

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2019/0167

BETWEEN:

[1] HU LAN

Claimant/
Respondent

and

**[1] SUNDALE INTERNATIONAL LIMITED
[2] BEST LAND INVESTMENTS LIMITED
[3] HARNEYS CORPORATE SERVICES LIMITED**

Defendants

[4] DAVID GOLDEN

Defendant/Applicant

Appearances:

Mr. Richard Millett, QC with him Ms. Tameka Davis for the Claimant/Respondent
Mr. Tom Lowe, QC with him Mr. John McCarroll, SC, Ms. Kimberley Crabbe Adams and Mr.
Stuart Rau for the Fourth Defendant/Applicant
Mr. Shane Donovan for Receivers.

2021: February 22, 23, 24;
May 19.

JUDGMENT

[1] **WALLBANK, J. (Ag.)** This is the Court's judgment upon an application filed by Mr. David Golden ('Mr. Golden'), the Fourth Defendant, on 22nd July 2020, seeking the discharge of a receivership order granted to the Claimant against the First and Second Defendants on an *ex parte* basis on 29th May 2020, with costs and an interim payment on account.

Introduction

- [2] On 25th February 2020, the Claimant had applied for and obtained a proprietary injunction on an *ex parte* basis against the First and Second Defendants (the 'BVI Companies' or 'Sundale' and 'Best Land' respectively) and the Fourth Defendant, Mr. Golden. This injunction was subsequently varied on an interim basis. Mr. Golden applied on 15th April 2020 for the injunction to be discharged on grounds, *inter alia*, that the Counsel had breached her duty of full and frank disclosure. The hearing of that discharge application significantly exceeded the parties' original time estimate and occupied significant Court time on 3rd, 4th and 22nd June 2020. The Court ultimately ruled that the injunction should be set aside, and that a fresh injunction should be imposed.
- [3] Before the injunction discharge application could be heard, and whilst other interlocutory disputes concerning the operation of the injunction were being argued over on an *inter partes* basis before the Court, the Claimant applied under a Certificate of Urgency on an *ex parte* basis for a receivership order. The Certificate of Urgency stated:
- “Not only are the Receivers sought to police the injunction, but the passage of time and based on the conduct of the Fourth Defendant it has become obvious that the Injunction Order alone is not sufficient to hold the position properly pending the resolution of the dispute.”
- [4] The Certificate of Urgency recounted at considerable length that Mr. Golden was shortly about to embark upon 'an “active” plan' to dissipate assets or to diminish their value, to the point of threatening to drive one of the operating companies (a company which we can refer to as 'Jiacheng') into insolvency. The Certificate of Urgency also stated that:
- (1) Mr. Golden had adopted a 'narrow approach to interpretation of the Injunction Order';
 - (2) he had abused and 'made a mockery of' the consent mechanism for expenditure under the injunction and created chaos by last minute requests for expenditure approval.
- [5] The Certificate of Urgency was filed on 27th May 2020. It had its intended effect. The Claimant's receivership application was brought on for hearing the following day (28th May 2020) and the hearing continued the next morning (Friday 29th May 2020).
- [6] For the reader's convenience, in addition to the company referred to as 'Jiacheng', there is also another relevant company that was controlled by Mr. Golden, called 'Bange'. Jiancheng and

Bange were in essence the operating companies through which the BVI Companies operated and managed a real estate development in the Peoples' Republic of China ('PRC'), known as the 'Sunville Estate', which represents the economic value in these proceedings. At least up until the receivership order was made, Mr. Golden controlled both Jiacheng and Bange. Reference in this judgment to 'Harneys' or 'Messrs. Harneys' is a reference to the Fourth Defendant's BVI legal practitioners, more fully known as Messrs. Harney Westwood & Riegels LP. Similarly, reference to 'Conyers' or 'Messrs. Conyers' is a reference to the Claimant's BVI legal practitioners, Messrs. Conyers Dill & Pearman. Reference to the Civil Procedure Rules 2000 will be given as 'CPR'.

[7] The grounds relied upon for the appointment of receivers were stated in the Notice of Application to have been the following. I set these out not only to show what this concerned, but also to indicate the heightened level of detail the Claimant introduced into her application:

- (1) The Claimant claims a proprietary interest in the shares in the First Defendant and any and all assets of the First and/or Second Defendants and of their direct or indirect subsidiaries, including but not limited to Jiacheng, Bange, all villas, units or other premises comprising the villa estate in Songjiang, Shanghai known as Shanghai Ziyuan (the Sunville Estate), all movable and temporary property at the premises and all fixed assets (movable or immovable) of Jiacheng and Bange including but not limited to cars, furnitures, arts and crafts, etc. (together, the "Assets").
- (2) On 25th February 2020, this Court granted a proprietary interim injunction, which by its terms prohibited the Respondents from taking steps which would amount to the dissipation of the Assets; the order was continued on 18th March 2020 ('Injunction Order'). The terms of the Injunction Order are clear.
- (3) The Fourth Defendant had failed properly to comply with the terms of and has acted in disregard of the Injunction Order.
- (4) Critically, based on communications from Mr. Golden's lawyers received on 21st May 2020, these breaches were likely to continue unless prevented by the Court by a more draconian order.
- (5) In so far as it concerns the particular breaches by Mr. Golden, the more significant are the following. Mr. Golden has:
 - (i) failed to comply with paragraph 4.9 of the Injunction Order and its sub-paragraphs by *inter alia*:

1. failing to cause Jiacheng from stopping the completion of the sale of Villa 303, which was sold at an undervalue, and without consent issued a VAT Fapiao which caused Jiacheng to pay an excess amount of VAT taxes of RMB 4.2 million associated with the sale;
2. participating in negotiations with a 'third party unconnected potential buyer' in an attempt to cause Jiacheng to sell Villa 202;
3. caused Jiacheng to pay Mr. Golden's personal legal fees against the Claimant of RMB236, 736;
4. without the Claimant's consent, on 1st April 2020, knowingly failed to cancel payment instructions and allowed for a payment of RMB 293,595.30 to be made to a Mr. Lv from a bank account belonging to Bange;
5. without the Claimant's consent, on 9th March and 9th April 2020, caused Bange to transfer RMB 1,000,000 to Jiacheng, for which no explanation had been offered and why it could be maintained that the same was not in breach of the Injunction Order;
6. without the Claimant's consent, in March 2020, failed to cancel payment instructions and allowed the payment of salaries to employees of Jiacheng and Bange to be made in the amount of RMB 725,079.42 from Jiacheng's bank account and RMB 474,272.03 from Bange's bank account;
7. without the Claimant's consent, in March 2020, caused Jiacheng and Bange to make outbound payments for expenses in a total amount of RMB 851,146.21 (inclusive of employees' salaries) and RMB 863,232.08 (inclusive of employees' salary and travel expenses withdrawn in cash, see item 12 below) respectively; based on the Claimant's calculations, Mr. Golden paid a total expenses of RMB 1,714,378.29 for Jiacheng and Bange, which was far in excess of the Claimant's approved monthly budget of RMB 1,246,000 for March 2020;
8. without the Claimant's consent, in April 2020, failed to cancel payment instructions and allowed the payment of salaries to employees of Jiacheng and Bange to be made in the amount of RMB 515,614.19 (exclusive of social security) from Jiacheng's bank account and RMB

320,294.77 (exclusive of social security) from Bange's bank account; based on the Claimant's calculations, Mr. Golden paid a total of RMB 835,908.96 for employees' salaries and contributions exclusive of social security, which was far in excess of the agreed monthly budget for salaries, social security and provident funds of RMB 826,000 for March 2020;

9. without the Claimant's consent, in March, April and May 2020, failed to cancel automatic payments and allowed for automatic payments of social security and provident funds to be made to employees of Jiacheng and Bange where payments in breach of the Injunction Order was forthcoming as the excessive amount of which would artificially compromise the ability to afford other operating expenses without exceeding the Claimant's approved monthly budget; at no point did the Fourth Defendant ask for the Claimant's permission to cancel automatic payments, if such was needed;
 10. without the Claimant's consent, on 11th March 2020 and 20th April 2020, withdrew from Bange's bank account a total of RMB 100,000 in cash for purported 'travel expenses'; and
 11. without the Claimant's consent and knowingly defying the Claimant's disagreement, in May 2020, caused Jiacheng to reimburse himself personally for school fees of his children and made a further payment directly to the school in the total amount of RMB 376,916.31, being his personal expenses.
- ii) and in so far as any of the above steps required Mr. Golden taking any step in his position as signatory of the bank accounts of the PRC Subsidiaries, then if such step was taken without the Claimant's consent then same would amount to a breach of the Injunction Order;
- iii) pursuant to paragraph 4.14 of the Injunction Order, the Fourth Respondent was prohibited, *inter alia*, from taking any step in his position as the legal representative of Jiacheng and Bange to use his signature or company chops on any resolutions, contracts and agreements with third parties, without the Claimant's consent, on 2nd April 2020, the Fourth Defendant caused Bange to open a new investment account with Shanghai SPD Bank. The company chop and legal representative chop were needed for opening such bank account,

the course of which included signing an agreement with the bank which required the chops. Any such use of the chops is in breach of the Injunction Order.

- (6) More recently Mr. Golden had through Messrs. Harneys, his lawyers in the BVI, informed the Claimant that: 'Funds must be raised to meet this future liability either by securing investment, a loan or sale of the underlying villas or by sale of Best Land, offshore. Our client puts you on notice that he will be therefore actively seeking the foregoing so that your client does not misconstrue his actions as any intended breach of the injunction.'
- (7) On 24th May 2021, the Claimant wrote to Mr. Golden highlighting the above breaches. In so far as it concerns the sale of House 303, Harneys repeated the position that they had taken previously and took the view that the Fourth Defendant by merely entering into negotiations with a view to selling certain villas did not amount to breaching the Injunction.
- (8) These breaches are plainly deliberate and intended to evade the purpose and spirit of the Injunction Order.
- (9) In light of the obvious, the Applicant is entitled to police the Injunction Order and ensure that its terms are adhered to.
- (10) Not only were Receivers sought to police the injunction but it had become obvious by the passage of time and based on the conduct of Mr. Golden that the Injunction Order alone was not sufficient to hold the position properly and there was imminent peril of significant irreparable damage to the business of the PRC Subsidiaries if an immediate appointment was not made. The conduct complained of included the following:
 - a. Mr. Golden has repeatedly shirked the consent mechanism provided for in the Injunction Order;
 - b. Mr. Golden has breached the Injunction Order in a number of respects;
 - c. Mr. Golden has threatened further breach of the Injunction Order if the Applicant does not consent to the making of disputed payments;
 - d. Mr. Golden has threatened to make the payment of RMB4.2 million described as tax liability although the court has determined that there needed to be a hearing on that issue and that hearing has been listed for 28 May 2020; and
 - e. Mr. Golden has stated in correspondence that he will be actively seeking to secure investment, enter into a loan or sale of the underlying villa or by a sale of the Second Defendant and hence all the assets of the Subsidiaries, including the business of Sunville Estate and its unsold villas.

- (11) Moreover, since the Subsidiaries are a going concern, it is appropriate that receivers be appointed to manage the business and its assets, to prevent dissipation whether by way of preventing the unnecessary incurring of liabilities or selling villas at an undervalue. The proposed order is limited in scope and is intended to achieve that objective in a meaningful and purposeful way.
- (12) In the circumstances, this is an appropriate case for the appointment of receivers.
- (13) The relief sought was proportionate. Sunville Estate is one of the top four luxury properties in Shanghai; it is extremely valuable. It comprises of 268 high end luxury villas. The cost of the receivership is not significant when compared with the actual value of Sunville Estate, the estate that would be secured by the appointment of the receivers. The appointment of the receivers in these circumstances was a proportionate and fair response and was just or convenient in the circumstances.

[8] In support of the *ex parte* receivership application the Claimant relied upon a Seventh Affidavit of a Mr. Ribeiro, her Hong Kong Solicitor. This was a long Affidavit, of some forty pages, 109 paragraphs in length, addressing a lot of contentious detail in argumentative fashion. This portrayed Mr. Golden as acting in bad faith as well as incompetently. This Affidavit gave the impression that whatever Mr. Golden might say, the Claimant generally disagreed and had an answer to it. What was crystal clear was that the Claimant and Mr. Golden have a huge number of differences, on points great, small and minuscule. Beyond this, it is not easy to say who is right and who is wrong on differences that really matter. Lost in the red mist of dispute was also the question as to which differences really matter.

[9] Mr. Ribeiro broadly summarises the thrust of his evidence as follows:

“40. The Fourth Defendant was notified and served with the Injunction Order and accompanying documents on 27 and 28 February 2020...

41. Since then, the Fourth Defendant has embarked on a strategy of (i) circumventing the injunction Order inter alia by failing to cancel instructions given before 25 February 2020 and allowing their parties to rely on the same, (ii) dissipating the assets by inter alia causing the PRC Companies to reimburse his personal expenses and making payments from their bank accounts in excess of approved amounts for their monthly expenses and (iii) diminishing the value of the BVI Companies by inter alia causing Jiacheng to proceed with the sale of Villa 303 at an undervalue and incur the tax liability. ...

49. In summary, given the failure of the Fourth Defendant to comply with the Injunction Order there is no realistic alternative to the appointment of a receiver so as to enforce the Injunction Order.”

- [10] Mr. Ribeiro proceeded to illustrate this summary with an array of examples, explaining why (in the Claimant's side's view) these were instances of breaches of the injunction and conduct on the part of Mr. Golden and his colleague, a Mr. Feng, giving rise to fears that the property in question was in peril if left unpoliced in Mr. Golden's control.

The *ex parte* receivership application hearing

- [11] The following were what I perceive to have been the headline points made by Counsel for the Claimant during the *ex parte* hearing. I should observe that that Counsel was not the Claimant's Queen's Counsel who led for the Claimant at the subsequent discharge application hearing.

- [12] The Claimant had not filed a skeleton argument prior to the *ex parte* hearing. So, the Court was dependent upon Counsel's presentation to illuminate and fill-out its own pre-reading. I have taken these headline points from the Official Transcript, since there is even disagreement over what Counsel for the Claimant in fact said at the hearing on 28th and 29th May 2020:

- (1) In breach of the injunction, Mr. Feng, the Chief Financial Officer of Jiacheng, but who has been described by Mr. Golden's legal representatives as 'autonomous', used the chop (a corporate ratification instrument akin to a company seal) of Bange to open bank accounts at a separate bank and then caused funds from Jiacheng to be transferred to the new Bange account. The funds were moved from an account that had been restricted, because Mr. Golden and Mr. Feng did not have the chops, to an account over which they did have the chops, and thus which was not so restricted. The implication of this was that Mr. Golden and Mr. Feng were laying the groundwork for transferring assets, suggesting a risk of imminent dissipation.
- (2) The Jiacheng chop had just been released to Mr. Golden by law enforcement authorities and could be used by anyone (such as Mr. Golden or Mr. Feng) who had possession of it to deal with assets.
- (3) The receivership application was being made on grounds of many breaches of the injunction.
- (4) The injunction order was not sufficient to safeguard the interests of Jiacheng, Bange or the Claimant.

- (5) Mr. Feng was a criminal who had been convicted of tax fraud and had been in prison for a year.
- (6) Corporate control had been shifted from Mr. Golden to Mr. Feng in order to allow the injunction to be breached at will and zealously without any accountability on behalf of Mr. Golden.
- (7) Tax liabilities have been created by Mr. Golden (through Mr. Feng) for the purposes of nosediving the Sunville Estate into insolvency.
- (8) The Defendants have 'weaponized' and played fast and loose with the injunction order, e.g. making a payment of RMB 100,000 which was described as a 'travel expense', instead of for 'petty cash' and then there was no accounting how the monies were applied.
- (9) The Defendants' steps in relation to the injunction order were blatantly intended to ensure that it had no teeth.
- (10) There was sufficient evidence to show not just a risk of dissipation but actual dissipation.
- (11) Evidence of breaches of the injunction is contained in the Seventh Affidavit of Mr. Ribeiro.
- (12) The Claimant has a good arguable case and Mr. Golden's defence and counterclaim are inherently weak and/or are bound to fail.
- (13) Mr. Feng, who, Counsel for the Claimant stressed, was a criminal who had been convicted of tax offences, has been generating tax invoices which have caused significant tax liabilities to be incurred that would deplete the value of the assets.
- (14) The Claimant alleges that it is 'absolutely incredible' that a fine of RMB 10,000 (US\$850 approximately) could (as Mr. Golden pretends) be the trigger for a wholesale audit of Jiacheng and Bange and the 'fast tracking' of a tax liability for RMB500 million which (Mr. Golden also pretends) would require perhaps the whole estate to be sold off at below market value.
- (15) Although Mr. Golden has assured the Claimant that the newly released Jiacheng chops would not be used by Mr. Golden without the Claimant's consent there is no mention in letters of 25th or 27th May 2020 from Mr. Golden's legal representatives whether the 'autonomous' Mr. Feng would adhere to the injunction order.
- (16) Risk of dissipation is also evidenced by sale by Mr. Golden at an undervalue of Villa 303.
- (17) Sale at undervalue (RMB 47 million rather than the advertised RMB 80 million) would be a breach of the Injunction.

- (18) The sale and purchase contract pertaining to Villa 303 was ‘tucked away’ in Mr. Golden’s evidence, demonstrating a ‘campaign...of swamping the Court and indeed the Claimant, with reams and reams and reams of information in the hope and expectation that if you don’t pay proper attention to it things will be missed.’
- (19) The receivership application was made *ex parte* on the basis that the Defendants ‘have taken a narrow interpretation of the [injunction] order and we have no assurance that they will not seek to dissipate assets and/or carry on with that narrow interpretation in order to allow for assets to be dissipated so that by the time the receivers are in place it would render that second order, receivership order, ineffectual’. ... ‘*Ex parte* is simply because... we’ve identified numerous instances of the injunction being breached...’
- [13] The Claimant’s Counsel mentioned and made reference to letters sent on behalf of Mr. Golden by Messrs. Harneys on 21st, 25th, 27th and 28th May 2020. In doing so, she took the Court’s attention to a selection of points, arguments and explanations raised by Mr. Golden’s legal representatives, expressly as part of her duty of full and frank disclosure and fair presentation, and then proceeded to explain why the Claimant disagreed with them. In this, Counsel for the Claimant followed the pattern adopted in Mr. Ribeiro’s Seventh Affidavit. For present purposes, I do not think it is necessary to summarise the various arguments. It suffices to say that Counsel for the Claimant would take a point made on behalf of Mr. Golden, summarise it briefly, and then argue vigorously against it.
- [14] In this regard, learned Counsel for the Claimant was in a very difficult position: on the one hand, Counsel’s desire and purpose were clearly to obtain the result that the client wanted (the receivership). On the other hand, Counsel acknowledged being bounden by a duty of full and frank disclosure and fair presentation. Counsel certainly demonstrated an encyclopedic knowledge of the case and the materials before the Court. But, on yet another hand, Counsel’s own interpretative vision was, quite naturally, coloured by the Claimant’s perspective. As learned Queen’s Counsel for Mr. Golden later remarked at the discharge hearing, based upon the Claimant’s Counsel’s presentation, it is not surprising that the Court made the receivership order.
- [15] So, the receivership order was indeed made, on 29th May 2020.

The subsequent procedural developments

- [16] On 6th July 2020 the injunction order, which the receivership order was intended to police and render effective, was discharged. The Court indicated that a fresh injunction order, on different terms, would be made.
- [17] The terms of the fresh injunction were not immediately settled. There was considerable argument (over several further hearings) about the precise form the new injunction order should take. Differences between the parties and their respective desires proved intractable.
- [18] A solution that neither side had identified (nor foreshadowed) recommended itself. On 28th July 2020, the Court determined that control over the relevant companies should be returned to the Claimant and Mr. Golden, but with the balance of power held by an independent director who should be an experienced BVI licensed accountant or insolvency professional. The extant receivership would provide the mechanism whereby such a director could be appointed, since the Court itself has no power to appoint directors. Pending such reconstitution of the company Boards (which the Court intended should take place promptly) the receiver and Mr. Golden would together operate the business of Jiacheng and Bange. Thus, the receivership order continued in effect, albeit temporarily in what the Court envisaged would be the short-term.
- [19] On 21st July 2020, that is, a week before the Court's determination of 28th July 2020, whilst the terms of the fresh injunction remained uncertain and the impact thereof upon the receivership were still unknown, Mr. Golden applied to have the receivership discharged. The orders sought were expressed to be as follows. This is important, as it shows which matters had been placed into issue in this application:
- “1. The Receivership Order be discharged
 2. The Claimant pay the Fourth Defendant's costs of, associated with and incidental to the Receivership Order.
 3. The Claimant make a payment on account of the Fourth Defendant's costs pursuant to CPR 69B.13.”
- [20] The Notice of Application raised some twenty-two grounds for discharge of the receivership order. The overarching theme was that the Claimant had improperly made the receivership application on an *ex parte* basis, had mischaracterized matters and events, and had failed to explain and disclose facts properly.

- [21] The alleged role of Mr. Feng in relation to the use of chops and bank account opening for Bange and the transfer of funds to it were included in three heads ('m', 'n' and 'o').
- [22] Mr. Golden's Notice of Application was supported by a Seventh Affirmation of Mr. Golden, affirmed on 22nd July 2020. In this, he expressly responded to Mr. Ribeiro's Seventh Affidavit. Mr. Golden's Seventh Affirmation was even longer than Mr. Ribeiro's (at some 59 pages and 148 paragraphs in length). In this Mr. Golden sought to put his side of the story.
- [23] Mr. Golden addressed the alleged role of Mr. Feng in relation to the use of chops and bank account opening for Bange and the transfer of funds to it at paragraphs 99 to 106.
- [24] The volume of the discharge application and Mr. Golden's Seventh Affirmation indicates that his legal team must have been working on this application for considerable time prior to filing it.
- [25] Before the substantive hearing of the receivership discharge application, the parties came to be of the same view that the receivership should be discharged once the Boards had been reconstituted. I put it like this because there was no formal settlement between the parties. That consensus, in a sense, resolved the first head of relief sought in Mr. Golden's discharge application.
- [26] In relation to the second head, a proposal and a counter-proposal were made in relation to appropriate costs orders but no agreement was reached.
- [27] The third head was also not resolved. Indeed, it remained incapable of resolution, because Mr. Golden did not submit an itemized schedule of costs as required by CPR69B(2).
- [28] The only real issues remaining thus concern the second head, the incidence and (depending upon how the incidence of costs is determined) eventual quantum of costs.
- [29] No issue arises (yet) in relation to the Claimant's cross-undertaking in damages, as that undertaking had been given to the First and Second Defendants as Respondents to the receivership application, not directly to Mr. Golden. It is Mr. Golden who is the applicant in the receivership discharge application, and not the First and Second Defendants.

- [30] After some further (typically heavily contested) interlocutory hearings, Mr. Golden's receivership discharge hearing was brought on for hearing on 22nd to 25th February 2021.

The receivership discharge application hearing

- [31] At this hearing, issues of the Court's jurisdiction to make costs orders were argued along with the issue whether the receivership order warrants being discharged and the basic costs order that should flow from that.

The Claimant's skeleton submissions – receivership discharge application

- [32] In this section the Claimant's skeleton arguments upon the receivership discharge application are rehearsed so far as it appears to me to be necessary. Nothing in this section is to be taken as a finding of the Court. In summary:

- (1) the hearing is entirely academic since the outcome is not disputed. The Claimant and Fourth Defendant agree that the Receivership Order should be discharged. The Court should proceed to do so with suitable consequential orders to permit the Boards to be reconstituted as soon as possible, if that has not yet occurred.
- (2) the only live issue is one of costs. Using two full days of court time to decide the incidence of costs is disproportionate and inconsistent with the overriding objective.
- (3) quite apart from the incoherent way in which the alleged material nondisclosures has been pleaded, in any event the Claimant strongly denies each and every allegation of material non-disclosure and it is clear that there has been no material non-disclosure, let alone one that is material enough to attract a cost penalty.
- (4) the order for discharge, and consequential mechanics, can still be made since the outcome is agreed.

- [33] The events preceding this hearing are important. The, very short, point is that on 6th August 2020, after very much *inter partes* argument, the Court decided to make a carefully constructed order by way of regrant of the original injunction (the '6th August Order'). The only way that this order would work is if the receivers remained in place for a temporary period, in order to act as midwives to the independent running of the board in the hands of an independent director. Thereafter they would be discharged. The 6th August Order remains in place and it has not been appealed. The Fourth Defendant has not applied to vary or discharge the 6th August

Order. Therefore, this application must either fail or result in the wholesale disruption and redesign of the 6th August Order.

[34] The pertinent history is as follows. On 29th May 2020 the Claimant was granted an *ex parte* order appointing two persons as receivers over the assets of the First and Second Defendants and the PRC Subsidiaries (the 'Receivership Order'). The application for the appointment of Receivers was filed three (3) months after the injunction order was granted on 25th February 2020 (the 'Injunction Order'). The grounds of the application were that there were clear existing and threatened breaches of the Injunction Order of which thirteen were identified in correspondence and in any event the injunction order did not offer adequate protections. The Court accepted that notwithstanding the Injunction Order there remained a risk to the assets of the companies the subject of the title dispute between the parties based *inter alia* on correspondence received from Messrs. Harneys on 21st and 25th May 2020. That correspondence intimated that the Fourth Defendant would be actively taking steps to sell Villa No 202 and to raise funds whether through a loan or sale of the underlying villas in the Sunville Estate or to sell 'Best Land offshore' to raise funds to meet an alleged future tax liability of RMB 500 million. Even though the Fourth Defendant threatened that this liability was imminent, nine (9) months on, that liability has not yet crystallised. It is still under investigation and discussion as evidenced by Mr. Golden himself in his Tenth Witness Statement.

[35] The Claimant relied on clear evidence of mismanagement of the subsidiaries that had not been curtailed by the Injunction Order including the Fourth Defendant's handling of the tax liability issue or the failure to do so and the position then being taken that Mr. Feng (the CFO of Jiacheng) could act autonomously and that his conduct could not be curtailed by Mr Golden. Indeed, there was good reason to suppose, on the evidence, that the Fourth Defendant had deliberately caused that liability to accrue, or at least had taken no steps to prevent or mitigate it.

[36] A further hearing in respect of the Receivership Order was fixed for 25th June 2020 (the 'Return Date').

[37] As at the Return Date, no application to discharge the Receivership Order had been filed, although the Claimant applied for its continuation. Instead, the Fourth Defendant took the position that if the injunction would be discharged (and not regranted) then the receivership

would fall away. In so doing the Fourth Defendant relied on a comment made in passing by the Court on 4th June 2020 that 'if the Injunction goes, frankly the receivership order does not have legs to stand on.'

[38] As it turned out, the Court was not prepared to deal with any points of substance at the Return Date. It adjourned the Return Date and continued the Receivership Order until 1st July 2020.

[39] On 1st July 2020, the Court indicated that it would discharge the Injunction Order but also decided to re-grant an injunction on the grounds that there was evidence that Mr. Golden would sell the business outright. The Court gave reasons for that decision without actually making the order. The new injunction was complex, and it took a further five weeks and four further hearings to iron out the precise details of the regranted injunction, resulting in the 6th August Order.

[40] Clearly, the Fourth Defendant had not bargained for a re-grant. Since the Court was yet to decide the effect that the 6th August Order would have on the Receivership Order, if the Fourth Defendant had really wanted to ensure that the Claimant retained no benefit of the Receivership Order, he should have applied for its discharge at that stage, before the terms of the 6th August Order were settled.

[41] On 6th July 2020 the Court circulated its reasons for discharging and re-granting the Injunction Order (the 'Judgment'). The parties were directed to seek to agree a form of order as a consequence, if they could. Hearings on 13th, 20th, 29th July and 6th August were all listed with the singular aim of settling a form of order; the parties not being able to agree a form of order between them despite strenuous efforts on both sides.

[42] It was quite apparent by 6th July 2020 that the Court was going to re-grant the injunction in some form, and that Mr. Golden's argument that the Receivership Order would fall automatically as a consequence of the discharge of the original injunction was no longer tenable. The Fourth Defendant nonetheless proceeded to issue his application to discharge the Receivership Order on 22nd July 2020 (the 'Receivership Discharge Application').

[43] The Receivership Discharge Application was in two parts in the alternative. The first part alleged that the Receivership Order should be discharged as an automatic consequence of the

discharge of the Injunction Order because the former was, it was said, 'parasitic' on latter. On 9th December 2020, the Court rejected that argument. The second part comprised of wider allegations of material non-disclosure.

[44] Curiously, had the Fourth Defendant succeeded on that occasion, the Receivership Order would have been discharged and costs (if any) limited to that hearing because by their Counsel's own admission they would not have proceeded with the wider application had they succeeded. This is telling. It shows that the true purpose of the current wider application is to accomplish a win at all costs. This is a bizarre position to take because, to continue the analogy, the game had already been forfeited.

[45] On 28th July 2020 the Court circulated a draft form of the 6th August Order for the regranted injunction with a helpful explanatory note (the '28th July Note'). It is worth repeating the salient parts because it demonstrates (submits the Claimant) the care and dedication which the Court invested in crafting an order which balanced the interests of all the parties:

"[2] It appears to me just and convenient to return the day-to-day conduct of the business of the First and Second Defendants, and through them, of the subsidiaries, from the Receivers to the Boards of Directors of these companies. By doing so, the trouble and inconvenience of the notification and consent mechanism that has so far been in place will then become unnecessary, as well as that allegations of obstructionism on the part of the Claimant and of partiality on the part of the Receivers can be avoided.

[3] That said, there should be certain safeguards in place. It appears apposite that the Boards of the First and Second Defendants should be reconstituted to reflect equal representation on the Boards by both the Claimant and the Fourth Defendant. To avoid almost inevitable deadlock, as well as eventual 'micro-management' attempts by the Claimant or the Fourth Defendant, and efforts to impose the viewpoint of one particular side, the balance of power and casting vote should be held by an independent director. Such an independent Director should be well versed in the requirements of BVI company law and be endowed with mature business experience. An accountant or IP of at least 15 years PQE, licensed to practise in the BVI, should meet these requirements. He or she should not be affiliated with the current Receivers to avoid even any perception of eventual bias. He or she should be entitled to charge a proper fee to be paid by the company of which he/she is the Director.

[4] The draft Order makes provision for a mechanism for the reconstitution of the Boards.

[5] Pending such reconstitution the Fourth Defendant shall be entitled to run the companies together with the Receivers, with the notification and consent mechanisms in place. There continues to be scope for deadlock and obstruction, and general administrative burdens and difficulty under such an arrangement. It thus behoves the parties to reconstitute the Boards promptly and the Court intends to do its best to ensure this happens.

[6] For the avoidance of disputes, for the purposes of this Order, ordinary business expenses will be deemed to include those types of expenses that the Fourth Defendant was paid initially by the companies and more lately by his father/Ms. Hu in addition to the Fourth Defendant's base salary before they were stopped. I appreciate that Ms. Hu feels strongly that these are not ordinary business expenses and, tacitly, that the Fourth Defendant should be paid no more than his base salary. But in my considered opinion that is too restrictive a view. Ms. Hu had been content to let the Fourth Defendant have a certain elevated standard of living. That standard of living is commensurate with someone in an elevated position in relation to the business. The Fourth Defendant is in such an elevated position. He also has a competing claim to be the beneficial owner. He should be permitted to maintain his commensurate standard of living, provided the companies can afford it. In order to protect the companies from eventual exorbitant charging in this regard, it appears to me to be just and convenient to cap the amount the Fourth Defendant can cause or permit the companies to incur by way of such costs and expenses, such that the aggregate total of the companies' monthly expenditure shall not exceed RMB1,950,000 until further order. The Fourth Defendant has previously represented that the companies' monthly costs and expenditure should not exceed this amount, so that is an appropriate cap."

[46] In summary therefore, the Court devised a mechanism to return the business of the PRC Subsidiaries, through the Boards of the First and Second Defendants, to the Boards, but only comprising of an independent director, the Claimant and the Fourth Defendant. The expressed intention behind this order was to allow for equal representation on the Boards, to avoid allegations of bias on the part of the Receivers and to do away with the consent mechanism.

[47] The Court also ordered that until the Boards were reconstituted that the business of the PRC Subsidiaries would be run by the Receivers and the Fourth Defendant. This order was contrary to what the Fourth Defendant was urging on the Court, namely a form of order that the Fourth Defendant and he alone be permitted to run the companies. In refusing to make this form of order the Court clearly accepted the risk of leaving the Fourth Defendant unchecked in a position of management and control.

[48] As a result of the 6th August Order, it became apparent to the Claimant that once the Boards were reconstituted there would be no role to play by the Receivers. Importantly, until the Boards were reconstituted, the control of the PRC Subsidiaries was returned to Mr. Golden along with the Receivers.

[49] There were hearings on 29th July and 6th August to finally settle the terms of the new injunction. Although the Fourth Defendant disputed (rather half-heartedly) the Court's jurisdiction to make the form of order that it did, the order was made. When the Court made the 6th August Order, it

was certainly just and convenient to have Receivers there, whether they were new Receivers appointed for the first time or already in harness. The difference is completely academic. In any event, the Fourth Defendant was plainly content with that outcome because he did not appeal that order.

[50] Even now he is not seeking any variation to the terms of the 6th August Order. Nor can he because there has been no material change of circumstance which would justify removing the Receivers now, before the machinery of the 6th August Order has worked through.

[51] The consequence of the 28th July Note, and the 6th August Order that followed it, was twofold. First, the Claimant was bound to accept that, as a result of that order, the Receivers had no role to play in the running of the business in the long term and second, the Fourth Defendant's discharge application, having been filed so late in the day was rendered nugatory by a regime which meant that there would be no significant role for the Receivers. But it also meant that they would have to stay in office *pro tem* until the mechanics of the 6th August Order had worked through to completion.

[52] Recognising the inevitable practical consequences of the 6th August Order, the Claimant wrote to the Fourth Defendant on 17th August 2020 asking that he agree to a stay of the Receivership Order. The Fourth Defendant rejected that offer and counter-offered a discharge with costs. Messrs. Conyers, for the Claimant, wrote again on 24th November 2020 proposing a formal discharge but with a carve-out to enable the Receivers to continue to put into effect the terms of the 6th August Order and suggested that the appropriate costs order would be costs in the case. That was rejected by the Fourth Defendant on 27th November 2020 who insisted that the appropriate order was an outright discharge with costs to their client without setting out what those costs would be. The Claimant still does not know the alleged costs consequences. They could not have been significant because as early as 28th July 2020 the business was returned to the control of Mr. Golden alongside the Receivers. Notably, it appears that Mr. Golden and the Receivers had been working together on a number of key issues including causing of the entry of sale of villas without the Claimant's consent and agreeing to utilise the services of Mr. Golden's recommended PRC Counsel to advise on the tax liability issue.

[53] The position the Fourth Defendant now finds himself in, pursuing an application that is purely academic, is a circumstance of his own making. While the Fourth Defendant may feel hard

done by that outcome, the Claimant should not be obliged to pay for this purely academic exercise simply to give the Fourth Defendant a 'win'. She did the right thing and conceded the match once it became apparent that this was the sensible thing to do in the light of the 6th August Order.

[54] In short, the Claimant can live with the 6th August Order. The Fourth Defendant must also. That means that the Receivership Order, implicitly varied by the 6th August Order by language and by operation, must remain undisturbed.

[55] As a postscript, although this application is all about costs, those costs can only be of the application itself. The Fourth Defendant should never have incurred them and should certainly have stopped incurring any more once the 28th July 2020 note had been circulated and it was clear that the terms of the regrant under consideration would require the Receivers to remain in office for a period (and with certain limited powers).

[56] Oddly, as matters stand it is not even known what the quantum of the costs sought by the Fourth Defendant is. That is also telling because it shows that this application is not really even about money, but about power and face. The Court could be forgiven for thinking that this application is being pursued as just another skirmish in all-out war of attrition between family members who have fallen out and for whom the idea of any kind of moderation or proportionality is unthinkable.

[57] The reality is that this application has really become an abuse, if it did not start out as one.

Claimant's submissions on jurisdiction where substantive dispute academic

[58] The Claimant submitted the following in relation to the Court's jurisdiction where the issue arising in a dispute is academic. Again, nothing in this next section is to be treated as a finding of the Court.

[59] Generally, where there is no dispute to be resolved and the sole issue is one of costs, the Court is asked to look at the matter in the round and determine what costs order is appropriate. If that exercise is exceedingly tortuous or it is not obvious who the real winner is, then the

appropriate costs order is no order as to costs. The starting point in relation to this exercise is the commentary at of the English Civil Procedure Rules:

“A live issue between parties may become “academic” or “hypothetical” for various reasons. Generally, it is inappropriate for parties seeking to resolve a dispute between them as to costs to seek to do so by litigating to a conclusion a substantive issue that has become “academic”.”¹

[60] The correct approach therefore is that there should not be a hearing where no substantive rights will be affected merely for the purpose of determining costs. That is a salutary and sensible rule and there is no reason to depart from it here.

[61] However, if the Court feels that we have already crossed that Rubicon, the question it must next ask itself is, what is the proper approach to determining costs where the issues or substantive issues have been resolved?

[62] This question has been the subject of discussion in a number of cases starting with the decision of the English Court of Appeal in **R v Holderness Borough Council ex p. James Robert Developments Limited**.² In that case it was held as follows:

“Although it was not the function of the court to determine academic issues where there was no dispute, Popplewell J had jurisdiction to entertain the proceedings and decide the substantive question in order to determine liability for costs. Further, where the costs were so high, it was proper for the Court of Appeal to entertain the appeal ...”

[63] Simon Brown L.J. dissented and held that ‘the issue here was only ever decided as one going to costs and it was not an appropriate use of the court time to resolve in a series of decisions that was a purely academic question just to deal fairly and properly with costs.’ Pausing there, the Court does not even know what the costs are, to even begin to determine whether the means justify the end.

[64] In **Brawley v Marczyński and another (No 1 and 2)**³ the English Court of Appeal was asked to consider the discretion of the court where the action had been settled save as to costs. The court was asked to consider whether and to what extent the court would determine unresolved substantive issues. It was held as follows:

“(1)...where litigation has been settled save as to costs, there was no convention that there should be no order as to costs; that in such a case it was ordinarily irrelevant that

¹ ‘The White Book Service 2019’, Civil Procedure, Vol. 2 9A-77.

² [1993] 66 P & CR 46, CA.

³ [2002] EWCA Civ 756.

the claimant was legally aided, and the court's overriding objective was to do justice between the parties without incurring unnecessary court time and additional costs; that where it was obvious which party would have won had the substantive issues been fought to a conclusion it would be appropriate to award costs to that party; that where that was not obvious the extent to which the court would be prepared to look into previously unresolved substantive issues in order to determine the issue of costs would depend on the circumstances of the case, including the amount of costs at stake and the conduct of the parties; that in the absence of a good reason to make a specific order the court would make no order as to costs; ...”

[65] The English Court of Appeal in **BCT Software Solutions Ltd v C Brewer**,⁴ a case decided very shortly after **Brawley**, adopted a different approach to the exercise of the discretion:

“(1) there were real difficulties in asking a judge to exercise his discretion in respect of the cost of an action which he had not tried. In all but the most straightforward cases it would be difficult for the judge to decide who was the winner and who was the loser without embarking on a course which came close to conducting the trial of the action that the parties intended to avoid by their compromise.

(2) Unless the court was satisfied that it had a proper basis of agreed or determined fact upon which to decide whether a case was one in which it should give effect to the general rule that the unsuccessful party should pay the costs of the successful party or that it should make a different order, it had to accept that it was not in a position to make an order about costs at all. That was not an abdication of the court's function but a recognition that the course which the parties had adopted in the litigation led to a position in which the right way to discharge that function was to decide not to make an order about costs.”

[66] Implicit in the **BCT** case was the recognition that the Court may well have to try the issues sufficiently to determine liability but importantly that a judge should be slow to embark on a detailed trial. Although a slight shift away from the stricter position in **Brawley** that the exercise should only be conducted in obvious case, the case does emphasise that the approach to determining an issue where the sole question to be decided was the liability for costs would not be the same the exercise required actually to determine the substantive issue.

[67] In **Hanspaul & Anor. v Ward & Ors**,⁵ at paragraphs [16]- [23], the English High Court held that the scope of the inquiry will depend on the circumstances of each case but that the court should have in mind rule 1.1 (the ‘Overriding Objective’ which is materially the same in this jurisdiction) and rule 44 (our CPR 64.6) (on costs) (English Civil Procedure Rules).

[68] CPR 64.6 provides materially as follows:

⁴ [2003] EWCA Civ 939.

⁵ [2016] EWHC 1358.

“64.6 (5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular it must have regard to

(a) the conduct of the parties both before and during the proceedings;

(b) the manner in which a party has pursued

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to

(i) pursue a particular allegation; and/or

(ii) raise a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim.”

[69] Finally, in **Hamnett v Essex County Council**,⁶ the English Court of Appeal was asked to consider the appellate jurisdiction where the only question was one of costs. There, the Court held that ‘if the only extant issue went to costs, the court was likely to be still more cautious before deciding to hear the appeal.’ While this case does not concern an appeal, the overarching principle remains the same, the court should exercise caution in the interest of proportionality and the overriding objective when essentially being asked to conduct a trial of an issue that is now academic. This is even more relevant here, where there is yet to be a substantive trial on the issues in dispute and the Fourth Defendant has offered no evidence of the level of his costs exposure caused by the Receivers.

[70] While these cases are mere examples of the way in which the English court has previously exercised its discretion they are a useful roadmap to how this Court should approach the exercise of its discretion on these facts. Emerging from these cases:

- (1) At the heart of the exercise of the discretion is rule CPR 1.1, which provides that the Court and the parties should seek to further the Overriding Objective.
- (2) The hearing should not replicate a full hearing on the substance of the dispute.
- (3) Where the incidence to costs is not obvious, the court may well make no order as to costs.

⁶ [2017] EWCA Civ 6.

(4) The court should also have regard to rule CPR 64.6(6).

[71] A crucial factor in how the discretion is exercised and particularly notable in the context of proportionality is the amount of costs which is said to be in issue. Here, the Fourth Defendant has provided no evidence of the costs he claims. It is difficult, if not impossible, to attribute any weight to costs which have not been quantified. Indeed, the only costs conceivably in play are the Fourth Defendant's costs of issuing his discharge application based on the 'wider' grounds (the 'automatic discharge' ground having been dismissed in December 2020). Those are the costs of the application and the supporting evidence. It is not known even what those costs are, but they are likely to be dwarfed by the enormous costs of quite unreasonably pursuing it beyond 28th July or 6th August 2020. Indeed, it is the Fourth Defendant who has put the Claimant to significant and wholly unjustifiable expense.

[72] Quite apart from the fact that this application is entirely academic, there are four fundamental points of substance which the Court should bear firmly in mind when considering this application and particularly its discretion when making an order as to who is to pay the costs of the Receivership Discharge Application, before even getting into the grounds at all.

[73] First, the 'Respondents' to the Receivership Order were only ever the First and Second Defendants (see paragraph 1 of the Receivership Order). The First and Second Defendants are separately represented and although they complained about the grant of the order at the outset, at no point did they issue an application to discharge the Receivership Order. Indeed, they played no part in these proceedings save to indicate that they would remain neutral.

[74] Second, the Fourth Defendant is represented in his personal capacity by Messrs. Harneys; any right which he now seeks to vindicate by this application, or disadvantage which he says was ill-gotten by the Claimant proceeding *ex parte*, on the 28th and 29th May, can only relate to those which he says affected him personally.

[75] Third, the Receivers were only ever appointed over the assets of the First and Second Defendants and the PRC Subsidiaries (the "Assets"). As the Court knows, the true owner of the Assets is at the very heart of this dispute.

[76] Fourth, although on appointment the Receivers changed the Boards of the First and Second Defendants to remove the Fourth Defendant as a director of each company, and removed the

Fourth Defendant as legal representative/chairman of Jiacheng and legal representative/executive director of Bange (all unpaid positions) at no point was Mr. Golden dismissed from his paid position as President of Jiacheng and Bange. Indeed, although the Receivers recognised that 'the salaries of many employees had increased substantially from November 2019' and said that in relation to Mr. Golden his salary increased by an astronomical 567%, the Receivers continued to pay Mr. Golden that sum and he remained in his position as President.

- [77] If the Court steps back, the obvious question to ask is, what is Mr. Golden doing seeking to discharge an order that has had no apparent negative impact on him personally and why would he, on his case, incur the legal costs to do so? No doubt he wants his 'day in court', but that is a phrase from an earlier era. The mere fact that one issues an application does not automatically mean that one is entitled to pursue it come what may. One is left with the sense that pursuit of the application has been driven by personal animus rather than any rational litigation strategy.
- [78] The short point is that it was unreasonable for Mr. Golden himself to pursue the application not only because it had become academic but because the First and Second Defendants did not seek to discharge it and the continuation of the Receivership Order did not affect him personally. Indeed, one might say he benefitted because he continued to be paid the same income for a job which was now substantially done by the Receivers.
- [79] The Fourth Defendant's Notice of Application is unwieldy and at times confusing. It is not entirely clear what the precise grounds of the application are. They appear to fall under one of three categories. First, the consequential argument (as defined above). Second, a failure to explain why the Claimant was proceeding *ex parte*. Third, the alleged 'mischaracterisation' of a number of facts. There is a bare and poorly articulated statement which relates to the 'balance of convenience' laying in favour of the Fourth Defendant.
- [80] An application to discharge an *ex parte* order for non-disclosure is a serious one. Implicit in it is a failure of duty to the court, whether by the claimant or the attorney or both. It may involve impugning the professional integrity of the advocate. It carries the risk of censure of the court. It therefore goes without saying that an application to discharge an *ex parte* order on the grounds of material non-disclosure must be based on the clear particularisation of the precise material facts said not to be disclosed, and their materiality. The scatter-gun torrent of

complaints, rhetoric and an unfocussed trawl through thousands of pages with which the court is faced here will not do.

[81] The relevant principles in respect of the duty of full and frank disclosure, and the consequences of a breach of that duty are well established and should be uncontroversial, while arising in the context of injunctions, it is submitted by the Claimant that the cases and the principles will apply *mutatis mutandis* to Receivers appointed *ex parte*.

[82] The starting point is the well-known summary of Ralph Gibson LJ in the English Court of Appeal decision in **Brink's Mat Ltd v Elcombe**,⁷ at 1356F to 1357G:

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ. (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and *Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295. (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93. (5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an *ex parte* injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91, citing *Warrington L.J. in the Kensington Income Tax Commissioners' case* [1917] 1 K.B. 486, 509. (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was or perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give

⁷ [1998] 1 WLR 1350.

careful consideration to the case being presented. (7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes afforded:" per Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms. "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc*, ante, pp.1343H-1344A."

[83] In addition to the above, the following further principles have been made clear in the case law:

- (1) The test for materiality has been expressed in authorities in several ways. Helpful formulations of the test for materiality may be found in **Alliance Bank JSC v Zhunus**⁸ at paragraph [65], per Cooke J, where it was stated that '[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' and in **National Bank Trust v Yurov**⁹ at paragraph [18], where Males J explained that a fact is material 'if it is one which the judge would need (or wish) to take into account when deciding whether to make the freezing order'.
- (2) In considering whether to continue the injunction despite material non-disclosure, the 'overriding consideration will always be the interests of justice': per the **Yurov** case, above, per Males J, at [18]. When deciding the interests of justice

"it is necessary to take account of all the circumstances of the case including (without attempting an exhaustive list) (i) the importance of the fact not disclosed to the issues which the judge making the freezing order had to decide; (ii) the need to encourage proper compliance with the need for full and frank disclosure and to deter non-compliance; (iii) whether or to what extent the failure to disclose was culpable; and (iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts"

[84] The Claimant's skeleton argument then sought to address in detail and argue against the various grounds cited in Mr. Golden's application.

[85] The Claimant's Counsel concluded their analysis by submitting that in summary, when examined, none of the alleged material non-disclosures are made out. The Fourth Defendant has simply raised a series of bad and unproven points, in the vain hope that one would stick and give rise to a costs order in his favour. Not for any purpose other than to settle the fees of

⁸ [2015] EWHC 714 (Comm).

⁹ [2016] EWHC 1913.

his lawyers incurred on this unfortunate misadventure. The Claimant does not know the quantum of those fees nor has the Court been told but what is at least certain is that the Claimant should not be asked to pay the costs of this unmeritorious application. Even if the court is attracted by some of these allegations, the position is at best unclear.

[86] Where the court is being asked to exercise its discretion to resolve an academic question purely to determine what the appropriate costs order should be, regard should be had to not only the Overriding Objective but also to the considerations at CPR 64.6. While the success of a party on a particular issue is relevant it is by no means the only relevant consideration.

[87] The court must have regard to all the circumstances including the conduct of the parties, the manner in which the allegations were pursued and whether it was reasonable for a party to pursue a particular allegation. So even if the Fourth Defendant were to convince this Court that there was a material or even several material non-disclosures, he should not get his costs. The Fourth Defendant pursued the discharge application when it was a nonsense to do so, continued to do so when it had become academic and insisted on Court's time being utilised on a consideration of each, and every, alleged non-disclosure. In so doing, the Fourth Defendant was acting unreasonably. Importantly, the Fourth Defendant pursued an application which had no negative impact on his personal rights. This conduct should be deprecated. This application is both pointless and meritless. It should be dismissed.

The Fourth Defendant's approach

[88] At the hearing, Mr. Golden was represented by leading Queen's Counsel, Mr. Tom Lowe, QC. It is apparent that Mr. Lowe, QC favoured a slimmer, more focused approach than had featured in his side's documentary preparation earlier on (which learned Queen's Counsel for the Claimant, Mr. Richard Millett, QC compared to a 'lumbering elephant'). This aspect gave rise to an argument on the part of the Claimant that the Claimant should in any event not be required to bear Mr. Golden's costs of preparing a bloated application when he (or perhaps rather his Counsel) could have opted for a more lithe approach at the hearing and belatedly did so.

[89] Mr. Lowe, QC's primary focus was to address the – clearly alarming – impression that had been given by the Claimant that Mr. Feng, under a specious and far-fetched characterization of being 'autonomous', had in his possession the company chops and had, in breach of the

injunction, already used the Bange chop to open bank accounts and then caused Jiacheng to transfer money into the new Bange account(s).

[90] Mr. Lowe, QC submitted that this account did not accord with the evidence. He observed that there was no evidence that Mr. Feng had the chops. Moreover, Mr. Feng had used the Bange chop to open the bank account before the Injunction Order had been made, so it could not have been a breach of the injunction for him to have done so. Contrary to the Claimant's submissions, there was no evidence Mr. Feng had used the chops once the injunction order had been made. Furthermore, the monies had been placed in an interest-bearing deposit account in Bange's name and had not left the group of companies. Counsel for the Claimant had referred to this as evidence of a real risk of dissipation, but rather, it was the opposite. Mr. Lowe, QC thus struck at the heart of the Claimant's apparently urgent plea for receivership relief.

[91] To encapsulate Mr. Lowe, QC's submissions, he was in essence saying that the Claimant had presented a sensationalist and alarmist picture of Mr. Golden making use of an unscrupulous, tax-criminal ex-convict, who had artificially been shrouded in a cloak of autonomy by Mr. Golden, so that he go about at will using company chops in breach of the injunction to move monies around so that they could be dissipated. But, submitted Mr. Lowe, QC that picture was far from the truth. It had, he contended, misled the Court into making the receivership order.

[92] Mr. Lowe, QC supported this by remarking that Counsel for the Claimant had not taken the Court to the following part of a second letter Messrs. Harneys had sent on behalf of Mr. Golden on 25th May 2020:

"It is said by your client that the opening of the account would also have required the use of the chop and signature to enter into a new agreement. But for CoVID-19 the account was not opened earlier. The application for opening the bank account was made on 19 January 2020 as per the enclosed application form. The deposit account was only in fact available in April because of the extended Chinese New Year and the Covid-19 restrictions which precluded the account opening administration being attended to in person at the Bank."

[93] That letter went on to say:

"The May bank statement is not yet issued but can be provided to your client once issued, should she require it. The monies have not been dissipated and are sat in Bange's account earning interest as aforesaid. All of these steps were taken by Mr. Feng and his team – as head of department and CFO he enjoys the autonomy to do so -

and it was a commercially sound decision to obtain higher interest on a fixed term deposit. As head of finance inter-company balance transfers fall within his remit without reference to anyone else. The transfers do not need Mr. Golden's intervention at all; they do not leave the group of companies and inter-company transfers to meet cash flow needs (i.e. for salary payments to be met) are solely dealt with by Mr. Feng for Jiacheng, without recourse to Mr. Golden. Such transfers are incapable of being a breach of the injunction."

[94] Two main points emerge from this passage:

- (1) Mr. Golden offered to show the Claimant proof of retention of the funds; and
- (2) The 'autonomy' that Counsel for the Claimant had laid such heavy emphasis upon as being a compelling reason for the need to appoint a receiver to police and render effective the injunction was nothing of the sort: it was expressed to relate only to internal inter-company transfers that were incapable of being a breach of the injunction. The same point was also subsequently made by Mr. Golden at paragraph 104 of his Seventh Affirmation.

[95] That part of the letter thus conveyed a radically different account than had been portrayed by or on behalf of the Claimant.

[96] This, in essence, would (in Mr. Lowe, QC's submission) have been sufficient to dispose of the picture painted concerning Mr. Feng. But that would still leave the Claimant's reliance on other alleged manifold breaches of the injunction.

[97] Mr. Lowe, QC approached this by pointing out that Counsel for the Claimant had not brought to the Court's attention other passages in correspondence from Messrs. Harneys which, contrary to the impression the Claimant was pressing upon the Court, show that Mr. Golden had adopted a responsible and careful approach towards compliance with the injunction order and that he had sought to engage with the Claimant on a constructive basis.

[98] In particular, Mr. Lowe, QC observed that a first letter dated 25th May 2020 from Messrs. Harneys to the Claimant's legal practitioners had not been read out to the Court at all. This letter explained why Mr. Golden had not been in breach of the injunction. It tried to explore possibilities with the Claimant for raising funds. The letter continued attempts by Mr. Golden to obtain the Claimant's permission for proposed transactions and complained about her refusal to do so. Whilst it set out in firm terms matters on which Mr. Golden's side considered the Claimant to have been mistaken or to have been behaving improperly, it was also an attempt to

engage with the Claimant in discussions. It moreover explained Mr. Golden's concerns about potentially serious adverse financial consequences for the estate should the Claimant continue to withhold her consent to the transactions Mr. Golden was proposing.

[99] The Claimant responded in terms that the letter was summarized by Counsel for the Claimant at the *ex parte* hearing and that all the arguments raised in the letter were presented to the Court, as well as addressed elsewhere.

[100] The Fourth Defendant contended that the Court should also have been shown and taken through a letter from Messrs. Harneys dated 28th May 2020, in which, on its second page, Messrs. Harneys were at pains to stress that there would not be a breach of the injunction.

[101] Specifically, it included the following passage:

“As set out previously our client confirms he is not in breach of the injunction by identifying funding sources for that future tax liability and confirms he will not enter into any agreement or resolution which is contrary to the Injunction. In short, there is, as we have explained on a number of occasions, no threatened breach nor any intended breach. We await confirmation of the parameters for meeting that future tax liability that your client considers to be viable by the end of the week as requested. We consider it would assist to have an all parties meeting to discuss and agree what is to be done in that regard, so that correspondence can be avoided and an agreement be reached. Please let us know; our client is amenable to the same.

For the avoidance of any doubt, Mr. Golden further again confirms that he has no intention to, nor will he use the chops or his signature as prohibited by the Injunction, nor will he cause the BVI Companies to take any step to breach the Injunction under paragraph 4.9. Further, Mr. Golden has confirmed that he will not, without your client's consent or an order of the Court, use the chops to sell any Villa, and in particular will not agree any sale of Villa 202 nor will he use the chop to submit the January sale of Villa 303 for online filing.”

[102] The Claimant contends that it was understood by her Counsel that the Court had read the letter and was aware of its contents, and that her Counsel had fairly summarized it. Counsel for the Claimant indeed summarised the letter as a whole, but without taking the Court to, or reminding the Court of, exactly what Messrs. Harneys had said.

[103] By my count, Mr. Lowe, QC raised seven further points on which he submitted that Counsel for the Claimant had not given full and frank disclosure and/or a fair presentation.

Discussion

The Court's jurisdiction

- [104] Learned Counsel for the Claimant urged that the Court should be cautious, or perhaps more aptly put, reluctant, to hear the receivership discharge application as the parties were already agreed that the receivership should be discharged once the company Boards had been reconstituted.
- [105] Learned Counsel for the Claimant stressed that it would be disproportionate for the Court to hear the application where Mr. Golden's costs must have been relatively small and there is no evidence what they are.
- [106] Although the authorities referred to by the Claimant speak in terms of the Court's 'jurisdiction' to determine incidence and quantum of costs after the substantive matters in dispute become moot or academic, it is apparent that by the term 'jurisdiction' is meant that the Court has a discretion whether or not to do so. The authorities concern not so much the existence of the Court's power to do so, which is not so controversial, but the manner, in which the Court should exercise the discretion.
- [107] I accept that the Court has power to hear and rule upon Mr. Golden's receivership discharge application. The issue whether to 'hear' the application has become somewhat unreal; the application had been directed to be heard now at a previous hearing, and the parties came prepared to argue it fully and did so. The question then becomes whether a costs order should be made, and if so, what.
- [108] Learned Counsel for the Claimant gave a helpful explanation of the authorities but he omitted some important aspects from his summary of the authorities. In short, the authorities indicate that the Court should not be as diffident about making a costs order as he submits. I will now try to right the balance.
- [109] In **R v Holderness Borough Council ex p. James Robert Developments Limited**¹⁰ the English Court of Appeal was concerned with a situation where the claim – an application for

¹⁰ [1993] 66 P & CR 46, CA.

judicial review for which permission had already been granted – was listed for its substantive hearing, but its underlying cause of action had become moot. The parties had failed to agree the ensuing issue of costs. It is a theme of most of the authorities in question that what the court was facing was a decision whether or not a substantive hearing, in terms of a trial of a substantive action, should nonetheless proceed in order to determine issues of costs. The principles identified by the authorities are clearly sufficiently general to apply also to interlocutory applications, but, logically, where an interlocutory application concerns a limited range of issues and does not require the heavy investment for the Court and the parties of a plenary trial, the Court might be somewhat less reluctant to embark upon the exercise.

[110] The majority in **Holderness** (Butler-Sloss LJ and Dillon LJ) both adverted to a principle stated by Lord Bridge of Harwich in **Ainsbury v Millington** that ‘litigation may sometimes be properly continued for the sole purpose of resolving issues as to costs, when all other matters in dispute have been resolved.’¹¹ As Butler-Sloss LJ observed: ‘The court is not in a position to assess the correct costs order without an evaluation of the prospects of success had the application for judicial review been heard and determined. Consequently, Popplewell J had the jurisdiction to hear the matter of costs and in doing so to decide the issue which otherwise would not have been tried.’¹²

[111] Lord Dillon took the analysis a step further:

“So in *Westminster City Council v Croyalgrange Ltd.* Lord Bridge of Harwich said at 678E that since the issue of costs remained at large, it could not be said that there was no *lis* sufficient to keep the appeal alive.”¹³

[112] Lord Dillon nonetheless recognised that the converse of the power was the discretion of the court not to hear a matter:

“...there may be cases where the substantive question raised in proceedings becomes academic at a very early stage, when the costs incurred by the plaintiff are small. It may then be felt unreasonable for the plaintiff to incur the expense and delay of going to a full trial on that academic question, in order to recover the costs. In such a case the court may have jurisdiction to refuse to try the case.”¹⁴

¹¹ [1987] 1 W.L.R. 379 at p. 381.

¹² [1993] 66 P & C.R.46 at 57 CA (Butler-Sloss, LJ).

¹³ [1993] 66 P & C.R.46 at 59 CA (Dillon, LJ).

¹⁴ [1993] 66 P & C.R.46 at 59 CA (Dillon, LJ).

[113] The consideration whether there remains before the Court a pending *lis* was also referred to as a material factor by the English Court of Appeal in **BCT Software Solutions Ltd v C Brewer**.¹⁵

In giving the leading judgment, Mummery LJ stated:

“In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties, “If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well.”¹⁶

[114] The concurring judgment of Chadwick LJ was in similar terms:

“The cases in which the judge will be asked to decide questions of costs – following a compromise of the substantive issues – are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs. As Mummery L.J. has put it, the better course may be to require the parties to confront the realities of their litigation situation; to point out to them that, if they have not reached an agreement on costs, they have not settled their dispute and the action must proceed to judgment.”

[115] Lord Brooke agreed with both judgments. That case concerned whether a plenary trial of an action should nonetheless proceed.

[116] It can thus be seen that in unobvious cases, instead of the Court’s caution impelling it to make no order as to costs, at least where issues remain live in an action, or application, the more appropriate approach may simply be for the Court to allow the inevitable consequences of the parties’ failure to reach complete agreement take its course. That was not an approach contended for by Counsel for the Claimant here, for reasons that must be obvious – it would suit the Claimant for the Court to make no order as to costs.

[117] In the present case the Fourth Defendant, as Applicant, had specifically applied for costs, in the second head of the relief he sought. Costs, here, were expressly put into issue. That issue, or *lis*, had not been compromised. In principle therefore, since legal proceedings under our legal system are adversarial, there would be nothing heterodox about allowing the application to proceed and for the Court to determine it on its merits.

¹⁵ [2003] EWCA Civ 939.

¹⁶ [2004] F.S.R. 9 150 at page 153 paragraph 6 (Mummery LJ).

[118] That there is no default position that there should be ‘no order as to costs’ was made clear by Lord Longmore in the English Court of Appeal in **Brawley v Marczynski and another (No 1)**:

“...there is in my judgment no tradition in these matters of there being “no order as to costs” merely because a dispute has been settled except as to costs. No doubt if it is truly impossible to say what the likely outcome would have been it is a possible order. But if one looks at the authorities...one finds that the position is much more precisely expressed.”¹⁷

[119] Lord Longmore then quoted from **Holderness**, including the following passage:

“In a dissenting judgment but on this point not substantially dissenting from Butler-Sloss LJ, Simon Brown LJ said, at p 52:

“I recognise, of course, that costs applications have to be entertained and resolved. But not, I would suggest, by litigating the case for all the world as if the substantive issues need to be resolved for their own sake. In my judgment an altogether broader approach should be adopted. One which enables the court in a comparatively short time to decide, and decide moreover without giving a fully reasoned judgment, into which general category of discontinuance the case falls.”¹⁸

[120] **Brawley** was a case where the question was whether a trial of a preliminary issue should proceed.

[121] In the English Chancery Division case of **Hanspaul & Anor. v Ward & Ors.**, the two slightly different approaches towards exercise of the court’s discretion in **BCT** and **Brawley** were reconciled with reference to the overriding objective and proportionality, as follows:

“It is common ground between the parties that, in an appropriate case, the court may give directions for the trial of the claim to take place even though the only issue to be resolved is costs. To do so would be a surprising exercise of the court’s discretion in a case in which it is obvious who has won and who has lost. Whether the case should go to trial (meaning a hearing at which evidence is called and tested by cross-examination) or some other procedure is adopted is entirely fact specific and will be determined applying the principles set out in the overriding objective. ... [P]roportional cost will be an important factor in all decisions.”¹⁹

[122] **Hanspaul** concerned whether or not a plenary trial should proceed.

[123] In **Hamnett v Essex County Council**²⁰ the English Court of Appeal recognised that the court should apply caution in proceeding to exercise a ‘narrow discretion’ to determine a dispute that has become academic.²¹ The court also said:

¹⁷ [2003] 1 WLR 813 at 819, paragraph 19 (Longmore LJ).

¹⁸ [2003] 1 WLR 813 at 819, paragraph 19 (Longmore LJ).

¹⁹ [2016] EWHC 1358 (Ch), paragraph 23 (Chief Master Marsh).

²⁰ [2017] EWCA Civ 6.

“...[E]ven if an extant issue of costs is capable of justifying the court proceeding with an appeal which is otherwise academic, we were not presented with any clear evidence as to the costs issue. With the public interest in mind, there must be real doubt as to the wisdom of and justification for permitting yet more costs to be incurred simply in order to dispute on appeal the incidence of costs below.”²²

[124] In **Hamnett**, the context was that the claimant sought to have a statutory review of certain County Council experimental traffic regulation orders but the claimant had applied in the ‘wrong’ court (the High Court as opposed to the County Court). When the High Court declined jurisdiction, the claimant appealed the jurisdiction point. By that time, the experimental traffic orders had long since expired. The claimant would moreover be no worse nor better off if she won or lost the jurisdiction point. There was nothing to suggest there would be a significant number of similar cases to engage the public interest for the Court of Appeal to make a pronouncement upon the matter. Finally, there was no clear evidence as to the costs in issue. It is clear that the decision to dismiss the appeal did not pivot upon lack of evidence as to costs. It was a factor, but other factors rendered the appeal purely and literally academic.

[125] There is further authority which merits mention, dealing not so much with whether a costs order should be made as, indirectly, with considerations which affect both incidence and quantum. In **National Bank Trust v Yurov**,²³ at paragraphs 19 and 20 Males J stated the following:

“19. It is important also not to allow a dispute about full and frank disclosure to turn into what is sometimes euphemistically described as a “mini” trial of the merits. That danger has not been avoided in this case, where the defendants’ evidence ran to some 130 pages of written evidence and over 1,500 pages of exhibited documents and the bank responded in kind, in addition to the substantial volume of material on which it had initially relied. In a case where the defendants accept that the bank has a good arguable case and where it is impossible for disputed allegations to be resolved on an application of this nature, much of this material was unnecessary. It is understandable that a defendant accused of misconduct will wish to give his account, not least to avoid any suggestion that he has failed to answer the accusations against him. However, unless both parties exercise restraint, there is a danger that applications for the grant or discharge of freezing orders may become unmanageable. Thus the claimant must disclose material facts, which will include making the court aware at the without notice stage of the issues which are likely to arise and the possible difficulties in its case, but need not extend to a detailed analysis of every possible point which may arise; and the defendant must identify with clarity (and if necessary restraint) the failures of which it complains, rather than adopting a scatter gun approach.

²¹ [2017]1 WLR 1155 at 1166, paragraph 37 (Gross LJ).

²² [2017]1 WLR 1155 at 1167, paragraph 41 (Gross LJ).

²³ [2016] EWHC 1913.

20. The correct approach to such an application, at any rate in a case of any magnitude and complexity, was described by Toulson J in *Crown Resources AG v Vinogradsky* (15 June 2001) and was adopted by the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36]:

"... issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself. ...

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. ...

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

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

- [126] These observations can aptly be directed to questions of which party should bear costs for parts of an application, or in relation to which issue. The consideration comes down to reasonableness and proportionality.²⁴

Application of principles on jurisdiction/discretion

- [127] This is a case where it was not obvious prior to the hearing of the receivership discharge application which side would win or lose.
- [128] Thus, following **Brawley v Marczynski and another (No 1 and 2)**,²⁵ the extent to which the Court would be prepared to look into previously unresolved substantive issues in order to determine the issue of costs would depend on the circumstances of the case, including the amount of costs at stake and the conduct of the parties. Then, if the Court does so, in the absence of a good reason to make a specific order the court would make no order as to costs.

²⁴ See also *Horsford v Bird* (Privy Council Appeal No. 43 of 2004 per Lord Hope.

²⁵ [2002] EWCA Civ 756.

- [129] Not radically different from this is the approach taken in **Hanspaul & Anor. v Ward & Ors**,²⁶ which is that the scope of the inquiry will depend on the circumstances of each case, applying the overriding objective of the Civil Procedure Rules and in a proportionate manner.
- [130] A first point to note is that the present case does not concern the conduct of a substantive or plenary trial. It concerns an interlocutory application. Admittedly, it was listed for two days of Court time. But in the overall history of the matter, where hearings have been long and detailed, that amount of time was relatively short.
- [131] The main issue was moreover a single discrete point: had there been a failure of full and frank disclosure and/or fair presentation warranting discharge of the receivership order? It is not as if this hearing was going to replicate the substantive trial of the matter in terms of length, factual investigation and breadth of argument.
- [132] A second point in relation to the circumstances of the case is that Mr. Golden filed his application before he knew – and could have known – what, if anything, would be the impact upon the receivership of the regranted injunction. It was not necessarily the case that the receivership would fall away. If it was that the receivership should continue alongside the regranted injunction, he was entitled to apply for discharge of the receivership when he did so. That application was not belated, as the Claimant argued. Nor, at the time the application was made at least, was the application nugatory. He could have brought a discharge application at the return date, and did not, but that does not disentitle Mr. Golden from having filed his application subsequently.
- [133] Indeed, the Claimant has not argued that Mr. Golden had no standing to bring that application. The Claimant, herself, referred to her interest in the receivership. Mr. Golden, *mutatis mutandis*, claims the same interest. Mr. Golden is the Claimant's main protagonist. It is highly artificial for the Claimant to take her own interest in the receivership for granted, and expect the Court also to do so, but at the same time to contend that her direct competitor in claims to the companies' ownership should be treated as having no interest and that the only opposing persons who might have an interest are the First and Second Defendant companies.

²⁶ [2016] EWHC 1358.

- [134] The Claimant has, though, argued that Mr. Golden's costs must be minimal. In this regard, the Claimant has sought to portray Mr. Golden as having the same or similar characteristics as the unsuccessful appellant in **Hamnett v Essex County Council**,²⁷ namely no real interest in the relief sought and no upside or downside if he were to win or lose.
- [135] There are, however, a number of distinguishing features between this case and **Hamnett**. Mr. Golden has a real financial interest in whether, or not, the receivership should be discharged, and, if so, when. A receivership is an intrusive and costly remedy. The Claimant herself has sought to fix the cost of the receivership onto the companies concerned. Mr. Golden claims to be the beneficial owner of the companies concerned. The cost of the receivership would or could affect the value of the companies and thereby his own net worth. It also affects Mr. Golden whether the receivership should be treated as simply falling away, or, alternatively, whether the receivership order should be found to warrant being set aside for breach of the duty of full and frank disclosure and fair presentation. That question directly engages questions of costs.
- [136] It also engages a factor which did not feature in the cases cited by the Claimant in this area, namely that the Court should be astute to deprive an application who has breached that duty of benefit she has gained thereby.²⁸ Mr. Golden has a legitimate expectation that the Court will do so, if it is found that the Claimant has breached her duty. It was not unreasonable for Mr. Golden to pursue his application when the narrow question of whether the receivership should be discharged had been conceded by the Claimant. Costs orders against such an applicant are a means whereby the Court can protect its own processes. Costs orders give such discharge orders teeth. Otherwise, an applicant can obtain a draconian and invasive order, reap the benefit of its immediate effect, and shrug off the consequences of a simple discharge later, content with the benefit of her strike. The situation in **Hamnett** was quite different. There, the underlying legal issue fell away when the traffic orders expired. They simply did not matter anymore, for no fault of anyone.

²⁷ [2017] EWCA Civ 6.

²⁸ *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350 at 1356F to 1357G (Gibson LJ) quoting Donaldson LJ in *Bank Mellat v. Nikpour*, at p. 91, citing Warrington LJ in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486, 509.

- [137] I have mentioned the need for the Court to be astute to protect its own processes. This entails, as a matter of principle, that the Court must not shrink from discharging an order that has been improperly obtained, even if it means the additional work and inconvenience of having to recraft other orders (in this case, potentially, the regranted injunction order, if it is that the Boards have not yet been reconstituted – as, at the hearing date, they had not been). The integrity of the Court's processes cannot be built upon rotten foundations.
- [138] I cannot agree with the Claimant's submission that the receivership should be preserved in order to give effect to the Board reconstitution. Certainly, a receiver could not have been appointed merely to create the mechanism whereby the Boards could be reconstituted. If such reconstitution has not yet occurred, then, unless the parties want otherwise, there is no reason why the Court should not follow principle through to its logical conclusion, require the receivership to be discharged on grounds of a breach of the duty of full and frank disclosure, and craft some further order (or not as the case may be) without a receivership in place.
- [139] Nor am I able to see in the parties' 'consensus' or 'agreement' any acknowledgement or estoppel which requires the Court to view the Fourth Defendant as having acquiesced in the continuation of the receivership so as to undermine his own application.
- [140] The Claimant submitted that Mr. Golden's application was not only late (it was not), but it was unmeritorious. As will be covered below, it did have merit.
- [141] Another circumstance of the case, and the conduct of the parties, is that it was the Claimant, not Mr. Golden, who introduced the breadth of detail into this whole episode. Having themselves presented the Court with a host of matters at the *ex parte* receivership application stage, it is not surprising that Mr. Golden should have wished to respond to these, lest the Court might consider that the Claimant's wide, full frontal, attack should have created a winning overlap with details that had gone unanswered.
- [142] This bring the focus onto costs. The Claimant made much of the fact that Mr. Golden had not adduced evidence of his costs. The Claimant urged that the Court should treat this as a roadblock to a determination, or at least as a very significant stumbling block. Without a figure, the Court could not adequately consider the overriding objective of the CPR or gauge the proportionality of the exercise, went the argument.

[143] That is too narrow an argument, however, which ignores wider considerations. The fact of the matter is that the Fourth Defendant's application as a whole had not been settled between the parties. There remained a live *lis*. The Claimant's resistance to having to pay costs can be seen as opportunistic: she appears to have seized upon the fact that the Court ordered the receivership to be used, as the vehicle for reconstituting the Boards, as an opportunity to avoid scrutiny and the eventual costs consequences for the way in which she had obtained the receivership order in the first place. That would be wrong. The Fourth Defendant has brought an in-time application challenging the Claimant's conduct in the presentation of her *ex parte* receivership application, with an application for costs, and that application remains unresolved. The Claimant had opted to move the Court on an *ex parte* basis, seeking one of the most intrusive and expensive forms of relief available. It is hard to see how it could further the Overriding Objective to allow the Claimant to avoid all consequences of that choice simply by conceding discharge of the substantive relief she had sought and obtained. The Fourth Defendant must have incurred some, not inconsiderable, cost in preparing his application. Were it to succeed, he would ordinarily be entitled to a costs order in his favour. Dealing with cases justly entails rendering to a person what is due to him. Moreover, the Court ought to discourage applicants (such as the Claimant upon her *ex parte* application) from lightly and unnecessarily causing others to incur costs. So, I do not see the lack of a figure for the Fourth Defendant's costs as a fatal flaw standing in the way of a determination.

[144] Although the Fourth Defendant would ordinarily be entitled to a costs order were his application to be successful, he is entitled to recover only his reasonable costs. In assessing what these would be, the Court is required to consider the range of matters identified in CPR 64.6(6). This entails a detailed consideration in the round of the way the application was conducted by both sides. That said, the Court should not forget that generally the rule of costs following the event is applied in a rather broad way; the overall result usually warrants the losing party paying all the reasonable and proportionate costs of the successful party, irrespective of whether the successful party won on all his points. That would normally be the default manner of proceeding. This is commensurate with the two stage approach to assessment propounded by the English Court of Appeal in **Lownds v Home Office**.²⁹ This militates against a pedantic and overly expensive exercise where the purpose might be seen as to be to achieve a perfect

²⁹ [2002] EWCA Civ 365.

application of CPR 64.6 rather than the Overriding Objective. Obviously, though, there are cases in which it becomes reasonably clear that a winning party has conducted an application in a disproportionate or unreasonable way. In such cases CPR 64.5 and 64.6 allow for adjustments to be made. The Court has not yet heard the parties to any significant extent in this respect in the present case. This would be a logical next step. Doubtlessly the Court will wish to be careful to keep the necessary time for such submissions within tight limits. The cases of **Brawley** and **Holderness** advocate a somewhat summary approach.

The merits of the Fourth Defendant's application

[145] I should first say that I accept the Claimant's proposition that the cases and the principles pertaining to the duty of full and frank disclosure and fair presentation apply equally to *ex parte* applications for the appointment of receivers as they do for other types of *ex parte* relief. The question here is whether the Claimant breached that duty in a manner and to an extent warranting the order she obtained to be discharged with costs against her. In my respectful judgment, she did. I will now explain why.

[146] The Claimant had sought to capture the Court's sympathy and excite its concern by representing that Mr. Golden was using an unscrupulous ex-convict, Mr. Feng, to go about breaching the injunction. The Claimant alleged that Mr. Golden was artificially characterizing Mr. Feng as 'autonomous' so that Mr. Golden could avoid being held to account for Mr. Feng's breaches of the injunction. The Court was told by the Claimant that Mr. Golden, through Mr. Feng, had breached the injunction by using the Bange chop to open a new bank account, through which Jiacheng funds could be dissipated. The urgency was heightened by the fact that the Jiacheng chops had only recently before the hearing been released by the state authorities to Mr. Golden. The assets of the companies subject to the injunction were thus (on the Claimant's version of events) in imminent peril unless a receiver was appointed to police and enforce the injunction.

[147] This 'case concept' was, however, shown conclusively by Mr. Lowe, QC, Queen's Counsel for Mr. Golden, to have been fundamentally wrong:

- (1) The description of Mr. Feng as autonomous only referred to his authority over inter-company transactions, which could not amount to a breach of the injunction, and it did not refer to a more general autonomy;

- (2) Neither Mr. Golden nor Mr. Feng had used the Bange chop in breach of the injunction. They had used it, but only before the injunction had been granted;
- (3) The opening and transfer of money to a new bank account did not constitute breaches of the injunction;
- (4) Had the Court been taken properly to correspondence from Messrs. Harneys on behalf of Mr. Golden, the Court would have seen that Mr. Golden had been taking great care to avoid breaching the injunction and that he had been taking it extremely seriously.

[148] Specifically, Counsel for the Claimant had not taken the Court to pertinent passages in

- (1) A second letter Messrs. Harneys had sent on behalf of Mr. Golden to Messrs. Conyers on 25th May 2020;
- (2) A first letter dated 25th May 2020 from Messrs. Harneys to Messrs. Conyers – in fact this letter had not been read out to the Court at all;
- (3) A letter from Messrs. Harneys to Messrs. Conyers dated 28th May 2020, in which, on its second page, Messrs. Harneys were at pains to stress that there would not be a breach of the injunction. This letter had also not been read out to the Court.

[149] The first letter dated 25th May 2020 explained why Mr. Golden had not been in breach of the injunction.

[150] The Claimant submitted that this letter, although not read to the Court, was summarized by Counsel for the Claimant at the *ex parte* hearing and that all the arguments raised in the letter were presented to the Court, as well as addressed elsewhere.

[151] This was, I respectfully find, a superficial answer. It does not address how the debate was presented to the Court by Counsel for the Claimant. It was a presentation heavily laced with the Claimant's perspective, and in which propositions put forward by the Fourth Defendant were immediately scotched before they being allowed to mature in the Court's mind. This did not make for a fair presentation.

[152] That attempt by the Claimant to extricate herself from criticism of this omission also leaves out that in presenting the arguments to the Court, Counsel for the Claimant had already fixed in the forefront of the Court's mind the apparently wrong picture of Mr. Golden allowing or causing the

criminal ex-convict Mr. Feng 'autonomously' to have and use the company chops in breach of the injunction and to effect transactions that were likewise a breach of the injunction.

[153] This first letter dated 25th May 2020, when read dispassionately on its own terms (and not simply as paraphrased and interpreted by Counsel keen to press the Claimant's own case), indicates that Mr. Golden wished to be careful about complying with the injunction order, that he expressed frustration at what he saw as the Claimant's unjustified and obstructive approach, but that, absent her consent to the proposed transactions, he recognised he would have to live with the Claimant's reluctance and/or refusal to go along with his proposals. This first letter of 25th May 2020 does not lend any support for a notion, urged upon the Court by Counsel for the Claimant, that Mr. Golden was content to play fast and loose with the estate assets, disregarding the injunction and pushing transactions and payments to the very limits of the injunction and beyond.

[154] In relation to the letter dated 28th May 2020, Counsel of the Claimant contended that it had been reasonable to assume that the Court had read it. Counsel for the Claimant sought at the *ex parte* hearing to rebut Messrs. Harneys' assurances that **Mr. Golden** would not breach the injunction by raising once more the spectre of the 'autonomous' Mr. Feng going about breaching the injunction. Upon that narrative, Messrs. Harneys' assurances that Mr. Golden would not be breaching the injunction were no more than hollow, pious platitudes and cynical ones at that. A closer look at the correspondence shows this to be an untenable suggestion.

[155] As soon as one realises (as one must, upon reading the correspondence) that Mr. Feng's autonomy from Mr. Golden was only expressed to be in relation to transactions within the group, the Claimant's slant on this letter becomes unsustainable. It becomes apparent that Mr. Golden is described as having an earnest desire and concern not to breach the injunction. Counsel for the Claimant coloured interpretation of this letter with an unjustified, exaggerated and unsupported concern that the 'autonomous' and criminal Mr. Feng would be at large and able to commit the breaches of the injunction that Mr. Golden would want to do but piously disavowed.

[156] The Claimant's submission that she had understood the Court to have read this letter does not save her. It is one thing the Court reading a short document in the context of a matter where the facts and documents are sparse and simple. It is quite another where there is a lengthy

train of long letters with numerous annexures making a myriad of points as well as long affidavits, and seemingly every detail is the subject of a disagreement. Counsel should, in such a case, assist the Court properly to understand both sides of the arguments that really matter. That did not happen here. It can be difficult to do so, and no doubt it was difficult here, particularly where Court time is limited, but that is a risk an *ex parte* applicant and his or her Counsel take.

[157] I have also considered whether or not Mr. Golden had or had not breached the injunction. The balance favours the Fourth Defendant on this, in my respectful view. None of the instances of alleged breach relied upon by the Claimant are clear breaches. Nor are they necessarily serious enough to have warranted a receivership.

[158] The factor which tipped the balance in favour of making the receivership order was the notion of an artificial 'autonomy' projected onto an unscrupulous and criminal Mr. Feng by a cynical and calculating Mr. Golden, with Jiancheng chops just released to them, and where, allegedly, Mr. Feng had used the Bange chop (in breach of the injunction) to open bank accounts into which Jiacheng money was transferred, whence it could be further disbursed using the Bange chop. As I have tried to explain above, this picture was wrong at several levels.

[159] Learned Counsel for the Claimant unfortunately did not give full and frank disclosure of important correspondence on behalf of Mr. Golden; nor did Counsel give a fair presentation. It would be unfair to lay all the blame for this upon the approach taken by Learned Counsel for the Claimant at the hearing. The problem started with Mr. Ribeiro's affidavit evidence in support of the *ex parte* receivership application. Mr. Ribeiro included what appeared to be a lengthy section on full and frank disclosure. This ran from paragraph 64 to 107. In retrospect, this was light on the Fourth Defendant's contentions and explanations (already given or anticipated) and overwhelmingly devoted to detailed counter arguments on behalf of the Claimant. I can see now that this was not a fair representation of the Fourth Defendant's case. What initially came across at the hearing as an alarmed and alarming, urgent, appeal for the Court's assistance to grant more draconian orders to render the Injunction Order effective, appears, in retrospect and upon more mature reflection, to have been a slanted narrative calculated to convince the Court overwhelmingly to grant the receivership. The obligation on the part of the Claimant to give a fair presentation of the Fourth Defendant's position was

observed in the breach even at the stage of preparation of Mr. Ribeiro's Seventh Affidavit, thus even before the hearing.

[160] But for this distorted and exaggerated picture, I would not have granted the receivership order.

[161] I would not have permitted the application to proceed on an *ex parte* basis either; once the tendentious and inaccurate representation of the Bange chops affair is discounted, the Court would have been left with a series of arguments on both sides whether or not the injunction had been breached, and if so, whether intentionally or sufficiently seriously to warrant a receivership. Proper consideration of such a debate would require an inter partes hearing.

[162] Thus, the Claimant's omissions and unfair presentation in this regard were very material.

Disposition

[163] The Court is satisfied that it was appropriate for the Court to determine whether the Fourth Defendant's application to discharge the receivership order, with costs, should succeed.

[164] The Court is also satisfied that the receivership order should never have been made. It warrants being set aside for breach of the duty of full and frank disclosure and fair presentation and not to be re-granted.

[165] The Court should also be astute to deprive the Claimant of any advantage she obtained thereby and to compensate the Fourth Defendant for the costs he has reasonably incurred by reason of the improper grant of receivership order.

[166] It also warrants an order that the Claimant should bear the Fourth Defendant's reasonable costs of his application to set aside the receivership order (or at least that second part of his application which the Court has now determined in his favour).

[167] The Court will hear the parties further on what Mr. Golden's reasonable costs were.

[168] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar