Claims and the BVI, and the very strong connection between those claims and Cyprus and Switzerland, there was no basis for Emmerson's assertion that the BVI was clearly and distinctly the most appropriate forum for the determination of those claims. Jack J's conclusion that it was, as a matter of discretion, inappropriate to grant permission to Emmerson to serve Berdwick and Tiwel out of the jurisdiction under the 'necessary or proper party' gateway (even if that gateway had been available) or under any other gateway, was not plainly wrong. In the circumstances, there is no basis for appellate interference with the exercise of the judge's discretion.

Ground 27

[128] Emmerson contended in ground 27 that the judge erred in finding that it could not rely on the 'tort gateway' CPR 7.3 (4) for permission to serve Berdwick and Tiwel out of the jurisdiction. The bases for that contention were, *inter alia*, that the decision was wrong in that:

(1) The judge held that the gateway could have no application because (1): that form of relief is posited on the applicant having no cause of action against the Chabra respondent.

(2) Emmerson did have causes of action against Berdwick and Tiwel, in respect of its personal claims against those companies.

(3) The judge held that, as he had disallowed amendments to the claim form served on ABC, that Emmerson could not rely on the tort gateway. It does not follow that the fact that amendments to the claim form have been disallowed, the claimant should not have permission to serve a claim form out of the jurisdiction on another party.

(4) The decision to allow the amendment was wrong.

(5) The judge wrongly held that the appellant purported to amend its pleadings so as to make a personal claim against Berdwick and Tiwel for conspiracy and causing harm by unlawful means.

(6) The judge wrongly held that there were fatal procedural defects in the appellant's original application for permission to serve out on Berdwick and Tiwel, which meant that permission to serve out should be set aside. The defects referred were that Emmerson needed to "identify the grounds, in other words, the gateways relied upon, and the evidence for the application."

(7) The judge wrongly proceeded on the premise that the automatic consequence of not having specified the tort gateway in the application notice is the setting aside of the order granting permission to serve out. CPR 26.9 (2) applies, so that the order is not invalidated unless the court orders otherwise.

(8) There is no requirement under CPR Part 7 to file evidence in support of the claim as against the respondent against whom permission to serve out is sought.[24] There is no procedural defect in this regard.

[129] Mr. McGrath, KC supported Jack J's statement that Emmerson could not rely on the jurisdictional gateway in CPR 7.3 (4) (which applies to, inter alia, if a claim is made in tort and damage was sustained within the jurisdiction) in order to serve Berdwick and Tiwel out of the jurisdiction. The judge reached that conclusion because Emmerson had not sought permission to serve any substantive claim against them out of the jurisdiction; and Emmerson had failed to identify the tort gateway in its application and supporting evidence when applying for the Chabra order, as required by CPR 7.5 (1) (a).

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[24] See: Rule 7.5 of the Civil Procedure Rules 2000.

[130] CPR 7. 3 (4) ordains that a claim form may be served out of the jurisdiction if a claim is made in tort and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction. CPR 7.5 (1) provides that an application for permission to serve out of the jurisdiction must be supported by evidence on affidavit, stating *inter alia*, the grounds on which the application is made; that in the deponent's belief the claimant has a case with a reasonable prospect of success.

[131] The principles to be applied when granting permission to serve a foreign defendant out of the jurisdiction are well established. The three basis criteria were restated by Lord Collins in **AK Investment CJSC v Kyrgyz Mobile Tel Ltd**[25] at paragraph 71. Firstly, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given (often referred to as "the gateways"). Thirdly, the claimant must satisfy the court that in all the circumstances the 'BVI' is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

[132] As Lord Sumption explained in **Four Seasons Holdings Incorporated v Brownlie,**[26] in order to establish a good arguable case in relation to a gateway: "the claimant must supply a plausible evidential basis for the application of a relevant gateway; if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available, if it can reliably do so".

[25] [2011] UKPC 7.
[26] [2017] UKSC 80 at [71].

[133] As Mr. McGrath, KC correctly argued, it is well - established that an application for permission to serve outside the jurisdiction must explicitly identify the heads (or gateways) of jurisdiction on which reliance is placed. The applicant must also satisfy the court that there is a good arguable case that the claim falls within the stated heads of jurisdiction by putting forward a plausible evidential basis on the material before the court. In the absence of such evidence, the court has no power to grant permission. This is reflected in the procedural requirement in CPR 7.5 (1) (a) that the affidavit evidence in support of the application must state "the grounds on which the application is made"; that is, it must identify clearly the jurisdictional gateways in CPR 7.3 on which reliance is placed and explain the basis for that reliance.

[134] Emmerson accepted that its notice of application and supporting evidence made no reference to the tort gateway in CPR 7.3 (4). The judge found that "[t] here was simply no evidence to support a tort claim against" Berdwick and Tiwel before Wallbank J. Mr. McGrath, KC submitted, and I agree, that the consequence of that concession is that the tort gateway was unavailable, and this ground must fail.

[135] Mr. McGrath, KC further submitted that Emmerson's reliance on the substantive Schedule 6 Claims cannot affect this result for the reasons that: (1) no substantive tort claim has ever been advanced against Tiwel and (2) the substantive Schedule 6 claims against Berdwick have been struck out. I agree.

[136] Mr. McGrath, KC noted that as part of the disposal of ABC's application in respect of the freezing order made against it, Jack J was required to determine the scope of the permission granted to Emmerson to amend its pleadings pursuant to Wallbank J's order dated 31st December 2018. Jack J held that paragraph 1 of the order did not grant Emmerson permission to introduce the substantive claims against Berdwick, Liwet and ABC which Emmerson subsequently sought to advance in Schedule 6 to its principal pleading. That flowed from the fact that, in its submissions and in the draft pleading amendments filed with its application, Emmerson had sought only Chabra relief and associated declarations. In the circumstances, I

accept the submission that Jack J was correct to adopt that reasoning in relation to the Schedule 6 Claims sought to be made against Berdwick.

[137] Further there is no evidence that Emmerson has suffered any damage as a result of the Liwet Transfers, let alone damage within the jurisdiction of the BVI. Emmerson's reliance on the tort gateway cannot be sustained. Further, Emmerson has failed to establish that the BVI is clearly and distinctly the most appropriate forum for the determination of any tort claims against Berdwick.

Ground 28

[138] Ground 28 alleged that Jack J erred in finding that: Berwick and Tiwel had filed an acknowledgement of service; were entitled to challenge jurisdiction; and were entitled to a declaration of non-service. Emmerson contended that the decision was wrong in that neither document was an acknowledgement of service within the meaning of CPR 9.7 (2), since in those documents Berdwick and Tiwel purported to deny service. The judge was wrong to find that a document in which a defendant denies having been served is actually an acknowledgment of service. Further, if Jack J had properly directed himself, he ought therefore to have held that Berdwick and Tiwel were not entitled to challenge jurisdiction since a precondition for doing so is to file a valid acknowledgement of service. It was premature for the judge to determine the question of service in circumstances where Emmerson had filed an affidavit pursuant to CPR 5.13 (2) and the process set out in that rule had not been completed. Once the jurisdiction under CPR 5.13 was engaged, the judge was wrong to determine the matter by another route. The judge did not appreciate the specific provisions for service within the BVI.

[139] Mr. McGrath, KC described as 'fundamentally misguided', Emmerson's argument that Jack J was wrong to reject its assertion that Berdwick and Tiwel were debarred from challenging the BVI Court 's jurisdiction (and seeking a declaration that they had not been served) because they had filed an acknowledgement of service on the requisite court form which, inter alia, denied that proper service had been effected.

