Neutral Citation Number: [2021] EWHC 1299 (Ch)

Case No: BL-2020-002199

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

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

Date: 17 May 2021

Before :

Mr Justice Trower

- -

Between :

Cardium Law Limited

Claimant

- and -

Kew Holdings Limited
(a company incorporated in the Cayman Islands)

Defendant

- -
- -

Mr Howard Smith (instructed by **Cardium Law Limited**) for the **Claimant**
Mr Jonathan Bellamy (instructed by **Veale Wasbrough Vizards LLP**) for the **Defendant**

Hearing date: 19th April 2021

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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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THE HONOURABLE MR JUSTICE TROEWR

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email and release to Bailii. The date and time for hand-down is deemed to be 9.45 am on 17 May 2021

Mr Justice Trower :

1. On 22 December 2020, when sitting hearing the interim applications list in the vacation, I made a limited freezing order ("the December order") against Kew Holdings Ltd ("Kew") restraining it from disposing of, dealing with or diminishing the value of its interest in the long leasehold property, known as the Kings Observatory, Old Deer Park, Twickenham Road, Richmond ("the property") and from, dealing with or diminishing or removing from England and Wales the proceeds of any sale of the property up to the value of £525,000.

2. Kew is a company incorporated in the Cayman Islands whose sole asset is an interest in the property. Its controlling director is Mr RFJ Brothers, a resident of Hong Kong.

3. The December order was made on the application of Cardium Law Ltd ("Cardium") which had, until very shortly before the application was made, acted as solicitors for Kew. The application was made without notice to Kew and the December order made provision for a further hearing to be held on 12 January 2021. On the return day the parties agreed to adjourn the matter to the first available date after 15 February 2021 with provision for the December order to continue in the meantime on the same terms. Meade J made an order to that effect.

4. At the hearing before Meade J in January, and at the adjourned hearing before me in April, Kew contended that the freezing order should be set aside on the ground that Cardium had not established a real risk of dissipation. It also argued that the December order should not have been made without notice and that, in any event, Cardium was guilty of a failure to make full and frank disclosure.

5. The proceedings in which the December order was made seek relief pursuant to section 61(2) of the Solicitors Act 1974 to enable a contentious business agreement made between Cardium and Kew on 20 February 2019 to be enforced against Kew as being fair and reasonable. The contentious business agreement took the form of what has been called a hybrid conditional fee agreement ("the CFA"). The claim form also seeks an order that Kew pays Cardium the sum of £468,344 pursuant to its obligations under the CFA.

6. The amount claimed by Cardium from Kew relates to fees and disbursements incurred by Kew in respect of litigation against Donald Insall Associates Ltd ("DIA"), which had provided architects services in relation to the renovation of the property. In those proceedings, Kew claimed damages for professional negligence and a declaration that DIA had overcharged in respect of the services it had provided.

7. The background is that DIA was first retained by Kew in 2010 to assist in the conversion of the property from commercial to private residential use. The property is a well-known historic building situated in the middle of the Old Deer Park in Richmond, the freehold of which is vested in the Crown Estate. By 30 June 2017, the relationship between DIA and Kew had broken down and DIA's retainer by Kew was formally terminated.

8. DIA claimed to be owed fees at the date of termination and proceeded to an adjudication. It obtained a decision in its favour in November 2018. Kew did not rely on DIA's alleged overcharging or negligence as a ground for resisting the relief sought by DIA from the adjudicator, although that did not affect its right to litigate these issues at a later date. Kew did not pay the adjudication debt and so DIA commenced proceedings in the Technology and Construction Court to enforce the adjudicator's decision in which O'Farrell J granted summary judgment in the sum of £263,520 on 5 February 2019. Permission to appeal O'Farrell J's decision was refused by Coulson LJ on 29 March 2019.

9. Kew did not discharge its liability under the order for summary judgment made by O'Farrell J in February 2019. As a result, DIA took steps to enforce that judgment and on 3 May 2019 Waksman J made a charging order over the property as security for the judgment debt, plus accruing interest. On 13 September 2019 DIA commenced proceedings for sale of the property pursuant to its rights under the charging order.

10. The order for summary judgment made by O'Farrell J was therefore granted shortly before the CFA was entered into. The essential elements of the CFA were that 50% of Cardium's fees in relation to the professional negligence proceedings against DIA were to be charged and paid on a monthly basis, with the remaining 50% being deferred and paid in the event of a success, in which eventuality a success fee of 50% would also be payable. It was also provided that disbursements were to be paid as they were invoiced.

11. The CFA contained provision (clause 8.1.1) enabling Cardium to terminate the retainer in certain circumstances including default by Kew in paying disbursements. In that event, the deferred charges and the success fee would be payable (clause 8.2). One of the defences advanced by Kew is that the provisions to this effect were unfair, were not explained to Mr Brothers and that he had not received a copy of the CFA. This is disputed by Cardium, which points to the fact that Mr Brothers is an experienced businessman and signed the CFA having had its terms explained to him.

