



Neutral Citation Number: [2020] EWHC 2439 (Ch)

Case No: BL-2020-000898

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 21/07/2020

Before :

MR JUSTICE MANN

Between :

**SHANGHAI HONGTOU NETWORK
TECHNOLOGY CO LIMITED**
(a company incorporated in China)

**Claimant/
Respondent**

- and -

(1) JAGEX LIMITED

Defendant

**(2) PLATINUM FORTUNE LP (a limited
partnership constituted under the laws of Delaware)**

**(3) PLATINUM WEALTH DEVELOPMENT
LIMITED (a company incorporated in the BVI)**

**Defendants/
Applicants**

(4) MR DUKE LI ZHU

Defendant

- and -

**(1) CHINA MINSHENG TRUST CO LTD (a
company incorporated in China)**

**(2) HUARONG INTERNATIONAL TRUST CO
LTD (a company incorporated in China)**

Respondents

**Robert Howe QC and Timothy Lau (instructed by Shoosmiths LLP) for the Applicants/2nd
& 3rd Defendants**

**Jeffrey Chapman QC and Samuel Ritchie (instructed by Cameron McKenna Nabarro
Olswang LLP) for the Claimant/Respondent and Shareholders**

Clifford Chance LLP in attendance on behalf of Jagex

Hearing date: 20th July 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Mann:

Introduction

1. This is an application for fortification of a cross-undertaking in damages which was given on 12th June 2020 when the claimant (“SHNT”), a Chinese registered company, was granted an injunction against the first defendant (“Jagex”) by Mr Charles Hollander QC (sitting as a deputy High Court Judge) restraining it from registering any transfer of its shares in favour of the second and third defendants (together, “Platinum” - save where it is necessary to distinguish between the two Platinum defendants, which it usually is not, I shall treat them as one for ease of exposition.) Platinum claims to have acquired the entire share capital of Jagex from SHNT as a result of legitimate transactions. SHNT disputes that. Although the application was technically without notice, and the hearing was the first hearing of the application, the injunction was granted until trial or further order. Platinum attended the hearing for other purposes (the discharge of stop notices), but did not participate in the debate about the injunction. No point is taken at this stage about the absence of a return date. The usual cross-undertaking in damages was given, and SHNT’s two parent entities (China Minsheng Trust Co Ltd - “CMT”- and Huarong International Trust Co Ltd - “HIT”) joined in the cross-undertakings to provide additional support. The undertaking extended to those who might suffer loss as a result of the injunction, and therefore operates for the benefit of Platinum. There was no dispute about that before me. Platinum now seeks an order for fortification of the cross-undertaking in damages on the footing that it is exposed to a real risk of very significant losses if it is not allowed to sell its Jagex shares (which it wishes and plans to do), and those who gave the cross-undertaking are all Chinese entities with no assets in the jurisdiction and enforcing any order on the cross-undertaking would be very problematic at best and impossible at worst. Platinum therefore seeks fortification in alternative sums ranging from £5m to about \$209, depending on the appropriate analysis.
2. On this application Mr Robert Howe QC appeared for Platinum, and Mr Jeffrey Chapman QC appeared for the respondents, including CMT and HIT.

Factual background

3. It is unnecessary to go into much of the background leading up to the grant of the injunction. I shall confine myself to such elements as are necessary to deal with the fortification application. In what follows, and throughout this judgment, many of the valuation and price figures are approximate rather than precise, because approximation will generally suffice. Where more precision is required it will appear. All dollar figures are US\$.

4. The first defendant (“Jagex”) is an English company which designs, sells and operates a very successful online computer game called Runescape. Its 2019 figures show revenue of £110m and an operating profit in excess of almost £49m. Until April of this year its shares were owned by SHNT. Platinum claims that by a Share Purchase Agreement (“SPA”) dated 27th June 2019, as varied and amended by 5 supplemental agreements including one on 17th April 2020, it agreed to purchase, and is now entitled to, the entire share capital of Jagex. It says that completion took place on 17th April 2020 and it is now entitled to be registered as the owner of the shares. The total purchase price was said to be \$530m, but only just over \$5m has been paid, and Platinum says that by one or more of the supplemental agreements the balance is not due until September 2021. It also says that by way of another variation the balance due is a little under under \$400 million to reflect price adjustments that are said to have taken place.
5. That state of affairs has been challenged by SHNT. By various measures in China, prompted by creditor action, control of SHNT has passed to CMT and HIT. The latter is a state-owned Chinese company. That has led to a challenge to the validity of the share sale arrangements and/or the supplemental agreements for reasons which I do not need to go into. That in turn has led to these proceedings in which that validity is challenged.
6. Although the two Platinum companies are parties to the action the injunction application was made against Jagex alone. The Platinum defendants (a Delaware and BVI company respectively) do not intend to challenge jurisdiction. The fourth defendant (a former director of each of the Platinum defendants, and now a director of Jagex) does intend to challenge jurisdiction, but that does not matter for the purposes of this application.
7. Having agreed to purchase the shares in Jagex, and believing they have completed that sale and are, or are entitled to be treated as, owners of the entire share capital in Jagex, Platinum now intends to sell on its shareholding in fairly short order. It has been negotiating with an unidentified private equity company which has made an indicative non-binding offer at a price which would give Platinum cash of \$500m and a retained equity holding of about 30% which is valued at \$130m - so a total of \$630m as the price or “enterprise value” for the company. The would-be purchaser has issued a letter of intent which provides further details of what can be and would be expected, including (understandably) the completion of a due diligence exercise.
8. The injunctive relief that has been granted prevents the final implementation of that purchase (if the purchaser goes ahead after the due diligence exercise) though negotiations are said to be continuing “apace” (the word used in Mr Howe’s skeleton argument). The concern of Platinum is that if the injunction remains in place it will

lose that sale and circumstances are such that there is a good arguable case (at least) that in 18 months time, after it has putatively won a trial, it will not be able to sell Jagex for the same price and will therefore have lost a good deal. The present time is said to be particularly favourable for the sale of online gaming companies because Covid lockdowns have increased interest in, and the number of players of, such games. It wishes to take its gains now rather than risk the consequences of having to wait, and is concerned about the loss of sale value on a sale 18 months hence. It is that loss that it would seek to recover via the cross-undertaking in damages and in respect of which it seeks fortification.

9. An alternative to sale in a private sale to a single purchaser, if the deal with the private equity purchaser does not come off, either now or in the future, would be an IPO on a major exchange, and the Platinum companies (which are themselves within a private equity group) have that in mind as a real possible alternative. However, such an IPO would also be prevented by the current injunctions, and Platinum again expresses concern that an IPO in 18 months time, after a trial in which it wins, would raise less money than an IPO now. The sort of losses which would arise in that scenario are alternative losses which it would seek to recover via the cross-undertaking and which Platinum seeks to have protected by fortification in this application.
10. As a third alternative loss, Platinum is concerned about dividends. The injunction prevents the declaration and payment of dividends, and although the potential dividends would accumulate within Jagex, Platinum is concerned that it will lose the opportunity to use the dividends in its private equity business and will thereby lose profits. These are also losses against which Platinum seeks to guard via the cross-undertaking and fortification.
11. I shall provide more elaboration of the nature of the alleged losses below.

The principles about fortification

12. There was no real dispute about the principles applicable when a court has to consider whether to require fortification for a cross-undertaking in damages given as the price of an interim injunction. The relevant principles were summarised by Popplewell J in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm):

“[A]n applicant for fortification must satisfy three requirements. First, that the court can make an intelligent

estimate which is informed and realistic, although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant by reason of making the freezing order. Secondly, that the applicant has shown a sufficient level of risk of loss to require fortification, that it has shown a good arguable case to that effect. Thirdly, that the making of the interim order is or was a cause without which the relevant loss would not be, or would not have been, suffered. In relation to that third requirement, whilst it is open to the respondent to the application to demonstrate that there is no causal link between the granting of the injunction and the loss in question, if disproving that asserted causal link, as to which a good arguable case is shown, requires the deployment of extensive contentious evidence and argument, then that is not an exercise to be attempted at the interlocutory stage.”

13. It was also not disputed that it was relevant to bear in mind that “[w]here an applicant for an interim remedy is not able to show sufficient assets within the jurisdiction of the Court to provide substance to the undertakings given, particularly the undertaking in damages, it may be required to reinforce the undertaking by providing security” (Commercial Court Guide paragraph F15.4(a), WB Vol 2 p 491).

14. As will appear, Platinum has sought to justify some fairly precise figures by rational valuation calculations of lost opportunities to sell or to extract dividends. It sets out its case as a matter of valuation. If the calculations are convincing enough then the court can adopt them. However, it is also important to bear in mind that there are cases where such scientific (if that is the right word) calculations are not possible because of commercial and other uncertainties, yet the court might still be satisfied that there is a risk of some loss. In those circumstances the court can still come up with a figure of potential estimated liabilities. As I said in my judgment in *Sinclair Investment Holdings SA v Cushnie and others* [2004] EWHC 218 (Ch):

“24 ... In many cases the fact that there is a risk of loss will be obvious merely from the general situation, and while it may not be possible to put anything like a precise figure on the loss, the court will, if necessary, do what it can on the evidence before it to reach an appropriate figure. The courts are well accustomed to assessing the appropriate value to be given to things whose valuation is difficult. In some cases it will be possible to make a more precise or confident assessment than in others. The mere absence of particularised evidence does not mean that there is no evidence of a risk of loss...”

It is therefore necessary to see where those principles take one on the facts of this case.

The need for fortification - the enforceability of judgments

15. One point can be got out of the way relatively straightforwardly, namely the risks arising out of the unenforceability of judgments. The entities giving the undertaking (SHNT, CMT and HIT) are all Chinese entities, and there is no evidence that any of them have any assets in the jurisdiction or indeed outside China. Platinum's case is that even if it manages to get an award under the cross-undertaking in damages against those giving the undertaking there is no evidence that such an award would be enforceable, realistically speaking, in China.
16. HIT is a non-bank financial institution, which is state-owned. CMT is a Chinese trust and investment management company. Platinum has received Chinese law advice that enforcing an English judgment there would be very difficult, not least because of the state-owned characteristic of HIT which might present additional problems to those presented by the other respondents. China's recent signature of, but not ratification of, the Hague Convention does not materially improve matters. SHNT claims to have identified 3 instances of foreign judgments which have been recognised in China but even Mr Chapman did not draw a lot of comfort from that. He expressly said that he could not put his case higher than appeared in paragraph 11 of his skeleton argument:

“However, it is accepted that this court does not have the material before it to conclude that there would be no possibility of practical difficulties, notwithstanding the willingness by SHNT, CMT and HIT to submit to the jurisdiction to make good the undertaking.”

17. The evidence indicates that there does not appear to be much prospect of enforcing a substantial (or any) judgment on the cross-undertaking in China should it be necessary to do so. To the extent to which that is an element of the risk of loss for the purposes of Popplewell J's second requirement, that factor is established.

The claimed risk and likelihood of loss in financial terms

18. I therefore turn to the risk of loss under the three heads relied on by Platinum and identified in outline above.
19. The first is the risk of losing the current potential purchaser and not being able to find another purchaser at the same or better price after trial in which the Platinum defendants succeed, or to put it another way the risk that the shareholding will not have the same value as that attributed to it in the current private equity (non-binding) offer at that time.
20. Mr Wang of Platinum, who claims to have some experience in private equity firms but who cannot be treated as an independent expert for these purposes (and who does not claim to be) has put forward a calculation which he says demonstrates a real risk that if the present sale is lost and a sale has to be revived in 18 months time, then the sale proceeds will be less, and there will be consequential losses. He first calculates the losses arising from the fact that Platinum will not have any of the cash sale proceeds (\$500m) for the period of the delay. That, he says gives rise to a loss of opportunity to apply those sums in Platinum's own equity business, which loss he estimates at \$56.7m by applying a rate of return of 8%, which he states to be conservative for such equity houses. That sum, when aggregated with the total value of the sale price, gives a gross value to Platinum over the period (assuming it can complete the sale to the private equity concern this summer) of \$686.7m.
21. Then Mr Wang seeks to arrive at a likely value of Jagex in 18 months if a sale is prevented till then. He does that by taking its net profits and applying a multiplier. He has projected the net profits of Jagex forward for 18 months and assumed that they will suffer a 2% reduction over that which would otherwise be expected, which he says is likely to, or may, result from two factors, both attributable to the presence of the injunction. The first is that players, and therefore income, may be lost as they appreciate that Jagex is for the time being (during the period of the injunction) under the control of a Chinese state entity. He considers that players may have concerns over privacy and information security similar to those which were raised over Huawei's rule in "5G masts" that have been seen recently. The second is the effect on the morale of employees. Certain senior managers have expressed dissatisfaction and "offered" to leave because of stop notices obtained by CMT and HIT (which have since been removed by the court). If they left that would or could have an effect on profits.
22. The net profits thus reduced are said to be £46.4m, to which Mr Wang applies a price/earnings rate of 8.1, which he says is a conservative multiplier for these purposes, and comes up with an initial enterprise valuation figure of \$477.5 million (applying a currency conversion rate of \$1.27 to the £).

23. Thus Mr Wang calculates Jagex is available for sale now at \$686.7, and values it in 18 months at \$477.5 million. The differential is said to be the potential loss to Platinum of not being allowed to sell now, which is \$209m. That is Platinum's first case for the amount of fortification.
24. There is one immediate problem with that calculation. Platinum accepts that it could not complete an onward sale to a private equity firm without paying the balance of the purchase price - almost \$400m. That sum would have to be found. If it was to be paid out of the proceeds of sale then a large part of the cash proceeds (about 4/5th) would not be available for reinvestment, so that part of Mr Wang's calculation has to be reduced to about \$11m, bringing the \$209m down to about \$165m. If the money were to be found from elsewhere, then there would still be a reduction of about \$400m in the money available to Platinum. On any footing this is a hole in the calculations. It is a little surprising that Mr Wang did not allow for that.
25. The two supposed reasons for a possible reduction in profits attributable to the injunction also need serious scrutiny. It is said that there will be player loss because of concerns about a continued tie in with Chinese concerns, and in particular a state-owned tie in, and some customers will be lost. There has, of course, been no considered analysis of the customer base of Jagex for these purposes, but I view with considerable scepticism the idea that games players on this platform will be particularly concerned about that and withdraw their custom. Comparisons with the recent debate about Huawei's involvement in this country's 5G infrastructure are in my view misplaced.
26. The potential loss of senior managers attributable to the injunction is also not easy to accept. The evidence is that they were concerned about the stop notices that were briefly in place. It is not clear why they would be concerned about those, but even if they were then those have gone now. There is no real evidence that they are concerned specifically about the continued, and on this footing interim, maintenance of potential Chinese control. This is a thriving company. Senior personnel have shared most of a £5m bonus pool arising out of the sale to Platinum (with the remainder to be distributed shortly) and would doubtless be looking forward to more if Platinum sells on. I apply an appropriate degree of scepticism to this attempt to rationalise lower profits over the injunction period as being attributable to the effects of the injunction.
27. Accordingly I do not consider either of these rationales for a 2% reduction in profits, and hence a reduction in the value of the company, as being particularly satisfactory. I shall return to the question of other risks of loss below, and to some of Mr

Chapman's submissions about the quality of the evidence and the link with the injunction.

28. The next basis on which it is said there will be loss arising from the injunction is the inability to arrange an IPO this year. Mr Wang's evidence is that if there is no sale to the anonymous private equity firm this summer then it is likely that, in the absence of the injunction, Platinum would offer 50% of the shares in Jagex in an IPO before the end of the year. Mr Wang's estimate is that that would have yielded half the value of company. He values the company at \$558.3m by applying a multiplier of 8.10 to the annual net profits. Half would be offered in an IPO, yielding cash of \$279m. If the IPO is delayed for 18 months the value would be reduced for the same reasons as those applied in the consideration of the private equity sale, so that only \$238m would come from the IPO, and there would be a similar loss of opportunity to use the proceeds to good effect during the period of the delay. That is said to lead to a total loss arising from an inability to conduct an IPO now of \$103m. The same criticisms can be made of this calculation as I have made in relation to the putative sale to the anonymous private equity concern.
29. The third way in which loss is projected is an inability to have the benefit of dividends for the period of the injunction, so that they can be used for Platinum's business purposes. Mr Wang's evidence is that, absent a sale or IPO, Platinum would declare dividends in amounts comparable with previous years. If that were to happen the funds would be available for reinvestment in Platinum's business to generate good returns. He projects the likely dividends based on past dividend levels, which he puts at about £69.5m across the 18 month period to trial. He says that a reasonable internal rate of return for private equity funds would be between 15% and 20%, but adopts a conservative return of 8% which would have been obtained on the dividends if received. That would yield £3.9m on his figures, leading to a loss of that amount attributable to the injunction if the relevant hypothesis is that Platinum would have held on to Jagex for the 18 months to trial with the injunction in place. I consider that this calculation has a reasonable degree of plausibility to it.
30. Mr Chapman had various criticisms of those calculations and averments, including some of those that I have already mentioned. I shall deal with them briefly.
31. First, he submitted that because of the terms of a power of attorney, executed as part of the documentation pursuant to which Platinum agreed to acquire the shares, Platinum could not sell them on anyway, so any inability to sell was not caused by the injunction. The power of attorney was intended to secure the payment of the balance of the purchase price, and if it was not paid the shares could be transferred away from Platinum. Furthermore, the power was in favour of another company, Shangai

Chengming Technology Co Lt (“SCNT”) and not SHNT, and there was no evidence that it would give consent to depart from the bars in the power of attorney.

32. The answer to that point seems to be that the power of attorney, according to its terms and effect, will not block an onward transmission provided the balance of the purchase price is paid, which it doubtless could be as part of the money flows from an onward transmission transaction. The fact that the power is in favour of SCNT does not seem to stand in the way of that conclusion, odd though the interposition of that company might seem to be.
33. Next Mr Chapman submitted that what stood in the way of a sale or IPO was not the injunction, but the underlying dispute about share ownership. In the real world, he said, the shares were not saleable while there was a dispute as to Platinum’s entitlement to them. Accordingly the injunction had no relevant causative effect on any inability to sell for the purposes of the third requirement in Popplewell J’s formulation.
34. This is a curious submission. If it is correct then Mr Chapman’s client did not need the injunction in the first place. But it was not prepared to take the risk of that and preferred to have an injunction to prevent the very sale which Mr Chapman said could not, realistically, take place anyway. Even though it might be said that there is something in Mr Chapman’s submission on the facts, it is not plain that he is right, and if he has the benefit of an injunction which is intended to stop transactions of the kind contemplated by Platinum he can hardly be heard to say the injunction should be treated as being ineffective in causation terms for the purposes of the cross-undertaking in damages, at least at this stage of the argument. He said that the injunction was obtained because his client did not trust Platinum. That means that it did not trust Platinum not to sell, and that means that there is at least an arguable possibility that it could sell. That does not take the situation outside the 3rd requirement. I consider that this is a bad point for these purposes.
35. Next Mr Chapman went on to query the figures applied as to the likely returns on available money (8%) which he pointed out was way above prevailing interest rates. He referred to this as unsubstantiated in terms of the activities of the group of which Platinum is apparently part. I agree with him on what has been shown, but am still prepared to find that Platinum will lose the opportunity to get a decent return on available significant sums, which could well exceed prevailing interest rates.
36. So far as the unavailability of dividends is concerned, Mr Chapman pointed to 5 year projections for the company, prepared recently by Jagex, which showed dividends

retained and not distributed. Mr Wang said that that assumption of non-distribution was made because of the stop notices, but I find that unconvincing. No-one can have thought that the effect of the stop notices would go on for that long. A business update prepared recently contains figures and plans which would tend to suggest the retention of dividends in the business. Having said all that, while it is not obvious that dividends would be paid out as and when profits allowed it, it is plausible in the event that a sale does not take place in the proximate future. The dividend projections are plausible, though at the same time they do show a healthy business with no apparent decline in value or profitability.

37. Mr Chapman also said that the retention of profits in Jagex would not prevent the application of those amounts in the sort of manner in which Platinum would deploy them if they had the opportunity - Jagex could do what Platinum would do with the money. I regard this submission as somewhat unrealistic. Apart from anything else, the deployment within Jagex would require different management skills, and it would be impossible to aggregate the moneys in Jagex with other moneys with which it might be desirable to aggregate them in order to take advantage of business opportunities.

Conclusions

38. Platinum does not have to show a case which is as high as the balance of probabilities of loss that will accrue from the injunction being in place. The word used by Popplewell J was “might”. An assessment needs to be made that is “informed and realistic”. One has to bear in mind the situation which the exercise is addressing. The claimant has got interim relief to which it might not have been entitled. The cross-undertaking is intended to deal with that. Fortification is intended to provide adequate security for that potential liability. The defendant has been exposed to a risk, and an accurate prediction of loss may well not be possible in the position in which the defendant has been put. The confidence of predictions will vary from case to case, and while the court will need to guard against the fanciful predictions, it must bear in mind the difficulties in predicting a future commercial position and not hold that against a defendant who has had a risk imposed upon him by the injunction.
39. In this case, for the reasons given above, I do not find the calculations of Mr Wang as to the loss of value which will be experienced on a future sale or IPO, as opposed to a sale or IPO now, particularly compelling. His main thesis is the 2% reduction of the profits from what they would otherwise have been for the two reasons given. I think those arguments are not at all strong in this case - not strong enough to justify basing a fortification sum on them. It cannot be said that they are unarguable, and to that extent they “might” accrue in that way, but any old possibility which is not fanciful is not good enough. The court has to make an assessment of the strength of that

argument for the purposes of determining whether there is a risk which needs fortifying against, and the amount of that risk, and I do not consider that in this instance those arguments are strong.

40. On the other hand I do consider that there is material which indicates that Platinum is exposed to a potentially substantial risk. As well as presenting his detailed calculations, Mr Wang also points out the potential for loss arising from market conditions generally. At the moment the online gaming market is particularly strong, because of the effect of the Covid-19 pandemic and locked-down individuals turning to computer games. Total play time is said to be up 40%, and the shares of publicly traded video games companies are up 12% on average in a market in which most other shares have declined. This boost is unlikely to be available in 18 months time (or it is not apparent it will be), leading to different market sentiment in relation to gaming company shares. He says that Platinum is particularly keen to realise its value from Jagex in the short term to capitalise on its current position in the market.
41. If the injunction continues till trial Platinum will not be able to achieve that objective. There is a real possibility (well within Popplewell J's "might") that a sale in 18 months time will take place in less favourable market conditions and that less will be realised. That is a risk against which Platinum, which does not wish to run it, is entitled to be protected so far as it is sensible, practical and proportionate to do so. The quantification of that risk is not possible in a scientific way (or if it is possible no-one has sought to do it) and the appropriate amount becomes one of those things which the court has to do its best to assess (see *Sinclair*, above). I consider that the court can make that assessment for the purposes of the first of Popplewell J's requirements.
42. I have already dealt with the level of risk in enforceability terms and found that that risk is sufficient to justify or require fortification if fortification is otherwise appropriate. In terms of amount I consider it to be at a sufficient financial level to require fortification (the second requirement - I will consider amounts in moment).
43. It follows from my conclusions above that I consider that the third requirement is fulfilled. I am satisfied that Jagex wishes to sell now, and that there are real prospects of its being able to do so. I am satisfied that the injunction prevents that happening at the moment, and that there is a risk that a sale in 18 months time would yield less than would be achieved this year.
44. In all the circumstances I therefore consider that fortification for the cross-undertaking should be provided, and it should be provided in the sum of £35m. That

is roughly 7% (in dollar terms) of the private equity valuation and, in my view, provides an appropriate amount of protection in this case. It should be provided by a secured cash deposit, bank guarantee or some other appropriate mechanism which I need not prescribe here - if the parties cannot agree it the court can rule on any disputes. Mr Chapman sought 56 days to provide fortification, saying that it might take that long to get approvals and process matters in China. Frankly, it ought not to take that long. The claimants (or at least CMT and HIT) are apparently substantial organisations in China, and China is now a modern trading nation. I would expect the fortification to be available within 28 days, but if there is a legitimate difficulty in achieving that then the respondents will be at liberty to apply for an extension, on producing proper evidence of the difficulties. If the fortification is not provided then the injunction will lapse.