



Neutral Citation Number: [2021] EWHC 544 (Ch)

Case No: BL-2020-002167

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (ChD)**

Rolls Building  
Fetter Lane  
London  
EC4A 1NL

9 March 2021

**Before :**

**MRS JUSTICE BACON**

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**Between :**

**VALBONNE ESTATES LIMITED**

**Applicant**

**- and -**

**(1) CITYVALUE ESTATES LIMITED**

**(2) UNITED HOMES LIMITED**

**Respondents**

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**Gary Blaker QC** (instructed by **SBP Law**) for the **Applicant**  
**Harry Hodgkin** (instructed under the public access scheme) for the **First Respondent**  
**Edward Levey QC** (instructed by **Stewarts**) for the **Second Respondent**

Hearing dates: 18–19 February 2021

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**Approved Judgment**

I direct that 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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**Mrs Justice Bacon:**

1. The present dispute is between three property investment companies and concerns the leasehold interest in a property known as Beckton Arms, Beckton Road, London E16 1PY (“the property”). On 10 December 2020 Mann J granted the Applicant (“Valbonne”) a pre-action injunction on a without notice basis, restraining the First Respondent (“Cityvalue”) from selling, disposing of, encumbering or otherwise dealing with the property, restraining the Second Respondent (“UHL”) from acquiring any interest in the property, and restraining both Respondents from registering at the Land Registry any dealing with the property that had already taken place.
2. Valbonne now seeks to continue that injunction to trial. The Respondents seek to have the injunction set aside on the basis of a series of alleged misrepresentations and non-disclosures in the hearing before Mann J, which are said to constitute material breaches of the duty of full and frank disclosure. If the injunction is set aside on that basis, Valbonne says that it should nevertheless be re-granted, either on an interim or a final basis. The Respondents oppose any re-grant of the injunction on various grounds, including that the injunction would be ineffective because the sale to UHL was completed before it was granted, that no claim has been served on UHL, and that the Particulars of Claim that have been produced for the (unserved) claim against UHL do not set out any properly pleaded case that would give rise to a proprietary interest on the part of Valbonne.
3. Valbonne was represented at the hearing by Mr Gary Blaker QC (who did not appear at the hearing before Mann J). Cityvalue and UHL were represented by Mr Harry Hodgkin and Mr Edward Levey QC respectively. In the circumstances of the current Covid pandemic, the hearing was conducted remotely using Microsoft Teams.

**Factual background**

4. Valbonne and Cityvalue are both companies owned by members of the ultra-orthodox Jewish community in North London. The leasehold interest in the disputed property was until at least November 2020 owned by Cityvalue.
5. In January 2015 Valbonne and Cityvalue exchanged contracts for the purchase of the property by Valbonne for a sum of £495,000, with a completion date of 27 February 2015. One of the conditions for completion was, however, that consent to the assignment should be obtained from the freeholder, the London Borough of Newham. Due to difficulties in obtaining that consent the purchase was not completed, and there was then a dispute as to whether the contract had been rescinded. Among other things, the dispute raised the issue of whether Cityvalue had exercised reasonable endeavours to obtain the consent of Newham. In August 2015, with the dispute unresolved, Valbonne registered a Unilateral Notice on the title of the property, which provided notice that there was a contract for sale between Valbonne and Cityvalue.
6. In 2018, having failed to negotiate a settlement of their dispute, Valbonne and Cityvalue agreed that the dispute would be subject to arbitration before the Beth Din of the Union of Orthodox Hebrew Congregations (also known as the

Kedassia Beth Din; for convenience I will simply refer this as the “Beth Din”). The arbitration agreement was signed by Mr Halpert, a director of Valbonne, and Mr Haut on behalf of Cityvalue. The Beth Din arbitration panel consisted of three Jewish halachic judges known as Dayanim, one of whom was Dayan Schwarcz.

7. Meanwhile it appears that in 2017 Cityvalue entered into an option agreement with UHL (a non-Jewish buyer) giving the latter an option to purchase the property for a far higher sum of over £2m. Valbonne discovered this in 2019 during the course of the Beth Din arbitration process.
8. On 1 October 2020 the Beth Din concluded the arbitration with a decision finding that Valbonne was entitled to complete on the purchase; that it had to provide the completion funds within 28 days; and that Cityvalue was then to transfer the property to Valbonne. That decision was provided in writing to the parties in Hebrew, and has subsequently been translated into English. I will refer to this as the First Award.
9. For various reasons – again apparently connected with the consents required from Newham – the funds were not transferred by Valbonne within the 28 day deadline, and on 19 November 2020 there was a further hearing of the Beth Din at which representatives of both Valbonne and Cityvalue were present. Those included Mr Margulies on behalf of Valbonne and Mr Haut on behalf of Cityvalue. In addition Mr Spitzer, the solicitor assisting Valbonne with the arbitration proceedings, attended remotely via video link. That hearing resulted in an oral decision which was not ever put in writing by the Beth Din. I will refer to this for convenience as the Second Award, although as I will explain below the effect of this decision is disputed in various respects. What is not disputed is that the Second Award purported to decide that Valbonne should pay over to the Beth Din the sum of £500,000 by way of completion funds for the purchase of the property, following which Cityvalue was required to provide Valbonne with a TR1 transferring the property to it.
10. The representatives of Cityvalue failed to disclose to the Beth Din, at the hearing on 19 November 2020, that Cityvalue had in fact already signed a TR1 form on 4 November 2020 transferring, or purporting to transfer, the property to UHL. The Beth Din was only informed of this subsequently, although the date on which it was told that is unclear.
11. Notwithstanding that signed TR1, on 20 November 2020 the solicitors for Cityvalue wrote to the solicitors for Valbonne saying “My client has informed me that your client must first send the deposit to the Beis Din and he will then honor his obligations”. On 23 November 2020 Valbonne duly deposited the £500,000 completion funds with the Beth Din. No TR1 was, however, forthcoming from Cityvalue; instead there was then an exchange of emails between the respective solicitors for the parties (Mr Spitzer for Valbonne and Mr Grunhut for Cityvalue) as to the conditions under which the completion funds would be released to Cityvalue.
12. On 29 November 2020, with that point still unresolved, Mr Halpert was told by Dayan Schwarcz that the Beth Din had learned that Cityvalue had purportedly transferred the property to UHL and had signed a TR1 making that transfer. The

next day the solicitors for Valbonne requested the urgent return of the completion funds from the Beth Din. Those funds were returned to them on 1 December 2020.

13. The Beth Din then issued a further written decision on 3 December 2020 which I will refer to as the Third Award. Again, this was issued in Hebrew and was subsequently translated into English. The Third Award recorded that Cityvalue had informed it that a TR1 had been signed in favour of a non-Jewish buyer, and that the Beth Din therefore did not have the power to enforce “anything in this matter”. The Beth Din therefore stated that Valbonne could bring proceedings against both UHL and Cityvalue in the secular courts, but that any claim for damages against Cityvalue had to be pursued in the Beth Din.

### **The injunction application**

14. On 10 December 2020 Valbonne filed an application notice seeking a without notice injunction against both Cityvalue and UHL, restraining their dealings with the property.
15. In support of that application, Valbonne relied upon a witness statement from Mr Halpert. He exhibited a number of documents, including a certified translation of the Beth Din arbitration agreement (which had been obtained on 8 December). He did not, however attach a translation of the First Award. Furthermore, while Mr Halpert did say that Valbonne had sought various amendments to the First Award, including a two-month extension of time for completion, Mr Halpert did not disclose the existence of either the Second or the Third Award. Nor did he disclose the fact that he had been told that the property had been sold already to UHL; rather he said that to the best of Valbonne’s knowledge the sale of the property to UHL had not yet occurred.
16. Valbonne was represented at the hearing by junior counsel, Mr Barnaby Hope, whose skeleton argument said among other things that:
  - i) “... in theory the proposed sale [of the property from Cityvalue to UHL] could take place any time.”
  - ii) “... it appears that the proposed sale from the First Respondent to the Second Respondent is imminent ...”
  - iii) “The Applicant is unable by way of full and frank disclosure to put before the Court any arguable basis upon which the First Respondent could resist the proposed claim, except ... that the Arbitration Agreement was signed by Mr Haut, who was not recognised by Companies House as being a director of the First Respondent at the time.”
  - iv) “The status quo in this case is that the Property is owned by the First Respondent, not the Applicant or the Second Respondent. The Applicant is unaware of any counter-argument that could be raised by the Respondents in respect of this.”
  - v) “Mr Halpert has complied with the duty of full and frank disclosure in every respect that could be anticipated ...”

17. The hearing before Mann J took place at 4.30pm on 10 December 2020, and was conducted remotely via Microsoft Teams. The Respondents had been notified informally of the application during the course of that morning, and were provided with Microsoft Teams details to join the hearing one minute before it started. They did not attend.
18. Valbonne’s note of the hearing records that the judge asked for evidence that Valbonne had the money to complete the sale. On instructions from his solicitors, Mr Hope responded that “although we haven’t received it from the [Beth Din]” there was a second award which amended the First Award, and which gave Valbonne “unlimited time to complete provided we have deposited the money with them which we have done”. The judge then requested an undertaking that this be set out in a witness statement before everything was served on the Respondents.
19. Following that discussion, Valbonne’s note of the judgment of Mann J read as follows:

“This is an application made by claimant for injunction restraining D1 from selling the Property and restraining D2 acquiring any interest in that property. Basis of claim is contract and C has decision from BD that contract should be enforced. The award provides that the Property should be conveyed when the specified purchase price has been paid to the BD and I am told that has been done. In the circumstances and reasons given by Mr Hope in his skeleton argument I believe serious question to be tried, if not a strong claim in this case, and all conditions of American Cyanamid are fulfilled.”

20. The injunction order provided that:

**“The First Respondent must not:**

- (1) Sell, dispose of, encumber or otherwise deal with the leasehold property situated at and known as Beckton Arms, Beckton Road, London E16 1PY, Title Number EGL359506 (‘the Property’)

**The Second Respondent must not:**

- (1) Acquire any interest in the leasehold property situated at and known as Beckton Arms, Beckton Road, London E16 1PY, Title Number EGL359506 (‘the Property’)

**The Respondents must not:**

- (1) In the event that any sale, disposition, encumbrance or other dealing of the Property has taken place which could be registered at the Land Registry, take any steps to register the same.”

21. Pursuant to the undertaking given during the hearing to set out, in witness evidence, the terms of the Second Award, Valbonne’s solicitor Mr Silver signed a statement later that day and filed it with the court. That statement described the Second Award in the following terms:

“2.2 In addition to the translated decision of the Beth Din dated 1 October 2020 there has been a subsequent award made by the Beth Din Tribunal dated 30 November 2020 which can be seen at pages 3–4 of exhibit SS1.

2.3 The decision provides that

2.3.1 The Claimant deposit £500,000 with the Beth Din to be held in accordance with the provisions of their decision;

2.3.2 The [first] Defendant is ordered to transfer the property to the Claimant forthwith;

2.3.3 The completion monies will be held by the Beth Din with the full amount to be released to the [first] Defendant upon successful completion of registration of the transfer;

2.3.4 The Defendant immediately instruct a named solicitor to communicate with the London Borough of Newham to assist in obtaining consent to the transfer; and

2.3.5 That this award of 30 November 2020 replaces the previous award dated 1 October 2020.

2.4 The Claimant deposited the requisite sum of £500,000 with the Beth Din in accordance with this decision.

2.5 The award of 1 October 2020 required that the parties ‘*conclude the purchase within 28 days from the date of signing [that] judgment*’.

2.6 However, as the 30 November 2020 decision supersedes and replaces the 1 October 2020 decision there is no longer a time limit imposed upon completion of the transaction for the transfer to the Applicant to take place and therefore consideration of any such timeframe is no longer an issue for the Court.”

22. The witness statement of Mr Silver then exhibited two documents, both in English, purporting to be translations of the First and Second Award respectively. It is now known that both documents were provided by Mr Spitzer. The translation of the First Award was headed “Decision” and the purported translation of the Second Award was headed “Final Award”. That latter document was dated 30 November 2020 and set out the terms of the Second Award as follows:

“1. The Claimant is ordered to deposit with the Beth Din the sum of £500,000.00 (“the Completion Sum”), being the total amount due from the Claimant to the Defendant for the Property, to be

held by the Beth Din in accordance with the provisions of this Award.

2. The Defendant is ordered to transfer the Property to the Claimant forthwith, by instructing solicitors and procure that they provide a duly executed TR1 to the Claimant's solicitors.
3. The Completion Sum will be held by the Beth Din on terms that the full amount will be released to the defendant upon successful completion of registration of the transfer of the Property to the Claimant at HM Land Registry.
4. The Defendant is ordered to immediately instruct Mr Jonathan Zeckler of Taylor Rose TTKW Ltd to write to the solicitors acting for the London Borough of Newham to confirm that the Defendant has transferred the Property to the Claimant, and to ask the Council's solicitors to liaise with the Claimant's solicitors in obtaining the council's consent to the transfer of the Property. A draft of the email/letter of instructions to Mr Zeckler is first to be seen and approved by the Beth Din.
5. This Award shall replace the previous (Hebrew-language) award of the Beth Din dated 01 October 2020 ("the Previous Award"). For the avoidance of any doubt, the time limit for compliance imposed on the Claimant by the Previous Award is dispensed with, and the Beth Din now acknowledges receipt of the Completion Sum from the Claimant."

### **The claims against Cityvalue and UHL**

23. On 11 December 2020 (i.e. the day following the hearing) a claim form was issued against Cityvalue seeking enforcement of the First Award "as amended on 2 November 2020". UHL was not listed as a defendant to that claim, nor joined as a party to the claim.
24. On 17 February 2021 a separate claim was issued against UHL seeking a declaration that UHL hold the property on trust for Valbonne, an order that the sale of the property dated 4 November 2020 be set aside, equitable compensation (and equitable interest), and/or damages for unlawful means conspiracy or for procuring a breach of contract. The claim was emailed to UHL's solicitors, together with unsigned Particulars of Claim, on the morning of 18 February 2021, i.e. the first day of the hearing in this case. By the time of the hearing it had not, however, been served on UHL as UHL's solicitors had not been instructed to accept service of the claim.

### **Further evidence provided for this hearing**

25. In addition to the evidence before the court at the original hearing (and the first witness statement of Mr Silver filed after the hearing), Valbonne relies on a second witness statement from Mr Silver and a witness statement from Dayan Schwarcz. Cityvalue, for its part, relies on a witness statement from Mr Haut.

UHL relies on a witness statement from Mr Jheeta, its sole director and shareholder, and a witness statement from Mr Valkov, UHL's solicitor.

26. I have also been provided with certified translations of both the First and the Third Award of the Beth Din.

### **The issues**

27. There are essentially two issues for me to determine:
- i) Whether there was any material breach of Valbonne's obligation to provide full and frank disclosure to the court in its application for a without notice injunction.
  - ii) Whether, if there was a material breach of that obligation, I should nevertheless exercise my discretion to continue the order or, if it is discharged, to re-impose the injunction immediately.

### **Breaches of duty of full and frank disclosure: the law**

28. It is well established that in an application for a without notice injunction the duty of full and frank disclosure requires the applicant to draw the court's attention to "significant factual, legal and procedural aspects of the case": *Tugushev v Orlov* [2019] EWHC 2013 (Comm) at §7(i), per Carr J. Carr J summarised, in that paragraph, 13 propositions regarding the nature and depth of the enquiry that has to be made to satisfy that duty, and the circumstances in which an order, once made, will be set aside for material non-disclosure.
29. The propositions set out by Carr J are not contentious and I do not need to repeat them here. I merely emphasise the following points:
- i) Where there has been a material and significant failure by an applicant to give full and frank disclosure, the starting point and the general rule is that the injunction obtained on that basis should be discharged, without renewal. That is for two reasons, as explained by Balcombe LJ in *Brink's Mat v Elcombe* [1988] WLR 1350, at p. 1358. The first is to deprive the wrongdoer of an advantage improperly obtained; the second is to serve as a deterrent to others.
  - ii) The court nevertheless has a general discretion to continue the order or to grant a fresh injunction, notwithstanding a failure to disclose. That discretion should be exercised sparingly, but the overriding consideration will always be the interests of justice.
  - iii) The relevant factors to take into account in that regard will include the degree of culpability with regard to non-disclosure, the relative importance to the application of the matters that were not disclosed, and the injustice to the claimant if the order is discharged, although Carr J emphasised that a strong case on the merits will never be a good excuse for a failure to disclose material facts.



30. I also note the comment of Carr J at §7(vii) that a dispute about full and frank disclosure should not turn into a mini-trial of the merits of the dispute. That would be the case, for example, if an objection of non-disclosure is made on the basis of facts which are themselves disputed, unless the facts relied upon are so plain and obvious that they can readily be established on the face of the evidence. As regards matters of law, the requirement is to identify arguments which it is reasonably anticipated that the absent party would wish to make, rather than to attempt an exhaustive trawl through every possible legal objection that might be taken.
31. It is also important to note that the duty of full and frank disclosure is not temporally limited to the hearing of the without notice application, but continues while the proceedings remain on that basis – i.e. until the first hearing on notice: see Saville J in *Commercial Bank of the Near East v A* [1989] 2 Lloyds Rep 319, 323. Accordingly, if there is a material change of circumstances, that should be drawn to the attention of the court, unless the respondent agrees to the continuation of the injunction. The same point was made by Eder J in *Speedier Logistics v Aardvark Digital* [2012] EWHC 2776 (Comm), at §32.
32. The same must, in my judgment, apply where a party who has obtained an injunction on a without notice basis becomes aware of new information which indicates that the court was given materially inaccurate or misleading information at the original hearing.

#### **Material breaches of the duty of full and frank disclosure in the present case**

33. In the present case both Cityvalue and UHL raise a whole series of matters in relation to which they say Valbonne failed to comply with its duty of full and frank disclosure and gave information that was inaccurate or misleading, in circumstances where there can have been no doubt whatsoever that Valbonne knew of the true state of affairs.
34. Valbonne contends that there were no breaches of the obligation to provide full and frank disclosure, and that even if there was any breach it cannot be considered to have been a material breach.
35. I will consider in turn the breaches of the duty of full and frank disclosure relied upon by the Respondents, which concern the following matters:
  - i) the nature and content of the Second Award;
  - ii) the legal effect of the Second Award;
  - iii) the fact that the completion funds for the property had been returned to Valbonne by the Beth Din by the time of the hearing;
  - iv) the fact that Valbonne had been told that the sale to UHL had already completed by the time of the hearing;

- v) the alleged connections between Cityvalue and UHL, and between UHL and a potential onward purchaser of the property, Beckton Development Limited (“BDL”);
- vi) the scope of the Beth Din arbitration agreement; and
- vii) the nature of the claim against UHL.

*(i) The nature and content of the Second Award*

36. Both Cityvalue and UHL say that the information given to the court about the Second Award, particularly in the first witness statement of Mr Silver dated 10 December 2020, was inaccurate and misleading.
37. I have set out the way in which the Second Award of the Beth Din was described by Mr Silver in his first witness statement. Mr Silver’s evidence on this point was unambiguous: it was that the Beth Din had handed down a written decision on 30 November 2020 in the form exhibited to the witness statement, which superseded and replaced the First Award of 1 October 2020. The purported translation by Mr Spitzer thus headed the Second Award as the “Final Award”.
38. That evidence was, however, comprehensively inaccurate. The Second Award of the Beth Din was given on 19 November, not 30 November, and was a purely oral decision that was never put in writing by the Beth Din whether in Hebrew or English. The purported translation of the Second Award provided by Mr Spitzer, exhibited to Mr Silver’s witness statement, was therefore a translation of a document that never existed: it was a complete fabrication.
39. Not only that, but – as Valbonne knew by the time of the hearing – the terms of the oral Second Award were disputed between the parties, as evidenced by the exchange of emails between Mr Spitzer and Mr Grunhut at the end of November 2020. Mr Spitzer contended in that correspondence that the decision provided for Cityvalue to instruct Mr Zeckler of Taylor Rose to write to the solicitors acting for Newham to confirm that Cityvalue was going to assign the lease to Valbonne, and that the Beth Din would hold the completion funds in escrow pending completion. Mr Grunhut, however, disputed that any conditions were attached to the release of the funds to Cityvalue, other than the requirement for Cityvalue to send Valbonne a TR1 transferring the property to it. No mention of that dispute was made by Mr Silver in his witness statement.
40. Nor is there in any event any evidence before me from those who attended the Beth Din hearing on 19 November 2020 that the Second Award, even in oral form, was in the terms set out in Mr Silver’s first witness statement and the purported translation exhibited to that witness statement:
  - i) Mr Haut’s witness statement agrees that Valbonne was directed to pay £500,000, but denies that there was ever a formal Second Award, and also denies there was any direction that the Second Award was to replace the First, or that any fixed extension of time was ever provided.

- ii) No witness statement has been provided by Mr Spitzer, who provided the purported translation attached to Mr Silver's witness statement; nor has a witness statement been provided by Mr Margulies who also attended the hearing on behalf of Valbonne.
- iii) Of the three Dayanim at the hearing, only Dayan Schwarcz has provided a witness statement. His evidence about the hearing on 19 November 2020 conspicuously does not confirm that the terms of the award were as set out by Mr Silver or Mr Spitzer's purported translation. Rather, he says only that:

“There was also an oral award made on Thursday 19 November 2020, which was not put into writing, which set out that the Applicant had to put the purchase money in the sum of £500,000 into the Beth Din and the First Respondent was required to provide a TR1 ...

Mr Haut, acting on behalf of the First Respondent was present at the Beth Din hearing and heard the award that we intended to give.

During this hearing Mr Haut argued that order of 1 October 2020 meant that time had expired and therefore the First Respondent was free to sell to someone else.

At that hearing we explained to Mr Haut that this was not correct, it was not what we had intended from the award and that accordingly we directed that provided the Applicant put the purchase money into the Beth Din's account the First Respondent was required to provide a TR1.”

- 41. The inescapable conclusion is that the court was seriously misled in what it was told about the Second Award, particularly in Mr Silver's witness statement and the purported translation exhibited to that witness statement. This matter cannot be said to be immaterial. The terms of the Second Award were critical to Valbonne's application, because if Valbonne had not complied with the 28-day time limit imposed by the First Award, then *prima facie* it had no basis for a claim to enforce the purchase agreement through the pursuit of the present proceedings. The substantive claim against Cityvalue therefore only got off the ground if the 28-day time limit in the First Award had been formally and validly amended, as Valbonne contended that it had been. The form and content of the Second Award were therefore essential facts in the establishment of a serious issue to be tried for the purposes of the *American Cyanamid* test.
- 42. I do not accept that the inaccuracy of the information given to the court could have been inadvertent or accidental. Valbonne had two representatives at the hearing (Mr Margulies and Mr Spitzer), both of whom were well aware that the decision was an oral and not a written one. The fact that there was no formal written decision was also expressly referenced in the subsequent correspondence between Mr Spitzer and Mr Grunhut. As I have already noted, it was also apparent from the face of that correspondence that the terms of the oral decision were not agreed between the parties.

43. If, notwithstanding those facts, there was any basis to suggest that the inaccuracy of Valbonne's evidence was due to an innocent mistake on the part of Valbonne and/or its representatives, I would have expected at the very least to see an explanation of that in evidence. It is noticeable, however, that no further witness statement has been provided by Mr Halpert. Furthermore, while Mr Silver has provided a second witness statement for this hearing which acknowledges (without any apology) that the Second Award was "never formalised in writing" and states that the document exhibited to his first witness statement was "therefore a written record rather than a translation", there is no acknowledgement of the fact that the "record" provided set out matters that were known to be disputed between the parties and which even now are apparently not agreed by Dayan Schwarcz. Nor has Mr Silver provided any explanation that would allow me to conclude that the misleading and inaccurate nature of the information previously given was innocent or accidental. Nor is there any explanation of why his first witness statement was not immediately corrected once the error became apparent, rather than waiting until 27 January 2021 when his second witness statement was made.

(ii) *The legal effect of the Second Award*

44. Both Cityvalue and UHL also object that the Second Award in any event had no legal effect, on the basis that the Beth Din was by then *functus officio* and did not have jurisdiction to vary the substance of the First Award, and also on the basis that the Second Award was an oral award and therefore did not satisfy the requirements of s. 52 of the Arbitration Act 1996, since there was (it is said) no agreement that the award could be made orally. Both Mr Hodgkin, for Cityvalue, and Mr Levey QC, for UHL, contended that these matters should have been drawn to the attention of the judge at the original hearing.
45. The response of Mr Blaker QC, for Valbonne, was that these are legal arguments for trial. While the duty of full disclosure does require disclosure of relevant legal points, the applicant does not have to disclose points against it which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if they were present: Lawrence Collins J in *Konamenevi v Rolls Royce* [2002] 1 WLR 1268, §180. These were not, he said, points that were (or should reasonably have been) anticipated by Valbonne at the time of the hearing before Mann J. Even after the hearing, he noted, these points were not raised until the solicitors for UHL wrote on 4 February 2021 raising the *functus officio* point, and then subsequently on 10 February 2021 raising the s. 52 point.
46. As Mann J observed in *JSC Mezhdunarodniy Promyschlenniy Bank v Sergei Viktorovich Pugachev* [2014] EWHC 4336 (Ch), §172, the duty of disclosure in an application without notice extends to defences that are sufficiently obvious, as arguable defences, when thought about. Whether that is the case falls to be judged on the basis of the facts of the individual case, and the mere fact that a defence is subsequently raised by a respondent does not necessarily mean that it should have been anticipated by the applicant at the time of the without notice hearing.
47. In this case both Valbonne and Cityvalue attended the hearing on 19 November 2020 with no suggestion on either side that the Beth Din lacked jurisdiction to

amend its First Award. The correspondence between the parties and their solicitors following the 19 November 2020 hearing likewise gave no indication that Cityvalue considered the Second Award to be ineffective or invalid on any grounds. On the contrary, the emails sent on behalf of Cityvalue positively asserted that Cityvalue intended to honour its “obligations” under the Second Award. Cityvalue’s emails also indicated that it considered that the absence of a written order did not undermine the validity of the Beth Din’s decision.

48. That is, no doubt, why it did not occur to Valbonne to raise, at the without notice hearing, the arguments on *functus officio* and the oral nature of the award that are now put forward by the Respondents. Moreover, as Mr Blaker pointed out, Cityvalue’s conduct in this regard arguably engages (among other things) the provisions on the loss of a right to object under s. 73 of the Arbitration Act. In these circumstances, while the defences raised by the Respondents are certainly arguable and may well have been more apparent if the true nature of the Second Award had been disclosed to the court, I do not consider that they were or should have been sufficiently obvious to Valbonne that the failure to raise these was a breach of the duty of full and frank disclosure.

(iii) *The return of the completion funds to Valbonne*

49. Cityvalue and UHL say that the statements made both at the hearing and in Mr Silver’s witness statement that Valbonne had deposited the sum required to complete the purchase with the Beth Din in accordance with the terms of the Second Award were materially misleading. While the completion funds had indeed been deposited with the Beth Din on 23 November 2020, on 30 November Mr Spitzer requested the return of the completion funds “as a matter of urgency”. Mr Halpert followed that up with a further email to the Beth Din administrator on 1 December, requesting the return of the funds by 2pm that day. The completion funds were duly returned to Valbonne that afternoon.
50. Mr Blaker accepted that the information given to the court was a half-truth, but contended that it was not misleading, since the fact that the monies had been returned to Valbonne would not have made a fundamental difference to the order made.
51. I disagree. In my judgment, as Mr Levey submitted, this was a highly material matter. It is apparent from the note of the hearing that the statement regarding the deposit was made by counsel specifically in response to a question from the judge as to what evidence there was that Valbonne had the funds to complete the purchase. The judge must have understood from the answer he was given that the funds remained with the Beth Din, as is evident from his judgment which expressly recorded that the property was (pursuant to the Beth Din’s award) to be conveyed when the purchase price had been paid to the Beth Din, “and I am told that has been done”. The point was further reinforced by Mr Silver’s first witness statement which stated that Valbonne had deposited the requisite sum of £500,000 with the Beth Din in accordance with the Second Award, without making any mention of the fact that this sum had been returned to Valbonne (at Valbonne’s request) eight days later.

52. If the judge had known that the funds had in fact been returned to Valbonne, that would undoubtedly have been a highly material factor to take into account in determining whether to grant the order sought. In particular, as Mr Levey observed, the judge may well have required further evidence that the funds remained available to complete the purchase before granting the injunction sought.
53. Again, the failure to disclose the return of the deposit cannot be described as inadvertent or accidental. That statement by Valbonne's counsel at the hearing that "we have" deposited the money with the Beth Din was expressly made on instructions, in circumstances where Valbonne was well aware that the funds had been returned to it eight days later. A full and frank statement inevitably had to disclose that fact.

*(iv) Failure to inform court that sale had already (arguably) occurred*

54. Both Cityvalue and UHL rely on Valbonne's failure to disclose to the judge the fact that it had been told, on 29 November 2020, that the property had in fact already been sold to UHL.
55. Mr Blaker accepted that this fact was not disclosed to the judge. But (as with the issue of the completion funds) he contended that this was not a material fact to raise at the hearing, in circumstances where it was not clear at the time of the hearing that completion had indeed taken place, such that Valbonne genuinely believed that the sale had not been completed.
56. Again, I disagree. The statements made in Mr Halpert's witness statement, and in the skeleton argument of counsel for the hearing, were seriously and materially misleading. As I have set out above, Mr Halpert contended that to the best of Valbonne's knowledge the sale to UHL had not yet occurred. The skeleton argument likewise asserted robustly that Valbonne was unaware of any arguable basis upon which Cityvalue could resist the claim to enforcement of the First Award save for the point about Mr Haut's status as a director of the company, that the status quo was that "the Property is owned by the First Respondent, and that Valbonne was "unaware of any counter-argument that could be raised by the Respondents in respect of this". Those statements were manifestly untrue. Valbonne was in fact well aware of the obvious counter-argument that would be raised by Cityvalue both in relation to the enforcement of the First Award and in relation to the ownership of the property, since it was the argument that *had already* been raised by Cityvalue before the Beth Din: namely that the property could not be transferred to Valbonne since it had already been sold to UHL.
57. It is, moreover, utterly fanciful to suggest that this fact was immaterial for the purposes of the without notice application. As Valbonne knew, Cityvalue's assertion that the property had already been sold to UHL was the express basis for the Third Award of the Beth Din, permitting Valbonne to bring civil proceedings. The very premise for the application before Mann J was therefore the claim by Cityvalue that a transfer of the property to Valbonne could no longer take place.

58. Moreover, even if Mr Halpert did genuinely believe that the sale to UHL had not completed, the fact that both he and the Beth Din had been told the contrary was a critically important fact to disclose to the court, since the court would then inevitably have had to enquire whether there was indeed a serious issue to be tried in the claim to enforce the First Award, notwithstanding the Beth Din's own decision that it was unable to enforce that award following the supposed sale to UHL. The court would also have had to consider whether Valbonne's arguments on balance of convenience and the status quo had any merit in those circumstances.

*(v) Alleged connections between Cityvalue and UHL, and between UHL and BDL*

59. The next matter relates to the claims that were made in the without notice application regarding the relationships between Cityvalue and UHL, and between UHL and BDL. UHL says that on both of these points Valbonne made representations in its without notice application that were not based on any evidence whatsoever.

60. As to the first of those points, Mr Halpert claimed in his witness statement that Cityvalue and UHL were "seemingly controlled by the same person". He used that to support an inference that the sale to UHL was not an arm's length transaction. In fact there was no evidence to support that claim, nor has any further evidence been provided for the purpose of this hearing. On the evidence before me, therefore, this was a matter of pure assertion by Mr Halpert.

61. As to the second point, the skeleton argument for the without notice application noted that the Land Registry documents suggested that there might be a potential onward sale of the property from UHL to BDL, and then commented that UHL and BDL were "owned by the same person". Again, however, there was no evidence of common ownership at the time of the without notice application, nor has any evidence of that subsequently been provided. To the contrary, the evidence of Mr Valkov for UHL is that the two companies are separate companies with no common owners.

62. Mr Blaker's response was to say that it is not possible to know what connections there are between the various parties, and that this will be a matter for trial. That is not good enough. Assertions as to the ownership of and therefore connections between these companies were made at the without notice hearing, with no evidential basis. They are assertions that either should not have been made at all, or if they were made then at the very least the duty of full and frank disclosure required Valbonne to draw the lack of evidence to the judge's attention and explain that the Respondents might seek to dispute these points on the facts.

63. Nor can these points be characterised as immaterial: the skeleton argument for the without notice hearing itself said that the application had been made without notice because of, among other things, "the connection between the Respondents" leading to a risk that they could seek to complete the sale forthwith if notice was given to them. The skeleton argument also contained a section headed "Relevant facts" which included the claim that UHL and BDL were owned by the same person, indicating that Valbonne itself considered this point to be material to its application.

*(vi) Scope of the Beth Din arbitration agreement*

64. In its skeleton argument for this hearing, Cityvalue raised several matters relating to the scope of the Beth Din arbitration agreement and the terms of reference of that arbitration. At the hearing, however, these points were not seriously pursued by Mr Hodgkin as being breaches of the duty of full and frank disclosure, as opposed to points that might in due course be raised at any trial of the substantive claim.

*(vii) Nature of the claim against UHL*

65. Finally, UHL relies on a series of complaints about the basis of any claim against UHL. While these are characterised as non-disclosure points, it seems to me that the more fundamental objection raised by these matters goes to the question of whether there is in any event a proper basis for continuing or re-granting an injunction against UHL, and I will therefore address these on that basis.

**Exercise of discretion to continue or re-grant the injunction**

66. As Carr J noted in *Tugashev* at §7(xi), the court will in principle discharge an order made following a substantial non-disclosure even if the order would still have been made had the relevant matter been brought to its attention at the without notice hearing. In the present case the non-disclosures and inaccurate representations set out at (i), (iii), (iv) and (v) above are all, in my judgment, substantial matters, all the more so when taken together. Moreover, as I have set out above, if the relevant facts had been properly disclosed, they might well have affected the outcome of the hearing in a material way.
67. That renders the inaccuracy of the information given to the court at, and immediately following, the without notice hearing in this case all the more serious. I have also rejected the suggestion that the breaches of the duty of full and frank disclosure were inadvertent or accidental. In those circumstances the starting point must in my view be the discharge of the injunction.
68. The question is then whether there is such a compelling case of injustice to Valbonne, if the injunction is discharged, that the court should exercise its discretion to continue or re-grant the injunction notwithstanding the serious breaches of the duty of full and frank disclosure that occurred in this case.
69. Contrary to Mr Blaker's submissions, I do not consider that Valbonne has demonstrated such injustice in this case, whether in relation to its claim against Cityvalue or its prospective claim against UHL.
70. In relation to the claim against Cityvalue, Mr Valkov says that the sale to UHL completed on 4 November 2020; the TR1 was signed on the same date; and the signed TR1 was filed with the Land Registry on 10 December 2020. None of that is disputed, in terms, by Valbonne in its evidence. On the face of the evidence, therefore, the sale enjoined by the injunction has taken place and the continuation (or re-grant) of the injunction against Cityvalue will therefore be of no practical effect.



71. Mr Blaker's response to that was to suggest that UHL may not have paid the full purchase price to Cityvalue, and that if that was the case then no completion has actually taken place and UHL is not entitled to be registered as the owner of the property. The basis for that submission was the fact that the original option agreement specified a purchase price of over £2m, whereas the TR1 signed in favour of UHL shows a consideration of only £1.1m. But the fact that the completion price ultimately paid may have been lower than the price specified in the option agreement does not of itself allow an inference to be drawn that completion has not occurred, and Valbonne does not rely on any other evidence suggesting that completion has not taken place. Mr Hodgkin also pointed out that there is not any evidence that Valbonne has made enquiries of Cityvalue and UHL as to whether the sale did in fact complete with full payment of the purchase price. In those circumstances Valbonne's submissions in this regard are pure speculation, and do not come close to establishing a compelling case of injustice if the injunction is discharged.
72. As for Valbonne's claim against UHL, the same problem arises in relation to the part of the order that prohibits it from acquiring any interest in the property. Even leaving that aside, however, Valbonne's request for the continuation (or re-grant) of the injunction is in my judgment fatally undermined by the fact that the cause of action establishing any proprietary interest of Valbonne in the property remains entirely unclear.
73. In the without notice hearing, it was implied that UHL would be party to the claim against Cityvalue to enforce the Beth Din's decision(s) in the arbitration procedure. That can be seen from (at least) the undertaking given by Valbonne, set out in Schedule 2 to the injunction order:
- “To issue a claim for enforcement of the Decision under r62.18 CPR and pay the appropriate fee forthwith and to serve the same on the Respondents as soon as practicable”.
74. In fact, however, as I have set out above, when the claim against Cityvalue was filed on 11 December 2020, that claim was brought only against Cityvalue, and UHL was not listed a defendant or otherwise joined as a party to those proceedings. Nor was any other claim served on UHL following the hearing. All that had been done by the time of the return date was that on 17 February 2021 a claim form was issued pleading a quite different claim against UHL, accompanied by Particulars of Claim which were unsigned. That claim form and unsigned Particulars of Claim were not served on UHL but were emailed to UHL's solicitors at 11:36 a.m. on the morning of the hearing in this case, which started at 2:00 p.m.
75. I agree with Mr Levey's submission that this is simply not good enough. More than two months elapsed between the without notice hearing and the return date before me, which gave Valbonne ample time within which to formulate and plead its case against UHL, issue its claim, and serve that upon UHL in good time before the hearing. I have not seen any satisfactory explanation of why this was not done. Mr Blaker's submission that the basis of the claim against UHL was at least set out in his skeleton argument is not an answer to this: the outline of points relevant to the proposed claim against UHL in Mr Blaker's skeleton argument (which was

in any event not filed until the afternoon of 15 February 2020) fell far short of what was required to plead a proper claim against UHL.

76. Mr Levey further objected at the hearing that the foundation of the proprietary claim against UHL, as set out in the unsigned Particulars of Claim, is a claim of dishonest assistance in a breach of trust, in circumstances where there is no evidence of dishonesty by UHL before the court. He also contended that the facts pleaded in the Particulars of Claim are demurrable in any event since they do not specifically show that UHL was dishonest (as opposed to negligent or innocent) in its purchase of the property: *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1, §§183–189 (per Lord Millett). He also submitted that even if dishonest assistance was established, it would not give rise to a proprietary remedy such as to justify the continuation of the injunction, referring in that regard to the analysis in *Williams v Central Bank of Nigeria* [2014] UKSC 10.
77. In further written submissions provided, with the court's permission, following the hearing Mr Blaker did not take issue with any of those submissions. Instead, he submitted that Valbonne retains a proprietary interest in the property on the basis of knowing receipt of property transferred in breach of trust. That is, however, a different case that is not pleaded in the Particulars of Claim, and no draft amendment reflecting that new case has been produced. If anything, therefore, this serves only to emphasise the absence of any clearly articulated proprietary claim against UHL.
78. In those circumstances I am unable to conclude that there is a sufficiently clear and compelling case of injustice to Valbonne, if the injunction is discharged, that I should exercise my discretion to continue or to re-grant the injunction that was obtained on the basis of serious and substantial breaches of the duty of full and frank disclosure.

## **Conclusions**

79. The injunction ordered by Mann J on 10 December 2020 will therefore be discharged and will not be re-granted.