12. Cardium proceeded to act for Kew in the professional negligence proceedings under the terms of the CFA. Up until March 2020 Kew paid some but not all of the interim invoices rendered by Cardium. Since March 2020, Kew has not paid any of Cardium's invoices, although Cardium continued to act for Kew under the terms of the CFA until it terminated that retainer on 18 November 2020. Cardium relies on an argument that, even if the CFA were to be unfair in the respects complained of, substantial amounts (approximately £290,000) would be payable in any event.

13. There is now a dispute as to whether the fact that Cardium continued to act demonstrates that it "went along" with an arrangement by which Kew would not pay its fees promptly. Mr Clark explained that he only continued to act because he had been told by Mr Brothers that he was having difficulty in transferring money out of the Philippines. He now thinks that Mr Brothers had simply made a choice not to pay and in my view the evidence is consistent with that being the case.

14. On 15 July 2020 (i.e., after the time at which Kew had stopped paying Cardium's invoices), O'Farrell J ordered Kew to pay £600,000 into court within 14 days as security for DIA's costs of the professional negligence proceedings. Kew did not

comply with that deadline and on 29 October 2020 O'Farrell J made an unless order which stipulated that if £600,000 security for DIA's costs was not provided by 4pm on 30 November 2020 Kew's claim would be struck out and judgment would be entered for DIA without further notice.

15. In the course of her judgment, O'Farrell J pointed out that Kew was in breach of several court orders, and that no applications had been made to vary them, to seek relief from sanctions or to ask the court's indulgence for further time to pay. She described its breaches as "very significant", and Mr Brothers' explanations for non-payment as insufficient to explain "the failure to comply in any small part with the court's orders". She also made an order for payment by Kew of DIA's costs on the indemnity basis. Security was not provided and so Kew's claim against DIA was struck out.

16. On 19 November 2020 (i.e., shortly before the negligence proceedings were struck out), Deputy Master Linwood made an order for sale in the proceedings to enforce the charging order over the property which had been commenced by DIA against Kew in September 2019. His order directed that DIA's solicitor should have the conduct of the sale and that it could take place without further reference to the court at a price of not less than £10 million. Kew was required to deliver possession of the property to DIA within 28 days of service of the order and to pay DIA's costs of those proceedings on the indemnity basis.

17. The order made by Deputy Master Linwood was subject to a proviso that it would not take effect if, by 4pm on 17 December 2020, Kew paid to DIA the judgment debt together with interest and costs, the full amount of which then amounted to £316,794.61. On 22 December 2020, Master Shuman varied this part of the order so that it would not take effect if, by 4pm on 22 December 2020, Kew paid to DIA £193,530.50 and, by 4pm on 11 January 2021, Kew paid to DIA £123,264.11. In the event of non-payment of the first instalment by the time stipulated, possession of the property was to be delivered by 10am on 24 December 2020. Kew made payment of those instalments on or immediately after the dates for which Master Shuman's order provided and the judgment debt to DIA has now been paid. That had not, however, occurred at the time the December order was made.

18. Reverting to Cardium's claim against Kew, when Cardium terminated the retainer under the CFA on 18 November 2020, it indicated that it was prepared to continue to act for Kew under the terms of an earlier retainer letter of 15 February 2019 which was not a CFA. This was what Mr Matthew Clark, the director of Cardium who gave evidence on this application, called a pay as you go arrangement.

19. However, nothing seems to have been taken forward on that front, and accordingly once the professional negligence proceedings had been struck out (as occurred on 30 November 2020), Mr Clark wrote to Mr Brothers with a detailed description of the outstanding invoices for both its fees and disbursements. The total amount claimed was £469,445.95. Mr Clark sought confirmation that payment would be made by 7 December 2020. He also said in his email of 1 December 2020:

> "a. It is unfortunate that the only asset that KHL has in the jurisdiction (TKO) is subject to an Order for sale as from 17 December 2020. Sale could take place any time after that date.

b. Time is therefore of the essence and there is little of it between now and 17 December.

c. Should TKO be sold, then Cardium will not have recourse to any asset in the jurisdiction for payment of all outstanding fees and disbursements.

d. In these circumstances, it would be reckless to do nothing to protect the position of Cardium, Council and BDLA in advance of 17 December 2020.

e. Please therefore confirm that (a) payment will be made by Monday 7 December 2020, or (b) the amount outstanding will be secured by a legal charge to be executed by Monday 7 December 2020.

f. If you select (b) then I will supply a legal charge in a suitable format by return.

g. In the absence of payment or provision of any executed security (by 7 December 2020), then it is highly likely that proceedings will be necessary to preserve some of the proceeds of any sale of TKO, sufficient to meet the amount due. I very much hope that this will not be necessary."

20. This was followed up by a subsequent email from Mr Clark in which he told Mr Brothers that there was an outside chance of the professional negligence proceedings against DIA being reinstated if funds to meet the security for costs were paid into court imminently and Kew produced a supporting witness statement with detailed evidence explaining all steps taken to raise the money and why the deadline of 30th November was not met.

21. Mr Brothers did not respond immediately but on 7 December 2020 (the deadline given by Mr Clark in his 1 December email), he sent an email to Mr Clark in the following terms:

"Dear Matthew

Many thanks for your emails and my apologies for the radio silence my end. I have been deeply involved in handling the issues that surround the financing required for the payment of the charging order later in the month as the party originally lined up for this purpose fell by the wayside on account of a low valuation that in itself was much delayed. I had hoped that, as a last resort, I could rely on EFG Bank for this payment, but it appears that this is not an option. However, I have located a substitute lender and will be following up on this over the coming week. Unfortunately, however it will inevitably be a bit of a scramble! I shall of course keep you posted.

Best wishes

Robbie"

22. Mr Clark: responded to this email by return.

"Dear Robbie

> Thank you for your email. I very much hope that you are able to raise the funds in what is a very difficult pandemic financial environment. Since there is a risk, however low it may be, that TKO may be sold at any time after 17 December it will be necessary (in the absence of payment or the requested security) for us to ask the Court to provide the required protection. This will involve an application to keep the appropriate amount of any proceeds of TKO's sale within the jurisdiction in respect of the unpaid disbursements and fees.
>
> Can you send payment today?
>
> Kind regards
>
> Matthew"

23. On 11 December 2020, there was a further letter from Cardium to Mr Brothers which made clear that there was ongoing communication between them because the previous day Mr Brothers had apparently suggested that the matter should be reviewed at the end of next week, i.e., after 17 December being the date from which DIA was able to sell the property in accordance with the order made by Deputy Master Linwood. He went on to say:

> "6. The level of risk of The Kings Observatory being sold at any time after 17 December will exponentially increase from that day onwards. That risk of sale is a risk that the only asset in the jurisdiction will be converted into cash that will leave the jurisdiction thereby making it nigh impossible for Cardium to recover the disbursements and its costs.
>
> 7. The only way forward, that gives any level of protection to Cardium, Counsel and BDLA, is for [sic] to seek a Court Order. This would be inappropriate whist the Letter of Retainer remained extant. As such, please take this letter as notice of immediate termination of the Retainer Letter.
>
> Please keep in touch since it is always good to talk."

24. Mr Clark also informed Mr Brothers that it would be necessary for Cardium to make an application to come off the record as acting for Kew based on non-payment of fees and disbursements, because as matters then stood, Kew did not have other solicitors to take over the conduct of the negligence proceedings. In the event, an order was made giving Cardium permission to come off the record 5 days later on 16 December 2020.

25. When the matter first came before the court in the vacation interim applications list, Mr Howard Smith for Cardium submitted that it appeared to have a strong claim against Kew and having read the papers, I was satisfied that there was a good arguable case. For the purposes of the application to continue the December order, Kew does not dispute that this remains the position.

26. I was less sure from my consideration of the papers that Cardium had made out a case that there was a real risk of dissipation and told Mr Smith at the outset of the December hearing that I needed to be persuaded that this was established. Accepting that he could not rely on a specific threat to dissipate, and that none of the factors on which he could rely were sufficient on their own, Mr Smith nonetheless submitted

that there were four factors which, taken together, demonstrated a real risk of dissipation so as to prejudice Cardium's ability to enforce any judgment that it might obtain in due course.

27. First, he said that Kew was a special purpose vehicle incorporated in the Cayman Islands whose sole asset was the property. It followed, therefore, that Cardium was vulnerable on a sale because there would be nothing against which Cardium could enforce if Kew failed to pay. He submitted that the same would be the case if Kew's beneficial interest in the property were to be depleted whether by way of re-mortgage or other dealing with the beneficial interest.

28. He said that it was inherently more difficult to pursue an entity such as Kew if the assets against which enforcement might occur were no longer located in the jurisdiction and that the kind of opaque structure utilised by Mr Brothers was liable to render execution of any judgment materially more difficult. He accepted that this was not sufficient to give rise to a real risk of dissipation in itself but submitted that it contributed to the risk.

29. Second, he relied on the history of Kew's non-payment of professional fees. He pointed out that Kew had failed to pay the sums due under court orders obtained by DIA, which I have described earlier in this judgment. He relied more particularly on the findings of O'Farrell J in her 15 July 2020 judgment to the effect that she was satisfied that Kew was in "deliberate and persistent breach" of her 5 February 2019 order, that its behaviour was "unreasonable and oppressive", and that Kew's conduct indicated that it could satisfy the judgment but had chosen not to do so.