[140] Mr. McGrath, KC posited that the accepted facts are that Emmerson purported to serve the 'Chabra' order and the Schedule 6 Claims on Berdwick and Liwet by serving those documents on legal practitioners in the BVI who were not authorised to accept such service. Emmerson had neither sought nor obtained permission for alternative service on Berdwick or Tiwel under CPR 7.8 A, and it chose not to attempt service outside the jurisdiction. In these circumstances, Mr. McGrath submitted, and I agree, there was no basis to suggest that Berdwick or Tiwel had been validly served.

[141] Given the circumstances, I accept Mr. McGrath's submission that Jack J was entitled to hold that "[a] party who claims not to have been served is entitled to dispute the jurisdiction of the Court on that ground" and that filing a qualified acknowledgement of service in the court - approved form (which is a mandatory precondition to dispute the court's jurisdiction) does not debar a party from challenging either service or jurisdiction. Jack J properly rejected Emmerson's argument to the contrary.

[142] Emmerson's reliance in Ground 28 on CPR 5.13 (2) is also misplaced as that rule does not apply to service on a defendant resident outside the jurisdiction; alternative service in such cases is governed exclusively by CPR 7.8 A.

Grounds 29 and 30

[143] Ground 29 asserted that Jack J erred in dismissing Emmerson's application for an 'unless order' requiring full and proper compliance by Mr. Vekselberg with the Asset Disclosure Order. Emmerson asserted that the judge was wrong in that, *inter alia*, he ought to have found that: Mr. Vekselberg and Renova had failed to comply with their disclosure obligations under the Asset Disclosure Order (see Grounds 6 and 14); alternatively, he applied the wrong test as to whether to make an unless order.

[144] Ground 30 alleged that the judge wrongly held that Renova was not abusing the court's process: (see Ground 15). As a consequence, the judge dismissed Emmerson's application to strike out the Discharge Application made by Renova.

[145] As Mr. McGrath, KC pointed out, Grounds 29 and 30 are really repetition of arguments correctly rejected by Jack J in his decision dismissing the Unless Order and Strike Out Application. These grounds but are entirely dependent on arguments relied upon by Emmerson in relation to Grounds 6, 14 and 15. For example, Emmerson's assertion that Mr. Vekselberg failed to disclose various documents alleged to exist concerning the Liwet Transfers, merely repeats the arguments made in Ground 6. Jack J was clearly entitled to conclude that the documents sought by Emmerson do not exist and consequently, there was no basis for concluding that Mr. Vekselberg had breached the Asset Disclosure Order.

[146] Emmerson's assertion that Renova was abusing the process of the court and remained in contempt by reason of a breach of the Asset Disclosure Order, simply repeats Grounds 14 and 15. Jack J correctly concluded that RHL was not in breach of the Asset Disclosure Order, and that its conduct did not constitute an abuse of process. Emmerson had not identified no independent grounds on which to impugn Jack J's dismissal of the strike out application.

[147] Of significance, Jack J noted that the relief sought by Emmerson in both the Unless Order and Strike Out Application was inappropriate and even if they were well founded, he would, as a matter of discretion refuse to grant them, i.e., the Unless Order against Mr. Vekselberg and Renova, and an order striking out Renova's discharge application. The decision not being plainly wrong, this court has no basis to interfere.

Ground 31

[148] Ground 31 alleged that Jack J was wrong in striking out Emmerson's application to commit Renova and Mr. Michaelides for contempt of court arising out of alleged

breaches of the Asset Disclosure Order by Renova. As Mr. McGrath, KC pointed out, that application depended on Emmerson's construction of the Asset Disclosure Order, which Jack J rightly rejected. Ground 31 would only have efficacy if Jack J was wrong in the construction, he placed on the nature of the obligations imposed by the Asset Disclosure Order and misdirected himself in relation to Emmerson's assertions about 'missing' documents which ought to have been disclosed by Mr. Vekselberg, pursuant to the Order. These matters were addressed in Grounds 6 and 14 and for the reasons set out therein, Emmerson's arguments fail.

Ground 32

[149] Ground 32 asserted that Jack J erred in awarding costs against Emmerson because he ought to have dismissed the respondents' discharge applications. This ground has no traction as Jack J was correct to make the Discharge Order and in light of the terms of the order, the respondents were clearly entitled to their costs relating to the relevant applications. The decision to award costs was not plainly wrong and fell within the generous discretion entrusted to the judge, hence there is no basis for appellate interference.

Conclusion

[150] In conclusion, I note that an appeal court is always reluctant to interfere with a finding of an experienced Commercial Judge on findings as to whether there is a real risk of dissipation. There was no error in principle in Jack J's approach to Emmerson's arguments on the risk of dissipation. Jack J handed down a well-reasoned judgment which addressed all the relevant issues. He considered the totality of the evidence and the parties detailed written and oral submissions and concluded that the freezing order should be discharged for the reasons that:

(1) there was no proper basis to conclude that there was "solid evidence" of a real risk of unjustifiable dissipation of assets by the respondents;

(2) in any event, Emmerson's unexplained and lengthy delay in seeking freezing relief rendered the freezing orders inappropriate; and

(3) Emmerson had committed a number of serious non-disclosures at the *ex parte* hearing hearings when applying for the freezing orders.

[151] Jack J's conclusion was based on a detailed evaluation of the facts. When any finding involves an evaluation of facts, an appellate court must take into account the fact that the judge has reached a multifactorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach.[27]

[152] The appellate court is not entitled to disturb Jack J's discretionary order based on his evaluative judgment of the relevant facts as it has not been demonstrated that in making the order he erred in principle or exceeded the generous ambit within which reasonable disagreement is possible. Neither is this court tasked with carrying out a balancing exercise afresh as it has not been shown that the judge was plainly wrong. An appellate court is not to interfere with the judge's evaluation of facts and the inferences to be drawn from them unless compelled to do so.[28] In relation to each of the factual issues, the judge took all of Emmerson's arguments into account when assessing whether there was solid evidence of a real risk of unjustifiable dissipation but made it clear that those arguments carried very little weight.

[153] Jack J's conclusion that Emmerson was guilty of culpable delay is consistent with the applicable legal principles; likewise, was his discharge of the freezing order for serious non -disclosure. Jack J made it clear that he did not think Emmerson had complied with its duty to make a fair presentation of the material at the *ex parte* hearings. Jack J assessed 15 allegations of non – disclosure, some of which he rejected entirely, and accepted others. He accepted five breaches which he graded

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[27] Per Arden LJ paragraph [72] of Langsam v Beachcroft [2012] EWCA Civ 1230.
[28] Fage UK Ltd v Chobani UK Ltd. [2014] EWCA Civ 5 at 114.

on a scale from “serious” to “modest”. That approach evidenced a careful and balanced one, in assessing Emmerson’s conduct at the *ex parte* hearings. It involved no error of law. The judge properly exercised his discretion based on correct legal principles. There is no basis for appellate interference.

[154] I note that Emmerson had also filed an appeal against the order of Jack J refusing to grant an adjournment of the Discharge Application - the Adjournment Appeal (Civil Appeal No 2019 /0018). As Mr. McGrath, KC correctly stated in his submissions, the Adjournment Appeal becomes redundant if either the Confidentiality Club Appeal or the Discharge Appeal is dismissed. I would also have dismissed the Adjournment Appeal on the grounds that Jack J weighed several relevant factors in deciding to refuse the adjournment and his decision was well within the generous ambit of the discretion entrusted to him and was not unfair.

Disposition

[155] For all the reasons given, it is ordered that the Discharge Appeal and the Adjournment Appeal are dismissed with costs to the respondents to be assessed by a judge of the Commercial Court, if not agreed within 21 days.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar