

**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:

Ms. Tameka Davis, with her Ms. Jane Fedotova and Dr. Alecia Johns for the
Claimant/Respondent

Mr. John McCarroll, SC, with him Mr. Stuart Rau for the Fourth Defendant/Applicant

2020: June 3, 4, 22;
July 1, 6.

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 15th April 2020 seeking the discharge of an injunction granted on an *ex parte* basis on 25th February 2020 and continued on 18th March 2020. For the reasons given below, the injunction will be discharged with costs against the Claimant, but a new injunction on different terms regranted.

Introduction

- [2] On 3rd June 2020 Mr. Golden's application to discharge the injunction came on for hearing. After some six and a half hours of argument the hearing was part heard until the following day, 4th June 2020. Some five hours of argument were heard on that occasion, and it was again part heard, this time until Monday 22nd June 2020, when the hearing concluded after three and a half hours of further argument. On 1st July 2020 I gave an indicative update to the parties that the Court's order would be that the injunction obtained by the Claimant would be discharged on account of the Claimant's failure to disclose three facts as part of her duty of full and frank disclosure, that the Claimant would be ordered to bear the costs of the discharge application and lastly that a more limited injunction would be reinstated.
- [3] A receivership order was also obtained by the Claimant on an *ex parte* basis at hearings on 28th and 29th May 2020. The receivership order was made in support of the injunction, on grounds of Mr. Golden's alleged breaches of the injunction. It remains to be determined what effect, if any, discharge and re-imposition of injunctive relief will have upon the receivership order. The Court has yet to hear the parties on that issue.
- [4] The injunction was made against the first defendant, Sundale International Limited ('Sundale'), the second defendant, Best Land Investments Limited ('Best Land') and Mr. Golden, on the application of the Claimant, Ms. Hu Lan ('Ms. Hu').
- [5] Sundale and Best Land are companies incorporated in the Territory of the Virgin Islands ('BVI').
- [6] By the injunction, the enjoined parties were prohibited from taking steps that might deplete the value of Sundale and Best Land pending the determination of the Claimant's claim in these proceedings.
- [7] The injunction is a proprietary injunction. Ms. Hu claims to be the sole director and beneficial owner of 100% of the issued share capital of Sundale, which itself is the legal owner of Best Land. Mr. Golden claims that *he* is the beneficial owner of Sundale. Ms. Hu claims that Mr. David Golden holds her share in Sundale on trust for her. Mr. Golden denies this.

- [8] The Claimant states that until 10th January 2013 the entire issued share capital of Sundale consisted of a single share of US\$1. As of that date the share was transferred to Mr. Golden. Mr. Golden subsequently caused a further 999 shares to be issued to himself. But by virtue of the alleged trust, Ms. Hu claims to have the beneficial interest in those shares as well.
- [9] However, Mr. Golden contends that Ms. Hu transferred that share to him as a gift. Allegedly this was pursuant to a share transfer agreement executed in or around June 2012 and/or an oral agreement entered into around that time. Mr. Golden contends that he did not execute a declaration of trust document relied upon by Ms. Hu, nor an authorization letter in her favour relied upon by her. Mr. Golden contends that the share had been previously owned beneficially by his father, with the Claimant acting as his nominee, and that his father had repeatedly expressed an intention to effect an *inter vivos* gift to him as his only son.
- [10] I should say that the details of this defence were not necessarily known to the Claimant's Counsel at the *ex parte* hearing on 25th February 2020, as Mr. Golden filed his Defence subsequently, on 4th April 2020. Nonetheless, the Claimant's Counsel correctly suggested that Mr. Golden might allege that the transfer had been a gift. Mr. Golden had stated as much in a First Affirmation that he made in these proceedings on behalf of Sundale and Best Land on 13th December 2019.
- [11] He there accused Ms. Hu of having forged corporate documents in his name, and further, that the company which provided corporate secretarial services in Hong Kong notably did not have the purported declaration of trust amongst its records. He thereby suggested that Ms. Hu had created or procured the declaration of trust by fraud.
- [12] There is evidence on behalf of the Claimant that she did indeed, from time to time, write Mr. Golden's name on documents that he would be required to sign. Ms. Hu states though that she would notify him before doing so, that she did so in accordance with an accepted practice between them and that she would subsequently have Mr. Golden re-execute such documents when he became available.
- [13] The value in this dispute concerns a high-end luxury residential villa development near Shanghai, called Sunville (which I will refer to as the Sunville estate) comprising of around 268 villas, in various stages of readiness for sale and occupancy. This is ultimately held through

Sundale and Best Land. Earnings for the business are generated through sales of villas (through a company called Jiacheng) and management fees that are charged to residents (through a company called Bange). For convenience only I shall refer to this enterprise as 'the business'.

- [14] The Claimant is the current wife of a very successful, now quite elderly, businessman named Mr. Gao. Ms. Hu and Mr. Gao have two young daughters together. Mr. Gao is the father of Mr. Golden, by a previous marriage. Mr. Gao's previous wife, Mr. Golden's mother, Ms. Qu Guanglan, is still alive. There is no love lost between Ms. Hu, Mr. Gao and Mr. Golden's mother. Mr. Golden is himself married and is the father of four children.

The Points of Claim and Claimant's procedural steps

- [15] Ms. Hu communicates the following narrative in her Points of Claim filed on 3rd February 2020. For sake of clarity, I set out below what Ms. Hu alleges. These are not findings of fact.
- [16] In or around late 2012, Mr. Gao became very ill with heart disease. He needed to seek treatment in the United States of America. Assuming a good outcome, convalescence would take several years. Ms. Hu had to be with Mr. Gao and care for him.
- [17] So, she thought it advisable to have Mr. Gao's son, in whom she reposed confidence and trust, registered as the owner of the issued share capital of Sundale in case any documents needed to be signed by a registered shareholder. But, says Ms. Hu, Sundale would be held by Mr. David Golden on trust for her as part of this arrangement. She would remain the beneficial owner of the company.
- [18] A suite of documents dated 10th January 2013 was then executed to record this arrangement. This included an irrevocable declaration of trust, with Mr. Golden as trustee or nominee in favour of Ms. Hu as the beneficial owner.
- [19] Mr. Gao underwent medical treatment and he recovered gradually. By mid-2019 he was able to resume work and travel.

- [20] Ms. Hu and/or Mr. Gao (purportedly on behalf of Ms Hu) instructed Mr. Golden to transfer Sundale back to Ms. Hu. But he refused. Instead he took various steps to consolidate his control and oust Ms. Hu. He:
- (1) Changed the registered agent on 16th October 2019: previously it had been Vistra, who, I am told, treated Ms. Hu as its client of record. Then it was changed to Harneys Corporate Services, who treat Mr. Golden as their client of record, with 'Harneys' the law firm acting for Mr. Golden himself;
 - (2) Caused the companies to revoke a power of attorney in favour of Ms. Hu;
 - (3) Took personal custody of the records and company documentation;
 - (4) Caused Best Land to adopt a resolution removing Ms. Hu as director of the underlying operating company that held the real estate;
 - (5) Vandalized and destroyed the Sunville estate's sales office on 4th November 2019 and removed the steel to be sold for money;
 - (6) Terminated staff and senior management creating an environment of fear and intimidation such that Ms. Hu, Mr. Gao and their two very young daughters were forced to flee for their safety.
- [21] Ms. Hu says that she attempted to take various corporate administrative steps to reverse some of these steps and to establish herself as sole director of Sundale and Best Land, but Mr. David Golden and Harneys Corporate Services refused to update the company registers. The reason given was that Mr. Golden is the registered shareholder and director of Sundale and he disputes the authenticity of the declaration of trust.
- [22] Ms. Hu therefore brought these proceedings, seeking relief that would see her regain directorship control over Sundale and Best Land and have her beneficial ownership of all shares in Sundale formally recognised. She also seeks damages and/or equitable compensation for breach of trust by Mr. Golden.
- [23] The Claimant applied for leave to serve her claim outside the jurisdiction. This application was heard on 24th February 2020. She also applied for the injunction. That application was heard the following day on 25th February 2020.
- [24] In support of the *ex parte* application for the injunction, Ms. Hu relied upon a single affidavit, that of a Hong Kong Solicitor, a Mr. George Ribeiro. Mr. Ribeiro's affidavit, which was his

second affidavit, in turn adopted a First Affirmation made in these proceedings by Ms. Hu. That Affirmation is extremely short – barely five pages in total – and sparse on detail.

[25] Mr. Ribeiro sets out the story as it appears in the Points of Claim.

He further went on to mention that Mr. Golden might argue that the shares had been a gift to him, before immediately trying to quash that notion.

[26] Mr. Ribeiro also explained a little of the background circumstances. He stated at paragraph 24:

“David Golden in response to requests that he transfer the shares in Sundale back to the Applicant [Ms. Hu] has begun to isolate the Applicant from control of Sundale and have [sic] engaged in tactics intended to intimidate and sought to diminish the value of the underlying assets and misappropriate funds generated by the Villa to fund his lavish lifestyle. For this Honourable Court’s further information I am advised by the Applicant and Mr. Gao and verily believe that at least prior to purportedly taking over the control of Sundale and its subsidiaries, David Golden did not work (not even for Jiacheng or Bange) and Mr. Gao and the Applicant had to support him by giving him between RMB 200,000 to RMB 300,000 per month as the expenses of him, his wife and his four children as well as providing them with a lavish residence in Sunville Estate with a private swimming pool, theatre, billiard room, gymnasium etc. David Golden had no working experience.”

[27] I quote this paragraph in full because it is very important. It is important both for what it says, and even more important for what is omitted. Upon a first reading of this passage, it is easy not to notice that the long penultimate sentence does not say that Ms. Hu and/or Mr. Gao cut Mr. Golden off from receiving his monthly expense payments. But that is apparently what happened. This detail only came to the surface well into the hearing of the application to discharge the injunction. Also omitted is reference to Ms. Hu and Mr. Gao having withdrawn RMB3.5million in liquid funds from Jiacheng in around October 2019. The significance of this is that, as Mr. Golden contends, this withdrawal left the business with a cash shortage.

[28] But we are getting ahead of ourselves. The steps Mr. Golden is alleged to have taken to diminish value were those cited by the Claimant in her Points of Claim, whereby Mr. Golden shifted control to himself and ousted Ms. Hu Lan, as well as a number of other steps.

[29] These included, but are not limited to:

- (1) Destroying the Sunville estate by rampaging through and vandalizing the temporary sales office, and demolishing it to sell materials for money, allegedly unaccounted for to

the relevant companies, allegedly causing severe loss and diminution in value of the underlying assets;

- (2) Destroying many of Mr. Gao's personal items in the sales office, worth about RMB 4.08 million;
- (3) Horrifying residents who complained and no longer wanted to live there, causing severe reputational damage to the Sunville estate and its brand;
- (4) A relentless campaign of dismissing senior management and replacing them with inexperienced stooges;
- (5) Attempting to raise extra management fees by promising residents a 10% discount for prepaying one year's fees and a 15% discount for prepaying two years' fees;
- (6) On the night of 26th November 2019, Mr. Golden, together with his mother, aunt and an employee, criminally broke into the offices of Ms. Hu and Mr. Gao and took chops and corporate documents of Jiacheng that had there been kept in a safe by Mr. Gao and Ms. Hu;
- (7) Mr. Golden has professed that he intends to sell the villas quickly, possibly at below market prices, in order to get ready cash. He devised a plan whereby buyers could pay in cash and Mr. Golden could deliver the house a year later. Thereby, said Mr. Ribeiro, Mr. David Golden would be able to pocket the money and leave the aftermath of unpaid taxes and chaos to Jiacheng to sort out. Around 100 villas are currently fully completed and ready for sale. These could be sold at a moment's notice or used as mortgages in exchange for cash.

[30] Mr. Ribeiro sums up Mr. Golden's alleged conduct like this, at paragraph 43:

"In reality, David Golden prompted by requests to transfer the shares back to the Applicant is simply seeking to extract as much value from the Villa [i.e. the Sunville estate] as possible and as quickly as possible to fund his lavish lifestyle."

[31] At the *ex parte* hearing Learned Counsel for the Claimant stated that she was going to 'hone in on the steps taken [by Mr. Golden] to diminish the value of the assets and to gain control of [the business] by [Mr. Golden].'¹

[32] Learned Counsel for the Claimant informed the Court with no equivocation, nor qualification, that Mr. Golden had caused the temporary sales office to be vandalized and then destroyed,

¹ Transcript, 25th February 2020, page 52 lines 23 to 25.

over 140 tons of re-enforced stainless steel to be sold off, pocketing the proceeds, and that he had wrecked artworks worth RMB3million.

- [33] Learned Counsel for the Claimant specifically addressed the Court on Mr. Golden's alleged motivation. She stated:

"And, My Lord, one can see how David Golden may well feel that as the adult son this should have been a gift, but that was not the intention, and he is maintaining as much control and extracting as much value from the villas as he can while he can. And the Applicant/Claimant has been very clear about the motivation behind this, My Lord."²

- [34] She repeated this case concept a few moments later:

"The Applicant's position in this is he's essentially trying to get as much money as possible from the villa owners before this Court makes a declaration that he is not the proper legal owner and correct matters in terms of fixing the registers and transferring it from Harneys into some other registered agent."³

- [35] She explained that Mr. Golden had obtained the necessary corporate chops by dint of a criminal break-in performed by his mother, his aunt and someone else, and with those instruments he could sell villas, possibly at an under-value.

- [36] Learned Counsel for the Claimant pressed for an urgent injunction on the basis that '[t]he longer this takes to resolve the more damage Mr. Golden is able to do...'⁴

- [37] The picture thus painted of Mr. Golden was of a dishonest, embittered, vindictive, thuggish, high-living, greedy, spoilt opportunist who has never known the responsibilities and disciplines of work, who is out to convert as much of other people's money as he can to his own luxurious use before inevitably being adjudged to have had no such entitlement, with his mother and aunt as his enthusiastic acolytes.

Mr. Golden's perspective

- [38] During the hearing of Mr. Golden's application to discharge the injunction, a different, rather broader picture emerged.

² Transcript, 25th February 2020, page 64 lines 8 to 15.

³ Transcript, 25th February 2020, page 66 lines 4 to 10.

⁴ Transcript, 25th February 2020, page 71 lines 18 to 19.

[39] The main grounds upon which Mr. Golden relied in his application to discharge the injunction were that the Claimant had breached her duty of full and frank disclosure and her duty to present her arguments in a fair and even-handed manner at the *ex parte* hearing. Mr. Golden submitted that the Claimant had deliberately suppressed matters known to the Claimant.

[40] Mr. Golden's Learned Senior Counsel argued that there had been several breaches of this duty. I need not consider them all for present purposes, but I will concentrate upon those which I consider to be the most material and indeed decisive. I will also explain why this Court considers them to be material. The other breaches are in my view of more arguable materiality.

[41] Most significantly, he contended as follows:

- (1) "In particular the Claimant failed to inform the Court in breach of the Duties that Mr Golden had been appointed a director of Jiacheng in 2001 and became its legal representative and chairman of the board on 16 July 2008 and had been the legal representative and executive director of Bange since January 2015. These were material matters which, had they been disclosed, would have had a bearing on how the court viewed Mr. Golden's so-called danger to the company in terms of both experience and conduct and in terms of the strength of his claim. They were clearly known to the Claimant and their withholding can thus only have been deliberate."
- (2) "The Claimant failed to disclose to the court that Mr Gao and the Claimant withdrew 3.5m RMB from Jiacheng's bank account in October 2019 [he said 2020 but underlying correspondence in the form of a letter from 'Harneys' to 'Conyers' dated 24th April 2020 indicates that this happened in 2019] leaving the company with very limited means with which to operate. This was a matter which in its own right ought to have been disclosed. However, it has a further significance in that it was alleged that Mr. Golden had asked property holders to pay service charges in advance at a discount. It was suggested by the Claimant that he did so in order to extract cash out of Jiacheng for his own purposes. In fact, Mr. Golden sought to accelerate the service charge payments in order to provide the company with the cash which it needed to operate as a result of the company's cash reserves having been wrongfully removed by the Claimant. This was an important, material and deliberate omission in respect of which there can be no excuse."

The reference to service charge payments here concerns Mr. Golden's attempt to raise extra management fees by offering discounts on future years' fees if paid early.

- (3) "There was no evidence that Mr Golden "vandalised" the sales office." Mr. Golden's own version of this event was that it was his mother was the one who did this act, not he himself. The Claimant, later, through Mr. Ribeiro's Sixth Affidavit, asserted that indeed

Mr. Golden's mother had taken part (but with Mr. Golden as well), using stone flowerpots to smash the interior of the sales office and cause damage.

Materiality of these omissions

- [42] The withdrawal of RMB3.5million from Jiacheng's bank account in October 2019 is certainly a material fact, known to the Claimant, which should have been disclosed but was not. What emerged at the hearing appears to have been as follows.
- [43] After the dispute had arisen between Ms Hu. and Mr. Golden, Mr. Gao caused this sum to be removed from Jiacheng's bank account on 29th October 2019 and paid to another company, Shangahi Ledao Investment Co. Ltd, leaving Jiacheng with only RMB1,010.66 in its bank account. This withdrawal took place about two weeks after Mr. Golden changed the companies' registered agent. Ms. Hu's evidence, relying upon a statement by one Ms. Guo Yuting who had worked in the business as an accountant up until September 2019, was that Mr. Gao and Ms. Hu had been the only actual investors in the companies that comprise the business. Furthermore, as stated by Ms. Guo, Jiacheng and Bange had been under the 'unified management' of Mr. Gao and Ms. Hu. Ms. Hu also gives detailed evidence through Mr. Ribeiro, at paragraph 26 of his Fifth Affidavit, concerning amounts of cash injected into the business via Shangahi Ledao Investment Co. Ltd and another company. I deduce from these asserted facts that Ms. Hu probably, and almost certainly, knew about the RMB3.5million withdrawal from Jiacheng, at the time of the withdrawal, as Jiacheng was a company she managed with Mr. Gao until Mr. Golden ousted her. I am satisfied that she knew about the withdrawal before the *ex parte* application for an injunction was made.
- [44] Ms. Hu has claimed that this withdrawal was in repayment of loans made by Shangahi Ledao Investment Co. Ltd to Jiacheng.
- [45] Mr. Golden has asserted that this withdrawal left Jiacheng with insufficient cash to operate, informing his decision to sell a villa, House 303, to raise funds for the business to continue operation. There is a separate but related dispute over whether, as Ms. Hu alleges, House 303 was sold off at an undervalue. Learned Counsel for the Claimant vigorously contested the allegation that the withdrawal had left the business without enough cash, arguing that some RMB941million in retained earnings of Jiacheng meant that it had no cashflow shortage. In this

regard, she was supported by the second Affidavit of Mr. Ribeiro, at paragraph 13, where he set out what he referred to as Jiacheng's 'cash finance' position. He included under this description registered share capital, outstanding payables due to loans made by Mr. Gao and/or Ms Hu Lan through their companies, as well as these retained earnings. The first two of these items are decidedly not direct evidence of readily available money. I was not taken to any evidence that the retained earnings took the form of available cash. I have no basis for making such an assumption. Just because Mr. Ribeiro mentions the word 'cash' does not mean that there were available liquid funds. Indeed, Mr. Golden's case was that the RMB3.5million withdrawal left the company with so little cash that Mr. Gao then re-injected RMB150,000 or so at the Chief Financial Officer's request, in order that utility bills of the Sunville estate could be paid. The fact of that payment is adduced by Ms. Hu as evidence that Mr. Gao had continued to invest in Jiacheng even after Mr. Golden had taken over control in October 2019, but she stops short of acknowledging that this payment was made because the company otherwise did not have enough funds to pay the bills.

[46] Mr. Golden also contended, in effect, that Ms. Hu's explanation that the withdrawal was to pay off a loan was a misleading excuse, with the reality being different. He contends that no formal written demand had been made to Jiacheng for repayment of any loan and no repayment had been made in the eight years prior to the withdrawal, and with there, moreover, being no repayment terms specified that would have required this payment at that given time. The real reason for the withdrawal, according to Mr. Golden, was because he had fallen out with Ms. Hu and his father, and they wanted to remove this cash out of the company before Mr. Golden could benefit from it.

[47] This explanation makes sense when seen in light of another detail which the Claimant did not disclose at the *ex parte* hearing. Whilst the Claimant had alluded to the fact that Mr. Golden had been receiving a payment of between RMB200,000 and RMB300,000 per month to cover his expenses, and those of his wife and family, before he took over control of the estate, the Claimant did not say that she and Mr. Gao had cut Mr. Golden off from receiving this sum. Mr. Golden did not cite or rely upon this as a breach of duty to give full and frank disclosure, yet it supplies important context.

[48] There is a dispute about the basis upon which this sum had been paid, with Ms. Hu characterizing this as essentially an allowance for Mr. Golden in that he had never worked and

had no educational qualifications, and Mr. Golden saying this was a form of pay for his work in relation to the companies that, for tax reasons, was no longer being paid by the companies but by his father and/or Ms. Hu.

- [49] However these payments should properly be characterized, the fact of the matter is Mr. Golden was no longer receiving this money. Thus, in order to maintain the lifestyle that he, his wife and his children had become accustomed to, he would have to look to the business to make good the shortfall. And a shortfall there would be, as he had been paid only a low basic monthly wage.
- [50] It is also clear to me that since the RMB3.5million withdrawal, the business, under Mr. Golden's control, would no longer benefit from regular and significant advances from Mr. Gao, Ms. Hu and their other companies or sources of finance.
- [51] Mr. Golden would therefore also need to look to the business to raise the necessary cash to pay for the day to day running of the business.
- [52] Within this business there were two main sources of revenue: management fees and villa sales. It comes as no surprise therefore that Mr. Golden should try to come up with creative ways of maximizing both, without necessarily any bad faith on his part. His actions can be seen not (or not only) as those of a greedy opportunist seeking to extract maximum value for his own benefit, but as the initiatives of a businessman trying to lead a company that is in a very tight financial corner.
- [53] The fact that Mr. Gao and Ms. Hu had previously injected funds regularly into the estate indicates that the business needed outside capital to function as a going concern. That this should entail Mr. Golden taking financial risks with the companies and their assets is consequently also unsurprising, without necessarily bad faith needing to be imputed to him.
- [54] It was particularly material for the Court to have been told at the *ex parte* hearing that Mr. Golden could argue that the RMB3.5million had deprived Jiacheng of available cash, for the very simple reason that Mr. Golden would then have to look for other potential sources of cash, with the business being a logical first port of call.

- [55] It was also material for the Court to have been told that Ms. Hu and/or Mr. Gao had cut Mr. David Golden off from payment of his monthly expenses, such that he would almost certainly have had to look to the business to maintain the lifestyle to which he and his family had become accustomed.
- [56] Mr. Golden's previous positions of responsibility within the business were also material for the Court to know. Ms. Hu contends that they were sinecure positions only and that Mr. Golden did not engage with them properly or at all. Ms. Hu must have known that Mr. Golden had held such positions. However, there is a disconnect between the 'good-for-nothing' image of Mr. Golden portrayed by Ms. Hu and the rather imaginative commercial proposals that have seen the light of day under Mr. Golden's watch. In saying this I do not endorse such proposals as commercially prudent. Nor can I condemn them as imprudent. My point is simply that Mr. Golden has had the aptitude to foster such ideas, whether in himself or others. This shows leadership and a degree of commercial nous. He was also clearly no stranger to the companies. Had the Court been informed that Mr. Golden had had several years' experience in positions of responsibility within the group, however she might have wanted to couch the degree of Mr. Golden's real engagement with these roles, the Court would have been in a better position to assess the risk that he might pose to preservation of the assets. Moreover, his claim that he had received the share in Sundale as a gift from his father suddenly looks less outlandish when seen in the context of the positions his father (and Ms. Hu) had been content to appoint him to – culminating, of course, in Ms. Hu's transfer of the share to him. That transfer did not come out of the blue, as one sometimes sees where a cleaning lady or chauffeur is suddenly constituted, as if by magic, as the legal owner of a huge business empire.
- [57] The reason these omissions are important is because they go to Mr. Golden's motives. Those were the basis upon which the injunction was sought and indeed granted. In the way Mr. Golden's motives were portrayed, they were entirely selfish on the part of Mr. Golden with no regard to the longer-term interests of the companies. As presented, they warranted an *ex parte* application to avoid tipping off Mr. Golden. They also warranted the injunction in the form it took as at the date of hearing the discharge application.
- [58] Had the Court been provided with these omitted details, however, a radically different motivation would have become apparent, or at least possible; Mr. Golden appears to have

been devising or promoting money raising schemes in an attempt to keep the business going, whilst raising enough to meet his and his family's own expenses.

[59] Learned Counsel for the Claimant switched her focus at the discharge hearing from Mr. Golden's motives as alleged by Ms. Hu, to arguing rhetorically how it could possibly be in the best interests of the companies for Mr. Golden to pay himself monthly personal expenses of around RMB200,000. This argument itself discloses Ms. Hu's apparent desire: she does not want Mr. Golden to benefit from the business – "her" business - beyond his low baseline salary. Mr. Golden argues for a different view: he is merely resuming a practice of the business paying his and his family's expenses that had earlier been stopped for tax reasons; irrespective of the strict contractual position, the payment of such expenses had been an established practice in this business and family circle; he is the head of a prestigious property development estate and business; it would be out of kilter with the treatment of equivalent business leaders in the PRC for him to live in radically reduced circumstances and thus entirely appropriate for him to try and retain his prestige. From that perspective, Mr. Golden may well be acting honestly and in good faith in what he believes to be in the best interests of the companies.⁵

[60] The omission to inform the Court that Mr. Golden had held positions of responsibility within the business and that Ms. Hu and/or Mr. Gao had withdrawn RMB3.5million from Jiacheng was in my view deliberate, and I so find as a fact. Ms. Hu knew of these matters and she, or her mouthpiece, the overseas lawyer on whose affidavit evidence she would rely, decided not to tell the Court about them in case these matters would influence the Court's mind in a manner contrary to their own views. The failure to disclose these matters was not innocent in that sense. It was incumbent upon her legal Counsel to explain the duties of full and frank disclosure to Ms. Hu and the need for a fair and even-handed presentation. It appears to me that this was either not done, or if it was, then her omission to bring these material facts to the Court's attention is all the more egregious.

⁵ Cf. BVI Business Companies Act 2004, Revised Laws of the Virgin Islands No. 16 of 2004, section 120, the wording of which I here deliberately track.

The legal principles

- [61] Mr. Golden's Learned Senior Counsel relied upon the well-settled legal principles that were conveniently expressed by Popplewell J in the English High Court in **Fundo Soberano de Angola v. Dos Santos**⁶

"[51]...The importance of the duty [to give full and frank disclosure] has often been emphasised in the authorities....It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is the exceptional course adopted in cases of extreme urgency or the need for secrecy. If a court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, in a fair and even handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to secure the integrity of the court process.

[52] The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects.....This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided....

[53] Thirdly the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged...."

- [62] These principles have been stated numerous times in similar terms in other authorities. They also apply in this jurisdiction, following our Court of Appeal decision in **Enzo Addari v Edy Gay Addari**.⁷ That case cited, with approval, the principles set out in **Brink's-Mat Ltd v Elcombe and others**.⁸

- [63] A convenient summary of these and related principles was set out in **Congentra Ag v Sixteen Thirteen Marine SA ("The Nicholas M")**:⁹

"61. The owners allege that the charterers made a number of misrepresentations to the Court on the ex parte application, alternatively failed to make full and frank disclosure to the Court on that occasion. The importance of making full and frank disclosure to the

⁶ [2018] EWHC 2199 (Comm) at para. 51 to 53 (Popplewell J).

⁷ British Virgin Islands Civil Appeal No. 21 of 2005 (delivered 23rd September 2005, unreported).

⁸ [1988] 1 WLR 1350.

⁹ [2008] EWHC 1615 at paragraphs 61 to 64 (Flaux J).

Court of all matters material to the Court's decision on an ex parte application for relief cannot be emphasised too strongly, particularly in the case of an application for a freezing order which may cause substantial prejudice to the defendant. The matters which are 'material' are all matters relevant to the Court's assessment of the application, including matters which may be adverse to the application.

62. As the Court of Appeal stated in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 and as has been repeated in subsequent cases, the purpose of this rule is to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on ex parte applications. However, even if there has been material non-disclosure, the Court has a discretion whether or not to discharge an order obtained *ex parte* and whether or not to grant fresh injunctive relief. Discharge of the order is not automatic on any non-disclosure being established of any fact known to the applicant which is found by the Court to have been material, although it would only be in exceptional circumstances that a Court would not discharge an order where there had been deliberate non-disclosure or misrepresentation. ... Whilst it is no answer to a complaint of non-disclosure to say that even if the relevant matters had been placed before the Court, the result would have been the same that is a relevant consideration in the exercise of the Court's discretion.

63. In exercising that discretion, the overriding question for the Court is what is in the interests of justice. This is very clear from all three judgments in the Court of Appeal in *Brink's Mat*. Ralph Gibson LJ was prepared to continue the order on the basis that he had no doubt that even if the additional information had been disclosed, the judge at the ex parte hearing would have made the same order on the same terms. Balcombe LJ at 1358E said this:

"Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained."

64. Slade LJ at 1359C made the point that in heavy commercial cases, the borderline between material facts and non-material facts may be an uncertain one. He continued:

"In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Comrs* principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Though in the present case I find that there was some material, albeit innocent, non-disclosure on the application to Roch J, I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J on 9 December 1986."

[64] Related principles have also been summarized in the English High Court decision in **National Bank Trust v Yurov et al.**¹⁰

“18. Without attempting a comprehensive restatement which would serve no useful purpose, I consider that the following points are particularly relevant in the present case:

a. 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.

b. Failure to disclose a material fact will sometimes require immediate discharge of the order. This is likely to be the court's starting point, at least when the failure is substantial or deliberate.

c. Nevertheless the court has a discretion to continue the injunction (or to impose a fresh injunction) despite a failure of disclosure; although it has been said that this discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.

d. In considering where the interests of justice lie, 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.

e. The interests of justice may sometimes require that a freezing order be continued, but that a failure of disclosure be marked in some other way, for example by a suitable order as to costs.”

[65] In March this year our Court of Appeal in **Paraskevaides et al. v Citco Trust Corporation Limited**¹¹ stated:

“[30] The jurisdiction to grant an injunction or to appoint a receiver and, by extension, to discharge or refuse an injunction or appointment, by interlocutory order, is derived from section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**. (Cap. 80 of the Laws of the Virgin Islands)

...

[31] ... a deliberate non-disclosure will always be a factor against [an applicant].

[32] A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. ...

¹⁰ [2016] EWHC 1913 (Comm) at paragraph 18 (Males J).

¹¹ BVIHCMAP2018/0046 (unreported, delivered 30th March 2020. (Carrington JA (Ag.).

[33] Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts, (See *Brink's-Mat v Elcombe and others* at page 1356F, et seq per Ralph Gibson LJ and adopted by this Court in *Enzo Addari v Edy Gay Addari* at paragraph 7) the Court must ensure that the party who failed to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the *ex parte* order but, even if it does, the Court may nevertheless grant a fresh order if the non-disclosure was innocent only and the balance of convenience in light of all the material facts of which the court is aware demands that a new injunction should be granted. However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief being sought.

...

[39] ...In ***Brink's-Mat***, Ralph Gibson LJ stated that a non-disclosure would be innocent if the fact was not known to the applicant or its relevance was not perceived by them. (See page 1357D.) The onus is on the applicant to explain the non-disclosure. In ***Banca Turco Romana S.A. (in Liquidation) v Cortuk and others*** ([2018] EWHC 662 (Comm) at para. 35.) it was held that "the very least that can be said is that no innocent explanation has been put forward, and if an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, it is incumbent upon it to explain how it came about.

...

[44] The Learned Judge clearly had the discretion to refuse to renew the injunction and in the exercise of this discretion, he considered correctly that the overriding question was where the interests of justice lay. While the Judge considered the strengths and weaknesses of the appellants' case and the prejudice to be suffered by each side from the grant or refusal of the injunction, I find that he nevertheless failed to weigh in the balance other factors that were material to his decision. In particular, the Judge did not consider that the risk of asset disposal was only one element of the possible prejudice. The appellants' claim is a proprietary claim so, strictly speaking, there was no requirement to establish such risk. ..."

Discussion

[66] It is clear to me that the Claimant did not fairly and in an even-handed manner present the evidence and the arguments at the *ex parte* hearing. The evidence and argument was presented in a misleading and one-sided manner.

[67] Had I been provided with these omitted details I would not have granted the injunction, at least in the terms sought. At the very least, I would not have prevented Mr. Golden and the First and Second Defendants from selling villas, since to do so would deprive the companies of one of its

two main sources of earnings, in circumstances where they could no longer rely upon Mr. Gao and/or Ms Hu Lan to inject capital.

[68] I would also not have imposed consent terms for the payment of disbursements in terms as onerous as those obtained by the Claimant, because they restricted Mr. Golden's ability to manage the business: they placed on him a heavy and continuous burden to provide documentary justification for expenditure concerning the minutiae of the business to the Claimant, who showed herself innately hostile towards Mr. Golden. A burdensome duty such as this is conducive to distracting efforts from running the business.

[69] Those provisions as framed in the injunction order were predicated upon an acceptance of Ms. Hu's view of Mr. Golden. The broader, fuller picture suggests that Mr. Golden is less of a threat to the assets of the business than Ms. Hu would have the Court believe, and that the steps he has taken are a genuine attempt to keep the business going in circumstances where Ms. Hu and Mr. Gao have withdrawn the bulk of their financial support as long as Mr. Golden is in control of the business.

[70] This is a clear case, in my view, where discharge of an injunction is warranted on account of breach of the duty of full and frank disclosure. That will be the order of the Court.

Fresh injunction order

[71] The question whether an injunction on new terms should be granted is a more difficult one.

[72] On the one hand, **Paraskevaides** appears to be authority that binds this Court that a fresh order should only be made where non-disclosure has been innocent (at paragraph [33]), on the basis that the Court must ensure that the applicant is stripped of an advantage she gained by reason of the non-disclosure. On the other hand, there is the principle that the penalty of discharge should not itself be used as an instrument of injustice, with the interests of justice being the ultimate goal. On my reading of **Paraskevaides** in its entirety, our Court of Appeal was not deviating from the well settled English law principles in order to lay down a more absolute rule for our jurisdiction. The Learned Justice of Appeal was, upon my reading of the judgment, merely summarizing the English law principles. The overriding consideration for the

grant of a fresh order is not whether non-disclosure was innocent or not, but how the interests of justice overall are to be served.

- [73] The balance to be struck, in this case, seems to me to be between stripping Ms. Hu of the advantage she gained through her non-disclosures and preserving the assets pending the determination of this claim. The assets are valuable. Ms. Hu and Mr. Golden have competing claims to their ownership. To give Mr. Golden carte-blanche to deal with them with no need to show the Claimant what he is doing, such that he might reduce the companies to mere shells, would be an extremely severe penalty to pay for these breaches of full and frank disclosure. That would reduce the rule to a penal instrument that disregards the ever present need to act in the interests of justice as a whole.
- [74] There is some evidence to suggest that Mr. Golden may be engineering a wholesale disposal of the Sunville estate. This is grounds for concern. Mr. Golden has claimed that due to failures to adhere to a tax deadline for which he himself disclaims responsibility, the business is facing an accelerated claim by the Chinese tax authorities in a very large amount that would render the business insolvent, precipitating a sale of the remaining villas in the estate. The Claimant disputes this and suggests that this is an attempt by Mr. Golden to liquidate the estate and leave with the cash.
- [75] I am simply not in a position to take a view on the competing merits of this sub-dispute at this point. Yet both sides are agreed upon one thing – this is a war between the parties. I cannot discount the possibility that Mr. Golden should now wish to take matters into his own hands, liquidate as much of the assets as he can and leave with the proceeds.
- [76] In terms of the merits of the parties' respective cases, for present purposes I do not see that either side has an overwhelmingly strong case. Learned Counsel for the Claimant pins a lot of weight on a pleading point. But pleading points are often arid and are frequently curable and eventually cured. The substantive case comes down to a dispute of fact. Credibility of witnesses will be important. The Claimant, through her Learned Counsel, urges that the Claimant has such a strong case that she is optimistic she will succeed on a forthcoming application for summary judgment. I am not in a position to accept that now.

- [77] The interests of justice would in my view be best served if a fresh injunction is granted. This outweighs the need to penalize the Claimant for her non-disclosures. It is a proprietary injunction designed to protect the Claimant's alleged ownership interest in the group and ultimately its assets for the eventuality that her claim succeeds.
- [78] Concerning the fresh terms, the overall shape of the substantive terms should in my view be as follows. I will hear the parties in respect of the precise terms of the order, if they cannot be agreed.
- [79] The prohibitions against dealing in the companies' shares should remain.
- [80] Mr. Golden should be entitled to cause the companies to transact the business of the group, but with an obligation to provide the Claimant with particulars of steps decided upon within a set, reasonable, time after the decision(s) have been taken, and where feasible, a reasonable time before steps are taken. Such steps should include the raising and collection of management fees, the sale of villas and the payment of expenses.
- [81] In relation to payment of expenses, Mr. Golden previously sought permission to pay up to RMB1,950,000 per month in disbursements without the Claimant's prior consent. The Court had fixed a limit at a lower, compromise figure. Such a limit and consent mechanism remain appropriate, but Mr. Golden should have greater latitude in the running of the business. It is appropriate in my judgment to raise the limit on disbursements to RMB1,950,000 per month, as that is the figure that Mr. Golden himself had proposed as being manageable.
- [82] Both sides should have liberty to apply.
- [83] Such new terms would cause less prejudice to the companies and Mr. Golden, whilst still giving the Claimant visibility over the running of the business with an opportunity to take legal action if something untoward occurs, as well as a degree of control over monthly expenditure.
- [84] In terms of costs, it is appropriate that the Claimant should bear the Fourth Defendant's costs of the discharge application. I will hear the parties as to the scope of the costs order, specifically to what extent the Claimant should also pay for other costs connected with the injunction and in relation to the fresh order.

[85] 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