30. Third, he submitted that O'Farrell J's finding of deliberate breach was fortified by evidence that Kew appeared to have access to funds from which it could have paid Cardium's bills but had chosen not to do so. He relied on the fact that Mr Clark had been told by Mr Brothers in March 2020 that monies to fund the litigation were located in the Philippines but that he was unable to access them because of currency restrictions imposed by the Philippines government as a result of the coronavirus pandemic, but that this explanation had not later been relied on.

31. Mr Clark also gave evidence of how he knew that Mr Brothers is a wealthy man (including the fact that the house he occupies in Hong Kong is owned by another company controlled by him and was said to be worth c.£32 million) but said that he has chosen not to use any of the wealth to which he has access to ensure that Kew is put in funds to discharge its liabilities. It appeared from Mr Clark's evidence that he also relied on the fact that Mr Brothers operates a substantial number of offshore companies and that, if a decision was taken to dispose of the proceeds of any sale, it would be very difficult to go after them. In these circumstances, it was particularly relevant (so Mr Smith submitted) that nothing had been paid at all. Cardium made clear that there may be an argument that aspects of the CFA would not be found to be fair and reasonable but submitted that it was difficult to see how it might be said that substantial amounts would not be payable in any event.

32. Fourth, Mr Smith submitted that it was relevant to a real risk of dissipation that no proposals had been received from Kew or Mr Brothers for either payment or the grant of security over the property, despite the 1 December 2020 email that I have already described.

33. In addition, although this was not a factor which went to the risk of dissipation (but was I think relevant to the exercise of my discretion), it was said on behalf of Cardium that no immediate prejudice would be caused to Kew if an injunction were to be granted given that the order sought was not a general freezing order but was limited to a specific asset and a portion of its proceeds of sale. Kew did not carry on a trading business that would be affected by an injunction and it also then appeared that the property would be sold in any event pursuant to the order for sale made by Deputy Master Linwood, a sale which Cardium accepted should not be restricted or restrained by the freezing order it sought.

34. In the event I was persuaded that there was a real risk of dissipation. So far as an actual disposal of the property itself was concerned, this was not an immediate risk in the sense that there was insufficient evidence that the property itself was on the point of imminent sale nor that any part of the proceeds was on the point of being distributed to Kew. It seemed improbable that, even if DIA was on the immediate point of enforcing its rights under Deputy Master Linwood's order by a sale, that would lead to an immediate distribution to Kew with the consequential possibility of a further imminent dissipation of the proceeds thereby coming into its hands. This was all the less likely as there was also a need to discharge at least one prior charge in favour of EFG Private Bank ("EFG") for a figure in excess of £5 million.

35. However, I took the view that, in light of the factors relied on by Mr Smith, and the prior conduct of Mr Brothers, there was a real risk of dissipation by the grant of interests in the property to other persons so as to reduce the outstanding amounts available for payment to Cardium. It was apparent that this was something that might happen at any time. On that basis, I granted a limited freezing order over a return day on 12 January 2021. The court was not however addressed in any detail on the question of whether this risk of dissipation was sufficiently imminent to justify an application being made without notice. This is a point to which I shall return.

36. Although Mr Smith developed some of the submissions on real risk of dissipation that he had made at the December hearing, the essential elements of his case both on the January return date and at the adjourned hearing in April were the same.

37. Mr Jonathan Bellamy who now appears for Kew contended that I was wrong to reach the conclusion I did. He submitted that as at 22 December 2020 there was no real risk of dissipation because there was no real risk that, if DIA proceeded to exercise its power of sale, Kew would dissipate its share of the proceeds of sale, nor that Kew would sell the property or otherwise diminish its equitable interest. He also submitted that, if the application had been made on notice as it should have been, these points would have been made to the judge hearing the application and no freezing order would have been granted.

38. Mr Bellamy pointed out that the thrust of Cardium's application had been that the risk of dissipation was driven by the likelihood of an imminent DIA enforcement sale and its consequences. He said that the risk of an unjustified dissipation by other means was little more than an after-thought.

39. Mr Bellamy also submitted that nothing has changed since 22 December 2020 to improve Cardium's case, and that accordingly injunctive relief is not justified at all. Indeed, quite the contrary, he submitted that as the judgment debt to DIA had now

been paid, the risk of unjustified dissipation of the sale proceeds in the context of an enforcement sale by DIA had now gone. He also said that, whether or not the freezing order was now justified, Cardium had failed to make full and frank disclosure on the without notice application, and on that ground alone the freezing order should now be discharged.

40. In addressing Cardium's case on the real risk of dissipation, both as at the time of the December order and now, Mr Bellamy referred to *Candy v Holyoake* [2017] EWCA Civ to the effect that the burden to show a real risk of dissipation is on the applicant for a freezing order and if he does not do so the application will fail. He also cited *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 203 at [34] in support of the submission that solid evidence is required – mere inference or generalised assertion is not sufficient – and he relied on those parts of the judgment of Haddon-Cave LJ in which the point was made that a use of offshore structures (although relevant) does not equate to a risk of dissipation.

41. These are important points as to the correct approach on that aspect of an applicant's case which requires it to demonstrate a real risk of dissipation. Furthermore, I agree with the submission that the dissipation must be unjustified. As Haddon-Cave LJ said:

> "What must be threatened is unjustified dissipation. The purposes of a WFO [worldwide freezing order] is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of or concealing assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof."

42. Mr Bellamy criticised Mr Smith for not taking me through these authorities at the hearing on 22 December, but I do not accept that this criticism is justified. The principles are well known. In my judgment the dispute is not about the correct approach. It is whether the factors on which Mr Smith then relied (and the factors on which he still relies) are sufficient to evidence a real risk of dissipation. The parties addressed this point first in their submissions and then dealt with the points on full and frank disclosure. I shall deal with the points in the same order.

43. In criticising the evidential weight and accuracy of the factors on which Mr Smith relied, Mr Bellamy took each in turn. I shall explain my conclusions in relation to each, but it is important to bear in mind the need to stand back and look at the whole picture. At the end of the day the ultimate question for the court is whether there is a real risk of dissipation – merely because one factor would not of itself be sufficient does not answer the question of whether it is a part of the story by which, in the context of the case as a whole, a real risk of unjustified dissipation is established.

44. This is well illustrated by the first factor, which is that Kew was a special purpose vehicle incorporated in the Cayman Islands whose sole asset was the property. I agree that this factor alone would be insufficient to establish a real risk of dissipation. There will often be legitimate reasons for using structures of this sort, but that is not always the case. All depends on the context and *Candy* makes clear that it is still a relevant consideration. It seems to me that that this is particularly the case where the entity concerned is an SPV with a single asset and does not appear to conduct any other business activity.

45. This consideration is all the more significant where the controller of the relevant entity, in this case Mr Brothers, has access to considerable wealth, but where his other assets are located outside the jurisdiction and are themselves held through corporate entities. Although Mr Brothers challenged the evidence adduced by Mr Clark on this point, he did so in the most general terms without explaining in any detail the respects in which he was wrong. He also sought to distance himself from Kew by explaining in one of his earlier affidavits that he did not own any shares in it. I do not think that he was being entirely straightforward in what he said on this point, because it is clear from the evidence that he gave to the court in the summary judgment application brought by DIA that Kew was controlled by him and his wife. I am satisfied that the evidence points to this being a relevant factor in the present case.

46. The next factor was Kew's history of non-payment, as to which Mr Bellamy submitted that, if the application had been made on notice to Kew, the court would have been told that Kew was taking steps to pay DIA which it achieved with two payments made on or immediately after the deadlines imposed by the order made by Master Shuman. That would have gone to questions of whether there was in reality any urgency in the application being made when it was but would have been limited in its impact in light of Kew's prior history of non-payment. In short, it does not deal with the real gravamen of the charge which was the last-possible-minute nature of these payments and the prior history of serious and deliberate non-payment. In any event I accept Mr Smith's submission that it is a fair conclusion that the only reason why Kew paid when it did was because DIA had been forced to go to the lengths of obtaining an order for sale from Deputy Master Linwood before it did so.

47. It also does not address the further consideration that, in relation to the debt secured by the charging order, Kew was not only late in relation to the payment obligation itself, but it was also late so far as the order made by Deputy Master Linwood was concerned, because the time the Deputy Master allowed for payment before the order for sale was able to be enforced had also expired (although it was then subsequently extended by order of Master Shuman). This therefore was yet another example of serious and deliberate non-compliance by Kew with its legal obligations.

48. Mr Bellamy also submitted that a decision not to pay invoices which were not disputed (conduct of which O'Farrell J had concluded that Kew was guilty) is not evidence that there is a risk that Kew will dissipate its assets. I disagree. In my view, non-payment of undisputed invoices, more particularly where that is combined with evidence that the debtor has access to funds in the control of its controlling director which he has deliberately decided not to use for that purpose, is relevant to the question of whether there is a real risk that an English asset that is available to the debtor will be dealt with in a manner that tends to render that debtor judgment-proof. It demonstrates the willingness of its controller (in this case Mr Brothers) not to discharge its established liabilities and not to comply with court orders; conduct which is all the more serious when it is driven by choice, not inability to do so.

49. As to the fourth factor relied on by Mr Smith, it was and remains insufficient of itself to justify the grant of the December order, but in my view, it is relevant when assessing the probabilities that Kew might dissipate its interest in the property to the detriment of Cardium's ability to enforce any judgment in due course. While the burden remains on Cardium to show a real risk of unjustified dissipation, and while Kew is under no duty or obligation to offer Cardium even limited security over the

property or its proceeds pending determination of the dispute, the fact that Kew, as a single asset-owning, non-trading SPV has not done so, and has not asserted any specific commercial detriment that it might suffer were it to do so, legitimately strengthens Cardium's concern that it may take steps to render itself judgment-proof at any time during the course of these proceedings.

50. Mr Bellamy's submissions also raised a number of further issues, which he said pointed against a real risk of dissipation. The first was that the correspondence passing between Kew and Cardium at the beginning of December (the letters of 7 and 11 December referred to above) was inconsistent with there being a real risk that any dissipation was imminent. The second linked issue is that the payments to DIA shortly after the time of the December order and on or before the return day before Meade J means that the charging order has now been discharged and so there is no longer any risk that DIA will sell the property from which a portion of the proceeds might more easily be dissipated in cash form by Kew.

51. Mr Bellamy submitted that the correspondence was relevant because Cardium's intentions were clear from the 7 December email (which was not drawn to my attention). It was said that, if there were to be any imminent risk of dissipation, that email would have prompted it to occur. In other words, it was said that once notice of Cardium's intention to seek relief had been given, Kew would have had an opportunity to take those steps. Having given warning of an application on 7 December, there could be no continuing risk of dissipation as at 22 December, because if it was going to dissipate, Kew would have used the intervening period to do so. He described this as the "stable door" point.

52. In my view, that is not a very powerful argument in the present case. A real risk of unjustified dissipation is not answered by Kew contending that it would have dissipated already if it was going to do it at all. I do not consider that the mere fact of such disclosure to Kew, and the relatively short period of time that expired between disclosure of Cardium's intention and the making of the actual application, undermines the substance of Cardium's case on real risk of dissipation if otherwise justified.

53. Likewise, it seems to me that, even though the immediacy of the risk is no longer linked to a sale by DIA pursuant to the order made by Deputy Master Linwood, the real risk of unjustified dissipation continues to exist. In my view, the factors on which Cardium relies continue to support this conclusion as a matter of substance, even though the dealing with the property pursuant to DIA's rights under the charging order (with the consequence that in that context Kew would become entitled to a share of the proceeds of sale in liquid form) is no longer something that will occur. As I shall now explain, I consider that this is the case, notwithstanding the factors on which Kew relies in support of its contention that Cardium failed to make full and frank disclosure, the aspect of the case to which I now turn.

54. The duty to make full and frank disclosure on a without notice application is a high duty to make full disclosure of all material information and is fundamental to the proper functioning of the court's process. It includes disclosing all the material facts and all matters relevant to the exercise of the court's discretion. It also includes making sure that the judge correctly appreciates the significance of what he is being asked to read.

55. This duty is very well known and is discussed in numerous authorities. As Mr Bellamy submitted the decision of the Court of Appeal in *Brinks Mat Limited v Elcombe* [1988] 1 WLR 1350 is generally regarded as the starting point on the duty and its application. The principles to be derived from this case have recently been summarised in the judgment of Cockerill J in *Petroceltic v Archer* [2018] EWHC 671 (Comm) to which I was referred:

> "1. Firstly, an applicant making a without notice application is under a high duty to make full, fair and accurate disclosure of material information to the court and draw the court's attention to significant factual, legal and procedural aspects of the case.
>
> 2. Secondly, the duty is fundamental to the proper functioning of the court's process on any application without notice.
>
> 3. The material facts of those which it is material for the judge to know in dealing with the application made and materiality is to be decided by the court and not by the assessment of the applicant or its advisors.
>
> 4. The duty of disclosure applies not only to material facts known but also to additional facts which he would have known if he had made inquiries.
>
> 5. The applicant must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application.
>
> I would add that the duty to make proper disclosure goes beyond merely including relevant documents in the court bundle. It means specifically identifying all relevant documents for a judge and taking the judge to particular passages which are material and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read.
>
> ...
>
> Where the court finds material non-disclosure, the authorities say that the general rule is that the injunction should be discharged and not renewed. If material non-disclosure is established, the court "will be astute to ensure that the plaintiff who obtains a without notice injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty"."

56. Mr Bellamy submitted that Cardium failed to comply with this duty in a number of respects.

57. First, Mr Bellamy said that there was a failure to disclose the directly applicable authorities relevant to the question of whether it was entitled to proceed without notice. As was the case in *Wild Brain Family International Limited v Robson* [2018] EWHC 3163 (Ch) at [10], the complaint that the application should not have been made without notice is intimately connected to the obligation to make full and frank disclosure in any event. He drew attention to a number of cases in which it is emphasised that to grant an injunction without notice is to grant an exceptional remedy *(*e.g. *Moat Housing Group South Ltd v Hartless* [2005] EWCA Civ 287 at

[71]) and submitted that they should have been put before the court at the first hearing.

58. Mr Bellamy also drew attention to the fact that CPR 25.3(3) provides that, if the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given. This requirement is reiterated in PD 25A para 3.4. He submitted that this requirement had not been complied with because the evidence in support of the application only referred to two factors justifying the hearing of the application in private and without notice: the risk of dissipation and because information from Mr Brothers had come to Mr Clark in circumstances where Cardium was acting as Kew's solicitor and was therefore potentially privileged.

59. I did not understand Cardium to submit that the potential disclosure of privileged information derived from Mr Brothers was a justification for proceeding without notice. In my view it was clear that it was Cardium's case that this point only went to explain the need for the hearing to be held in private. What was clear to me, however, was that it was Cardium's case that the risk of dissipation was sufficiently imminent to justify a without notice application. The real question is whether the justification advanced was in fact sufficient, and whether the court was informed of all material facts relevant to that issue.

60. Mr Smith relied on the statement in the Chancery Guide (at paragraph 16.26) that applications for freezing orders are almost invariably made without notice in the first instance and based on that statement, submitted that it is usual to proceed without notice. He said that the court was obviously aware at the hearing on 22 December that the application was being made without notice and did not express any concern about the principles to be applied.

61. On one level, that was a telescoped submission because it did not explain that the reason why freezing orders are almost invariably made without notice in the first instance is that the giving of notice might frustrate the order, which is normally the only basis on which a without notice application for a freezing injunction can be justified *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16 at [13]. However, the underlying principle is very well known and was itself clear to me on 22 December. So far as the principles themselves were concerned, I do not consider that it was a matter on which further explanation was required from Cardium.

62. As to the justification for proceeding on a without notice basis, I do not accept that the mere fact that applications for such orders are "almost invariably made without notice in the first instance" is of itself sufficient justification for making a without notice application; Mr Smith came close to submitting that this was the case. Nor does it of itself justify the making of an application without explaining to the court the reasons why notice has not been given. There may be a real risk of dissipation such as would justify the grant of a freezing injunction, but that risk may not be sufficiently imminent to justify the making of an application for such an injunction without notice.

63. The obligation to explain to the court the reason for proceeding without notice does not mean to say that it was necessary for Mr Smith to make specific submissions on what it was that justified making the application in that manner. There will be cases

where the nature of the risk of dissipation, itself justified an application being made without notice, and Mr Smith submitted that this was one of them. Where that is the case, it may not be necessary to make an explicit cross-reference to the risk of dissipation as the reason why a without notice application is justified if this is self-evident. In the present case Mr Smith relied on the real risk of dissipation, and subject to one important point discussed below, I consider that the court was sufficiently apprised of both the principle and the circumstances to make an informed decision as to whether a without notice application was justified.

64. However, I agree with Mr Bellamy's submission as to one of the failings by Cardium on which he relies. The court should have been shown the totality of the correspondence between Cardium and Mr Brothers in the period 18 November 2020 to 11 December 2020, and most particularly the email of 7 December 2020. This is not because sight of this email might have altered my view as to the real risk of dissipation at some stage in the immediate future, nor even that prior disclosure of Cardium's intentions would have caused a dissipation by the time the application was made if there were to be a real risk that Kew might take steps to that end. Its non-disclosure meant that I was not shown that Mr Clark was himself of the view that the risk of the property being sold at any time after 17 December was one that he had characterised in a communication with Mr Brothers as being "however low it may be".

65. On this issue, I do not agree with Mr Clark's evidence to the effect that these emails were merely repetitive of the matters referred to in the 1 December email which was in evidence at the hearing on 22 December. The correspondence in its totality would have provided further colour to the nature and extent of the continuing discussions between Mr Brothers and Mr Clark and was capable of affecting the court's approach to the imminence of the risk of dissipation, more particularly in so far as Kew intended to justify a freezing order by reference to a real and imminent risk of dissipation once the order made by Deputy Master Linwood became enforceable.

66. In my view the correspondence was capable of causing the court to insist on some notice of the application being given to Kew. To that extent there was material nondisclosure by Cardium, an omission which in my view was capable of affecting the court's decision to hear the application without notice. Whether it in fact made any difference to the court's preparedness to do so is difficult to determine, and I think it is equally possible that I would have been persuaded that there was a real prospect that Kew might take steps by way of unjustified dissipation of its assets before it was possible to have an effective hearing on notice.

67. In assessing the significance of this failure, I emphasise that the correspondence was only material to the imminence of any dissipation and therefore whether to proceed without notice. I do not consider that it has proved to have any bearing on the underlying question of whether there was a real risk of dissipation more generally in the short or medium term. The answer to that question is in my view unaffected by the correspondence.

68. As I remain persuaded that a freezing order is justified notwithstanding the arguments advanced on behalf of Kew, and as the existence of the conditional orders for sale made by Deputy Master Linwood (as varied by Master Shuman) meant that the property was not at the free disposition of Kew for the period between the making of

the December order and the return day in any event, it is inconceivable that Kew could have suffered any prejudice by the freezing order subsisting for a period until it was possible to hear an application on notice. For this reason, I do not consider that this failing should of itself be a reason for discharging the December order.

69. In my view, however, it would not in the circumstances be just for Cardium to be awarded its costs of the without notice hearing, even if I might otherwise have been persuaded that such an order should be made. This reflects the fact that there is a real possibility that, if the full correspondence had been disclosed (which it should have been), the court would have decided that notice should have been given, in which event the likelihood is that only two hearings would have been required - the initial return date and the substantive hearing of the application.

70. The next failure relied on by Mr Bellamy was said to be a failure to disclose the third-party charges registered in favour of EFG and the Crown Estate, and the chargees' actual or likely ability to restrict Kew from dealing with or disposing of its interest in the property. He submitted that, as an applicant for a freezing order over real property, Cardium was under an obligation to investigate the registered title of the charges and disclose the fact of those charges to the court. He criticised Cardium for not including a copy of the Land Registry charges register in the evidence it put before the court and failing to obtain an up-to-date copy of the registered title.

71. I do not agree that there was any failure by Cardium in this respect. There were a number of references to the prior charges, including in particular the EFG charge, in Mr Smith's skeleton argument, his oral submissions and in Mr Clark's evidence. The EFG charge was also referred to in O'Farrell J's July 2020 judgment and a witness statement of Mr Brothers dated 21 October 2020 both of which I read. While a copy of the Land Registry entries would have completed the evidential record, I do not consider that a failure to include a copy of the register in the bundle was a material failure.

72. The court was not informed about the existence of a negative pledge in the EFG charge, which meant that any further grants of security would amount to a breach of covenant. This might have tended to suggest that any further dissipation of or dealing with the equity of redemption was unlikely. I think that it would have been better if this had been disclosed because the court would have obtained a fuller picture if it had done so, but covenants in the form of a negative pledge are commonplace when such security is granted and I have concluded that for the following further reasons it would not have made any difference to my approach and cannot on proper analysis be regarded as a non-disclosure that was material.

73. It is self-evident that the existence of a prior charge, of which despite Kew's submission the court was aware, would inhibit the ability of the chargor to create interests in competition with the prior charge, so the question only related to the surplus after satisfaction of the prior charges. I accept Mr Smith's submission that there were two reasons why it was most unlikely that the negative pledge would not of itself disable Kew from dealing with its equity of redemption to the potential prejudice of its own unsecured creditors, (of which Cardium claimed to be one).

74. The first was that the negative pledge only operated as a personal covenant between EFG and Kew, but the second and more significant in this case was that Mr Brothers

had himself put in evidence on a recent security for costs application in the DIA negligence proceedings to the effect that EFG would consent to a further charge over the property. As this was Mr Brothers' position in that context, it was reasonable for Cardium to take the view, which the court was highly likely to accept, that there was no basis on which the existence of a negative pledge might be an answer to any allegation of risk of unjustified dissipation in this one.

75. The Crown Estate charge was not one to which my attention was specifically drawn, but Mr Smith's submission in his skeleton argument prepared for the hearing before Meade J that Kew accepted that there were no sums due under that charge was not gainsaid by Kew. It follows that further disclosure in relation to it was not in my view material to the application.

76. Mr Bellamy also submitted that there was a failure to disclose the fact that prior to 22 December, Kew had been in negotiations with a lender called Bridge Invest Ltd to refinance Kew's interest in the property, such that it could retain an equity interest of over £4 million. The court was not provided with details of Kew's refinancing negotiations, but I was informed of Cardium's acceptance that any re-mortgage the defendant may wish to enter into in order to pay off the EFG charge and/or DIA was something that it should be entitled to do. In other words, if Kew was able to obtain an offer of alternative secured funding the injunction should not restrict any such dealing and a proviso to this effect was included in the December order (having been included in the draft prepared by Cardium for the purposes of the December hearing).

77. Mr Bellamy contended that the details which were not disclosed were plainly material to Kew's intention to retain its equitable interest in the property. I agree that this material related to what Mr Brothers might have hoped would occur, but at the December hearing I was informed that this was something that might be in the pipeline. I do not consider that any further detail of re-financing negotiations that had been ongoing for some time, but had not so far come to fruition, could have affected the approach that I took to the application.

78. Accordingly, for these reasons, I am satisfied that Cardium has established a real risk of dissipation and that the December order should not be discharged for failure to make full and frank disclosure. Subject to one further point, a limited freezing order in the form of the December order should therefore continue until trial or further order.

79. The further point is that I consider that it would be just and convenient to give Kew greater flexibility in relation to the operation of paragraphs 5 and 6 of the December order. Those paragraphs should be redrafted so as to enable Kew to dispose of or deal with the property so long as:

    i) it retains either an equity of redemption in the property or an interest free of charges in its proceeds of sale of at least £525,000; and

    ii) it gives written notice to Cardium prior to entering into any legal commitment to give effect to any such disposition or dealing.

    The parties should endeavour to agree an appropriate form of words.