

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2021/0050

BETWEEN:

[1] VISION EN ANÁLISIS Y ESTRATEGIA, S.A. DE C.V.
[2] CAPITALIZA-T, SOCIEDAD DE RESPONSABILIDAD LIMITADA DE
CAPITAL VARIABLE

Claimants/
Respondents

and

[1] CHRISTOPHER RONALD ERWIN, ALSO KNOWN AS
CHRISTOPHER R. ERWIN AND/OR CHRISTOPHER ERWIN

[2] LAUREOLA ADVISORS INC.
[3] GORDON ANTHONY BREMNESS, ALSO KNOWN AS TONY
BREMNESS

Applicants

[4] ERWIN LEGAL, PC, ALSO KNOWN AS ERWIN LEGAL, P.C.,
AND/OR ERWIN LEGAL, A PROFESSIONAL CORPORATION,
AND/OR ERWIN LEGAL A PROFESSIONAL CORPORATION

Defendants

Appearances:

Mr. Nicholas Brookes, with him Mr. David Lim for the Claimants/Respondents
Mr. Daniel Wise, with him Ms. Nadine Whyte Laing and Mr. Kerry Anderson

2021: July 26;
August 11, 27.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** These are the written reasons for an *ex tempore* decision given at a hearing on 27th August 2021, discharging with immediate effect certain receivership, injunctive

relief and disclosure orders made against the Second and Third Defendants on an *ex parte* basis.

- [2] On 18th March 2021, the Claimants filed an application seeking, *inter alia*, an order pursuant to rule 51, Civil Procedure Rules 2000 ('CPR') for the appointment of a receiver over the shares of Laureola Advisors Inc. ('Laureola'), the Second Respondent, as well as for injunctive relief, disclosure and other orders. On 24th March 2021 this Court made an order granting that application on an *ex parte* basis.
- [3] On 17th May 2021, Laureola and Mr. Bremness, as Applicants, applied to have the order of 24th March 2021 set aside, in so far as it granted injunctive relief, receivership and disclosure orders against them. Ultimately the set aside application was successful.

Background

- [4] The thrust of the matter can be stated quite briefly. Nothing in this summary is to be taken as findings of fact or law. This is an over-simplification but suffices to explain the background.
- [5] The Claimants are corporate entities incorporated in Mexico. They hold two judgments against the First Defendant, Mr. Erwin, and his corporate/professional vehicle, the Fourth Defendant, 'Erwin Legal'. Mr. Erwin is (or was) an attorney-at-law licensed as such in California, United States of America. It should be said immediately that the judgments the Claimants seek to enforce against Mr. Erwin and his corporate/professional vehicle were not made against Laureola or Mr. Bremness.
- [6] The first judgment was entered in favour of the Claimants in California on 21st June 2019. It was subsequently modified, on 20th September 2019. This 'Modified California Judgment' held Mr. Erwin and Erwin Legal jointly and severally liable to pay the Claimants an amount of US\$2,940,927.29 in compensatory damages and US\$906,418.98 in pre-judgment interest, together with post-judgment interest and various costs. The Modified California Judgment is or was subject to an appeal and cross-appeal. It has not been satisfied.
- [7] The second judgment is a declaration and summary judgment issued in favour of the Claimants against Mr. Erwin on 10th October 2019 by the Supreme Court of Bermuda ('the Bermuda

Judgment'), in an amount of US\$3,847,346.00 together with post-judgment interest and costs. The Bermuda Judgment was not appealed. Nor has it been satisfied.

- [8] The Claimants have commenced legal proceedings in this jurisdiction (the 'BVI') to seek recognition and enforcement here of both the Modified California Judgment and the Bermuda Judgment.
- [9] The Claimants believe Mr. Erwin has assets in this jurisdiction, in the form of a shareholding or other financial interest in Laureola.
- [10] More specifically, the Claimants believe and aver that since Laureola's incorporation, Mr. Erwin is legally or beneficially entitled to at least 12,500 voting shares in Laureola. Laureola is a company that was incorporated in the BVI in December 2012. The Third Defendant, Mr. Bremness, owned 25,050 voting shares since the company's incorporation. Mr. Erwin held 12,500 voting shares similarly since the company's incorporation. It is certainly the case that Mr. Erwin held shares in Laureola for a considerable length of time. The question is whether he continued to do so at the time the Claimants applied for the receivership and freezing order (18th March 2021), and now.
- [11] The Claimants claim that Mr. Erwin continues to hold at least 12,500 shares in Laureola, despite certain transactions which appear to show Mr. Erwin is no longer owning these. I should promptly state, in all fairness, that Laureola and Mr. Bremness deny that Mr. Erwin continues to hold any such shares, whether legally or beneficially.
- [12] The Claimants logically treat Mr. Erwin as their main protagonist, not Mr. Bremness. That said, the Claimants consider that Mr. Erwin's business associate Mr. Bremness has been aiding Mr. Erwin by hiding and dissipating Mr. Erwin's assets.
- [13] It would be fair to observe that as at 18th March 2021, the Claimants could not point to a clear split between Mr. Erwin and Mr. Bremness, such that the Claimants' suspicions concerning Mr. Bremness were understandable.

- [14] The primary evidence relied upon by the Claimants when they sought and obtained *ex parte* receivership, injunction and disclosure orders from this Court was contained in a first and a second affidavit of a Mr. Jose Juan Hernandez ('Mr. Hernandez').
- [15] In a nutshell, it appears that Mr. Erwin and Mr. Bremness were in business together providing investment fund services. This business involved investing in life insurance policies. The business entailed the use of an array of corporate entities in a host of jurisdictions. A number of such entities used the name 'Laureola' as part of their designation. Mr. Erwin appears to have been a, or the, moving spirit behind this business. He appears to have been physically based somewhere in the United States of America and/or Puerto Rico. Mr. Bremness, on the other hand, is based in the Isle of Man. He appears to have relied upon Mr. Erwin to identify suitable life insurance policies.
- [16] I will refrain from commenting extensively about the complaints laid by the Claimants against Mr. Erwin, as he has not appeared before this Court so far and the merits of such complaints are not matters that this Court needs to determine. It suffices to say that they do not cast Mr. Erwin in an edifying or honest light and show him to have been deliberately evasive in the face of attempts to enforce the judgments against him. The Claimants say that Mr. Erwin has engaged in dishonest conduct to hinder the Claimants' efforts to collect upon the judgments they have obtained.
- [17] In July 2019 the Claimants obtained injunctive relief in Bermuda to restrain Mr. Erwin from having a Bermudan company thought to be controlled by him, 'EMP', from making payments by way of management fees to Laureola, up to a certain amount. That injunction was amended on 9th October 2019 to allow EMP to make payments in good faith and in the ordinary course of business. This order was further modified on 10th October 2019 and 27th February 2020. The net result of the modifications was to reduce the frozen sum but to expand the number of corporate entities associated with Mr. Erwin that were caught by the injunction. The 'ordinary course of business' exception remained. For convenience I shall refer to these as the 'Bermuda Freezing Orders'.
- [18] The Claimants claim that in an effort to circumvent the July 2019 Bermuda Freezing Order, on 6th August 2019, Mr. Erwin incorporated two new companies, Laureola Advisors USA and Laureola Policy Servicing, two California limited liability companies legally or beneficially owned

and/or controlled by Mr. Erwin. The Claimants say that after the entry of the Bermuda Freezing Orders, Laureola Advisors USA and Laureola Policy Servicing received payments directly from Laureola and/or the enjoined entities.

- [19] The Claimants contend that Laureola's management accounts for 2019 show that Laureola paid some US\$83,000 to Mr. Erwin, directly or indirectly, by way of dividends for that year, whereas Mr. Bremness received only slightly more, at about US\$96,000. The Claimants contend that these proportions are inconsistent with the 66.7% (Mr. Bremness) – 33.3% (Mr. Erwin) proportionate shareholdings in Laureola at the time, and thus indicative of some different, ancillary, arrangement which accorded Mr. Erwin a greater beneficial ownership interest than was suggested by his shareholding percentage. The shareholding figures suggested that Mr. Bremness held that additional shareholding on behalf of Mr. Erwin.
- [20] Furthermore, the Claimants observe that for the same 2019 year, Laureola paid Mr. Erwin approximately US\$57,000 in purported loan repayments, leaving a purported approximate sum of US\$290,000 outstanding.
- [21] The Claimants remark that some US\$86,000 was paid in 2019 to the Fourth Defendant, Erwin Legal, for something referred to as 'servicing and support'.
- [22] The Claimants also mention that in 2019 some US\$382,000 was paid by Laureola in 2019 for payroll in respect of its employees, which the Claimants presume included Mr. Erwin.
- [23] The Claimants have laid before the Court that, in addition to his role as minority shareholder in Laureola, Mr. Erwin also served as its Chief Investment Officer ('CIO'), 'Reserve Director', and 'Director of Sourcing'. The Claimants have pointed out that during a deposition Mr. Erwin gave in 2017 in the California action ('the 2017 Deposition'), Mr. Erwin testified that he was CIO of Laureola and his role was '[t]o source, transact, and manage life insurance policies that the fund acquires'.
- [24] The Claimants say Mr. Erwin served as CIO and Reserve Director of Laureola from 21st December 2012 until 15th May 2020, the latter date being that in which Mr. Bremness, as Sole Director of Laureola, issued a written resolution removing Mr. Erwin as CIO and Reserve Director and appointing himself as CIO and Managing Director (the '15 May 2020 Sole Director

Written Resolution'). Mr. Erwin also served as Laureola's Director of Sourcing from allegedly 15th May 2020 to 21st December 2020, the date on which Mr. Bremness, as Sole Director, issued a written resolution removing Mr. Erwin as Director of Sourcing ('21 December Sole Director Written Resolution').

[25] The Claimants allege that Laureola also made some payments to Mr Erwin and/or Erwin Legal which are not reflected in Laureola's financial statements. On 29th October 2019, Laureola transferred at least USD \$29,978.00 to a Premier Package account held by Mr. Erwin (individually) or a Linda S Budd. From 21st January 2020 to 12th March 2020, Laureola transferred at least USD \$204.42 to a Small Business Checking account titled 'Erwin Legal A Professional Corporation Operating Account'. From 19th July to 9th September 2019, Laureola transferred at least USD \$22,111.75 to a Basic Business Checking account titled 'Erwin Legal a Professional Corporation Laureola QP Escrow Account'. From 6th August 2019 to 28th April 2020, Laureola transferred at least USD \$452,738.19 to a Lawyers Trust Interest Checking account titled 'Erwin Legal A Professional Corporation Lawyers Trust Checking'. From 9th July 2019 to 1st October 2019, one of the enjoined entities transferred at least US\$3,129,861.80 to Basic Business Checking account titled 'Erwin Legal a Professional Corporation Laureola Account'.

[26] In the Claimants' Notice of Application for their *ex parte* application to this Court, the Claimants have characterized these payments as made to defraud creditors and in violation of the Bermuda Freezing Orders. I pause here to note that, at that point, the Claimants did not explain how or why those payments constituted such a violation. Nor did they address the possibility that they might have been permissible pursuant to the 'ordinary course of business' exception in the Bermuda Freezing Orders. This became the subject of a major objection by Laureola and Mr. Bremness, that the Claimants had breached their duty of full and frank disclosure and fair presentation. As I will explain, that challenge was, however, unsuccessful.

[27] In terms of evidential material, there was also this.

[28] The Claimants explained that during the 2017 Deposition, Mr Erwin provided sworn testimony that he was an officer and equity owner of Laureola. In contrast, and importantly, on 19th April 2019, Mr. Erwin testified that Laureola was owned by Mr. Bremness and 'Bella' (an entity named after and owned by Mr. Erwin's then minor daughter, Isabella). Mr. Erwin further

testified, importantly, that, after the 2017 Deposition and prior to his testimony on 19th April 2019, he transferred his interest in Laureola to Bella for no consideration, that Laureola occasionally earned management fees, and that he had been paid for his role as CIO of Laureola.

[29] The Claimants decided to check up on these averments. They applied for and obtained a third-party disclosure order from this Court against Laureola's registered agent, on 14th December 2020.

[30] As a result, the Claimants obtained a number of documents. The Claimants say the documents produced by the registered agent prove that Mr. Erwin ***never transferred his interest in Laureola to Bella*** and always has been an ultimate beneficial owner of Laureola.

[31] The documents disclosed recorded a rather complex transaction, as reflected in amended Memoranda and Articles of Laureola. The effect of it was that the shareholding in Laureola was converted from Mr. Erwin holding 12,500 voting shares and Mr. Bremness holding 25,050 voting shares, to a situation where all of the voting shares were purportedly cancelled on 23rd December 2020 and two new classes, 'A' and 'B' were created. Class 'A' shares had voting rights, whereas class 'B' shares did not. Class 'B' shares entitled their holders to receive certain dividends, but also carried certain conditions prohibiting their holder(s) from competing with Laureola. On 23rd December 2020, Mr. Bremness was purportedly issued 24,950 Class A shares and 25 Class B shares. Mr. Erwin's shares were purportedly cancelled, leaving Mr. Bremness as the sole shareholder. This apparent change was reflected in a Register of Members dated 7th January 2021 ('the January 2021 Register').

[32] The transaction documentation included a shareholders' resolution, signed by Mr. Bremness but not by Mr. Erwin (although there appears to have been no requirement for such a members' resolution to have been unanimous), dated 15th December 2020, which provided for the details of this change. The Claimants observe that this resolution did not provide for the cancellation of Mr. Erwin's shares – and no other disclosed documentation does so either. The Claimants submitted that the January 2021 Register showed Mr. Bremness as Laureola's sole shareholder from 23rd December 2020, and that Mr. Erwin's shares had been ***converted*** (said the Claimants, although the January 2021 Register simply noted them as cancelled) on 23rd December 2020, ***with no paper trail evidencing their disposal***. The Claimants concluded

that it would appear that Mr. Erwin thus continued to own his 12,500 voting shares, with the transaction serving as a smokescreen to create a different impression. – with the active and deliberate collusion and complicity of Mr. Bremness.

[33] The Claimants remarked that there was a great coincidence in the timing of this transaction, with the Court's disclosure order being made on 14th December 2020 (but entered on 16th December 2020, and indeed with a seal and gag order in place to prevent tipping off by the registered agent), the purported shareholder resolution being dated 15th December 2020, with this order being served on 18th December 2020 by email and physically on 21st December 2020, with the new shares being issued on 23rd December 2020.

[34] The Claimants submitted that it was necessary to appoint a receiver over all of the shares of Laureola, as:

- (1) Mr. Bremness has facilitated a fraud and may use his remaining shareholding to assist in further dissipation of assets to devalue Mr Erwin's shares;
- (2) The share register is in disarray and has been reorganised so that Mr. Erwin's actual shareholding is not clear or appears as potentially having been transferred to Mr. Bremness;
- (3) A receiver must investigate and understand the true asset position of Laureola in support of the eventual enforcement; and
- (4) A receiver would not prevent the Laureola's fund business from continuing to operate by allowing the active appointment of directors, rather than an injunction which would preclude Mr. Bremness from being allowed to take any steps.

[35] The Claimants contended at the *ex parte* hearing that they have at least a good arguable case that the prospective claim for the enforcement of the Bermudan money judgment or alternatively for common law enforcement of the Modified California Judgment will succeed. Clearly this submission was made for the Claimants to satisfy the well settled threshold requirement for obtaining freezing orders, of demonstrating that the claimant has a good arguable case against the defendant.

[36] Following the *ex parte* presentation, I had been persuaded that the Claimants have a good arguable case against the Defendants, that there was a real risk of the Defendants dissipating

assets other than in the ordinary course of business, so as to frustrate any judgment that might be obtained against them in due course and that it would be just and convenient, in all the circumstances, to freeze part of the Defendants' assets. I was also persuaded that despite a freezing order, assets were liable to be dissipated and thus, in all of the circumstances as presented by the Claimants, it was appropriate to appoint a receiver.

[37] In coming to these conclusions, I was persuaded that the Claimants could well be right that Mr. Erwin continued to own shares in Laureola. The Claimant's suggestions that the December 2020 transaction had 'great coincidence' with their obtaining a third-party disclosure order against the registered agent under seal and gag conditions, would necessitate a suggestion that the registered agent had leaked information to the Defendants. I found that far-fetched, not least because the purportedly operative members' resolution was dated 15th December 2020, a day earlier than 16th December 2020, which was when the third-party disclosure order was entered. Nonetheless, I was persuaded at that point that Mr. Erwin and Mr. Bremness had a history of close collaboration and that Mr. Erwin's versions of events did not tally with corporate documents disclosed by the registered agent. Mr. Erwin was portrayed by the Claimants as having played fast and loose with the truth and to be actively engaged in frustrating justice and enforcement against him. I was persuaded that in all of the circumstances as had then been presented, it could well be the case that Mr. Bremness might be holding some of the new shares in Laureola for the benefit of Mr. Erwin.

[38] I was also concerned at the apparent continued flow of money from entities enjoined in Bermuda to or for the benefit of Mr. Erwin, which suggested that merely granting further injunctions would not be enough to prevent dissipation. Although Mr. Hernandez had not spelled this out in his affidavit evidence, it was not lost on me that those payments might conceivably have been made in the ordinary course of business. Indeed, Mr. Hernandez had quite rightly identified the ordinary course of business exception in the Bermuda Freezing Orders. That Mr. Hernandez did not explicitly make the connection between the payments and the ordinary course of business exception perhaps inevitably caused Laureola's and Mr. Bremness's lawyers later to allege a breach of full and frank disclosure, but, I should say, the connection was implicit and apparent.

[39] Thus, although not all the pieces of the jigsaw puzzle seemed to fit perfectly together in place, on balance, making a receivership and freezing order seemed to be a 'just and convenient'

step to take. At the same time, I was conscious that at the *inter partes* return date, this decision could well be shown to have been wrong. Thus it was, that on 24th March 2021 I made the receivership and freezing (and ancillary) orders. These orders were continued at a short return date on 14th April 2021, without prejudice to the Defendants' rights to apply to have the orders set aside.

[40] On 13th April 2021 Mr. Bremness filed an affidavit, headed 'Second Affidavit', in support of an application on behalf of Laureola and himself to vary the receivership and freezing orders on an interim basis pending an application to have those orders set aside. In this, he explained that Laureola is an active and profitable fund management business with some US\$78million under its management, with Laureola itself valued at around US\$2.3million.

[41] Mr. Bremness further explained that he had discovered that Mr. Erwin had conducted business in competition with Laureola and relations between them had deteriorated. Mr. Bremness says he took advice on how to terminate the relationship but was told that this was not straightforward. Mr. Bremness thus decided to demote Mr. Erwin from his positions of Chief Investment Officer and Reserve Director to 'Director – Sourcing', and to continue working with him for the time being. However, explained Mr. Bremness, by October 2020 it became clear to him that 'things would not work out' between Mr. Erwin and him, so he decided to cut all Mr. Erwin's ties **with Laureola**. Mr. Bremness does not say **between themselves personally**. On 21st December 2020 Mr. Bremness removed Mr. Erwin as 'Director- Sourcing' with immediate effect. Mr. Bremness determined upon a transaction which would see Mr. Erwin's minority shareholding in Laureola redeemed, a mutual compromise of claims reached, and a loan Mr. Erwin had previously advanced to Laureola repaid. Mr. Bremness explained that negotiations concerning this exit mechanism commenced in October 2020 and were concluded on 25th January 2021, with a 'confidential' agreement. Mr. Bremness explained that he had asked Mr. Erwin to waive the confidentiality, but that Mr. Erwin did not do so, such that Mr. Bremness was not free to disclose it.

[42] Mr. Bremness refuted notions that the registered agent had leaked information about the third-party disclosure order, saying that he only found out about that order several months later.

[43] Mr. Bremness exhibited a number of documents to his Second Affidavit. These included correspondence between his BVI legal practitioners and the registered agent, which explained

that the January 2021 Register prepared by the registered agent had in fact been inaccurate and that a couple of further iterations needed to be produced in order accurately to reflect the outcome of the transaction mentioned above.

- [44] The documents also included a letter from those same legal practitioners to the Claimants' legal practitioners, dated 2nd April 2021, which sought to explain the transaction as not having the purpose of removing Mr. Erwin but of re-organising the shareholding in a way that would render membership of Laureola more attractive to investors and to reward and incentivize employees. There is some tension between this explanation and Mr. Bremness's own explanation in his Second Affidavit, but it is not one that this Court can, or needs to, resolve at this stage. Mr. Bremness seeks to address this in a Third Affidavit, in which he explains that the transaction in question had this more general intent and was a precursor to the exit mechanism agreed for the departure of Mr. Erwin.
- [45] That letter also enclosed a 'corrected' Register of Members, dated 24th March 2021, i.e., the same day this Court made the *ex parte* order. This showed that both Mr. Bremness's **and Mr. Erwin's** ordinary shares had been converted into class 'A' voting shares on 23rd December 2020 and simultaneously cancelled, with Mr. Erwin's shareholding then repurchased or redeemed on **1st March 2021**, leaving Mr. Bremness as the sole shareholder in Laureola. Thus, by **18th March 2021**, when the Claimants made their *ex parte* application, Laureola's/Mr. Bremness's case is that Mr. Erwin was no longer a shareholder in Laureola.
- [46] Mr. Bremness explained that although he had inserted a line in the shareholders' resolution of 15th December 2020 for Mr. Erwin to sign it, by this time Mr. Bremness did not think he could obtain Mr. Erwin's consent to anything, and, in the end, Mr. Bremness executed that resolution as the majority shareholder, on notice to Mr. Erwin, but without waiting for his consent.
- [47] Mr. Bremness denied that the various payments the Claimants implicitly impugned had been made in breach of the Bermuda Freezing Orders. He maintained that they had been made in the ordinary course of business.
- [48] In the same letter dated 2nd April 2021 from their BVI legal practitioners to the Claimants' legal practitioners, Laureola's and Mr. Bremness's legal practitioners acknowledged a 'serious error' on Laureola's/Mr. Bremness's part, saying that they had paid insufficient attention to the

Bermuda Freezing Orders, thinking (incorrectly) that Laureola was not before the Bermuda courts and that Mr. Erwin and/or one of his associated entities had taken care of removing their effect, if any, as against Laureola. In the same breath, however, Laureola's/Mr. Bremness's legal practitioners stressed that payments made had been made in the ordinary course of business (and thus exempted anyway).

[49] Mr. Bremness complained that the receiver appointed had been 'very aggressive' and had made Laureola's business difficult, for instance, in causing the company to be late in paying trade creditors.

[50] On 17th May 2021 Laureola and Mr. Bremness applied to set aside the receivership, injunctive and disclosure orders made on 24th March 2021. The main grounds for this challenge were, in very brief summary and with a considerable degree of simplification, as follows:

- (1) The Claimants have no good arguable case against Laureola and Mr. Bremness that the transaction and exit agreement with Mr. Erwin were a sham designed to facilitate dissipation of Mr. Erwin's assets to evade enforcement of the judgments;
- (2) There is no risk of dissipation of Mr. Erwin's assets by Laureola and Mr. Bremness;
- (3) The Claimants had breached their duty of full and frank disclosure and fair presentation in that they had failed to bring to the Court's attention that the Bermuda Freezing Orders contained an ordinary course of business exception and did not include any disclosure provisions;
- (4) Laureola and Mr. Bremness had not breached the Bermuda Freezing Orders at all.

[51] This application was supported by a Fourth Affidavit of Mr. Bremness. In this, he gave further evidence of Mr. Erwin's activities with another fund, in direct competition with Laureola. Mr. Bremness called this a flagrant breach by Mr. Erwin of the latter's fiduciary and contractual duties towards Laureola, as a result of which the relationship between Mr. Erwin and Laureola and Mr. Bremness had deteriorated.

[52] Mr. Bremness also gave further evidence here of the share redemption agreement with Mr. Erwin, entered on 25th January 2021, describing it as an arm's length transaction, and explaining that Mr. Erwin's shares had been redeemed on 1st March 2021, pursuant to this agreement, following a number of agreed payments.

- [53] The parties filed some further evidence concerning the effect of the Bermuda Freezing Orders. There was disagreement between the parties on this, and suggestions by the Claimants that Laureola and Mr. Bremness had deliberately tried to circumvent them. Laureola and Mr. Bremness, for their part, caused evidence to be filed that the Claimants had brought no proceedings before the Bermuda courts in respect of any alleged breaches by them of the Bermuda Freezing Orders, despite sufficient opportunity to do so.
- [54] There was also some further evidence filed in which the Claimants sought to pray in aid the fact that Laureola had engaged, or continued to employ, a small number of individuals who had worked for or with Mr. Erwin, and which Mr. Bremness also sought to explain.
- [55] Mr. Bremness gave evidence of difficulties encountered by Laureola which, according to him, had arisen as a result of the receivership and/or freezing order.
- [56] Mr. Bremness did not (as far as I can see, and I have looked specifically for this) address in terms in his affidavit or witness statement evidence the Claimants' observation that Mr. Erwin appears to have been paid dividends by Laureola in amounts which were disproportionately greater than his 33.3% shareholding would warrant. That said, Mr. Bremness and his Counsel did seek to explain the various payments made to Mr. Erwin and it may be that the Claimants' assumptions, or suppositions, that certain payments were disproportionate dividends, are mistaken.

Discussion

- [57] Laureola and Mr. Bremness cited several grounds for having the receivership, freezing and ancillary disclosure orders set aside as against them. I will deal with each of these.

'No good arguable case'

- [58] Laureola and Mr. Bremness argued that the Claimants do not have a good arguable case.
- [59] The criterion for an applicant for a freezing or receivership order to have a good arguable case is well established. An applicant for such relief must demonstrate that he has a claim being

‘one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success’.¹

[60] As stated by the Court of Appeal in **Mitsuji Konoshita et al. v JTrust Asia PTE Ltd**:

“The need to demonstrate on the evidence that the applicant for a freezing order has made out ‘a good arguable case’ is a threshold requirement for engaging the court’s jurisdiction and discretion and a component of the court’s assessment of whether, in all the circumstances, it would be just and convenient to grant the order sought.”²

[61] That case, which I shall refer to, for convenience, as ‘**Konoshita 2021**’, also establishes that there is:

“no continuing requirement for the applicant for a freezing order to demonstrate that it had ‘a good arguable case’, that is, one more than barely capable of serious argument’, in order for the freezing order to be continued. That threshold requirement of a ‘good arguable case’ having been met to the satisfaction of the court at the time of the application for the order, there was no requirement for the judge to conduct an assessment anew or reassessment of that requirement in order to determine whether the order ought to be properly continued or not.”³

[62] It is apt to note here that that finding was made in the context of a case where an *ex parte* freezing order had been continued after a full *inter partes* hearing, and indeed it had been confirmed following an unsuccessful appeal.⁴ Where, as in the present case, a discharge application is made as part of a substantive return date of an *ex parte* order, then the question for the Court should be whether it had been correct at the *ex parte* hearing in finding that there had been a good arguable case. By substantive return date, I mean to distinguish this from a ‘procedural’ return date at which an *ex parte* order may be continued for convenience pending fuller consideration when the Court’s diary affords sufficient time to hear full argument. It is a fact of life that in the BVI Commercial Court it is generally not possible for such a full return date hearing to be held within the 28 days stipulated by the Civil Procedure Rules 2000 for a return date to take place. In such a case it is common for the interim relief previously granted to be continued on an interim basis, with directions given to set up a substantive hearing, without prejudice to the Respondents’ rights to apply to set the injunctive relief aside. Such was the case here.

¹ *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1984] 1 All ER 398 at 404 (Mustill J).

² BVIHCMAP2020/0017 (unreported, delivered 24th March 2021) at paragraph [37] (Farara JA (Ag.)).

³ BVIHCMAP2020/0017 (unreported, delivered 24th March 2021) at paragraph [39] (Farara JA (Ag.)).

⁴ See BVIHCMAP2020/0017 (unreported, delivered 24th March 2021) at paragraph [3] (Farara JA (Ag.)).

[63] What this means is that it would be a legitimate enquiry in cases such as the present whether or not at the *ex parte* hearing the Claimants had established a good arguable case.

[64] That, however, was not the way Laureola and Mr. Bremness approached the matter. They argued that the Claimants do not have a good arguable case, once Mr. Bremness's evidence is taken into account, i.e. now.

[65] It would be irrelevant whether the Claimants have a good arguable case **now** to an inquiry whether the judge exercised his discretion properly on the material before the Court at the *ex parte* hearing. A discharge application is not a re-run of an *ex parte* hearing as if all the evidence **now** available, and the applicant's arguments in favour of discharge, had then been before the Court at the *ex parte* hearing. An applicant for discharge has a burden of proving that the orders made should be discharged. Laureola and Mr. Bremness would have the burden of showing that the Claimants do not have a good arguable case, on a balance of probabilities (see further at paragraph [85] *et seq.* below).

[66] Laureola's and Mr. Bremness's approach, in seeking to establish that the Claimants do not have a good arguable case now, was to marshal all the factual points they could think of that would militate against a finding that Laureola and/or Mr. Bremness have been assisting Mr. Erwin in dissipating his assets, inviting the Court to conclude that once all such circumstances are considered, the Claimants do not have a good arguable case. This, however, would require the Court to prefer Mr. Bremness's evidence over that of the Claimants, which would require the Court to make preliminary findings of fact, after what would in effect be a mini trial. The Claimants submitted, and I accept, that it would not be appropriate for the Court to be drawn into holding a mini trial of the claim in the context of an interlocutory set-aside application. In this regard, the Claimants relied upon the English case of **Crown Resources AG v Vinogradsky**,⁵ (cited in the English Court of Appeal case **Kazakhstan Kagazy Plc v Arip**).⁶ As Longmore LJ admonished in the latter (at paragraph [23]):

"It is very important that applications to discharge freezing applications do not turn into minitrials; parties are often tempted to anticipate the real trial on these applications but that temptation must be firmly resisted."

⁵ Unreported, 15th June 2001 at pages 4–5.

⁶ [2014] EWCA Civ 381 at paragraphs [23] and [36] (Longmore LJ).

[67] At paragraph [36] Longmore LJ stated:

“The judge adopted the approach of Toulson J (as he then was) in *Crown Resources AG v Vinogradsky* (15 June 2001) for cases of any magnitude and complexity and I am content to do the same: ‘... issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for nondisclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (pages 4–5 of the transcript).

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

[68] Our Court of Appeal in **Konoshita et al. v JTrust Asia PTE Ltd** has likewise held that

“It is a well-established principle that in determining whether there is a good arguable case on an application for a freezing order, the judge is not required to conduct a mini trial. Rather the judge must assess the claim and evidence before him and determine whether it meets the threshold of a good arguable case.”⁷

[69] I shall refer for convenience to this case as ‘**Konoshita 2018**’ so that it may not be confused with **Konoshita 2021**. Both Court of Appeal decisions arose out of the same legal proceedings, but at different stages.

[70] A mini trial to decide whether a claimant has a good arguable case either at an *ex parte* or *inter partes* first hearing of an application for receivership and/or freezing order relief, is clearly not appropriate.

[71] Whether or not Mr. Bremness is hiding assets of Mr. Erwin and whether or not Laureola and/or Mr. Bremness is assisting Mr. Erwin to evade enforcement by dissipating assets are highly fact specific inquiries. At the first hearing stage in the proceedings, the Court should do no more than assess whether or not the competing versions of events and the underlying evidence as then presented to the Court allows the Court to determine that there is a ‘plausible evidential basis’⁸ for the claim.

⁷ BVIHMAP2018/0047, BVIHMAP2018/0020 *Konoshita et al. v JTrust Asia PTE LTD* (unreported, delivered 18th December 2018) at paragraph [17] (Thom JA).

⁸ Gee: *Commercial Injunctions* (7th Edn. Sweet & Maxwell 2020) 12-033.

[72] In the present case I am prepared to accept that the Claimants did, at the *ex parte* hearing, have a good arguable case, in the sense of a plausible evidential basis, against Laureola and Mr. Bremness that they are assisting Mr. Erwin by hiding and/or dissipating his assets. That was so, because the documentary evidence presented by the Claimants seemed to show that despite ostensible cancellation of Mr. Erwin's shareholding in Laureola there was no evidence that he had in fact ceded his interest. The January 2021 Register was congruent with conversion of his shares and that Mr. Bremness had taken them over on an undocumented, i.e., informal, basis, in circumstances where Mr. Erwin and Mr. Bremness had enjoyed many years of cooperation in the same business and indeed Mr. Erwin appeared to have received a greater proportion of dividends than his shareholding percentage had warranted. The Claimants also presented evidence of a considerable number of payments which might be breaches of the Bermuda Freezing Orders.

[73] In my respectful judgment I am unable to say whether the Claimants still have a good arguable case, with Laureola's and Mr. Bremness's evidence before the Court. There are still perhaps serious issues to be tried, but a 'good arguable case' criterion is a higher threshold than a serious issue to be tried.

[74] To explain my indecision in this regard, I acknowledge that to all appearance Mr. Erwin has been removed from having any continuing involvement in Laureola, including any ownership interest in the company. That said, the full extent of communications and agreement between Mr. Erwin, Laureola and Mr. Bremness are not yet known to the Court. Clearly Mr. Bremness was able to come to some agreement with Mr. Erwin in January 2021. Clearly, also, Mr. Erwin's ownership interest in Laureola continued until at least 1st March 2021, less than three weeks before the Claimants filed their *ex parte* application. Moreover, the negative findings against Mr. Erwin by the California court somewhat curiously do not appear to have deterred Mr. Bremness from wishing to continue to allow Mr. Erwin to hold a directorship function within Laureola, despite the turpitude that this would almost inevitably reflect upon Laureola and himself, despite the apparently obvious and primordial need to uphold the trust and confidence of investors in the fund administration in question. Then, in recounting how Mr. Bremness decided to reduce Mr. Erwin's involvement further, Mr. Bremness seemed to qualify this with reference only to Laureola, leaving it open that Mr. Bremness was prepared to continue some other relationship with Mr. Erwin. Furthermore, Mr. Bremness appears not to have addressed

in terms, in his affidavit/witness statement evidence a possibly anomalous receipt by Mr. Erwin of what the Claimants have contended was an apparently greater proportion of dividends than his 33.3% shareholding in Laureola would warrant. Mr. Bremness has proffered explanations for the various payments made to Mr. Erwin, and it may (or may not) be that these suffice to answer this allegation at an appropriate juncture with the benefit of more evidence. But this interlocutory hearing is not that juncture. Moreover, the Claimants argued that Mr. Bremness's attitude towards the Bermuda Freezing Orders was carefully 'nuanced', and not, as the first impression would suggest, one of ignorance, such that it would appear that Mr. Bremness caused Laureola to make significant payments in favour ultimately of, or in the direction of, Mr. Erwin, with the risk that such payments breached the Bermuda Freezing Orders.

- [75] However, the Court is simply not in a position to take a view at this stage whether or not there is any real substance to these possible concerns. Short of conducting a mini trial – and indeed more than a mini trial - I am unable to find that the Claimants do or do not have a good arguable case against Laureola and Mr. Bremness. This head of Laureola's and Mr. Bremness's discharge application, in my judgment, fails, because they have not tipped the balance of probabilities that it is more likely than not that the Claimants do not have a good arguable case. Laureola and Mr. Bremness, as discharge application applicants, had the burden of proving on a balance of probabilities that the Claimants have no good arguable case against them, but they have not tipped that balance in their favour against the Claimants.

Alleged breach of Bermuda Freezing Orders

- [76] For the same reasons I am not at this stage able to come to a preliminary finding of fact whether or not Laureola and Mr. Bremness breached the Bermuda Freezing Orders. If the payments were what Mr. Bremness says they are, then it appears to me that there was no breach. The Claimants have not shown that Mr. Bremness's explanation for the payments was wrong or untrue. On the other hand, to determine whether the payments were what Mr. Bremness says they were would require more profound and detailed disclosure and analysis in respect of each of these payments – in short, a mini trial.
- [77] The fact – such as it appears to be – that the Claimants have not moved in Bermuda to have a breach found and dealt with by the Bermuda courts, despite, it would appear, opportunities to

do so, inclines me to think that there was no such breach. But I am bound to accept that absence of a ruling on this from the Bermuda courts is not determinative.

[78] Apparent breach of the Bermuda Freezing Orders was the major premise upon which the Claimants based their application for a receivership, which is a draconian form of relief requiring solid evidence of a real risk of dissipation. If the premise of a breach of the Bermuda Freezing Orders is weakened, then this commensurately detracts from the justice and convenience of retaining the receivership. The state of the evidence, as it currently stands, is that it is debatable whether or not the Bermuda Freezing Orders have been breached and to resolve that issue further inquiry would be required, which would go beyond the scope of assertions in affidavit/witness statement evidence and prima facie documentary evidence there presented.

[79] Laureola and Mr. Bremness have in my judgment succeeded in raising sufficient doubt that the payments were in breach of the Bermuda Freezing Orders for that to remain a viable premise.

Alleged breach of duty of full and frank disclosure and fair presentation

[80] The principles that the Court must bear in mind when considering the duty of full and frank disclosure and fair presentation are well settled (see, e.g., **Commercial Bank-Cameroun v Nixon Financial Group**⁹). I need not rehearse them here. Whilst the duty of candour is a heavy one, as stated by our Court of Appeal in **Konoshita 2018**:

“Failure to do so however does not lead to an automatic discharge of the *ex parte* injunction. The principles outlined in cases such as *Brink’s Mat Ltd v Elcombe and others* ([1988] 1 WLR 1350) and *Kazakhstan* show that a judge has a wide discretion when a party seeks to discharge an order on the basis of material non-disclosure. On the proof of material non-disclosure, the court has a discretion whether to discharge the *ex parte* order, or to continue the order, or to make a new order on terms. A court may well refuse to discharge an injunction on the basis of material non-disclosure where had the facts been disclosed the injunction could properly have been granted.”¹⁰

[81] Laureola’s and Mr. Bremness’s contentions that the Claimants breached their duty of full and frank disclosure and fair presentation in failing to bring to the Court’s attention that the

⁹ BVIHCVP2011/005 (unreported, delivered 6th June 2011).

¹⁰ BVIHCP2018/0047, BVIHCP2018/0020 *Konoshita et al. v JTrust Asia PTE LTD* (unreported, delivered 18th December 2018) at paragraph [23] (Thom JA).

Bermuda Freezing Orders contained an ordinary course of business exception and did not include any disclosure provisions do not succeed for the following reasons.

[82] Whilst the Claimants did not spell out these provisions at the *ex parte* hearing, the terms of the Bermuda Freezing Orders were amply adverted to in the Claimants' affidavit evidence. The description of the course of business exceptions in the Claimants' evidence was juxtaposed to their recital of payments, begging the question whether such payments came within the course of business exception. Whilst it is correct that the Claimants did not attempt an analysis whether or not the payments came within the exceptions, but rather advanced a conclusion that they constituted breaches of the Bermuda Freezing Orders, the way this evidence was presented in the Claimants' affidavit evidence made it hard to miss the possibility that the payments were not in fact breaches of the Bermuda Freezing Orders.

[83] In the event, I ultimately exercised the Court's 'wide discretion'¹¹ by not discharging the orders on grounds of a failure to give full and frank disclosure and fair presentation. This was because in my respectful judgment the Defendants here had not established a sufficiently serious breach of the duty of full and frank disclosure and fair presentation to warrant the orders being set aside on that ground, since the possibility that the Claimants might be wrong on their allegations of breach of the Bermuda Freezing Orders was always apparent. I took the view that any disclosure failure here was innocent. Thus, this premise of Laureola and Mr. Bremness did not succeed.

'No risk of dissipation'

[84] In relation to Laureola's and Mr. Bremness's submission that there is no risk of dissipation of Mr. Erwin's assets by them, the first question arises as to the test that the Court has to apply at this stage of the proceedings in deciding either to leave the receivership, freezing and disclosure orders in place or to dismiss them.

[85] In relation, first of all, to the Court's jurisdiction and the standard of proof to be applied, as stated by our Court of Appeal in **Konoshita 2021**:

¹¹ BVIHMAP2018/0047, BVIHMAP2018/0020 Konoshita et al. v JTrust Asia PTE LTD (unreported, delivered 18th December 2018) at paragraph [23] (Thom JA).

“A court has power to vary or to discharge any interim order, including a freezing order. This power is part of the court’s inherent jurisdiction. Thus, once granted, a freezing order may be discharged or varied by the court upon application. On an application to discharge a freezing order, the burden rests on the party seeking to have it discharged – the applicant for discharge – to satisfy the court, on a balance of probabilities, that it ought to discharge the freezing order.”¹²

[86] The Court of Appeal then stated the operative criterion:

“The question for the court on an application to discharge a freezing order, is whether it would be just and convenient to continue the order as made or whether the justice of the case favoured its immediate discharge or that the order ought to be varied in some material respect. This burden rests on the applicant for the discharge or variation of the order...”¹³

[87] The context in which the Court of Appeal on that occasion applied these principles was a case where a receivership and freezing order had been continued after a substantive *inter partes* hearing and discharge was then sought on grounds (*inter alia*) of an alleged change in circumstances. It is in such a case that the applicant for discharge has a burden of proof on a balance of probabilities.

[88] Where, on the other hand, an applicant for discharge seeks to argue that a judge at an *ex parte* hearing had erroneously exercised his discretion in granting an order, the Court of Appeal in **Konoshita 2018** reminds us that

“...an appellant who seeks to overturn the exercise of the discretion of a judge in granting a freezing order has a heavy burden and an appellate court should only interfere where the appellant has clearly demonstrated that the judge was plainly wrong.”¹⁴

[89] This begs the question which of these standards of proof apply here. Laureola and Mr. Bremness, for their part, approached this aspect of their discharge application as if the hearing of their application was simply a re-run of the *ex parte* application but on an *inter partes* basis and with the Court having the benefit of Mr. Bremness’s evidence. Thus, Laureola and Mr. Bremness submitted that the applicable test was simply that laid down for a risk of dissipation in the English cases of **Holyoake v Candy**¹⁵, **Lakatamia Shipping Co Ltd v Morimoto**¹⁶ and

¹² BVIHCMAP2020/0017 (unreported, delivered 24th March 2021) at paragraph [38] (Farara JA (Ag.)).

¹³ Ditto at paragraph [39].

¹⁴ BVIHCMAP2018/0047, BVIHCMAP2018/0020 Konoshita et al. v JTrust Asia PTE LTD (unreported, delivered 18th December 2018) at paragraph [19] (Thom JA).

¹⁵ [2016] EWHC 970 (Ch).

¹⁶ [2019] EWCA Civ 2203.

this Court's decision in **Green Elite Limited (in Liquidation) v Fang Ankong**¹⁷ without any reference to a burden and standard of proof applicable to themselves.

[90] In other words, Laureola and Mr. Bremness went directly to the test for a risk of dissipation that a judge should apply upon the application for a freezing (or receivership) order. To be clear, the starting point of these cases, as recalled by our Court of Appeal in **Konoshita 2018**,¹⁸ is as it was stated in **Holyoake v Candy** at paragraph 34 of the latter:

“...There was some debate as to what was the correct test to establish that there was a risk of dissipation such as to make it just and convenient to grant a conventional freezing injunction. However, the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.”

[91] A fuller enunciation of the material principles can be found in the English high court, commercial division, case of **Fundo Soberano de Angola & Ors v José Filomeno dos Santos**¹⁹ at paragraph 86:

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

- (1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
- (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
- (3) The risk of dissipation must be established separately against each respondent.
- (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary

¹⁷ BVIHCM2019/0030 (unreported, delivered 11th June 2021).

¹⁸ BVIHCMAP2018/0047, BVIHCMAP2018/0020 Konoshita et al. v JTrust Asia PTE LTD (unreported, delivered 18th December 2018) at paragraph [25] (Thom JA).

¹⁹ [2018] EWHC 2199 (Comm)

to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

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

[92] As explained further in *Gee: Commercial Injunctions* (7th Edn. Sweet & Maxwell 2020) at paragraph 12-041 (here abridged for summary purposes and with references omitted):

"Since each case depends on its own facts and the court looks at the totality of the evidence, it is impossible to lay down any general guidelines on satisfying this burden, but some of the factors which may be relevant are as follows.

- (1) The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated... .
- (2) The nature and financial standing of the defendant's business: see Lord Denning's remarks about certain types of offshore company in *Third Chandris Shipping Corp v Unimarine*, *Lawton LJ* and *Siporex Trade SA v Comdel Commodities Ltd*. Contrast, however, *The Niedersachsen*: a "one-ship" company incorporated in Panama or Liberia may be a subsidiary of a substantial company incorporated elsewhere, and would be likely to honour its debts... .
- (3) The length of time the defendant has been in business. Stronger evidence of potential dissipation will be needed where the defendant is a long-established company with a reasonable market reputation than where little or nothing is known or can be ascertained about it.

- (4) The domicile or residence of the defendant. At one time, Mareva injunctions were granted to prevent only foreign defendants from removing their assets from the jurisdiction to defeat a judgment or arbitration award. While the jurisdiction has widened to include domestic defendants, the court will be less ready to infer that a defendant who is based in England, and has a home or established business here, will remove or dissipate his assets. On the other hand, if the defendant company, though English, is controlled by an offshore company of the kind described by Lord Denning in *Third Chandris Shipping Corp v Unimarine*, the inference that there is a real risk that a judgment or award may go unsatisfied may be more readily drawn... .
- (5) If the defendant is a foreign company, partnership or trader, the country in which it has been registered or has its main business address, and the availability or non-availability of any machinery for reciprocal enforcement of English judgments or arbitration awards in that country. If such machinery does exist, the length of time it would take to implement it may be an important factor.
- (6) The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the claimant's favour—on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the claimant commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent. The possibility of insolvency does not justify the granting of Mareva relief... .
- (7) Any intention expressed by the defendant about future dealings with his English assets, or assets outside the jurisdiction. A threat to dissipate assets is indicative of risk of dissipation, and will not be protected by "Without Prejudice" privilege because of the unambiguous impropriety exception, based on abuse of a privileged occasion.
- (8) Connections between a defendant company and other companies which have defaulted on arbitration awards or judgments. If the defendant company is the subsidiary of a foreign company which has allowed other subsidiaries to default on awards or judgments, or go into liquidation owing large sums of money to trade creditors, this may be a powerful factor in favour of granting an injunction.
- (9) The defendant's behaviour in respect of the claims, including that in response to the claimant's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, or promises to pay and persistent defaults with implausible excuses, or running up liabilities and not paying them, or incurring liabilities beyond his means, or transferring assets or engaging in other conduct which may prevent enforcement... ."

[93] Upon an application for discharge of a freezing order, and, by extension, a receivership order, the Court clearly has to consider these factors. But the applicant for discharge has the burden

of satisfying the Court that, taken cumulatively and in light of the totality of the evidence, the interim relief ought to be discharged. Where, as here, the applicant for discharge does not complain that the judge at the *ex parte* hearing exercised his discretion incorrectly upon the material then before the Court, but rather that, when the applicant for discharge's further evidence is taken into account it can be seen that the test for a risk of dissipation is not satisfied, the applicant for discharge must satisfy the Court of this on a balance of probabilities. That is the burden and standard of proof which, in my respectful judgment, applies here to Laureola and Mr. Bremness.

[94] In considering whether Mr. Bremness's evidence tips the balance of probabilities against the existence of a real risk of unjustified dissipation, it is appropriate here to contrast the evidential position as presented at the *ex parte* hearing with that which is now before the Court.

[95] At the *ex parte* hearing what was presented to the Court was a situation in which there was no overtly apparent dishonest conduct on the part of Laureola or Mr. Bremness. But Laureola and Mr. Bremness made use of offshore structures, and Mr. Bremness himself was based offshore. Laureola and Mr. Bremness appeared to be in the process of changing the way in which the shareholdings in Laureola were organized, in an ambiguous way, as shown by the January 2021 Register. At the same time, there appeared to be a highly active flurry of payments from Laureola and/or injected entities in Mr. Erwin's direction, despite freezing orders made in Bermuda. Mr. Erwin himself claimed to have had a beneficial ownership interest in Laureola which he claimed to have transferred to 'Bella', but that was not borne out by corporate documents disclosed to the Claimants by Laureola's registered agent. Mr. Erwin's honesty and integrity had been gravely impugned by findings of the California court. He had been a long-running associate of Mr. Bremness and despite the extremely prejudicial findings against Mr. Erwin, Mr. Bremness appeared to have been in no hurry to distance himself and Laureola publicly from Mr. Erwin. Mr. Erwin himself appeared to have so little honesty and integrity that he himself would be likely to dissipate his assets unjustifiably to frustrate enforcement of a judgment, if he retained any influence and control over Laureola and/or Mr. Bremness.

[96] Moreover, the nature of the assets – shares in Laureola – would make dissipation easy. Shares can be moved within minutes. Against that, it would appear that Laureola was a holding vehicle for an established investment fund, which depends upon the manifest honesty and integrity of its principals and staff. Laureola and Mr. Bremness themselves did not appear

to have had any history of dishonesty or default on payment of debts nor indeed judgments, nor any other pattern of evasiveness. The shadow of suspicion that the Claimants portrayed in respect of Laureola and Mr. Bremness was cast entirely by Mr. Erwin and the documents obtained from the registered agent were insufficient to dispel that taint.

[97] It can thus be seen that in considering the factors going to a risk of dissipation summarised above, there appeared to be sufficient tell-tale signs to conclude at the *ex parte* stage that a brazen and highly active dissipation attempt had been under way, which warranted not just a freezing order but also a receivership to police it.

[98] Following the filing of Mr. Bremness's evidence however, a different picture emerged. Mr. Bremness had properly arguable answers both in respect of the series of payments made as well as for the share re-organisation transactions. He explained that he had been distancing and disconnecting himself and Laureola from Mr. Erwin. This was demonstrated by the Register of Members dated 24th March 2021. This is a key document. Unlike the January 2021 Register, this is not an ambiguous document. Mr. Bremness's account of events, that Mr. Erwin had been discovered to have been competing with Laureola, contrary to the interests of Laureola, is corroborated by the fundamental changes to Laureola's Memorandum and Articles of Association, some of which clearly had prevention of a repetition of this in view.

[99] The further evidence filed disclosed no reason to disbelieve Mr. Bremness.

[100] Mr. Bremness also explained that the fund management business held by Laureola is a growing business, which only now contemporaneously has been starting to make a respectable profit. The business has attracted the attention of a far bigger investment fund and certain business development talks have been held. He gave evidence that the receivership and freezing orders were interfering with negotiation prospects, as well as with relations with the business's bankers. This is not surprising, as these are typical kinds of prejudice that freezing and receivership orders cause.

[101] In my respectful judgment, the inferences the Claimant invited the Court to draw at the *ex parte* hearing were fair and reasonable then, and I am satisfied that the Claimants laid before the Court the material they had without improperly holding anything back. But once the evidence of Mr. Bremness was adduced it appears to me that there is no solid evidence of a real risk that

Laureola or Mr. Bremness will dissipate Mr. Erwin's assets. In other words, Laureola and Mr. Bremness have discharged their burden of proving on a balance of probabilities that there is no such risk.

[102] That alone suffices to warrant immediate discharge of the receivership, freezing and ancillary disclosure orders against Laureola and Mr. Bremness.

[103] I should also record that I reserved issues of the incidence and quantum of costs pending further argument on these issues and, also, that the period for appeal shall run from the date this finalised written judgment is communicated to the parties.

[104] I take this opportunity to thank Counsel for their assistance in this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar