

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0030

BETWEEN:

GREEN ELITE LIMITED (IN LIQUIDATION)

Appellant

and

[1] MR. FANG ANKONG

Second Respondent

[2] MR. FANG ANLIN

[3] MS. DING LI

[4] MR. GU LIYONG

[5] HWH HOLDINGS LIMITED

First Respondent

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal [Ag.]

Appearances:

Mr. John Machell, QC with him, Mr. Peter Ferrer for the Appellant

Mr. Andrew Ayres, QC for the First and Fifth Respondents

2020: July 22;

2021: June 11.

Interlocutory appeal – Discharge of ex parte freezing injunction – Application by respondents to discharge freezing injunction on basis of lack of full and frank disclosure and lack of justification for proceeding ex parte – Discharge of freezing injunction on basis of insufficient evidence of risk of dissipation – Whether learned judge erred in discharging freezing order on basis that there was no risk of dissipation – Relevance of delay in assessing risk of dissipation – Whether judge erred in failing to consider relevant evidence on issue of risk of dissipation that is, alleged wrongdoing of respondents which forms the basis of the claim – Whether judge erred in concluding that respondents' conduct during liquidation proceedings did not amount to dishonesty – Whether learned judge erred in ordering an equal split of costs between the parties – Rule 64.10 of the Civil Procedure Rules 2000 – Costs against person who is not a party – Whether learned judge erred in making third-party costs order

By order dated 3rd July 2018, Wallbank J [Ag.] placed Green Elite Limited in liquidation and appointed liquidators. Following the appointment, the lawyers who represented HWH Holdings Limited (“HWH”) on the liquidation application informed the liquidators, by letter dated 13th September 2018, that Mr. Fang Ankong (“Mr. Fang”) had received the proceeds of the sale of the shares in Chiho Tiande Group Limited (“CT”) and had distributed them to the three senior employees of CT for whose benefit Mr. Fang and Delco Participation BV (“Delco”) had established Green Elite Limited in the first place. In November 2018, when the issue of the costs of the liquidation application came up for consideration before Wallbank J [Ag.], the court was informed that the proceeds of the sale had been distributed.

Green Elite Limited (In Liquidation) (“Green Elite” or “the appellant”) filed an *ex parte* application on 10th December 2018 seeking a freezing injunction against Mr. Fang and HWH (the respondents in this appeal) and the other three directors of Green Elite, namely Mr Fang Anlin, Ms Ding Li and Mr Gu Liyong (“the three directors”) to restrain them from in any way transferring, disposing of, pledging, charging, diminishing the value of, encumbering or dealing with their assets up to the value of the claims which were to be issued against them. By order dated 13th December 2018, Wallbank J [Ag.] granted the freezing injunction.

On 14th December 2018, the appellant filed a claim against the respondents and the three directors seeking, *inter alia*, damages for breach of fiduciary duty and/or breach of trust; damages or compensation pursuant to section 254 and 255 of the Insolvency Act 2003 and/or a tracing claim; restitutionary damages; and an account of the sum of HK\$150,000,000 or such other sum as the court considers just. The appellant sought and obtained permission to serve the claim form and accompanying documents outside the jurisdiction.

On 30th May 2019, the respondents filed a joint application seeking, in so far as Mr. Fang is concerned, (i) a stay of proceedings (“the stay application”), (ii) an order setting aside leave to serve out of the jurisdiction (“the set aside application”); and (iii) jointly an order discharging the freezing injunction on the basis that the appellant failed to give full and frank disclosure to the court (“the discharge application”). On the discharge application, the respondents contended that: (i) the appellant failed to discharge its duty of full and frank disclosure to the court; (ii) there was no proper basis for making a without notice application for the freezing injunction; (iii) the appellant had no good explanation for the delay since the appointment of the liquidators in bringing these proceedings; and (iv) the appellant failed to bring certain matters to the court’s attention which were not favourable to the applications it made.

By order dated 21st November 2019, the learned judge, in so far as it is relevant to this appeal, dismissed the stay and set aside application but granted the discharge application on the basis that there was no risk of dissipation of the respondents’ assets if the freezing injunction was not granted. The learned judge also granted the appellant and the respondents half of their costs of the applications, and further ordered that the company procure that Delco pays both the appellant’s and the respondents’ costs of and occasioned by the injunction.

Green Elite appealed contending that the learned judge was not entitled to discharge the freezing injunction on the basis that there was insufficient evidence that there was a risk of dissipation as this was not the basis of the discharge application and therefore not a live issue before him. In the alternative, the appellant argued that in so far as the judge was entitled to consider the adequacy of the evidence, he erred in failing to consider the relevant evidence on this point, being the alleged wrongdoing which forms the basis of the claim and further that he erred in his assessment of the respondent's conduct in the liquidation proceedings. Finally, on costs, the appellant argued that the equal split of costs made by the learned judge was wrong and secondly, that the procedure outlined in rule 64.10 of the Civil Procedure Rules 2000 ("CPR") for ordering a third-party costs order was not followed.

Held: dismissing the appeal; affirming the orders of the learned judge save and except that the third-party costs order is set aside; and making the orders set out in paragraph 81 of the judgment, that:

1. It is well-established that a fundamental requirement of obtaining a freezing order is to demonstrate that there is a real risk that the defendant will dissipate his assets outside of the ordinary course of business if the order is not made. Accordingly, there is no proper basis for essentially tying the court's hands by concluding that because a foundational aspect of obtaining a freezing injunction was not raised as a freestanding ground, the judge was not entitled to consider and discharge the injunction on the basis on which he did in circumstances where the injunction would not have been granted initially had the risk of dissipation not been considered. Accordingly, the judge's consideration of whether there was sufficient evidence of risk of dissipation did not go beyond the confines of the adversarial process on which the common law system is built.

Part 17 of the **Civil Procedure Rules 2000** applied; **National Commercial Bank Jamaica Limited v Olint Corp. Ltd** [2009] UKPC 16 applied; Para 8.001 of **Gee on Commercial Injunctions**, 5th Edn, Sweet & Maxwell considered; **Nadia Fafdil Al-Medenni v Mars UK Ltd** [2005] EWCA Civ 1041 distinguished.

2. Where an appellant challenges a judge's exercise of discretion, he must satisfy this Court that the judge's exercise of discretion exceeded the generous ambit within which reasonable disagreement is possible and is clearly or blatantly wrong. From a review of the transcript and the judgment, it is evident that the judge factored in and contextualised the allegations of misconduct and weighed them against the other evidence before him. It is not for this Court to indulge the appellant's attempt to give greater weight to the alleged misconduct giving rise to the claim than the judge did. How heavily each factor should be weighed in the balancing exercise is a matter for the judge at first instance and this Court ought to give great deference to the conclusion reached by the judge, short of any error committed by the judge. There was no such error in principle in this case which warrants appellate intervention.

Dufour v Helenair (1995) 52 WIR 188 applied; **Hadmor Productions Ltd & Others v Hamilton & Others** [1982] 1 All ER 1042 applied; **Ming Siu Hung & Others v JF Ming Inc & Another** [2021] UKPC 1 applied.

3. The judge's treatment of the alleged dishonest conduct in the liquidation proceedings cannot be taken in isolation. His conclusion that the representation by the respondents, though very close to the line, did not amount to dishonesty, was weighed against the length of time which elapsed since the distribution of the proceeds of sale to the three directors coupled with his finding of the absence of any evidence of dissipation by the respondents who have been the subject of litigation since 2015 or by the three directors. The latter is a strong factor in ascertaining whether the dishonesty in question does in fact justify the conclusion that assets are likely to be dissipated and a powerful indicator of the respondents' conduct in response to the current dispute. Though not expressly stated by the judge, the consideration of delay clearly goes to his assessment of whether there was a current risk of dissipation. Given the totality of the evidence, the learned judge correctly exercised his discretion and jurisdiction to discharge the freezing order.

Dufour v Helenair (1995) 52 WIR 188 applied; **Hadmor Productions Ltd & Others v Hamilton & Others** [1982] 1 All ER 1042 applied.

4. The general rule is that the successful party is entitled to costs. However, the CPR reserves a discretion to the court to make exceptions and to take into account factors such as whether a party has succeeded on particular issues, in deciding who is liable to pay costs. In the appeal at bar, the judge awarded each party 50% of its costs based on their relative success. A review of the record indicates that counsel for the appellant at the hearing agreed to the equal costs split. Accordingly, the judge had exercised his discretion judicially, that is, in accordance with the established principles and in relation to the facts of the case and did not err in ordering an equal split of costs.

Rule 64.6 of the **Civil Procedure Rules 2000** applied; **Dufour v Helenair** (1995) 52 WIR 188 applied; **Hadmor Productions Ltd & Others v Hamilton & Others** [1982] 1 All ER 1042 applied; **Throne Capable Investment Limited v Agile Star Group Limited** [2021] ECSCJ No. 433 (delivered 14th January 2021) followed; **Pigot v Environment Agency** [2020] EWHC 1444 (Ch) considered.

5. Before the court can exercise its power to make a third-party costs order, whether on an application by a party or of its own motion, the person against whom the order is proposed to be made must be given at least 14 days' notice and an opportunity to be heard. The use of mandatory language in rule 64.10 (2) to (6) imposes an obligation to ensure that the procedural steps are adhered to. There is no evidence that Delco was ever put on notice or given an opportunity to make representations on its own behalf as to why the order should not be made. Consequently, in so far

as the judge made an order without following the proper procedure set out in rule 64.10, this part of the costs order must be set aside.

Rule 64.10 of the **Civil Procedure Rules 2000** applied.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against an order made by Jack J [Ag.] in the Commercial Division of the High Court of the Territory of the Virgin Islands on 21st November 2019 discharging a freezing order granted by Wallbank J [Ag.] on 13th December 2018 and making certain cost awards.

Background

- [2] Green Elite Limited (hereafter referred to as “Green Elite”) is a company incorporated in The Territory of the Virgin Islands in January 2010 for the purpose of holding the shares in another company, Chiho Tiande Group Limited (hereafter referred to as “CT”), which shares were to be used to create an employee benefit scheme for the benefit of three senior employees of CT, namely, Mr Fang Anlin, Mr Gu Liyong and Mr Ding Guopei.
- [3] At all material times, Green Elite had two shareholders, HWH Holdings Limited (hereafter referred to as “HWH”) and Delco Participation BV (hereafter referred to as “Delco”), each holding 50% of the shares in Green Elite. The directors of Green Elite at all material times were Mr. Fang Ankong (hereafter referred to as “Mr. Fang”), Mr. Fang Anlin (his brother), Ms. Ding Li (his niece) and Mr. Gu Liyong.
- [4] In April 2014, Green Elite sold its 60 million shares in CT to another company for a sum of HK\$150 million (hereafter referred to as “the proceeds of sale”).
- [5] On 8th March 2017, Delco filed an application seeking an order to appoint liquidators over Green Elite on the basis that, having sold the shares in CT, it had lost its substratum and should therefore be liquidated.

- [6] Green Elite and HWH opposed the liquidation application, contending that Green Elite still had the continuing purpose of holding and dealing with the proceeds of sale of the shares. The liquidation application was heard by Wallbank J [Ag.] who dismissed the application on the basis that Green Elite still had the secondary purpose of distributing the proceeds of sale.
- [7] Being dissatisfied with the decision of Wallbank J [Ag.], Delco appealed. When the matter came before this Court on 15th June 2018, the Court held that the main object of Green Elite was to hold the CT shares, so once the shares were sold in 2014, the main object of Green Elite ceased to exist, its substratum had totally failed, and it therefore ought to be wound up. This Court accordingly allowed Delco's appeal and ordered that Green Elite be wound up. On 3rd July 2018, Wallbank J [Ag.] made an order placing Green Elite in liquidation and appointing liquidators.
- [8] Following the appointment of the liquidators, the lawyers who represented HWH on the liquidation application informed the liquidators, by letter dated 13th September 2018, that Mr. Fang had received the proceeds of the sale of the CT shares and had distributed them to the three senior employees of CT for whose benefit Mr. Fang and Delco had established Green Elite in the first place. Two months later, in November 2018, when the parties came before Wallbank J [Ag.] on the issue of the costs of the liquidation application, the court was informed that the proceeds of the sale had been distributed.
- [9] The appellant - Green Elite Limited (In Liquidation) - filed an *ex parte* application on 10th December 2018, pursuant to rule 17.1(j) of the **Civil Procedure Rules 2000** (hereafter "the CPR") and section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,¹ seeking a freezing injunction against Mr. Fang and HWH (the respondents in this appeal) and the other three directors of Green Elite to restrain them from in any way transferring, disposing of, pledging, charging, diminishing the value of, encumbering or dealing with their assets up to the value of the claims which

¹ Cap. 80 of the Revised Laws of the British Virgin Islands.

were to be issued against them. By order dated 13th December 2018, Wallbank J [Ag.] granted the freezing injunction.

- [10] On 14th December 2018, the appellant filed a claim against the respondents to this appeal (Mr. Fang and HWH) and the other directors of Green Elite (Mr. Fang Anlin, Ms. Ding Li and Mr. Gu Liyong) for damages for breach of fiduciary duty and/or trust; knowing receipt and/or dishonest assistance; conspiracy to injure by unlawful means; damages or compensation pursuant to section 254 and 255 of the **Insolvency Act, 2003**² and/or a tracing claim; restitutionary damages; and an account of the sum of HK\$150,000,000; or such other sum as the court considers just.
- [11] The appellant then sought and obtained permission to serve the claim form, statement of claim and all ancillary documents filed in the claim out of the jurisdiction, using any method permitted by rule 7.8 of the CPR.
- [12] On 2nd January 2019 and 9th May 2019, HWH and Mr. Fang respectively acknowledged service of the documents. The three senior employees to whom the proceeds of sale were distributed were still in the process of being served in the People's Republic of China.
- [13] Subsequent to the issuance of the claim and service of it on HWH, HWH filed an application on 18th January 2019 seeking a stay of the proceedings in the appellant's claim on the ground of *forum non conveniens* or, alternatively, a stay until Hong Kong proceedings are determined. On 30th May 2019, the respondents filed a joint application seeking, *inter alia*, in so far as Mr. Fang is concerned: (i) a stay of the proceedings on the basis that the BVI is not the *forum conveniens* ("the forum application") and, alternatively, an order staying proceedings until claims made by Delco in Hong Kong have been resolved ("the stay application"); (ii) an order setting aside leave to serve the claim form and statement of claim out of the jurisdiction

² Act No. 5 of 2003, Laws of the Virgin Islands.

(“the set aside application”); and (iii) jointly, an order discharging the freezing injunction on the basis that the company failed to give full and frank disclosure to the court (“the discharge application”).

[14] In relation to the forum application, the respondents submitted that Mr. Fang and the other three directors of Green Elite are not subject to the jurisdiction of the BVI court. However, they and HWH are all subject to the jurisdiction of the Hong Kong courts and are currently defending proceedings brought against them there. They say also that HWH is willing to submit to the jurisdiction of the Hong Kong courts if the BVI proceedings are stayed on *forum non conveniens* grounds. The respondents submitted that as a corollary, once it was decided that BVI was not the proper forum for the trial of the claim, the permission to serve out had to be set aside. On the discharge application, the respondents argued, *inter alia*, that: (i) the appellant failed to discharge its duty of full and frank disclosure to the court; (ii) there was no proper basis for making a without notice application for the freezing injunction; (iii) the appellant had no good explanation for the delay since the appointment of the liquidators in bringing these proceedings; and (iv) the appellant failed to bring certain matters to the court’s attention which were not favourable to the applications it made.

[15] The appellant strenuously resisted the foregoing applications brought by the respondents.

The order

[16] On 19th and 20th November 2019, Jack J [Ag.] heard the various applications filed on 18th January and 30th May 2019 and dismissed the forum, stay and set aside applications, but granted the discharge application on the basis that there was insufficient evidence of a risk of dissipation. The learned judge opined that an important element in assessing the risk of dissipation is the period which elapsed since the distribution of the HK\$150,000,000 to the three employees in 2015 and

2016. He referenced the stable door point as mentioned in the **Holyoake v Candy**³ case as being a powerful, though not conclusive, factor militating against any conclusion of a real risk of dissipation. The stable door point, I should mention, references the idiom mocking ‘the closing of the stable door after the horse has bolted’ which, in the context of this case, highlights the fact that the delay between the making of the application for the freezing order and the distribution of the proceeds of sale of the shares would have allowed the respondents, if they were so minded, to dissipate their assets and leave nothing for a freezing order to ‘bite on’.

[17] In making his order, Jack J [Ag.] stated in considering the effect of delay, that Mr. Fang and his companies have been the subject of litigation since 2015, and from that time there is no evidence of assets being dissipated. The learned judge took the view that counsel who represented the appellant at the hearing relied heavily on the respondents’ alleged dishonesty, that is, their conduct giving rise to the claims, and their conduct during the course of the winding up proceedings. In relation to the former, the learned judge noted that had the GE scheme not permitted the distribution of the monies and had this not been known by the respondents, then there would be evidence of dishonesty. In relation to the latter point, Jack J [Ag.] observed that there was a distinction between *suppressio veri* and *suggestio falsi*. The learned judge concluded that there was a clear breach of the overriding objective, but, because there was no express false misrepresentation to the court, no dishonest representation was established.

[18] In the learned judge’s view, the allegations of lack of full and frank disclosure relied on by the respondents were irrelevant in so far as they relate to the non-disclosure of the Hong Kong proceedings, and were not established in relation to the other factors. On the question of whether the hearing before Wallbank J [Ag.] should have been *inter partes*, Jack J [Ag.] concluded that it should have been, but he specifically stated that he acquitted the claimant (the appellant in this appeal) of any misconduct

³ EWCA Civ 92 at para 62.

or of any relevant non-disclosure and would therefore not discharge the freezing order on the grounds of non-disclosure but, instead, he would discharge it 'on substantive grounds'. The learned judge also granted the appellant and the respondents half of their costs of the applications, and further ordered that the company procure that Delco pays both the appellant's and the respondents' costs of and occasioned by the injunction.

The Appeal

[19] The appellant, being dissatisfied with the decision of the learned judge, has appealed. The notice of appeal, filed on 12th December 2019, contained five grounds of appeal, as follows:

(1) Risk of dissipation not in issue

The learned judge had no power to discharge the freezing order on the basis that there was insufficient evidence that there was a risk of dissipation.

(2) Relevance of underlying wrongdoing to risk of dissipation

In so far as (contrary to the above), the learned judge was entitled to consider the adequacy of the evidence as to a risk of dissipation by the respondents, it is submitted that he erred in failing to consider the relevant evidence on this point.

(3) Whether the defendants (the respondents) acted dishonestly in the liquidation proceedings

In so far as the learned judge was entitled to make any finding as to the risk of dissipation, and in so far as it was necessary for him to do so in light of a proper consideration of the underlying wrongdoing, the appellant respectfully submits that the learned judge erred in his assessment of this issue.

(4) Cost allocation

The learned judge erred in awarding each party 50% of their costs, on the basis that each party had success on one application.

(5) Third party costs order

In making a costs order against Delco, the learned judge failed to give any regard to the proper procedure for a third-party costs order under CPR 64.10.

[20] The appellant filed written submissions in support of its appeal on 17th December 2019 and on 17th March 2020, whilst the respondents filed skeleton arguments in opposition on 9th January 2020 and on 3rd July 2020.

[21] The appeal was heard on 22nd July 2020, whereupon oral submissions were made by Mr. John Machell, QC for the appellant and Mr. Andrew Ayres, QC for the respondents.

The appellant's case

[22] On its first ground of appeal, the appellant submitted that the learned judge erred both as a matter of law and fact in discharging the freezing injunction on the basis that there was insufficient risk of dissipation. The appellant contended that Ms. Newman, QC, who appeared as counsel on behalf of the respondents in the court below, limited her submissions and framed them in such a way as to make it clear to the learned judge that the application was made on the basis of material non-disclosure and lack of justification for proceeding *ex parte* and that the appellant was not suggesting, as a freestanding ground, that there was no risk of dissipation so as to justify the discharge of the injunction. During oral submissions, counsel for the appellant, Mr. John Machell, QC took the Court through several pages of the transcript to support his contention that Ms. Newman, QC expressly disavowed reliance on an absence of risk of dissipation as a standalone ground. Mr. Machell, QC relied on the case of **Nadia Fadil Al-Medenni v Mars UK Limited**⁴ to support

⁴ [2005] EWCA Civ 1041.

his argument that the judge should have limited himself to considering the discharge of the freezing order on the grounds outlined in the respondents' application, because, except for the limited questions posed by the judge, there was no request or directive made or given by him to be addressed further on the evidence of risk of dissipation.

[23] On the stable door point, Mr. Machell, QC submitted that this simply did not arise in the circumstances of this case for two reasons. Firstly, he contended that Mr. Fang has disclosed some of his assets which exceed the value of the claim. Accordingly, there is no cause for concern about this being a case where the court may make an order that would 'bite' on no relevant asset. Secondly, he contended that where a dispute is out in the open and there is evidence that assets have not been dissipated, then the court can weigh in the balance the fact that no dissipation has occurred in deciding whether there is a real risk of dissipation in the future. Mr. Machell, QC contended that this also does not arise on the facts of this case, since this Court does not know what Mr. Fang has or has not done with his assets in the lead up to the order.

[24] In terms of its second ground of appeal, which the appellant advanced as an alternative to ground 1, Mr. Machell, QC argued that Jack J [Ag.] focused almost entirely on the question of whether the respondents acted dishonestly in the liquidation proceedings by misleading the court. Mr. Machell, QC stated that the starting point was whether the appellant has a good arguable case against the respondents on the claim. Relying on the cases of **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co. KG (The Niedersachsen)**⁵ and **National Bank Trust v Yurov**,⁶ he argued that the threshold for there being a real risk of dissipation for the purposes of a freezing order is relatively low.

⁵ [1984] 1 All ER 398.

⁶ [2016] EWHC 1913.

- [25] Mr. Machell, QC submitted that Jack J [Ag.] should have looked at the material as a whole, and the arguments advanced in the underlying proceedings, and then weigh the fact that there is a good arguable case in relation to those in light of all the material and the chronology to decide whether, for interlocutory purposes, there is a risk that Mr. Fang would dissipate his assets to try to avoid a judgment. Mr. Machell, QC posited that when one does this exercise, the answer is obvious – people who behave in this manner may dissipate their assets; in other words, there is a real risk of dissipation. Mr. Machell, QC relied on the cases of **VTB Capital Plc v Nutritek International Corporation**⁷ and **Rustam Yusufovich Gilfanov et al v Maxim Valeriovich Polyakov et al**⁸ in support of his argument that the judge should have considered whether the finding of a good arguable case as to ‘the underlying fraudulent misappropriation’ ought to have amounted to a risk of dissipation.
- [26] Mr. Machell, QC contended that the learned judge appeared to have proceeded on the basis that a positive finding of dishonesty is required to find that there is a risk of dissipation. He submitted that, applying the test outlined in **Ivey v Genting Casinos**,⁹ the judge would have had to first ascertain the respondents’ subjective knowledge or belief as to the relevant facts alleged to give rise to the dishonesty, and then determine whether their conduct was objectively dishonest. He argued that in relation to the latter, Wallbank J [Ag.], to whom the misrepresentations were made in the liquidation application, was properly positioned to better assess whether the respondents’ conduct was objectively dishonest. Mr. Machell, QC submitted that Wallbank J [Ag.]’s condemnation of the respondents appears to have been wrongly disregarded.
- [27] In terms of the appellant’s third ground of appeal, Mr. Machell, QC argued that the learned judge, in considering whether there had been dishonesty, erred in relying on a distinction between “active lies” and the creation of a “false impression” by deliberate omission. Mr. Machell, QC posited that a deliberate omission to disclose

⁷ [2012] EWCA Civ 808.

⁸ [2017] ECSCJ No. 13 (delivered 3rd February 2017).

⁹ [2017] UKSC 67.

facts which would correct an otherwise falsely created impression is, in law, equivalent to making a false positive statement.

[28] On the fourth ground of appeal, the appellant submitted that the judge erred in assessing costs to be paid by both parties on the basis of an equal split, in circumstances where the appellant was successful on four of the more substantive grounds of the application. The appellant argued that the judge was required under rule 64.6(5) of the CPR to have regard to all of the circumstances of the application before him when assessing the liability to pay costs. The appellant submitted too that the judge was invited to make an issue-based costs order but declined to do so on the basis that there were complexities involved. Mr. Machell, QC relied on the case of **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd**¹⁰ for the proposition that the judge ought to reflect the relative success of the parties on different issues by making a proportionate costs order.

[29] As to the fifth ground of appeal, the appellant submitted that the learned judge failed to have any regard to rule 64.10 of the CPR which deals with third party costs orders. The appellant submitted that Delco expressed concerns about the costs orders made by the learned judge without complying with the proper procedure outlined in rule 64.10, and that Delco had no opportunity to put in evidence or make submissions on the matter.

[30] The appellant urged this Court to allow the appeal and set aside the orders made by the learned judge.

The respondents' case

[31] In response to the first ground of appeal, Mr. Andrew Ayres, QC, appearing as counsel for the first and second respondents, submitted that in every case where a claimant applies for a freezing order, the court must be satisfied that there is a real risk of dissipation if notice were to be given. The respondents submitted that in

¹⁰ [2008] EWHC page 2280.

deciding to proceed *ex parte*, the appellant was under a duty to make full and frank disclosure, including providing cogent evidence of a risk of dissipation of assets if notice were given of the application for a freezing order. Mr. Ayres, QC relied on the case of **Holyoake v Candy** to support his argument on the standard of evidence to be provided to the court on the issue of risk of dissipation.

- [32] Mr. Ayres, QC submitted that if there is no solid evidence of a real risk of dissipation and the judge's attention is not drawn to that omission, then there is the risk of injustice in the freezing order being granted when it should not have been. Accordingly, he argued, where a without notice application fails to bring this to the judge's attention, there is material non-disclosure. He stated that the judge, having applied **Holyoake v Candy**, was of the view that the events complained of had happened in 2015 and the stable door point was a critical element going against there being a real risk of dissipation. He relied on the case of **National Bank Trust v Yurov** for the proposition that it is a requirement for the grant of a freezing order that there be a current risk of dissipation, in this case as at December 2018.
- [33] In response to the issues raised in ground 2 of the appellant's grounds of appeal, the respondents submitted that it was the appellant which focused almost entirely on the allegation of dishonesty and not Jack J [Ag.]. The respondents maintained that the learned judge was entitled to come to the conclusion which he did and to determine that although the oral and written submissions in the winding up proceedings came close to the line, there was no express lie to the court. Mr. Ayres, QC expressed that the wrong impression conveyed and the resultant lack of clarity before Wallbank J [Ag.] and the Court of Appeal about whether the appellant maintained the proceeds of sale, though regrettable, cannot factor towards the imposition or continuation of the freezing order. Jack J [Ag.] considered that allegations of past dishonesty by themselves are insufficient to ground a freezing order.

- [34] Mr. Ayres, QC argued that the appellant's contention that the judge made the mistake of thinking that a positive finding of dishonesty is a necessary prerequisite to the finding of a risk of dissipation is misplaced, because the judge was doing precisely what the appellant asked him to do. Mr. Ayres, QC advanced that the judge weighed the evidence before him of what was argued in the winding up proceedings before Wallbank J [Ag.] and before the Court of Appeal and, having done so, the judge found that the evidence did not reach the threshold of being cogent evidence of a real risk of dissipation.
- [35] In terms of ground 3 of the appellant's grounds of appeal, the respondents submitted that there is clearly a distinction between outright lies and the creation of a misleading impression, in that the latter can be dishonest, careless or inadvertent. They contended that the learned judge was unwilling to make a finding of dishonesty on the material before him, and that this Court should be unwilling to disturb that exercise of his discretion.
- [36] As to the fourth ground of appeal, Mr. Ayres, QC submitted that much of the court's time was focused mainly on two applications - the forum application and the discharge application. He contended that it is clear from the transcript that the parties consented to each party having half of its costs. He submitted that there has been no change in circumstances since the appellant consented to the 50/50 costs order which would enable it to appeal that order. He relied on the cases of **Chanel v Woolworth**,¹¹ **Holyoake v Candy** and **Kaneria v Kaneria**¹² to buttress this argument. Mr. Ayres, QC contended that, in any event, this was an exercise of the judge's discretion and it should not lightly be interfered with.
- [37] As to the fifth and final ground of appeal, Mr. Ayres, QC submitted that the appellant had also consented to Delco being the paying party and he referred this Court to the relevant portion of the transcript which confirmed this. He contended that if the

¹¹ [1981] 1 WLR 485.

¹² [2016] EWHC 2823.

order had been made without due regard to procedural fairness and Delco's right to be heard, then the appellant should have reserved the right to object before the order was sealed, which it did not do.

[38] In all the circumstances, the respondents urged this Court to dismiss the appeal.

Ground 1

[39] The question which arises on ground 1 is whether it was open to Jack J [Ag.] to consider the adequacy of the evidence of a risk of dissipation and to dismiss the discharge application on the basis of the inadequacy of the evidence when this was not a live issue before him.

[40] It is well-established that a freezing order is an interlocutory injunction which restrains the defendant from disposing of, dealing with or diminishing his assets. The legal principles for the grant of a freezing order are well known and hardly need any re-stating. Suffice it to say that, to obtain a freezing order, the applicant must show: (i) that he has a good arguable case against the defendant; (ii) the existence of assets belonging to the defendant, whether within or without the jurisdiction; (iii) a real risk that the defendant will dissipate his assets outside of the ordinary course of business; and (iv) that it is just and convenient to grant the freezing order.

[41] Essentially, the object of the freezing order is to prevent the defendant from unjustifiably dissipating his assets in an effort to frustrate the enforcement of any judgment which may be obtained against him. For that reason, it is usual for the application to be made *ex parte*. However, the courts have consistently pronounced that there must be good reason why a court should be moved *ex parte*. The approach of the courts is set out by the learned author of **Commercial Injunctions**, Stephen Gee QC, as follows:¹³

"It is a basic principle of fairness that an order should not be made against a party without giving him an opportunity to be heard. But there is an exception to that general principle when it appears likely that:

¹³ Para 8.001 of *Commercial Injunctions*, 5th Edn, Sweet & Maxwell.

- (1) if notice of an application were to be given, the defendant or others would take action which would defeat its purpose before the order could be made; and
- (2) any damage which may be caused by the order could be compensated under the cross-undertaking; or the risk of uncompensatable loss is outweighed by the risk of injustice to the plaintiff if the order is not made without notice...”

[42] This statement of principle is also reflected in the CPR. Rule 17.3 (2) of the CPR gives the court the discretion to grant an interim remedy (in this case, the freezing order) on an application made without notice if it appears to the court that there are good reasons for not giving notice. Rule 17.3(3) mandates that the evidence in support of an application made without notice must state the reasons why no notice was given. The rationale for the restrictive nature of the rules in this regard is quite simple. In circumstances where the court is being asked to grant what has been aptly described by Lord Donaldson MR as ‘one of the law’s two nuclear weapons’,¹⁴ there must be some safeguards in place for a defendant who is not present to make representations.

[43] I note in this regard, the pronouncements of Lord Hoffman in the judgment of the Privy Council in **National Commercial Bank Jamaica Limited v Olint Corp. Ltd.**¹⁵ At paragraph 13 of the judgment, Lord Hoffman expressed his views on the making of *ex parte* applications in this way:

“First, there appears to have been no reason why the application for an injunction should have been made *ex parte*, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases

¹⁴ Bank Mellat v Nikpour [1985] FSR 87.

¹⁵ [2009] UKPC 16.

in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.”

[44] In adopting that guidance to the present case, it may be said that on an application for *ex parte* relief, courts must be satisfied of either one of two factors: (i) there is cogent evidence to support the proposition that giving advance warning would lead to the assets being ‘spirited away’, thereby frustrating the enforcement of a prospective judgment and ultimately defeating the purpose of the injunction; or (ii) time constraints genuinely do not permit the giving of notice and even in those very rare instances, the applicant should endeavour to give shorter notice, at least by telephone.

[45] These considerations are reflected in rule 17.4(4) of the CPR, which empowers the court to grant an application *ex parte*. Rule 17.4(4) provides that:

“The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that –

- (a) in a case of urgency no notice is possible; or
- (b) that to give notice would defeat the purpose of the application.”

[46] As stated earlier, the appellant applied for a freezing order on an *ex parte* basis. At paragraphs 119 to 120 of the affidavit of Russell Crumpler, which was filed in support of the freezing order application, the appellant stated as follows:

“[119] ...the full extent of the [respondents’] conduct was confirmed at the hearing of the Costs application, where the Court determined that Fang and HWH had not been playing with a straight bat, had at all material times been the true parties to the Liquidation proceedings, and had procured Green Elite to take steps which were not in its best interests for Fang’s and HWH’s own benefit.

[120] The scope, extent and nature of the [respondents’] conduct are now apparent. The urgent nature of the Company’s application and the risk of dissipation is axiomatic. Any delay in granting the application is likely to result in the [respondents’] dissipating the sale proceeds to defeat any judgment obtained by Green Elite in the claim.”

[47] It seems to me, upon a clear reading of Mr. Crumpler's affidavit, that the appellant sought to fall under sub-paragraph (b) of rule 17.4(4) as its rationale for applying without notice was due to its belief that giving notice of the application might precipitate the dissipation of assets. Notwithstanding its failure to specifically plead rule 17.4(4), this is the only procedural rule which the appellant would have had to satisfy in order to obtain the freezing order on a without notice basis and the only rule empowering the court to grant same in those circumstances. This also brings into focus subrules (2) and (3) of rule 17.3 of the CPR for which the only exceptions are to satisfy the court that if notice of an application was given, the respondents or its agents would take steps to defeat the purpose of the application before the order could be made and that any damage which may be caused by the order could be compensated under the cross-undertaking or that the risk of non-compensable loss is outweighed by the risk of irretrievable prejudice or injustice which would be caused to the applicant if the order is not made without notice. It follows then, that in the context of a freezing order, and based on the manner in which the appellant's arguments were framed, the only basis to dispense with notice is to show that giving notice is likely to precipitate the dissipation feared.

[48] In light of the foregoing, I am not disposed to accept the appellant's submission that where the respondents raised the issue of risk of dissipation as a subset, there is a distinction to be made between whether there is a real risk of dissipation occurring in the interim period between the *ex parte* order and the *inter partes* hearing as opposed to a risk of dissipation in the general sense. Mr. Machell, QC also sought to rely on the dicta of Brooke LJ in the case of **Al-Medenni v Mars UK Ltd** (at paragraph 21) to advance his position that it was not open to the learned judge to consider and discharge the freezing order on the ground that on his findings, there was no real risk of dissipation. As I see it though, the judge's consideration of whether there was sufficient evidence of risk of dissipation in determining whether to discharge the freezing order did not go beyond the confines of the adversarial process on which the common law system is built. I can discern no proper reason for essentially 'tying the court's hands' in circumstances where one of the court's

most intrusive remedies was deployed, by concluding that because a foundational aspect of obtaining a freezing order was not raised as a free-standing ground, then the judge was not entitled to discharge the injunction which would not have been granted in the first place had the issue of risk of dissipation not been considered. Accordingly, whether Ms. Newman, QC framed her argument as the element of risk of dissipation being a subset of the lack of justification for proceeding *ex parte* or as a fundamental requirement which the applicant must demonstrate in order to succeed in obtaining a freezing order, the issue of risk of dissipation had to be considered on an application to discharge a freezing order.

- [49] It was therefore appropriate for Jack J [Ag.] to have taken into consideration the sufficiency of the evidence of risk of dissipation in determining that the freezing order should be discharged. I will accordingly dismiss the appellant's first ground of appeal.

Ground 2

- [50] In so far as I have determined that the learned judge did not err in considering the sufficiency of the evidence as to risk of dissipation, I must now consider whether he erred in failing to consider relevant evidence.
- [51] The appellant challenged Jack J [Ag.]'s conclusion that there was not sufficient evidence of a risk of dissipation on the basis that the learned judge failed to consider the relevant evidence on the issue of the risk of dissipation (being the alleged underlying wrongdoing of the respondents which undergirds the claim) and that, as a result, the judge's decision is wholly wrong.
- [52] The appellant contended that Jack J [Ag.] failed to consider any of the respondents' conduct which gave rise to the underlying claim and erred in this regard in his assessment of the significance of the respondents' wrongdoing. Essentially, the appellant sought to challenge the weight that the judge had ascribed to the alleged improper conduct of Mr. Fang, being that he dishonestly misappropriated the

proceeds of sale of the shares in CT. This challenge engages the principles regarding appellate interference with a discretionary evaluation by a judge.

- [53] The starting point for addressing this issue is to acknowledge the principles which guide an appellate court in reviewing the exercise of discretion by a judge. It is well settled that this Court can only interfere with the exercise of the learned judge's discretion, and exercise its own discretion, in limited and well-defined circumstances. These guiding principles were enunciated by Sir Vincent Floissac in **Dufour v Helenair Corporation**,¹⁶ as follows:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

- [54] In **Hadmor Productions Ltd & Others v Hamilton & Others**,¹⁷ Lord Diplock expressed that the appellate court:

“...must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it...”

¹⁶ (1996) 52 WIR 188.

¹⁷ [1982] 1 All ER 1042.

[55] In light of the foregoing, and in so far as the appellant has challenged the ultimate conclusion that there is no risk of dissipation, it is helpful to consider the test of whether there is a real risk of dissipation.

[56] In **Broad Idea International Limited v Convoy Collateral Limited**,¹⁸ this Court approved the test as stated by Gloster LJ in **Holyoake v Candy**, as follows:

“... the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.”

[57] On assessing whether there was a real risk of dissipation, Males J, at paragraphs 69 to 70 in **National Bank Trust v Yurov**¹⁹ had this to say:

“As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label ‘risk of dissipation’....

Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

- a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.
- b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
- c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

¹⁸ [2020] ECSCJ No. 262, (delivered 31st July 2020).

¹⁹ [2016] EWHC page 1913.

d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

e. The nature, location and liquidity of the defendant's assets are important considerations.

f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

g. So too is the defendant's behaviour in response to the claim or anticipated claim."

[58] On the basis of the foregoing, this appellant is tasked with establishing that the learned judge misunderstood the law or evidence, wrongly treated with the facts of the case or that there has been some change of circumstances subsequent to the making of his orders which would justify this Court interfering with the decision of the learned judge.

[59] The crux of the appellant's argument here is that the judge focused mainly on whether the respondents acted dishonestly in the liquidation proceedings by misleading the court and failed to take into consideration the underlying wrongdoing of the respondents which forms the basis of the claim brought against them.

[60] A review of the transcript reveals that the learned judge did take into account the alleged underlying wrongdoing of the respondents and that it was the appellant who placed much emphasis and reliance on the alleged dishonesty of the respondents. I note in relation to the latter point, the following detailed exchange between counsel representing the appellant at the hearing, Mr. Ferrer, and the learned judge:

"The Court: I mean dishonesty is the heart of your claim for the risk of dissipation, isn't it? I mean if one leaves the dishonesty to one side, this is just an ordinary commercial dispute as to whether these three directors were entitled to monies from Green Elite or not. And if it is just an ordinary commercial dispute, then one is not in freezing order territory, isn't it?"

Mr. Ferrer: Yes, absolutely. There certainly isn't a line of authority which says you can only get freezing injunctions if you have a risk of dishonesty to establish the risk of dissipation.

The Court: It's one position to have a risk of dissipation, but I am just wondering what is there in the evidence which shows a risk of dissipation apart from the dishonesty allegation.

Mr. Ferrer: Yes, you're right, My Lord, that is certainly that we rely on dishonesty and I think the allegation is part of the risk of dissipation, but in circumstances where a party is not aware or what has the director done with the funds, it is certainly, in my experience, the approach of the Court to err on the side of the aggrieved party and to grant the relief in terms of –

The Court: I suppose you're right, but in the future obviously we always deal with these problems *ex parte*, although there is the issue here as to whether they ought to be *inter partes*. That aside though, one still has got to apply the question of whether there is a real risk of dissipation. I mean one of the factors you are relying on is the risk of dissipation apart from the allegation of dishonesty?

Mr. Ferrer: I think we are standing firmly on the allegation of dishonesty. We're encompassing that obviously in the way in which they made their submissions to this Court at first instance and Court of Appeal. That obviously is bound up in the particulars of dishonesty..."

[61] I would go further to say that the judgment also contradicts the appellant's contention that the judge failed to take into account the alleged underlying wrongdoing. I note in this regard, the following observations made by Jack J [Ag.] in his oral judgment:

"Mr. Ferrer was constrained to say that the main matter relied on was the [respondents'] alleged dishonesty, firstly, in their behaviour giving rise to the claims; and secondly, their conduct in the course of the winding up proceedings against Green Elite. The problem with this first limb is that it is in the form of bootstrap argument. If the GE scheme gave Mr. Fang a discretion to distribute the proceeds of sale to the three employees, then there was no dishonesty. Only if the GE scheme (if it existed at all) did not permit such distributions and if the [respondents] knew that, would there be evidence of dishonesty."

[62] The respondents, more particularly Mr. Fang, reiterated in his evidence that the main purpose of Green Elite was to be a vehicle through which he could provide incentives to the three employees who made substantial contributions to the joint

venture throughout the years and that the distribution of the proceeds of sale was in accordance with the agreed portions and consistent with the purpose of Green Elite and therefore that there was nothing untoward about his actions in this regard. In relation to the first part of this argument, he finds support in this Court's observation at paragraph 34 of **Delco Participation BV v Green Elite**²⁰ that, '[t]he irresistible conclusion is that Green Elite's main purpose was to hold CT shares for the benefit of employees'. I wish to make clear that neither this Court nor the court below has made any finding on what ought to have happened to the proceeds of sale. The respondents have also maintained that the GE Scheme was not superseded by any other scheme; an argument which is strengthened by the evidence of the respondents that Delco's counsel abandoned the position that the GE scheme was superseded by the IPO scheme and this argument was also contradicted by Mr. van Ooijen, one of the two Dutchmen who formed Delco. All these factors were matters that were before the learned judge and which he was entitled to consider.

- [63] Further, what can be gleaned from the exchange between learned counsel and the bench and the aforementioned quotation from the judgment is that the judge clearly had, at the forefront of his mind, the alleged misconduct of the respondents and had engaged counsel on that matter. It seems to me that the learned judge was of the view that this matter, when examined in the round and stripped of all its appearance of complexity, is simply a commercial dispute between the parties. He stated that, '[i]n my judgment, this is a case centrally about the internal management of Green Elite. It is about alleged misappropriation of monies by the Company's directors.' Put another way, if Mr. Fang's actions - that is, the 'unjustified dealing' of which the appellant complains - were pursuant to what he thought he was entitled to do under the GE scheme, then there was no dishonesty and if this is removed, when viewed holistically, this is an ordinary dispute in commercial law.

²⁰ [2018] ECSCJ No. 163 (delivered 15th June 2018).

[64] It is pellucid that the judge had factored in and contextualised the allegations of misconduct and weighed them against the other evidence placed before him. It is not for this Court to indulge the appellant's attempt to give greater weight to the alleged misconduct giving rise to the claim than the judge did. How heavily each factor should be weighed in the balancing exercise is a matter for the judge at first instance and this Court ought to give great deference to the conclusion reached by the judge, short of any error committed by the judge. In fact, appellate courts were recently cautioned by Lord Briggs in **Ming Siu Hung & Others v JF Ming Inc & Another**²¹ to refrain from doing so. His Lordship stated at subparagraph (iii) of [28] that:

“A view that a judge should have given ‘more weight’ to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational...”.

In my view, this was not such a case, and I can discern no error in principle which warrants this Court's intervention. I will accordingly dismiss the appellant's second ground of appeal.

Ground 3

[65] The ultimate issue to be resolved on the third ground on which the appellant has sought to impugn the judge's decision is whether there was sufficient evidence before the learned judge to conclude that there were no acts of dishonesty on the part of the respondents during the liquidation proceedings. For clarity, the dishonest conduct referred to by the appellant is the misleading impression given to both Wallbank J [Ag.] and this Court that the proceeds of sale were still being held by Green Elite; this is distinct from the alleged misappropriation of monies in which the appellant claims a proprietary interest which gave rise to the claim.

[66] The appellant argued that the judge appears to have proceeded on the basis that a positive finding of dishonesty is a necessary prerequisite to finding that there is a

²¹ [2021] UKPC 1.

risk of dissipation. In my view, this submission is flawed. Firstly, as alluded to earlier, it was the appellant who relied heavily on the alleged dishonest conduct of the respondent in two respects. Further, on the appellant's case, the nature of dishonesty alleged is one which clearly supports an inference of there being a risk of dissipation by the respondents since, in its view, persons who mislead are those who may dissipate their assets to avoid a judgment. The appellant argued that this is a critical factor which, when weighed against the evidence as a whole, would justify a finding of a real risk of dissipation. Jack J [Ag.] found in relation to this second limb that:

"As to the second limb, there is no doubt that Justice Wallbank and the Court of Appeal were given a wholly misleading impression that the sale proceeds were still held by Green Elite. I entirely agree with Justice Wallbank's conclusion in the course of the costs assessment that someone was not playing with a straight bat. However, that is not quite the same as showing thorough going dishonesty on the [respondents'] part. There is a cynical injunction uttered by lawyers 'thou shalt not lie but needs not strive officiously to tell the truth'. There is a fine line to be drawn between *suppressio veri* and *suggestio falsi*. Ms. Newman has taken me to various passages in the oral submissions made and the skeleton served on the defendants' behalf in the winding up proceedings and in the Court of Appeal. They come very close to the line indeed but I accede to Ms. Newman's submission that there is no express lie made to the Court which can be identified. There is no express false representation to the Court, so a dishonest representation is not, in my judgment, established. There is, of course, a very significant breach of the overriding objective by the Defendants in the approach they took to that application and the subsequent appeal. I should say that even if I were wrong in my conclusion on dishonesty and the Defendants were dishonest in their presentation to the Court in the winding up case, the absence of any evidence of dissipation over such a long period would mean that in any event the freezing order should be discharged..."²²

- [67] Essentially, the claimant must demonstrate, with solid evidence, that there is a real risk, as opposed to a fanciful risk, that a judgment obtained against the defendant may not be satisfied as a result of the defendant's unjustified dealings with his assets. In my view, the appellant has taken how the judge has treated with the alleged dishonest conduct in the liquidation proceedings in isolation. The judge's

²² Record of Appeal, Volume 1, e-page 41, lines 21-25 to e-page 42, lines 1-25.

conclusion that the representation '[came] very close to the line indeed' was weighed against the length of time which elapsed since the distribution of the proceeds of sale to the 3 employees in 2016 and 2017 and the finding of the absence of any evidence of dissipation by the respondents who have been the subject of litigation since 2015 or by the 3 employees. The latter, in my view, is a strong factor in ascertaining whether the dishonesty in question does in fact justify the conclusion that assets are likely to be dissipated and a powerful indicator of the respondents' conduct in response to the current dispute. Though not expressly stated by the judge, the consideration of delay clearly goes to his assessment of whether there was a current risk of dissipation. On my perusal of the evidence available to the learned judge, the factual matrix of the case, the skeleton arguments, submissions, transcript, and the judge's reasoning (contained in the transcript) for discharging the injunction, I agree with the findings and conclusion of the learned judge. In all the circumstances, I am satisfied that the learned judge correctly exercised his discretion and jurisdiction to discharge the freezing order. I will accordingly dismiss the appellant's third ground of appeal.

Ground 4

[68] In ground 4 of its grounds of appeal, the appellant submitted that Jack J [Ag.] erred in awarding each party 50% of their costs, on the basis that each party had success on one application. This ground of appeal should more accurately be phrased to state that the judge erred in awarding the claimant (the appellant in this appeal) half of its costs of and incidental to the application, and in awarding the first and fifth defendants (the respondents in this appeal) half of their costs of and incidental to the application.

[69] The general rule is that costs should follow the event. Rule 64.6(1) of the CPR provides that where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, '[t]he general rule is that it must order the unsuccessful party to pay the costs of the successful party'. Rule 64.6(3)(c) gives the court power to order a person to pay a specified portion of another person's

costs. Rule 64.6(5) provides that, in deciding who should be liable to pay costs, the court must have regard to all the circumstances, which, in accordance with rule 64.6(6)(c), includes whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. These and other provisions of rule 64.6 of the CPR vest the court with wide discretionary powers to vary the application of the general rule. The costs order made by the judge in this case falls squarely within his discretion. In order to challenge it, therefore, the appellant must show that the judge committed an error of principle or was plainly wrong in the exercise of his discretion.²³

[70] To the extent that the appellant has argued that the judge erred, the starting point here is to examine the context and recite, in some detail, parts of the transcript, which reflect the discussions between counsel and the bench as to the appropriate costs order. After Jack J [Ag.] had delivered his judgment, counsel for the respondents in the court below, Ms. Newman, QC, noted one small correction and then proceeded to address the issue of costs. She stated that the joint liquidators having been successful in opposing the forum application and they having been unsuccessful on the discharge application, ‘the neatest and cleanest’ order would be to grant each party half its costs. She then stated that in relation to costs which her clients may receive, they request that Delco pays the said costs.

[71] The exchange between Ms. Crabbe-Adams, counsel for the appellant at the hearing, and the judge, when asked about the appropriate order, went as follows:

“Ms. Crabbe-Adams: ...I think we are happy with the assessment of my learned friend on the other side.

The Court: What do you say, to pay half the other side’s costs?

Ms. Crabbe-Adams: We are happy, since we have won the forum challenge application, we obviously would want our costs in that respect. And in relation to the discharge of the application, now we have no idea what the quantum of those costs are, so I don’t know that we are wholesale half and half. We think we would pay for the forum.

²³ See: *Throne Capable Investment Limited v Agile Star Group Limited* [2021] ECSCJ No. 433 (delivered 14th January 2021).

The Court: Can I just look at it overall and say who has had a degree of success? If you are each agreeing that each should pay half the other side's costs, then that means presumably no order for costs, subject to who has gotten greater costs.

Ms. Crabbe-Adams: My Lord, that's the issue I have, We don't know sort of what has been –

The Court: ...Are you saying there ought to be no order for costs or are you asking for some portion of the costs or are you saying you ought to pay half their costs and they ought to pay half your costs?

Ms. Crabbe-Adams: I think there should be an order as to payment of costs and I don't think it should be sort of like a set off, that there is no order. I think we should get half of our costs and I am happy, I think, for them to get...so our position is that we would like our costs for own on the forum challenge. We are happy to pay their costs for the...discharge...

...

The Court: In principle, you are in agreement with Ms. Newman that you pay half their costs and they pay half your costs. And what about Delco being the actual paying party?

Ms. Crabbe-Adams: No objection to that, My Lord."

[72] On the question as to whether the judge should have made an issue-based costs order, it was Ms. Newman, QC who indicated to the court that it appears as though Ms. Crabbe-Adams was requesting an issue-based costs order whilst she was asking for a percentage-based order. She stated that the issue-based costs orders were not favoured in the UK because of the complexity involved. The learned judge agreed. After a brief discussion, the judge ordered payment of reserved costs of the further hearing of the *ex parte* application on 10th January 2019 and payment of the costs of and in the discharge application, both by Delco. He stated that this was subject to half of the costs of the applications being paid by Delco to the respondents and the respondents paying half the costs of the applications to the appellant. There were no objections to this order by the parties.

[73] In light of the foregoing, it is certainly surprising that the appellant has sought to challenge the equal split of costs in circumstances where there was agreement by

both sides to the costs order being made. Further, and in any event, I do not consider that this was an appropriate case for an issue-based costs order. In this regard, I note the observations of Jourdan J in **Pigot v Environment Agency**.²⁴ Essentially, Jourdan J took the view that an issue-based costs order should not be made unless there is an issue which ‘starkly stands out’ as being separate on which the successful party lost.²⁵ At paragraph 6 of the judgment, Jourdan J summarised the principles relevant to making an issue-based costs order and which ought to guide the court in so doing, the most applicable to the circumstances of this case being, that (i) the fact that a party was not successful on every issue does not, by itself, justify an issue-based costs order or make it appropriate to deprive the successful party of their costs; (ii) an issue-based costs order may be appropriate if raising a discrete or distinct issue caused additional costs to be incurred or where the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed; and (iii) before making an issue-based costs order, it is important to ascertain whether, applying the principles of rule 44.2 of the UK Civil Procedure Rules (the equivalent of rule 64.6 of the ECSC CPR), it was the right result in all the circumstances of the case and reflected the overall justice of the case.

- [74] In the circumstances, I do not consider that the learned erred in the exercise of his judicial discretion and that he exceeded the generous ambit within which reasonable disagreement among judges is possible. I will accordingly dismiss the appellant's fourth ground of appeal.

Ground 5

- [75] As to the fifth and final ground of appeal relating to the third-party costs order, rule 64.10 of the CPR stipulates that:

“(1) This rule applies where
(a) an application is made for; or
(b) the court is considering whether to make;

²⁴ [2020] EWHC 1444 (Ch).

²⁵ See *Canary Wharf (BP4) T1 Ltd and Others v European Medicines Agency and Another* [2019] EWHC 921 (Ch) at para 15.

an order that a person who is not a party to the proceedings nor the legal practitioner to a party should pay the costs of some other person.

- (2) Any application by a party must be on notice to the person against whom the costs order is sought and must be supported by evidence on affidavit.
- (3) If the court is considering making an order against a person the court must give that person notice of the fact that it is minded to make such an order.
- (4) A notice under paragraph (3) must state the grounds of the application on which the court is minded to make the order.
- (5) A notice under paragraph (2) or (3) must state a date, time and place at which that person may attend to show cause why the order should not be made.
- (6) The person against whom the costs order is sought and all parties to the proceedings must be given 14 days' notice of the hearing."

[76] During the exchange between the learned judge and Ms. Newman, learned Queen's Counsel made submissions inviting the court to order that Delco pays the amount of any costs order that the respondents may receive.²⁶ The basis for this, she submitted, is that if there is to be a liquidation estate, then the costs of the freezing order and discharge applications should not come out of the estate as HWH would be paying half those costs. She maintained that the joint liquidators are funded by Delco and therefore 'should take the losses, take the pain as well as the glory, take the pain as well as the gain'. She indicated that if further submissions were needed on this point, they could be made in writing and make the relevant application on paper. At this juncture, the learned judge returned to ascertaining the appropriate costs order to make.

[77] For emphasis, and at the risk of being repetitive, I should point out that after the brief discussion with Ms. Crabbe-Adams on the costs order to be made, the learned judge then asked, '[I]n principle, you are in agreement with Ms. Newman that you

²⁶ See lines 10-17, p. 34 of the Transcript of Proceedings, Vol. 1, Tab 3 of the Record of Appeal.

pay half their costs and they pay half your costs. And what about Delco being the actual paying party?'. To this, Ms. Crabbe-Adams responded, '[n]o objection to that, My Lord'.

[78] Addressing the position taken by Ms. Newman, QC on Delco funding the liquidators, it has been established by numerous authorities²⁷ that where a third party does not just fund proceedings but also substantially controls or stands to benefit from them, it would be in the interest of justice to require them to pay the costs of the successful party. It is however unnecessary, given the circumstances of this case, to examine the involvement and conduct of Delco in the litigation proceedings to ascertain whether it was just to grant a third-party costs order against it or the fact that it could be argued that Ms. Crabbe-Adams agreed to Delco being the paying party. This is by virtue of the express wording in rule 64.10.

[79] Rule 64.10 outlines certain procedural steps which must be adhered to before the court can exercise its power to order costs against a person who is not a party. There was neither a formal application made on notice by the respondents for such an order as evidenced by the exchange outlined in paragraph 72 above, nor evidence in support of the application as required by rule 64.10(2). This takes me to sub-paragraph (b). Where the court is disposed to making a third-party costs order, the court is mandated to give that party prior notice, which outlines the grounds of the application on which it is minded to make the order and the date, time and place of the hearing. The notice must be given at least 14 days prior to the intended hearing.

[80] The use of the word 'must' in each paragraph (with the exception of 64.10(1)) imposes clarity on the concept of absolute obligation. In other words, there is no degree of discretion in making a third-party costs order to simply choose not to give notice and an opportunity to be heard to the person against whom the order is

²⁷ See for example: *Hamilton v Al Fayed* (No. 2) [2002] 3 All ER 641 and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors* (No. 2) (New Zealand) [2004] UKPC 39 at para 25.

proposed to be made. In so far as the judge made an order without following the proper procedure set out in rule 64.10, this part of the costs order must be set aside. I will accordingly allow the appellant's fifth ground of appeal.

Conclusion

[81] For the reasons given above, I make the following orders:

- (1) The appeal is dismissed and the orders of the learned judge are affirmed, save and except that: (i) paragraph 4 of the order is set aside and replaced by the following - "The Claimant shall pay half of the First and Fifth Defendants' costs of and incidental to the applications"; and (ii) paragraph 5 of the order is set aside and replaced by the following - . "The First and Fifth Defendants shall pay half of the Claimant's costs of and incidental to the applications;".
- (2) Costs to the respondents on this appeal to be assessed by the court below, provided that the costs assessed shall not exceed two-thirds of the amount awarded by way of costs in the court below.
- (3) The costs payable to the respondents by virtue of paragraph (2) shall be discounted by 20% to reflect the fact that the appellant prevailed on 1 of its 5 grounds of appeal.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Vicki Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar