Case No: HC12 EO4866

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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Tuesday, 26 February 2013

BEFORE:

MRS JUSTICE PROUDMAN DBE

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BETWEEN:

THE SHERLOCK HOLMES INTERNATIONAL SOCIETY LIMITED
Claimant

- and -

(1) JOHN AIDINIANTZ
(2) ROLLERTEAM LIMITED
(3) THE SHERLOCK HOLMES MUSEUM LIMITED
(4) SHERLOCK HOLMES LIMITED
Defendant

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MR NEIL HEXT (Instructed by Smithfield Partners Limited) appeared on behalf of the Claimant

MR CHARLES SAMEK QC (Instructed by Edwin Coe LLP) appeared on behalf of the Defendants

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Approved Judgment

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MRS JUSTICE PROUDMAN:

1. The claimant company, referred to throughout the hearing as "Society", obtained an *ex parte* freezing injunction against the defendants from Norris J on 13 December 2012. By a further order of Norris J, this time dated 21 December 2012, the return date was by agreement postponed to this hearing with various amendments to the injunction. The defendants reserved their rights. On 16 January 2013 the defendants applied to discharge or vary the injunction, and for consequential relief.

2. The following issues arise: whether the injunction should be continued, involving, in particular, consideration of (a) whether there is a good arguable case; (b) the risk of dissipation; and (c) the extent to which a proprietary injunction should be imposed. Alternatively, whether the injunction should be discharged and renewal refused on the ground of material non-disclosure. The original claim for a variation to the terms of the injunction is not pursued.

3. The dispute is a family one arising out of the business of running a museum in Baker Street, purportedly at number 221B, Sherlock Holmes's fictional address. The family have not in the past really distinguished between the functions of the various corporate entities which run the museum, simply thinking of the enterprise as a whole as "the museum". The museum is the brainchild of the first defendant. It was founded in about 1990 with financial help from the first defendant's mother, Grace (whom, without intending disrespect I shall call "Grace"). She was born in 1927. Grace has four children, the first defendant by one marriage and the others by another marriage. On the same basis I shall respectively call her children "John", "Jennifer", "Linda" and "Stephen".

4. The four corporate parties are associated with running the museum business. Their respective roles are not agreed, save that it is common ground that Rollerteam Limited ("Rollerteam") owns the freehold of the museum premises. The claimant is a not for profit company limited by guarantee. Grace is the sole member. It claims, and John disputes, that it is entitled to the entrance fees and (according to the particulars of claim) the revenue from such of the museum's shop sales as are zero-rated for VAT purposes. The other defendant companies (respectively "Museum Ltd" and "SH") are apparently subsidiaries of Rollerteam and also apparently have a part in the business. I note that in the Directors' Report in Rollerteam's last approved accounts its principal activity during the year is described as that it "continued to be a holding company".

5. Despite the answers to my question given by Mr Hext, I confess that I find the origin of the claim to the zero-rated shop sales mystifying on the evidence currently before me. The affidavit on which Jennifer relied in support of the *ex parte* application mentions only the claimant's entitlement to admission charges and, although entitlement to shop sales was mentioned to Norris J, the application before him proceeded on the basis of the admission charges alone.

The injunction only corresponds to allegedly missing money relating to admission charges. The documents rely only on entitlement to admission charges, save that in a letter of 10 December 2012 to the claimant's solicitors John says, apparently for the first time, that the claimant was entitled also to zero-rated book sales. This email was written in response to a letter from the claimant's solicitors dated the same day in which it is alleged that the claimant was entitled to revenue from all zero-rated sales but, as I have said, it is not clear to me from where this allegation originates or on what it is based. I understand that zero-rated sales, other than for books are probably in any event minimal. I also note the explanation given (to which I will refer in more detail later in this judgment) by Mr Harry Daniel, a chartered accountant with Pinnick Lewis, that Museum Limited was entitled to the proceeds of all souvenir sales. Jennifer's instructions to Mr Hext during the course of the hearing was incidentally that credit card slips signed by visitors to the museum were in the name of Museum Limited.

6. The evidence is from John (and a short affidavit from Mr Daniel) on the one side and, on the other, from Jennifer, Linda, Grace and the claimant's solicitor, Nicolas Foster. I have not seen any evidence from Stephen but I understand that he ranges himself on the side of his mother and sisters. All these members of the family have been involved in the practical side of running the business, although there is a dispute as to the extent of the involvement of anyone other than John in recent years. It is however common ground that it was John who principally ran the museum.

7. John is not legally connected with the claimant. He has never been a director or a shareholder, but he was nevertheless closely involved with it. His attitude seems somewhat ambivalent. In correspondence he states in some cases, and implies in others, that Linda and Jennifer were the persons in control of the claimant and all its funds and that they abused their position to misappropriate sums of money from the museum. On the other hand he also accepts, as I detail below, that in practice he was the person in sole charge of the museum finances and also of the claimant's finances.

8. Jennifer claims to be a director of the claimant. John disputes this. Grace is however indisputably a director who is entitled to authorise these proceedings. John says this is as a result of undue influence exerted by Jennifer and Linda but Mr Samek QC, who represents the defendants, does not take this point for today's purposes. John is a director of Rollerteam, Museum Ltd and SH. Since September 2012 John and his partner Andrea have been the only *de facto* directors of Rollerteam. John claims to be its sole shareholder. Grace says that, on the contrary, she is. There is also the issue which as I have said is not pursued today, as to whether Linda and Jennifer have exercised undue influence over Grace.

9. The claimant maintains that £1.8 million of the claimant's funds (specifically relating to admission charges) has not been accounted for in respect of the period August 2010 to July 2012.

10. Daily takings from the museum, comprising admission fees and proceeds of souvenir and book sales (in the form of both cash and credit card receipts) were collected by Grace and Jennifer. Again, that much is common ground. However, they say that the money was either banked in the names of one or more of the four companies on John's instructions or given to him in cash, and in respect of this period he misappropriated it.

11. Mr Samek says that the application before Norris J did not make proper allowance for the nature of the museum business. There is evidence (in her own affidavit) that Linda prepared the accounts for the museum. It is also evident, he submits, that the museum business has been run in the same somewhat haphazard way for some 20 to 25 years in the full knowledge of, but until recently without complaint from, Grace, Jennifer and Linda. He says that as it was always known to John's siblings what the structure was it does not lie in their mouths to complain about such matters now. They were content, year upon year, to take cash out of the museum business takings and it was only when the parties fell out that complaints were raised.

12. The business was not run, Mr Samek says "like Marks & Spencer". For example, John says that, "despite the directorship records at Companies House", none of his siblings had a physical role at the museum in the last seven years. It is true that money was apparently -- and I say "apparently" because I should make it clear that I make no criticism of the accountants or bookkeepers who are not parties to these proceedings -- moved around from one company to another without regard for legal structures or niceties, and it is hard to imagine how the structure operated for tax purposes. Again, John says in his affidavit that Linda and Jennifer "are the only signatories on the Society's bank account who are able to control the Society's account". The first part of this statement is undeniable. The second is in dispute.

13. Mr Samek submitted that it was incredible that Grace, Jennifer and Linda would not have known how the business was structured, especially since they prepared the museum accounts and year on year Grace signed the claimant's accounts. Again, all this will be a matter for evidence at trial. However, it is not incredible that, as Jennifer and Grace say, the business was run on trust and that while Grace, Jennifer and Linda continued to receive sums from the takings and while substantial sums were paid into the claimant's bank account, they did not think to question the propriety of what was done.

14. Mr Samek submits that in essence the case is simply a family dispute in which an account is sought, not at all one to which a freezing injunction is appropriate. To the extent that illegitimate use was (or rather, I stress, may have been) made of the claimant's not for profit structure to claim exemption from VAT, that is a problem, he says, for Grace, Linda and Jennifer, not one for John who was never a director or member of the claimant. Grace signed the company accounts, which declared that they had been approved by the Board, and they were prepared by Mr Daniel, who was for this purpose the claimant's own accountant.

15. Mr Samek submits that this action is simply a tit-for-tat response to a continuing action brought by Rollerteam, in effect John, against Linda in the Queen's Bench Division in which he alleges that she misappropriate £175,000 of the museum's cash. That action is Rollerteam v Riley, which is the culmination of the family dispute over the ownership of Rollerteam and the allegations of undue influence. Between 3 and 5 October 2012, Linda took £175,000 from Rollerteam's bank account, part of which she paid to Jennifer. On 11 October 2012 John obtained a freezing injunction against Linda and brought proceedings in the name of Rollerteam against Linda and Jennifer for the return of the funds. The defence is that Linda was authorised by Grace as the sole shareholder and a director of Rollerteam. Linda has paid the whole of the disputed sum into an escrow account in the name of Rollerteam's former solicitors so that some of the heat has gone out of that action and Jennifer understands that the proceedings may not be continued against her.

16. Mr Hext for the claimant asserts however that Rollerteam v Riley is irrelevant in that the reality of the matter is that John ran the claimant. Indeed, he said as much in his affidavit: "I alone have directed and managed the business carried on at the Property." Mr Daniel was to all intents and purposes John's accountant, whatever the technicality. John himself describes Mr Daniel and his firm as "Rollerteam's accountants" and says that the claimant was incorporated on his, John's, instructions. He himself says that the reason he was not a director or member of the claimant was that he could not assume that role if the claimant were to maintain its exempt VAT status. Significantly, he says in his affidavit:

> "The annual accounting process for the Society (i.e. the claimant), Rollerteam, SH Limited and SHM Ltd [Museum Ltd] has been undertaken by me in conjunction with Harry Daniel of Pinnick Lewis since the incorporation of the Society. In preparing the accounts, I do not believe that Mr Daniel has ever dealt with anyone other than me or the bookkeeper retained for all the companies, SP Fulfilment Ltd. To be clear, the bookkeeper was retained for both the Claimant and the corporate defendants. Once prepared, the accounts for each company would be presented for approval by an appropriate director of the respective company."

17. There is no question of ratification, says Mr Hext. This is the company's claim. If its funds have been misappropriated, it is entitled to claim. In any event, the accounts for the years in which it is said that money was misappropriated have not been approved.

18. In order to make good its claim for a freezing injunction, the claimant must show (a) a good arguable case (b) a risk of dissipation and must also (c) persuade the court to grant or continue the injunction in the exercise of its discretion. There is also the question of material non-disclosure which is a logically prior matter since if that is established the court may discharge the

injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure: see Siporex Trade SA v Comdel Commodities Ltd [1986] 2 LL Rep 428 at 437, at 439, per Bingham J and Memory Corporation Plc v Sidhu (No.2) [2000] 1 WLR 1443 at 1454-5. However the applications were taken in chronological order and because of the view I have taken I too propose to deal with them in that way.

19. I was referred to the speech of Lord Bingham in Fourie v Le Roux [2007] 1 WLR 320 at 322 for his classic statement of the justification for a freezing injunction:

> "Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings…
>
> In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way."

20. I bear in mind the very many reminders given at all levels of the judiciary to the effect that a freezing injunction is a draconian remedy which should only be granted with great care. It is capable of destroying a defendant's reputation and his business. Its purpose is to protect the claimant against the risk of the defendant deliberately making his assets proof against execution. Thus, there must be not only a good arguable case but solid evidence (see Thane Investments Limited v Tomlinson [2003] EWCA Civ 1272) of a real risk of dissipation. A freezing order is one of the two "nuclear weapons of the law" (see Donaldson LJ in Bank Mellat v Nikpour [1985] FSR 87) and indeed is the "thermo-nuclear" one of the two: see per Jacob J, citing his own judgment in Alliance Resources Plc v O'Brien (unrep) 8 December 1995 in OMV Supply & Trading AG v Clarke (unrep) 14 July 1999.

21. I turn to the three requirements. First, good arguable case. This means a case that is more than barely capable of serious argument, rather than one which the judge believes to have better than a 50 per cent chance of success. It is unnecessary (and indeed undesirable, save in a very clear case) to resolve conflicts of evidence at this stage: see, for example, Mustill J's analysis, not disturbed on appeal, in Ninemia Maritime Corporation v Trave

Schiffahrtgesellschaft GmbH [1983] 2 LL Rep 600 at 601 and Orri v Mondreas [1981] Com LR 168. There is no dispute between counsel as to the law in this area. As Mustill J said,

> "It is not enough to show an arguable case, namely one which a competent advocate can get on its feet. Something markedly better than that is required, even if it cannot be said with confidence that the plaintiff is more likely to be right than wrong."

22. As I have said, Mr Samek accepts, for the purposes of this application only, that the proceedings have been validly constituted.

23. I cannot at the moment find a good arguable case to support revenue from all zero-rated items in the shop despite the comments in John's letter supporting entitlement to admission fees plus revenue from zero-rated books. One question is therefore whether there is a good arguable case that the claimant was entitled to admission fees. In [60] of his affidavit sworn on 16 January last, John disputes the allegation that the claimant had any entitlement to receive any takings from the museum. He says,

> "Jennifer's case that the Society is entitled to the admission income is entirely misguided. Rollerteam as the museum owner is alone entitled to receive all income from the property and to account for it as it wishes. The arrangement between Rollerteam and the Society when my mother was actually in charge of it was that income was allocated to it only in order to fulfil its primary object, which was the maintenance and improvement of the museum's facilities."

24. He then points to the fact that his mother signed the claimant's annual accounts, saying that this ratified the arrangement, "allowing Rollerteam to take what money it needed throughout the year for that purpose". He then added in [61]:

> "The arrangement could not otherwise work or be of any benefit to Rollerteam and accordingly there would have been no purpose in incorporating the Society."

25. Although John does not explain this last statement, Mr Samek addressed the apparent inconsistencies in John's evidence as follows. He said that John stands by [60]. While it is true that income was initially allocated to the claimant, on the annual reconciliation it was only entitled to income for maintenance and improvement. However, for present purposes (and I stress I make no findings capable of binding a trial judge) that is hard to reconcile with other different accounts which John gives. For example, he says in a letter of 19 December 2012:

> "As joint treasurers they [Jennifer and Linda] were charged with the responsibility for processing and accounting for the Museum's and Society's income for many years, with souvenir sales allocated to the museum account and admissions and book sales income allocated to the Society account. The Museum and Society entities are distinct and where reference is made to the 'Museum income' it relates to income belonging variously to (i) Rollerteam Ltd, (freeholder) (ii) The Sherlock Holmes Museum Ltd, (iii) Sherlock Holmes Ltd. It does not relate to the Society's income which was accounted for on a yearly basis as it did not have to file VAT returns due to the company's exemption."

26. In his application against Linda for a freezing order John relied on a document dated 1 September 2007 in which the claimant was described as a company operating from the property "which receives all income from admissions", whereas Museum Ltd "receives all income from the sale of souvenirs". This document stated that the claimant operated "for tax-saving purposes" which arrangement was "preferable to conducting trade via Rollerteam". It is true that this documents is headed "Refurbishment Proposal", but that description does not appear to control its content which, under the heading "Background", describes the nature and function of Rollerteam, the claimant and Museum Ltd. In a letter dated 17 March 2008 John again referred to the claimant, without any such constraining words about refurbishment, as one of "the two current trading companies operating from the premises". Again, on 25 October 2012, a Mr Siddiqi, acting on behalf of Jennifer and Linda, met and spoke to Mr Daniel. In an email written on the same day, under the heading "Background" he sought Mr Daniel's confirmation of Mr Daniel's oral explanation that Rollerteam owned the freehold of the premises, that its income was derived from rents it received from SH Ltd and the claimant, and that the claimant was responsible for collecting the admission fees. Mr Daniel gave such confirmation in writing on 26 October 2012: "I can confirm that your comments concerning the "background" are correct".

27. John now draws a distinction between responsibility for collection of the admission fees and a preliminary allocation to the claimant on the one hand and entitlement to keep them on the other. However it is not explained how the allocation is reconciled with the claimant's turnover. John's email of 6 October 2012 and Mr Daniel's email of 17 September 2012 closely associate revenue from admissions with the claimant's turnover. This is consistent with the fact that prior to August 2012 the claimant received a substantial income into its bank account. There is no doubt that income was pooled between the four companies and then reallocated, but it is not explained how the reconciliation was made at the end of the year enabling the claimant to retain such substantial sums.

28. Further, the VAT scheme which was admittedly put in place by John would seem, without further explanation which John has not furnished, to depend on

the claimant receiving the net admissions charges. John's evidence is that the claimant was incorporated to take advantage of the VAT exemption applicable to cultural attractions available since the decision of the European Court of Justice in Customs & Excise Commissioners v Zoological Society [2002] QB 1252. The Value Added Tax (Cultural Services) Order 1996 inserted into the exemptions set out in Schedule 9 to the Value Added Tax 1994 the "supply by an eligible body of a right to admission to … a museum". It would therefore seem likely that Rollerteam, Museum Ltd and SH Ltd did not declare any admission income for VAT but that all such income was attributed to the claimant.

29. Mr Samek relied heavily on the fact that, on the evidence from both sides of the record, the museum was run in what he described as a "loose" manner, crucially to the knowledge and with the approval of Jennifer, Grace and Linda for a period of 20 to 25 years. He points to the evidence from Jennifer and Grace that they (and, as they were the controlling mind of the claimant) the claimant itself, "knew that monies including admissions monies were being banked in bank accounts other than that of the claimant. Jennifer's complaint is that although she knew how the monies were dealt with she did not know until October 2012 that the claimant was beneficially entitled to these monies. Mr Samek points to Jennifer's evidence, which he describes as "elliptical",

> "the rest of the family has not necessarily [sic] been aware of what company does what, notwithstanding their roles from time to time as directors in the relevant companies".

30. And to Grace's evidence,

> "I am not fully aware [sic] which company is the main operating company of the business or which companies are entitled to the revenue from the various aspects of the business."

31. Mr Samek says this is incredible but, in any case, it is obvious that the reason no-one elucidated such matters was that they recognised that John owned and controlled the museum business, a fact which Grace, when John was in prison some 15 to 20 years ago, acknowledged in a letter by saying,

> "The business is yours, John … If I should drop dead nobody can claim anything of the business except yourself."

32. Indeed, said Mr Samek, it is striking that until recently Jennifer and Grace were taking cash out of the business at the rate of £1,000 a week and Linda was taking rent in cash. It is said that the whole situation only changed once John had taken proceedings against Linda in the action Rollerteam v Riley.

33. Again, submits Mr Samek, there was contradictory evidence about safes used

to store cash generated by the business. Jennifer's evidence is that cash takings were either collected by John from Grace's house or banked by Jennifer and Grace on John's instructions. He says that the impression created before Norris J was that no cash was left at Grace's premises and that when collected by John it was lost to the claimant. John maintains that cash was left in a safe at Grace's house and no account has been given of it, whereas he has now accounted for the cash in the safe in his house which he has paid into court and has undertaken to leave there until final disposal of the action.

34. Thus it is said that there is no mystery where the admissions monies went. They were taken to Grace's house, counted by Grace, Jennifer and possibly others and then put in a safe or banked on John's instructions. This is not therefore, submits Mr Samek, a case where John simply took charge of the monies and no-one but John knew what had happened to it. Both the cash and the credit card payments went into the two safes and the various companies' bank accounts.

35. The problem with this analysis for present purposes (and again I make it clear that I cannot and do not make any findings of fact) is that the evidence is that in the past substantial sums, approximating to the claimant's turnover, were banked in its account, whereas it appears that this ceased to happen without any good reason being proffered for the change. Jennifer says that her previous conduct in allowing John to deal with the money and in taking cash from the takings is explained by the fact that she assumed that there was always a proper reconciliation and account at the end of each year.

36. Mr Samek also complains that the alleged gross shortfall is simply proved by production of a one page summary deriving from figures provided by Mr Daniel showing income from admissions for the relevant period whilst Jennifer and Linda must have had some more documents. However the evidence is that these figures correspond with the records of admissions made by Jennifer at the time of counting the takings which were in evidence before Norris J.

37. In my judgment there is a good arguable case that John has taken admissions monies belonging to the claimant or, in line with the pleading, that he is a shadow director of the claimant and is in breach of fiduciary duty.

38. The second issue under good arguable case is whether there was a shortfall in the claimant's funds.

39. I start by noting the acknowledgment of John himself in his email to Mr Foster of 10 December 2012 that, "substantial sums of money are missing", apart from the £175,000 in issue in the Rollerteam v Riley proceedings. He blames the fact that the funds are missing on Linda and Jennifer but does not deny that there is a shortfall.

40. The fact that money is missing is supported by the following evidence.

Jennifer says that she banked cash into the claimant's account of about £330,000 for the year ending 31 July 2010 and this roughly corresponds to the turnover in those accounts (described as attributable to admission fees) of about £340,000. However, from August 2010 onwards, the sums that were banked into the claimant's account became sporadic only. Between 1 August 2010 and July 2012 only £180,100 was paid into the account while Mr Daniel has produced the document showing that the takings in respect of admissions to the museum were about £1.8 million. Something therefore seems to have changed. Such money as was paid into the claimant's bank account was removed either to Rollerteam's account or to Museum Ltd. On 11 October 2012 all that remained in the account was some 22 p. Since May 2012 the claimant's bank statements have been sent to John's address.

41. Very substantial sums of money have been paid out of Rollerteam's account but the destination of this money is not known to the claimant. Significantly, sums were apparently drawn from the claimant's bank account and paid into Museum Ltd's bank account at a time when it was necessary to give Museum Ltd financial substance for the purposes of the cross-undertaking which it offered in lieu of Rollerteam on the freezing injunction in Rollerteam v Riley.

42. John says in his witness statement that the claimant has not attempted to reconcile income figures against expenditure and Mr Samek sought to show by reference to expenditure figures that this is indeed the case.

43. The problem with this is that on any basis there is still a substantial shortfall. Further, on 10 December 2012, the claimant's solicitors asked John to identify any legitimate expenditure he claims to have made on the claimant's behalf and he has not responded. Further still, the allegation contradicts John's own assertion in his email of 10 December 2012.

44. The defendants were required by paragraph 11(b) of the freezing injunction to provide the claimant with:

> "any accounting records or other similar documents … which identify in relation to the money collected from the entrance fees for, and/or in relation to the sale of VAT-zero-rated books at, [the museum] whether originally collected in cash or otherwise, in the period 1 August 2010 to date:
>
> i. where that money went and/or to whom it was paid;
>
> ii. the current whereabouts, form and location of the money or any assets that have been purchased with it."

45. None of the defendants has complied with that requirement. Mr Samek says two things about this. First, that John has "done his best" to comply. I do not agree. Apart from paying the cash sum (which he does not break down as to

time) into court John has not complied at all with paragraph 11(b)(ii) of Norris J's order. If there is a reason why it was too difficult to do so he could have given it to the claimant and to the court. Secondly, Mr Samek complains that the claimant has taken no steps to enforce such compliance by way of application for committal or for cross-examination. While that is true, it does not follow that the claimant cannot use non-compliance as the basis for its rejection of hypothetical sums which John says have been expended on the claimant's behalf.

46. In deciding whether there is a good arguable case, however, I must consider John's assertion that it is Linda and Jennifer and not the defendants who are responsible for any shortfall.

47. In his email of 6 December 2012 John accepted that Jennifer's role was simply to collect the museum takings but that he directed where it was to go, that a large sum of money (over £500,000) was handed to him in cash and that, in addition to cash, large sums had been paid into company accounts as he had requested. He accepts that he was the person who directed where money was to be paid to meet expenses but has not produced any accounting documentation to show what expenses were in fact paid on which account.

48. Significantly, John does not deny that he procured a card reader for the claimant's bank account in about January 2011 by causing one to be sent to Grace's address and then collecting it himself, whereby he was enabled to make transfers from the account even though he was not a signatory on it. As I have said, from May 2012 onwards, the claimant's bank statements were at his behest send to John's private address.

49. Further, the bank statements produced pursuant to Norris J's order show substantial receipts by way of credit card payments, substantial deposits of what was presumably cash and substantial payments out.

50. As to the corporate defendants, I balance the lack of payments into the claimant's bank account with regular payments into their accounts as follows:

- Sums paid by way of credit card (including admission fees) were paid into Rollerteam's account between 1 August 2010 and October 2011.

- Regular payments were made from Rollerteam's bank account into Museum Ltd's bank account in round sums until about October 2011.

- Sums were paid by way of credit card into Museum Ltd's account from October 2011 onwards and thereafter sums were transferred back to Rollerteam's account in large but irregular amounts.

- Payments were also made from Museum Ltd's account to SH Ltd's account.

- During the period 1 August 2010 to 31 July 2012 large sums were paid into the Rollerteam account, the Museum Ltd account and, especially, the SH Ltd account, which may have reflected cash deposits.

51. Each side of the family accuses the other of misappropriating cash. For example John demands to know what happened to cash collected by Jennifer in August 2012. However, the evidence is that John had complete control of the claimant's finances once the takings had been counted and was trusted by the family to deal with them properly. He managed what happened to them once they had been counted. He had complete control over all the bank accounts of the recipients of the money. It is true that the system which Jennifer, Linda and Grace operated with John was haphazard, not least in respect of the payments that Jennifer, Linda and Grace took for themselves, but that does not in my judgment bar the claimant from holding John responsible for any shortfall to which it may have been entitled.

52. Taking all the above matters into account, there is in my judgment a good arguable case against all the defendants sufficiently strong to reach the threshold to support a freezing injunction.

53. The defendants submit that there is no solid evidence of a real risk of dissipation of assets: see Thane, and Flaux J's summary of the decided cases in Congentra AG v Sixteen Thirteen Marine SA [2008] 2 LL Rep 602 at [49]. The focus is on unjustified disposals and the standard of proof is relatively high: see Ketchum International Group Public Relations Holdings [1997] 1 WLR 4 at 10, and Laemthong International Lines Company Ltd v Artis [2005] 1 LL Rep 100 at [54] and [61].

54. Mr Samek says that the case has been presented as one of fraud but that no allegation of fraud or deceit is advanced in the pleading. This is merely a family dispute about which of several companies in a structure, acquiesced in for many years, is entitled to admission charges. It is said that the court must be cautious in ascribing to John's conduct the label of fraud: see Thane at [28] and contrast VTB Capital Plc v Nutritek International Corp [2012] EWCA Civ 808 at [175]-[178], affd [2013] UKSC 5.

55. Mr Samek submits that the case was presented before Norris J on the basis that John has a conviction for fraud but that it is not open to the family to rely on this as they were content for him to remain at the helm of the business for over 15 years. I would comment at this stage that the claimant does not rely on John's conviction for fraud other than to say that it is consistent with his present conduct. In any event, I disregard it for present purposes as it seems to me to be very far removed in both time and nature from the matters in issue in these proceedings.

56. Further the defendants say that the family cannot rely on John taking steps to shut out family members from the business since he has done so against the background of a family dispute in which Rollerteam is suing Linda for

misappropriation of monies and that does not give rise to an inference that any of the defendants will act improperly. However, the steps taken by John to shut out members of the family from the business pre-dated Linda's removal of the £175,000 by two weeks. He now says that he removed Jennifer from the business because she refused to sign a contract of employment, but that is not what he said in his affidavit in support of the injunction in Rollerteam v Riley. He had also taken steps by writing to the claimant's bank to take charge of the claimant's finances and he has tried to wind the claimant up.

57. Importantly, it is said that there is no risk of dissipation because John and the other defendants have been on notice of claims against them since October 2012 but the present application was not brought until 18 December 2012, despite the fact that there was even a letter before action on 10 December 2012. As a separate issue, there was, it is said, no justification in these circumstances for an injunction having been sought *ex parte* rather than on notice. There is no evidence of any improper dealings since October (particularly in the light of the way in which the business was run) and indeed John has paid £535,000 of cash from his safe into court and is content that it should remain there whatever the outcome of this application.

58. Mr Samek says that there is "not a shred of evidence" of misconduct by John or the corporate defendants since Mr Siddiqi wrote an accusatory letter to John on 26 October 2012.

59. This lapse of time is the aspect of the claimant's application which has troubled me the most. However I am satisfied that it was not until December 2012 that (on their case) Jennifer and Grace understood the full extent of what they see as John's misappropriations and that it was reasonable for them to try to get to the bottom of what had happened before issuing proceedings. I accept for present purposes that matters escalated.

60. However although it is of course incumbent on the claimant to make out risk of dissipation, I share Norris J's evident concern that John has complete control over all monies passing through the defendants' accounts, and that he does not deny covertly accessing the claimant's account by means of a card reader.

61. It is wholly unclear on what basis the defendants allege that the monies in the various accounts should be reconciled and allocated. The bank accounts seem to have been used interchangeably. None of the defendants has complied with paragraph 11(b) of Norris J's order. They have provided no explanation or accounting documents which show what has happened to the money paid into the various bank accounts or what has happened to the funds remaining in cash.

62. There is the further matter of the monies paid to Aid Armenia Ltd ("AA Ltd"). AA Ltd is a company controlled by John. It is not itself a registered charity but was apparently set up to make grants to charities and other philanthropic institutions supporting Armenian causes. £177,500 was apparently donated by

John to AA Ltd from the museum's takings, but it is not clear from the documents how, from where and when this payment was made or to which account the payment falls to be debited. Sums totalling £126,500 were then paid by AA Ltd to Rollerteam and SH Limited in October 2012. I called for, and was given, an explanation about this from John by way of affidavit. He says that AA Ltd's account at HSBC was used as a temporary measure when the defendant companies were changing banks. These sums represent payment of sums held by AA Ltd for the defendant companies after the change had been effected. However, whatever the truth of the matter, the fact of the payments is opaque and shows that the defendant companies are, through John, able to and do switch money around between several accounts which he treats as his own.

63. As I have said, John's explanations for the removal of other members of the family from the business are also inconsistent.

Proprietary Injunction

64. The principles for granting a proprietary injunction are conveniently set out in Madoff Securities International Limited v Raven [2001] EWHC 3102 at [127]-[131] and [136]-[142]. The three elements are (1) a serious issue to be tried on the merits that monies belong to the claimant, (2) that the balance of convenience favours the grant of an injunction and (3) that it is just and convenient to grant it. Thus the claimant does not have to show risk of dissipation and delay is less relevant: see Cherney v Neuman [2009] EWHC 1743 (Ch) at [101]-[102].

65. There can be no proprietary injunction in relation to the money held by John in cash since he has paid the sums he says he holds in his safe into court.

66. The other sum is the money in Museum Ltd's account. The justification for a proprietary injunction is said to be derived from a letter from the defendants' solicitors in which they say:

> "the precise extent of ownership in respect of this sum is yet to be subject to the usual reconciliation and allocation between the respondent companies and [the claimant]."

It is therefore said that this is an acknowledgment that some of the monies must belong to the claimant.

67. The claim is that £295,708, being the sum in the account as at 5 October 2012, should remain in Museum Ltd's account and be ring-fenced so that it cannot be used for business or legal expenses. Mr Hext says, "Those monies [referring to the £434,000 currently in the account] plainly represent the product of the receipts of the businesses, including the admissions".

68. However for present purposes I accept Mr Samek's submission that there is no hint of an application for a proprietary injunction in the application notice and that it is not clear how much of the money in the account the claimant claims belongs to it. In these circumstances it would be unfair to grant a proprietary injunction.

Material non-disclosure

69. The principles as to material non-disclosure are set out in Brinks Mat v Elcombe [1988] 1 WLR 1356 and expounded further in subsequent cases. An applicant for an *ex parte* injunction has a duty after proper enquiry to make full, accurate and fair disclosure of all material facts and must draw the court's attention to all relevant material including points potentially adverse to his case. Material means what it is material for the judge to know and is a matter for the court rather than for the party and his legal advisers. There is no fundamental distinction between the duty of disclosure and the duty to refer to relevant authorities.

70. Crucially, an application for an *ex parte* injunction must not rely on general statements and the mere exhibiting of numerous documents but must disclose all the facts which reasonably could or would be taken into account by the judge.

71. Equally, the court discourages applications made on slender grounds. Further, it is generally inappropriate to seek to set aside a freezing injunction for non-disclosure where proof of the non-disclosure depends on proof of facts which are themselves in issue in the action, unless the outcome of that dispute is amenable to summary determination: see Civil Procedure Rules at 25.3.7 and the authorities there cited.

72. In summary, Mr Samek submits that the case was presented unfairly before Norris J, ignoring the matters which it was evident would have been taken by counsel for the defendants if the application had been on notice. He takes eight separate points of alleged non-disclosure with which I will deal in turn.

73. First, the case is based on misappropriation, whereas it is merely a family dispute and the basis of the claim and the circumstances in which it is said to arise are not explained. In general terms, I have already dealt with this matter. However the specific allegation in this context is that there is no mystery where the cash monies went. It is said that the case as put to Norris J suggested that there was a mystery about this. The money was taken to Grace's house, counted by her and other family members then put in Grace's safe and then banked in accordance with John's instructions. I have a number of observations. First, I do not regard the omission to emphasise the existence of a safe in Grace's house as material non-disclosure. The capacity of that safe is one of the hotly disputed issues in the action. In any event, it was not suggested that cash would lie unprotected in the house. Although there is no mystery where some at least of the cash went, that is to say into the various

bank accounts, it was always evident that the issues are (a) why has John not accounted for cash he has taken and (b) what happened to the money after it was banked in the defendants' companies' accounts. Norris J was told that the monies had been counted by Jennifer and Grace and then banked on John's instructions. That was the basis for the claim against the corporate defendants.

74. This first head of alleged non-disclosure is in substance the claim that the case was not fairly put to Norris J. It needed to be explained, said Mr Samek, that just because monies were banked in the corporate defendants' accounts did not necessarily mean that they had been misappropriated. However that is not how the case was put before the judge. It was explained that the money had gone to the other companies. It was explained that the monies were banked by Jennifer and Grace. The case was put on the basis, as it is now, that there was a significant shortfall. The judge was taken to the emails referring to the shortfall and asking John to explain it. He was taken to the response given.

75. Secondly, there is the related matter of the safes. It is suggested that Norris J ought to have been told of the precise and exact system used to bank the money. It is said that a full explanation should have been given about the safes, their use and capacity. However, it is evident that this is a matter in issue in the action and in any event I am unable to understand the materiality to the claimant's case.

76. Thirdly, it is said that Jennifer has records which she has not disclosed since she gives evidence that she kept a "detailed" record of admissions receipts as well as the takings in the museum shop. Failure to disclose these records, including the records prior to the period complained of, is, it is said, a material non-disclosure. However again the extent of the records kept by Jennifer is one of the issues in the action. Jennifer says she has disclosed what she has that is material.

77. Fourthly, the fact that there was a meeting between Mr Daniel and the claimant's representative Mr Siddiqi on 25 October 2012 at which Mr Daniel produced the claimant's accounting records. A conversation is referred to in the evidence before Norris J, as is the provision of accounting records. John and Mr Daniel say that all the claimant's accounting records were produced. Jennifer says they were not. Again, this is a matter in dispute. Mr Samek says that all this, together with the fact that Jennifer apparently raised no complaint about any period prior to August 2012 is inconsistent with her assertion of ignorance. Again, I do not agree.

78. Fifthly, there is a complaint that the claimant knew of the claims it had since at least the end of October 2012. This fact was not, it is said, brought to Norris J's attention. The emails of 25 October 2012 were in the bundle but that was not, says Mr Samek, enough to discharge the claimant's duty of disclosure. However the fact that there was a debate about shortfall between Jennifer and John in October 2012 was expressly drawn to Norris J's attention. He was also told about Rollerteam v Riley and that there was a dispute about the ownership of Rollerteam. He was specifically taken to the exchange of correspondence

on 10 December 2012 so that he was aware of the fact that John had been given full details of the claim prior to the application having been made. He therefore had proper material before him on which to make an informed decision as to risk of dissipation.

79. Sixthly, it is suggested that Jennifer failed to draw to the Court's attention the fact that the claimant must have had to use some of the admission monies to defray expenses of the museum business. However the claimant's case is based on ignorance of what those expenses were or of how expenses were allocated. Its accounts are themselves puzzling, showing, as they do, expenses in one year relating to employees and in a previous year a nil item under that head. It has always been the claimant's case that Jennifer and Grace were ignorant of how the business was run and that the defendants have refused to explain how the money in the accounts was spent. The fact that there is probably only a net shortfall was something that Norris J always knew, as is evident from the amount of the sum frozen.

80. Seventhly, it is said that there is no mention in the submissions of Stanley Burnton LJ's stricture in the Court of Appeal in Caterpillar Logistics Services Limited v de Crean [2012] EWCA Civ 1556 at [73] that, particularly in cases of misconduct it is:

> "… in the interests of justice and the efficient and fair conduct of proceedings that the claimant's case be defined and pleaded as soon as possible, so that the defendant knows precisely what is the case against her, and so does the judge."

81. The particulars of claim are dated 31 January 2013. However this seems to me not to be a matter of disclosure, (any judge is well aware of the principle in any event) but a complaint about delay and an allegation that the information obtained on the injunction was impermissibly used to bolster the claimant's case.

82. Finally, it is said in Mr Samek's skeleton argument that:

> "reliance is also placed on the other matters (insofar as not already covered above) referred to in [John's second affidavit]."

It does not seem to me that this is a proper way to make serious allegations about non-disclosure which must be made out. In any event I have read John's affidavit and do not consider that any of the other matters to which he refers constitute material non-disclosure. Those matters are, as far as I can make out: (a) that the claimant's Memorandum of Association does not permit it to operate the museum. This is denied in any event. (b) That there was insufficient disclosure about the dispute between John and Grace and "the strength of [John's] case in this respect". (c) That no mention was made of the

fact that John called the police following the discovery of the missing £175,000.

83. To my mind, neither (b) nor (c) is really material. All these matters fall plainly in my view within Slade LJ's observation in the Brinks Mat case (at page 1359):

> "While in no way discounting the heavy duty of candour and care which falls on persons making *ex parte* applications, I do not think the application of the principle should be carried to extreme lengths. 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 Rex v Kensington Income Tax Commissioners [1917] 1 KB 486 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 [otherwise] little hope of doing so..."

84. I do not accept that material non-disclosure has been made out or that all matters were not fairly presented to Norris J.

Conclusion

85. I propose to continue the injunction as asked by Mr Hext. No oral complaint was made about the adequacy of Linda's cross-undertaking in damages, I believe, so I need say no more about that.

Time estimate

86. There is however another matter I feel constrained to mention. It is that the time estimate for this hearing was one day but in fact it took three days plus pre-reading, which I observe one of the parties estimated completely unrealistically at five hours. Two things arise from this. First, when the Jackson reforms take effect and cost budgeting becomes the norm, the default position will be that parties will be held to their time estimates and will not be able to recover any extra costs. It is likely that the court will be significantly tougher than previously, even in relation to cases in which cost budgeting does not apply, in other words, in relation to cases commenced before 1 April 2013.

87. Secondly, I repeat the observations of both Parker LJ and Lloyd LJ in decided cases that the time taken in arguing a freezing injunction case should be "measured in hours, not days". While I suppose it is possible (although I do not think so) that I may through my interventions take some blame for the length of the hearing, it is my view that the approach on both sides was

somewhat leisurely and repetitive. Doubtless this will be taken into account by a costs judge on any assessment, although I make it clear that I make no direction binding on any other judge in the future.

88. Again, both sides said that they did not require an immediate judgment from me and Mr Samek asked that it should not be delivered in half-term week. It is nevertheless my view, which I reiterated at the time, that this is a case in which expedition should be considered. In the circumstances of the case I am very concerned that the injunction may be hanging over the defendants' heads for a disproportionate length of time.

89. The issues of principle governing the court's approach to an application for expedition were described by Laddie J in Ifone Ltd v Davies and Infospace [2005] EWHC 1534 (Ch) and Morgan J in Law Debenture Trust Corporation v Elektrim SA & Anr [2008] EWHC 2187 (Ch). I extract these relevant principles. I have not heard argument about this but I nevertheless feel that it is right to make these observations now.

- The court will not order a speedy trial unless there are pressing reasons justifying such a course in order to avoid injustice to the applicant.

- In considering that question, the court must also bear in mind the needs of other litigants in the queue for their cases to be heard. The court must remember that this case is to be put ahead of all the other cases in the list and to be given preferential timetabling treatment.

- The court will set any element of risk relied upon by the applicant against the history of the litigation. Thus the conduct of the parties is relevant.

- The court must weigh the risks of delay to the applicant against prejudice to the respondent caused by a restrictive trial timetable.

90. I have spoken to the listing officer to see what the claims of the other litigants are. He has told me that this case can properly be accommodated. I have heard such evidence as there is and it does seem to me that the prejudice to the defendants in not having a speedy trial and the prejudice to the business of the museum is the overriding factor in this case. Therefore, subject to any submissions of counsel, I propose to give directions. I must however stress that a realistic time estimate is essential and I have already warned that the court is unlikely to be sympathetic on the question of allowable costs.

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