Neutral Citation Number: [2022] EWHC 2137 (Ch)

Case No: PT-2021-000836

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

Rolls Building, 7 Rolls Building,
Fetter Lane,
London EC4A 1 NL
Date: 11 August 2022

**Before** :

**HH JUDGE DAVIS-WHITE QC**
**(SITTING AS A JUDGE OF THE HIGH COURT)**

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**Between :**

(1) AMMAR AL ASSAM
(2) MOHAMED KHALID AL ASSAM
(3) AHLAM ABU AL TIMEN
(4) ZEENA AL ASSAM
(5) HAIDER AL ASSAM
(6) JULIANA ANDRIA KHALIL BAMIEH
(7) LAITH AL ASSAM
(a child by Ammar Al Assam, his litigation friend)
(8) FARIS AL ASSAM
(a child by Ammar Al Assam, his litigation friend)
(9) AAA GROUP INC
(10) HROSTENCO COPORATION

**Claimants**

-and-

DIMITRIOS TSOUVELEKAKIS

**Defendant**

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**Mr Simon Adamyk and Ms Jessica Powers** (instructed by **DWF Law LLP**) for the **Claimants**
**Mr David Head QC and Ms Clarissa Jones** (instructed by **Peters & Peters Solicitors LLP**) for the **Defendant**

Hearing dates: 19, 20, 25 May 2022

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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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HH JUDGE DAVIS-WHITE QC

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 11 August 2022

## HH Judge Davis-White QC :

## Introduction

1. On 25 May 2022, following a two-day hearing on 19 and 20 May 2022, I decided that a worldwide freezing order should be made against the defendant. This was on the application of the claimants dated 29 September 2021, which was before me. However, I said that I would provide the reasons for that decision separately in writing. The detailed terms of the order were then settled at such hearing. So far as matters were in dispute, I made various decisions and gave reasons at the time, save in relation to one matter. That related to costs. I ordered that the costs should be reserved and, whilst indicating in broad terms my reasons for that decision, I said that I would also enlarge upon such reasons in writing. This sets out my reasons for both the granting of the freezing order and the order for costs that I made.

2. By way of very broad summary, the claimants bring various claims against the defendant in connection with investments made by two Cypriot trusts. The claims involve allegations regarding the defendant's role in advising upon and/or bringing about and/or reporting (or failing to report on) such investments. The investments in question appear to have, in some cases, experienced significant loss in capital value compared with the sums invested. The losses currently claimed, which include a claim for lost investment returns on the sums which were invested, are in the region of US$16 million. In other cases, the losses are said to amount to loss of income/capital growth by reason of the relevant sums apparently not being invested at all. The 1st to 8th claimants are beneficiaries, or potential beneficiaries, under the relevant trusts. The 1st and 2nd claimants are also the settlors of the trusts. The 9th and 10th claimants are companies owned by the trusts, which companies owned and held the underlying relevant trust investment assets.

3. The court has already dealt with the question of whether the English court should decline jurisdiction and stay the proceedings on the grounds of "*forum non conveniens*" or, put another way, on the basis that Cyprus is clearly or distinctly the more appropriate forum for determination of the claim. That application by the defendant was rejected by Judge Jonathan Richards sitting as a Deputy Judge of the High Court for the reasons set out in his judgment dated 7 March 2022 ([2022] EWHC 451 (Ch)) (the "March 2022 Judgment"). The March 2022 Judgment sets out a very helpful explanation of these proceedings, the claims brought and the potential issues that are likely to arise. The decision that that application should be determined before the application for a freezing injunction explains some of the delay in the court dealing with the freezing injunction application, now before me.

4. The claims in the proceedings involve allegations of breaches of the duty of care in tort, breach of fiduciary duty, deceit, dishonest assistance in the breach by the trustees of their fiduciary duties, an alternative claim in tort under Swiss law and a contractual claim under Swiss law by the 9th and 10th claimants. The claims (other than those brought under Swiss law) are brought under Cypriot law. At this stage at least, it appears uncontentious that Cypriot law is the relevant applicable law in respect of the non-Swiss law claims and that it does not materially differ from English law.

5. The claimants seek a worldwide freezing injunction. They say that the classic requirements for such relief are met, namely:

(1) The claimants have a good arguable case on the merits of the substantive claims.

(2) The defendant has insufficient assets within the jurisdiction to settle the claims but has assets outside the jurisdiction.

(3) There is a real risk of dissipation or secretion of assets by the defendant so as to render any judgment against him which the claimants may obtain worthless: such risk is demonstrated (in broad terms) by the underlying facts forming the relevant causes of action, what is said to be unsatisfactory evidence from the defendant on this application and that the defendant has the tools to effect the same by reason of the network of worldwide entities that he has used in the past and which is available to him.

(4) In all the circumstances, it is just and convenient that an order should be made.

6. Again, in very broad terms only, the defendant's position is as follows:

(1) By affidavit dated 20 April 2022, whilst making clear that he vehemently rejects all and any allegations of wrongdoing, breach of duty and dishonesty, the defendant made clear that he is prepared to accept (but for the purposes of the current application only) that the claimants have a good arguable case in respect of the claims advanced (but that various undisputed matters make the claims "implausible").

(2) I did not detect that the defendant really disputed the claimants' case regarding his assets and their location.

(3) There is no real risk of dissipation or secretion made out. That is so looking at, in broad terms, the underlying causes of action which are asserted, the delay in bringing this application and in bringing it to a hearing and the good character of the defendant.

(4) It is not just or convenient to make an order. In addition to the points in (3), such an order would be excessively onerous and have severe consequences for the defendant.

**The parties, connected persons and legal representation**

7. I take the following facts from the Particulars of Claim. A defence was due to be served in the month or so after the hearing and so the defendant's case, so far as it was then disclosed, had to be gleaned from the evidence that he had filed to the date of the hearing both on the application before me and the earlier application made by him challenging the jurisdiction of this Court.

8. In brief, the first two claimants are settlors and beneficiaries respectively of two Cypriot trusts, the AAA Family Trust (the "AAA Trust") and the Hamza Family Trust (the "Hamza Trust") (together the "Trusts"). Before me, and for convenience, the first claimant was referred to as "Ammar" and the second claimant was referred to as "Mohamed". I adopt the same convention, with no disrespect intended.

9. The third to eighth claimants are also beneficiaries (or potential beneficiaries to the extent that the trusts are discretionary trusts) under one or both of the Trusts and members of the same family.

10. Ammar and the fourth and fifth claimants are children of Mohamed and his wife, the third claimant. The sixth claimant is married to Ammar. The seventh and eighth claimants are the children of Ammar and the sixth claimant. The first to eighth claimants are all resident in Dubai, United Arab Emirates.

11. Ammar and Mohamed own are majority owners of and operate a family business, Dewan Architects & Engineers. That business is based in Dubai, with branches in several other countries.

12. The defendant is a financial and investment advisor and investment manager. He has had a long relationship with the first two claimants, both on the basis of personal friendship and as professional advisor. He was involved in the setting up of the Trusts and with certain investment decisions thereafter taken.

13. The AAA Trust was established by Ammar as settlor by Deed dated 2 December 2009. At all material times, the main asset of the AAA Trust was the entire shareholding in a Panamanian incorporated company, AAA Group Inc ("AAA Group"), the ninth claimant.

14. The Hamza Trust was established by Mohamed as settlor by Deed, also dated 2 December 2009. At all material times, the main asset of the Hamza Trust was the entire shareholding in a BVI incorporated company, Hrostenco Corporation ("Hrostenco"), the tenth claimant. That shareholding was held indirectly. The shareholding in Hrostenco was held in its entirety by Vector Projects Limited ("Vector"), a company incorporated in the Seychelles, as nominee. Vector was also the sole director of Hrostenco.

15. Each Trust is governed by the International Trust Law of the Republic of Cyprus and subject to the jurisdiction of, and to be construed in accordance with the laws of, Cyprus. The courts of the Republic of Cyprus are the forum for the administration of the Trusts.

16. Each of AAA Group and Hrostenco was the relevant investment/asset holding company of the relevant Trust. Each company had, at all material times, USD and Euro bank accounts and custody/brokerage accounts at a Swiss financial company, based in Geneva: Kendra Securities House SA (formerly known as Decova SA) ("Kendra"). Some assets were held at sub-custodians of Kendra, each of which was a Swiss bank: Cornèr Banca SA (as regards AAA Group) and Banque Pictet & Cie (as regards Hrostenco).

17. At all material times until about January 2020, the trustee of each of the Trusts was a Cypriot incorporated company: Latimer (Management Services) Limited ("Latimer"). Following the discovery of the matters of which complaint is made in these proceedings, Latimer was replaced as trustee of each of the Trusts by Assam Family Trust Limited, a Cypriot incorporated company.

18. At all material times, the two directors of and shareholders in Latimer were Mr Antonis Partellas and Mr Stelios Kiliaris. Both these men are accountants. They are also directors of and shareholders in Alliott Partellas Kiliaris Ltd ("APK"), a Cypriot accountancy and fiduciary company.

19. A Ms Antonia Kyriakou ("Ms Kyriakou") was at all material times an employee of APK. She was an authorised signatory on the accounts of each of AAA Group and Hrostenco with Kendra.

20. As regards control over AAA Group and Hrostenco, and their respective assets, at all material times in relation to which complaint is made:

    (1) Latimer held a general power of attorney to conduct and manage the property and affairs of AAA Group.

    (2) Vector was the sole director of Hrostenco. At all material times a director of Vector and its sole shareholder was Mr Andreas Partellas (the father of Mr Antonis Partellas). Latimer and those behind it therefore had full control over the affairs of Hrostenco.

    (3) Ms Kyriakou of APK, as said, was an authorised signatory on the accounts of each of AAA Group and Hrostenco with Kendra.

    (4) A BVI company, Tiger Capital Partners Limited ("Tiger Capital") was appointed asset manager in relation to the brokerage accounts held by AAA Group and Hrostenco with Kendra. This was done under two Asset Management Mandate documents dated 27 January 2010, governed by BVI law, one for each Trust company ("the Asset Management Mandates"). These documents give wide discretionary investment powers to Tiger Capital. They seek to exclude, or at least severely restrict, any liability of Tiger Capital in respect of its investment powers under the mandates and permit it to invest in assets in which it might have an interest or involvement. Tiger Capital is a company beneficially owned by the defendant. The relevant asset management mandates were signed on behalf of Tiger Capital by the defendant pursuant to a power of attorney granted to him by Tiger Capital.

    (5) AAA Group and Hrostenco executed (through Latimer and Vector respectively) two documents entitled "Powers of Administration in favour of Third Parties" (one for each Trust) each dated 15 December 2009 (the "Powers of Administration"). These conferred power on the defendant personally to administer and manage all assets and securities deposited in AAA Group's and Hrostenco's respective Kendra accounts. Among other terms, the defendant was not authorised to withdraw funds or assets held in either account or to pledge them. He did have an entitlement to receive all statements of account and deposits of securities.

21. The claimants were represented by Mr Adamyk and Ms Powers, instructed by DWF Law LLP. The defendant was represented by Mr Head QC and Ms Jones, instructed by Peters & Peters Solicitors LLP. I am grateful to Counsel for their helpful presentations, both oral and written, and especially for the extra documents that were

produced to explain certain matters further. I am also grateful to the solicitors for their work, not least in producing a helpful and workable electronic bundle.

## The history of the investments

22. Properly to understand the cases of the parties as to why a freezing injunction should or should not be made, it is necessary to set out the history in some little detail. This follows not just because the claimants rely upon the causes of action and the facts said to give rise to them as a key plank in their argument that there is a real risk of dissipation, but because the defendant asserts not only that the alleged causes of action do not demonstrate any real risk of dissipation but that the causes of action are "implausible" on the basis of matters that, it is said, the claimants do not dispute.

23. The following narrative is based on the pleadings and witness evidence before me. However, I should stress that I am dealing only with matters as they have been put forward at this interim stage and that to the extent that any matters of fact may be contentious the resolution and determination of the true position will be on a different occasion. I assume for present purposes that the claimants' evidence is correct, save to the extent that it is incredible or shown to be untrue by documents or other evidence. As it happens, I have not identified any evidence of the claimants bearing either or both of those hallmarks.

### (1) The background to the setting up of the Trusts

24. The defendant has a long relationship with the 1st and 2nd claimants and especially Ammar.

25. Ammar and the defendant first met in 1997 in Boston, USA. Ammar completed an unpaid internship under the defendant's supervision at Prudential Securities Inc ("Prudential") in Boston. Also in that year, Ammar opened a personal trading account with Prudential and the defendant provided advice and investment recommendations to Ammar in relation to such account. In about 1998, Mohamed and his wife also opened a trading account with Prudential which was managed by Ammar and the defendant, the latter providing advice and investment recommendations in relation to such account.

26. In about November 2002 Mohamed and his wife closed their account with Prudential and opened a new one with HSBC Republic Bank Suisse. This was on the recommendation of the defendant who continued to manage, advise upon and provide investment advice in relation to such account.

27. In about 2006-2007 the defendant advised Ammar and Mohamed to utilise a trust structure for wealth protection and financial planning. Two trusts were to be set up.

28. The first trust, in respect of Mohamed, was set up and was referred to before me as the "First Hamza Trust". The relevant trust investment company was Hamza Management Inc (a BVI incorporated company). The entirety of its issued share capital was held on trust for Mohamed from about August 2007 and for Mohamed and his family from about April 2008.

29. The second 'trust' investment vehicle was Laith Holdings Limited, another BVI incorporated company, which held various assets contributed by Ammar. The share

capital of Laith Holdings Ltd was intended to be held on trust for Ammar and his family but formal documentation to this end was never put in place.

30. Ultimately, the Trusts replaced the First Hamza Trust and the Laith Holdings arrangements.

31. The defendant played a key role in the setting up of the AAA Trust and the Hamza Trust and, say the claimants, thereafter played a key role in their management and in the decisions to invest made by the relevant trust investment companies.

32. Over the years, say the claimants, a close relationship of friendship and trust developed between the defendant and Mohamed, Ammar and their families. As well as the trusts that I have referred to, the defendant from time to time provided ad hoc financial and investment advice to Ammar and Mohamed and members of their families personally (e.g. to Haider, Ammar's brother and the fifth defendant). In addition, there was frequent social contact such as family holidaying together and attendance at respective weddings.

### (2) The setting up of the Trusts

33. The two Trusts were set up as I have described in December 2009. In effect, it involved the transfer of the First Hamza Trust and the Laith Holdings arrangements from the BVI to Cyprus.

34. The Trusts were set up following recommendations from the defendant to Ammar/Mohamed. The Particulars of Claim set out in detail the claimants' case as to the central role of the defendant in the establishment and administration of the Trusts (see e.g. paragraphs 30 to 34).

35. In particular, the claimants say that:

(a) all of Ammar's and Mohamed's dealings in relation to the Trusts until 2019 were through the defendant;

(b) all communications by Ammar or Mohamed in relation to the investments to be made with the Trusts' money were with the defendant;

(c) the defendant, over some 8½ years, provided to Ammar (and, through him, to Mohamed in respect of the Hamza Trust) certain portfolio reports (the "DT Portfolio Reports") which, as explained below, purported to show the assets and their value invested in by the Trusts;

(d) any requests by Ammar or Mohamed for distributions from the Trusts were always made to the defendant and were always swiftly actioned exactly as requested; and

(e) neither Ammar or Mohamed knew who else to contact in relation to the Trusts.

36. Once the Trusts were set up, at all material times it was the defendant who was the only individual providing investment advice and investment management services to the Trusts. The claimants' case is that Latimer and all other entities and persons were, in effect, carrying out the investment and management decisions taken by the defendant

and that none of the relevant trust entities properly reached any independent decisions of their own. This is likely to be denied by the defendant.

37. The Trusts received, in the case of the Hamza Trust, the assets of the First Hamza Trust and the proceeds of the HSBC account cited at paragraph 26 above, and, in the case of the AAA Trust, the assets from Laith Holdings. After these initial transfers, Mohamed and Ammar made further transfers of assets into their respective Trusts and also received distributions from such Trusts.

38. In total Ammar contributed about US$3,087,000 to the AAA Trust by way of cash and securities, and Mohamed contributed about US$6,500,000 to the Hamza Trust. In the period to 23 November 2020, Ammar received cash distributions from the AAA Trust in the approximate sum of US$980,000 and Mohamed received cash distributions from the Hamza Trust in the approximate sum of US$3,500,000.

39. The claimants say that the intended investment policies of the Trusts, as agreed between Mohamed/Ammar and the defendant, were a continuation of the same policies which had been followed by the First Hamza Trust. So much seems common ground. However, there is a fundamental disagreement as to what those policies were. The claimants say that the key agreed policy involved capital preservation. They point to a number of contemporaneous documents and communications between Ammar/Mohamed and the defendant as regards this. The defendant denies this and says that the agreed investment policy was much more risky. In fact, the actual written investment policy formally adopted for each Trust shortly after the same was established by their respective trustee, Latimer, was much more high risk. Ammar and Mohamed say that they were never consulted about nor shown nor did they ever agree to the written investment policy apparently adopted by Latimer for each Trust.

40. The asserted causes of action are directed to five investments of which complaint is made. However, one of the alleged causes of action, in deceit, relates to the manner in which the defendant provided, on an ongoing basis, reports as to the investments made by the two Trusts. I deal first with the investments of which complaint is made and then the factual background regarding the reports provided by the defendant.

## (3) The investments of which complaint is made

41. Complaint is made in relation to five investments, but without prejudice to the ability to make further complaint as the claimants' investigations continue. The investments are said to have been made at the instigation, and on the recommendation and instructions, of the defendant. The five investments in question are:

    (a) Investments in Rolaware Limited ("Rolaware"), a Cypriot incorporated company, incorporated on 31 December 2007. It later changed its name in December 2012 to Fixed Microwave Holdings Limited, though I will refer to it simply as "Rolaware" throughout for convenience.

    (b) Investments in Dremoplex Limited ("Dremoplex"), a Cypriot incorporated company, incorporated in March 2012. It provided financial support to Rolaware and then later acquired Rolaware's wholly-owned Greek subsidiary in June 2012.

(c) Payments to a Mme Lisa Locca.

(d) Payments to the Givols.

(e) Payments to NewLead JMEG LLC, a company incorporated in Delaware, USA and an indirect subsidiary of NewLead Holdings Limited, a Bermudian incorporated company listed on the NASDAQ stock exchange.

42. Between July 2010 and May 2015, some 60% of the total funds that Ammar and Mohamed contributed to the Trusts were represented by investments in Rolaware and Dremoplex. Each of those companies is, or was, a telecommunications company incorporated in Cyprus but carrying on businesses in mainland Greece. Their businesses involved the exploitation of telecommunications licences. From time to time, shares acquired by the Trusts in Rolaware and Dremoplex were held by a nominee company Hamervate Limited, incorporated in Cyprus. APK was the auditor of both Rolaware and Dremoplex. Put broadly, the claimants complain that there was an over concentration of the Trust assets in these investments, that the investments were extremely risky and that the defendant was connected with the two companies and that this connection tainted the investment decisions made. Accordingly, investments in these companies should never have been made.

**(3a) Trust investments in Rolaware**

43. The investments in Rolaware of which complaint are made can be summarised as follows:

(a) AAA Group invested just over €650,000 in the period between November 2010 and April 2012. This represented some 29.25% of the amount settled into the AAA Trust. In return AAA Group received a shareholding of 4.63% of the total issued share capital in Rolaware (being a combination of Ordinary Shares and Class C Shares). AAA Group was first registered as a shareholder of Rolaware on 30 June 2011 (some 11 months after having invested approximately €50,000).

(b) Hrostenco invested just over €2.2 million in Rolaware in the period July 2010 to November 2012. This represented some 33.85% of the amount settled into the Hamza Trust. In return Hrostenco received some 41.23% of the total issued share capital of Rolaware (being a combination of Ordinary Shares and Class C Shares). Hrostenco was first registered as a shareholder of Rolaware on 30 June 2011 (over a year after investing approximately €100,000 in Rolaware).

(c) Of the share capital of Rolaware held for the Trusts, it was not until 2017 (some five years after the last investment by the Trusts) that Hamervate Limited (a Cypriot company and original director of Rolaware) entered into two declarations of trust declaring that it held shares in Rolaware on trust for the AAA Group and Hrostenco respectively.

44. Rolaware was incorporated on 31 December 2007.

45. On 6 June 2008, Mr Andreas Partellas was appointed one of the then four directors. Mr Stamoulis Stratos was also appointed a director on this date. He is the defendant's

father-in-law. He was the founder and operator of a Greek incorporated company called Karre Projects SA, which later co-operated with Rolaware (or its then Greek subsidiary) in the installation of base stations at sites in Greece.

46. On 12 June 2008, Rolaware entered into an agreement with Tellas SA ("Tellas") / Wind Hellas ("Wind"), Greek incorporated companies, to purchase a licence (the "Licence") known as an Individual Right to Use of Radio Frequencies for Fixed Wireless Access at the spectral band of 25/26 GHz in Greece. The Licence had been granted by the Greek telecommunications regulator, the National Telecommunications and Post Commission of Greece (the "EETT"). Tellas had been required by the EETT to dispose of the Licence following a merger with Wind, which also possessed a licence to use certain radio frequencies of the wireless telecommunications band in Greece.

47. The purchase price that Rolaware was to pay under the acquisition agreement was some €5.25 million. €2 million (originally €2.5 million) was to be paid on approval by the EETT of the transfer to Rolaware, and the balance of €3.25 million at a later date. Payment of this balancing payment was guaranteed by Karre Projects SA, the company associated with the defendant's father-in-law, Mr Stratos.

48. The accounts for Rolaware for the period 31 December 2007 to 31 December 2008 record that the independent auditors were APK and that the company secretary was Latimer.

49. On 9 March 2009, Deloitte Business Solutions SA ("Deloitte") was engaged in connection with the preparation of a five-year business plan for Rolaware. The resulting report was dated 30 September 2009. It was provided on the basis of data and information provided by Rolaware's management. The management included the defendant who had been appointed a director of Rolaware, in place of a resigning director, on 1 April 2009.

50. On 13 July 2010, Rolaware's first set of accounts for the period to 31 December 2008 were approved showing a net loss of just over €3,800 and net liabilities on the balance sheet of just over €2,800.

51. On 14 July 2009, the EETT had given provisional regulatory approval for the transfer of the Licence to Rolaware. However, this approval was conditional upon Rolaware increasing its equity within 3 months to some €11.7 million and submitting a certified copy of its increased share capital to €12 million, setting out the shareholding structure and the main shareholder (which main shareholder had to be the same as identified in the application to transfer).

52. In July 2010, Rolaware issued a document which, in effect, set out an opportunity to invest in Rolaware. According to this document, at this point Rolaware was looking to raise an additional €3 million for the implementation of its network rollout and for working capital, having already raised funding from "its founders and current shareholders" of €3.6 million and debt guarantees of €3.25 million. The Licence was to be operated by a wholly-owned Greek subsidiary of Rolaware called Rolaware Hellas SA.

53. On 22 July 2010, Latimer (as trustee of the Hamza Trust) resolved to approve an equity investment by the Hamza Trust of up to €3 million in Rolaware.

54. On 27 July 2010, Rolaware's accounts for the year ended 31 December 2009 were approved. Again, the accounts were signed by Latimer as company secretary and audited by APK. A net loss of some €97,000 was recorded.

55. On 30 July 2010, Hrostenco invested just over €100,000 in Rolaware.

56. On 9 August 2010, Hrostenco invested just over a further €100,000 in Rolaware.

57. On 23 September 2010, Hrostenco invested just over €100,000 in Rolaware.

58. On 9 November 2010, Latimer (as trustee of the AAA Trust) resolved to approve an equity investment by the AAA Trust of up to €1.25 million in Rolaware.

59. On 18 November 2010, AAA Group invested just over €50,000 in Rolaware.

60. As recorded in the unaudited accounts for Hrostenco for the period from 1 January 2019 to 18 April 2019 (the "2019 Hrostenco Accounts"), during 2010 Hrostenco had invested some €300,000 in Rolaware in exchange for a shareholding of some 10.75% or so in that company.

61. On 10 February 2011, AAA Group invested just over a further €50,000 in Rolaware.

62. On 2 March 2011, Hrostenco invested just over a further €20,000 in Rolaware.

63. On 10 March 2011, the EETT issued a decision resolving that the transfer of the Licence to Rolaware had not taken place as relevant conditions that it had set had not been met.

64. Also on 10 March 2011, Hrostenco invested just over a further €100,000 in Rolaware.

65. On 18 April 2011, Hrostenco invested just over a further €150,000 in Rolaware.

66. On 20 May 2011, Hrostenco invested just over a further €40,000 in Rolaware,

67. On 27 May 2011, Hrostenco invested just over a further €150,000 in Rolaware.

68. On 22 June 2011, Hrostenco invested a further €275,000 in Rolaware.

69. On 16 August 2011, Hrostenco invested a further €100,000 in Rolaware.

70. On 29 August 2011, the consolidated accounts for Rolaware and its group for the year ended 31 December 2010 were approved. Again, they were audited by APK. The auditors' report referred to a material uncertainty casting doubt on the Group's ability to continue as a going concern. Group losses of just over €191,000 were reported. According to the accounts, group current liabilities (payable within 12 months) exceeded current assets by over €1.4 million.

71. On 31 August 2011, Hrostenco invested just over a further €100,000 in Rolaware.

72. On 23 September 2011, Hrostenco invested a further €200,000 in Rolaware.

73. On 5 October 2011, Hrostenco invested just over a further €165,000 in Rolaware.

74. According to the 2019 Hrostenco Accounts, during 2011 Hrostenco had invested some €575,000 (making €875,000 in total) and so increased its shareholding in Rolaware to about 23% of its share capital.

75. According to the unaudited accounts for AAA Group for the period from 1 January 2019 to 31 March 2019 (the "2019 AAA Accounts"), by the end of 2011 AAA Group had invested some €100,000 in exchange for a 2.59% shareholding in Rolaware.

76. On 9 February 2012, AAA Group invested just over €125,000 in Rolaware.

77. On 20 February 2012, AAA Group invested a further €125,000 in Rolaware.

78. On 8 March 2012, Dremoplex entered into a loan agreement with Rolaware, pursuant to which Dremoplex loaned Rolaware some €1.125 million.

79. On 9 March 2012, AAA Group invested just over a further €175,000 in Rolaware.

80. On 5 April 2012, AAA Group invested just over a further €125,000 in Rolaware.

81. On 30 April 2012, the EETT revoked the Licence in its entirety.

82. On 24 May 2012, Dremoplex demanded immediate repayment of its loan. On 29 May 2012, Rolaware agreed to sell Rolaware Hellas to Dremoplex. The sale completed on 29 June 2012 for a value equating to the amount of the loan from Dremoplex. Repayment of the loan was satisfied by the transfer of the shares in Rolaware Hellas to Dremoplex.

83. On 7 September 2012, the consolidated accounts for Rolaware for the year ending 31 December 2011 were approved. The write-off of the value of the Licence was recorded. The group was recorded as having made a loss of over €1.3 million. These matters were said to indicate the existence of a material uncertainty which might cast significant doubt about the group's ability to continue as a going concern.

84. On 1 November 2012, the defendant and his father-in-law, Mr Stratos, resigned as directors of Rolaware.

85. On 27 November 2012, Hrostenco invested just over a further €15,000 in Rolaware.

86. According to the 2019 Hrostenco Accounts, by the end of 2012 Hrostenco had invested some €890,000 in exchange for about 23.03% of Rolaware's issued share capital. That shareholding was later slightly diluted in percentage terms by share issues by Rolaware in which Hrostenco did not participate.

87. According to the 2019 AAA Accounts, by the end of 2012 the investment by AAA Group of €100,000 had resulted in a 2.59% shareholding in Rolaware which was subsequently diluted slightly by a share issue by Rolaware in which AAA Group did not participate. AAA Group's B Shares in Rolaware were converted to Ordinary Shares in Rolaware.

88. On 4 April 2013, Wind issued proceedings against Rolaware in the courts in Athens seeking payment of the outstanding debt of €3.25 million (plus interest) in respect of

the purchase of the Licence by Rolaware. Rolaware counterclaimed for the return of the €2 million down payment.

89. On 28 April 2017, Reed Smith LLP issued a letter of advice to "Funder" regarding causes of action that Rolaware was said to have against Greece by reason of the EETT's actions in connection with the granting of conditional approval of the transfer of the Licence to Rolaware, its subsequent decision that the transfer had not taken place and its later revocation of the Licence.

90. The Reed Smith LLP letter of advice was obtained following Rolaware (through Hamervate, one of Rolaware's directors) granting a power of attorney dated 17 March 2017 to the defendant to instruct Reed Smith LLP in connection with potential arbitration proceedings to be issued by Rolaware.

91. On 7 September 2017, the Athens Court accepted Wind's claim and gave judgment for Wind against Rolaware for €3.25 million. The Court also rejected Rolaware's counterclaim. Rolaware then appealed to the Athens Court of Appeal. At the time of the hearing before me a decision was awaited. I understand it has since been handed down, but it is not in evidence before me.

92. The current position is that Rolaware is not trading. The claimants assert that the shares in Rolaware held for the Trusts are worthless.

93. Other relevant shareholders in Rolaware include a number of persons with connections with the defendant as follows:

| **Person/ (defendant's relationship)** | **Details of some share acquisitions in Rolaware** | **Shareholding in Rolaware as at 27 July 2021 (shares)** |
|---|---|---|
| Tiger Equity (owner) | 1st acquisition 02.06.10 | 2 |
| Tiger Capital (owner) | 1st acquisition 03.02.17 | 43,940 |
| Mr Stratos (son-in-law) | 50,000 acquired on 23.12.15 | 124,261 |
| Christina Stratou (husband) | 48,571 acquired on 14.06.10 | 169,054 |
| Karre Ergon AETE (related to owners/managers: Mr Stratos, Mr Stratos' wife and Christina Stratou) | Shareholder 30.12.09 to 08.09.14 | |
| Karre Projects (Cyprus) Limited (related to owners/managers: Mr | Shareholder 06.06.08 to 03.02.17 | |

| | | |
|---|---|---|
| Stratos, Mr Stratos' wife and Christina Stratou) | | |
| David Salama (business associate) | Acquired 48,571 on 14.06.10 | 169,054 |
| Y-Holdings Limited (related to the 2 shareholders: Mr Constantinos Tsouvelekakis and his wife) | Acquired 7,500 on 17.04.12 | 7,500 |

**(3b) Trust investments in Dremoplex**

94. The investments in Dremoplex of which complaints are made can be summarised as follows:

(a) AAA Group invested just over €500,000 in Dremoplex between 30 August 2012 and 29 January 2013. This represented some 22.5% of the amount settled into the AAA Trust. In return AAA Group received a shareholding of 16.26% of the total issued share capital in Dremoplex.

(b) Hrostenco invested over €1.475 million in Dremoplex between 25 September 2012 and 26 May 2015. This represented some 30.9% of the amount settled into the Hamza Trust. In return Hrostenco received just over 34% of the total issued share capital of Dremoplex.

(c) The relevant shareholdings in Dremoplex were registered in the name of Hamervate, which declared itself trustee of the relevant shares by two declarations of trust each dated 31 March 2015, declaring that it held shares in Dremoplex on trust for AAA Group and Hrostenco respectively.

95. Dremoplex was incorporated on 8 March 2012 and on that day made the loan of €1.125 million to Rolaware as referred to earlier in this judgment.

96. The defendant was appointed a director of Dremoplex on 16 May 2012.

97. The revocation of the Licence on 30 April 2012, as referred to earlier in this judgment, amounted to an event of default under the loan to Rolaware. On 24 May 2012, Dremoplex demanded repayment of the loan.

98. The loan to Rolaware was satisfied by the transfer to Dremoplex of the shares in Rolaware Hellas held by Rolaware. The relevant agreement was made on 29 May 2012 and completed on 29 June 2012.

99. Between 30 August 2012 and 13 February 2013, AAA Group and Hrostenco invested respectively just over €500,000 and €630,000 in Dremoplex as follows:

| **Date** | **AAA Group Amount (€)** | **Hrostenco Amount (€)** |
|---|---|---|
| 30.08.12 | 60,045.79 | |
| 19.09.12 | 250,000.00 | |
| 25.09.12 | | 120.045.47 |
| 27.11.12 | | 50,045.65 |
| 17.12.12 | 150,045.52 | 40,000.00 |
| 21.01.13 | | 170,044.28 |
| 29.01.13 | 40,000.00 | |
| 13.02.13 | | 250,044.61 |

100. On 1 April 2013, Rolaware Hellas (now the wholly owned subsidiary of Dremoplex) published a document described as an "Executive Summary", publicising an investment opportunity in Dremoplex. This document:

(a) described Dremoplex as "an off-shoot of UK based Oppenheim Capital". Oppenheim Capital LLP was incorporated in England and Wales on 8 February 2010. The defendant was appointed a designated member of it on 1 April 2013;

(b) stated that Rolaware Hellas was operating a telecommunications licence for part of the wireless spectrum for the most part in the 28 GHz band. This licence related to a different frequency to that which was the subject of the original Licence (25/26 GHz);

(c) stated that Rolaware Hellas had "[s]ince inception … been funded solely via equity by its founders. Up to April 2013, this funding amounts to €4.5m …"

(d) stated that Rolaware Hellas was seeking to raise €2.5 million through equity investments in order to implement the rollout of wireless network and for working capital.

101. Between 28 May 2013 and 24 January 2014, Hrostenco invested a further €565,000 in Dremoplex as below:

| **Date** | **Hrostenco Amount (€)** |
|---|---|

| | |
|---|---|
| 28.05.13 | 40,000.00 |
| 24.07.13 | 300,000.00 |
| 09.01.14 | 125,000.00 |
| 24.01.14 | 100,000.00 |

102. On 16 September 2014, the board of directors of Dremoplex (which included the defendant) approved the consolidated accounts of Dremoplex and its subsidiaries for the year ended 31 December 2013. The accounts were audited by APK. They showed a group net loss of €1.134 million.

103. On 29 December 2014 and 26 May 2015, Hrostenco invested a further €280,000 in Dremoplex, being €130,000 in December 2014 and €150,000 in May 2015.

104. On 29 November 2016, the defendant ceased to be a director of Dremoplex.

105. In the year ended 31 December 2019, Dremoplex ceased to trade. It had consistently made losses (save for a small profit of €16,299 in the year ended 31 December 2019, attributable mainly to paying no directors' remuneration that year as contrasted with previous years).

106. The claimants assert that the shares in Dremoplex held by or for the Trusts are now of little value.

107. Other relevant shareholders in Dremoplex include the defendant and a number of persons with a connection to him as follows:

| **Person/ (defendant's relationship)** | **Details of some share acquisitions in Dremoplex** | **Shareholding in Dremoplex as at 27 July 2021 (shares)** |
|---|---|---|
| Defendant | Acquired 495,000 shares from Hamervate on 11.02.13 | 682,796 |
| Redilton Services Inc (owned or controlled by the defendant) | Became shareholder in March 2014. Shares disposed of in 2020. | 43,940 |
| Karre Ergon AETE (related to owners/managers: Mr | Acquired 2,655,800 shares on 23.04.15 | 2,655,800 |

| | | |
|---|---|---|
| Stratos, Mr Stratos' wife and Christina Stratou) | | |
| Mr Aslanoglou (friend and/or associate) | Acquired shares in June 2013 | 457,800 |
| Oppenheim Capital (defendant is designated member since 1 April 2013) | Dremoplex described in 2013 document publicising investment opportunity in Dremoplex as being an "off-shoot" of UK based Oppenheim Capital | |

**Rolaware and Dremoplex complaints: general**

108. By way of broad summary, and as I have said, the complaints in relation to the investments in Rolaware and Dremoplex centre around risky investments in new or untested companies with clear solvency issues, where the absolute size of the investment and the proportion of the investment to the overall relevant Trust assets was such as to be wholly unjustified, in some cases where the proportion of the shareholding held or acquired was itself of concern and where the investments were in companies in which the defendant and/or persons connected with him, including members of his family, had a significant interest. These investments were made by or on the instructions or advice of the defendant.

109. The main defences raised on the substance of the investments themselves are that the investments were at the time very promising investments and within the investment profile that the claimants had agreed to.

**(3c) Trust Payments to Lisa Locca**

110. A number of payments were made from the assets of the Trusts maintained with Kendra to a Mme Lisa Locca (or similar name) between November 2010 and March 2013 as set out below. The payments are said to have been made on the advice or instruction of the defendant. The sums were later returned to the accounts of the relevant investment/asset holding company of the relevant Trust, but several years later, in March or April 2019. No interest or other return on the payments was received.

111. The payments in question were:

| **Date of payment out** | **Relevant company** | **Amount** | **Date of return** |
|---|---|---|---|
| 30.11.10 | Hrostenco | US$1,050,055.16 | 18.04.19 |
| 17.12.10 | Hrostenco | US$50,022.95 | 08.04.19 |

| | | | |
|---|---|---|---|
| 30.08.12 | AAA Group | US$65,022.97 | 28.03.19 |
| 30.11.12 | AAA Group | US$23,023.78 | 28.03.19 |
| 21.03.13 | AAA Group | €90,000<br><br>(equivalent to US$116,100) | 28.03.19 |

112. The main defence raised was that these payments were made by Latimer in error. The claimants were however able to produce documents from 2010 and 2012 which the defendant accepts showed that he provided the instructions to make the payments in question. His current position is that it is hardly surprising that he misremembered the position from some years ago and that he still considers that these payments were errors, and that at least one of the payments may not relate to a payment to Lisa Locca. This line is not persuasive.

113. The defendant also asserts that the payments were returned in full once the position was "realised" and that there were no real attempts to hide the same. As regards the latter point, there was a significant amount of disputed evidence from Mr Partellas about the relevant "Bank Movement Tables" comparatively recently produced and the defendant's alleged role in creation of the same and which are said to demonstrate that there was no attempt to hide the investments. However, that is, in a sense, after the balloon had gone up in any event so that the alleged document said to reveal the position did not exist until the sums were returned or thereafter.

**(3d) The Givol Investment**

114. On 20 September 2010, Hrostenco paid out some US$100,054.52 from its USD account at Kendra to one or two individuals (Sharona Givol and/or Yoel Givol) or to an entity at their direction for the purposes of an investment referred to as "LTGO" (the "Givol Investment"). The payment was made on the advice, or at the direction of, the defendant.

115. The Givol Investment subsequently failed and the value of the investment was lost in its entirety.

116. The original defence put forward was the same as that put forward in relation to Lisa Locca: namely that Latimer made the payments in error. As the defendant now accepts, that is simply wrong given the documentation produced which shows that he provided the email instructions to Latimer to make the payments. Similar points about the Bank Movement Tables are also made.

**(3e) The NewLead Investment**

117. On 13 and 15 March 2013, two sums, totalling US$884,115.95, were paid out from Hrostenco's US$ account at Kendra to NewLead JMEG LLC (the "NewLead

Investment"). These payments were made on the recommendation of the defendant to Latimer and caused by him.

118. The claimants' primary case is that it is to be inferred that the NewLead Investment was paid as an advance under a loan agreement for and on behalf of Oppenheim Capital Limited, a BVI company of which the defendant was a director at all material times ("Oppenheim Capital BVI") (the defendant denies the directorship but not that he was connected with the company and that he executed the loan agreement).

    (a) In December 2012, NewLead Holdings Limited ("NewLead Holdings") entered into an agreement pursuant to which Asset Sale Agreements relating to Five Mile Coal Mine in Breathitt County, Kentucky, USA ("Five Mile") and Elk Valley Coal Mine in Tennessee, USA ("Elk Valley") were assigned to NewLead Holdings. Completions of such assignment agreements were due in January 2013 (Five Mile) and February 2013 (Elk Valley).

    (b) NewLead Holdings defaulted on completion of the Asset Sale Agreements by failing to pay sums of US$11 million (Five Mile) and US$30 million (Elk Valley) due on completion.

    (c) On 8 March 2013, Oppenheim Capital BVI entered into a loan agreement with NewLead JMEG under which it agreed to provide a revolving credit facility in an amount up to US$1.35 million for the purposes of providing partial bridging finance for the purchases of the Five Mile and Elk Valley Asset Sale Agreements. Repayment was due 12 months after final drawdown.

    (d) The NewLead Investment was made within one week of Oppenheim Capital BVI entering the loan agreement with NewLead JMEG. Further, the reference given for the investment bank transfers from Hrostenco's account was in each case "Five Mile/Elk Valley".

119. The alternative case of the claimants is that the NewLead Investment was a private equity investment in NewLead JMEG.

120. By or in about September 2014, NewLead Holdings was the subject of allegations and New York court proceedings regarding alleged involvement in a fraudulent scheme to inflate the share price of NewLead Holdings to prevent the de-listing of its shares from the NASDAQ stock exchange. Ultimately, NewLead Holdings was de-listed and the NewLead Investment is accordingly alleged to have failed and to have a nil value.

121. The defendant's position is that the investment was a legitimate investment in a convertible promissory note which was thought to be a good one.

## The Portfolio Reports provided by the defendant

122. Between March 2010 and 2018, various "portfolio reports" (the "DT Portfolio Reports") were provided by the defendant to Ammar (largely in response to specific requests from Ammar) which he knew would be relied upon by Ammar and, where relating to the Hamza Trust, he knew would be passed to, and relied upon by, Mohamed.

123. The DT Portfolio Reports purported to provide details of the composition and value of the investment assets of the two Trusts. They were in the main in the same sort of format. Some of them have an "Oppenheim" branding.

124. In broad terms the allegation is that the defendant lied to Ammar and Mohamed over many years about the true composition and value of the funds in the relevant portfolios. This is said to have been effected through the DT Portfolio Reports that he provided to them, as well as by way of related misrepresentations by email. The allegation includes the misreporting of the existence of millions of US dollars in cash which in fact simply did not exist.

125. At the same time as providing Ammar with the DT Portfolio Reports, the defendant had access to portfolio reports from Kendra (the "Kendra Portfolio Reports") on a regular basis which showed a very different position. I was provided with schedules comparing the Kendra Portfolio Reports with the DT Portfolio Reports provided by the defendant to Ammar. The Kendra Portfolio Reports did not pick up the five investments of which complaint is made but on the face of things there are a number of significant differences between the Kendra Portfolio Reports and the DT Portfolio Reports provided by the defendant with regard to the cash balances and cash equivalent balances. The differences between the stated balances of cash and cash equivalents varies as much as US$300,000 in the case of AAA Group and US$8 million in the case of Hrostenco. The later DT Portfolio Reports show many millions of dollars in cash of the relevant Trust companies which simply did not exist.

126. Further, save for some limited reference to investments in a "Rolaware Inc" in the early DT Portfolio Reports (mentioned as being included within "stocks" but not otherwise separately identified) at a time when the investments made by the Trusts were fairly modest, the DT Portfolio Reports made no mention of the large investments in Rolaware and no reference to the investments in Dremoplex or the other investments of which complaint is made.

127. The claimants say that there can be no doubt that the defendant knew that the contents of the DT Portfolio Reports were false and misleading given that he was effectively in complete charge of the investments and responsible for the investments in the five entities of which complaint is made, that he had full access to the Kendra Portfolio Reports and Kendra electronic reporting systems and could easily check the position, and that he alone created the DT Portfolio Reports.

128. This judgment would be over-burdened by a complete statement of the dates and details of the DT Portfolio Reports. However, I am satisfied that one of the significant matters is the dates of such reports compared with the dates of investments made by the Trusts. A number of helpful documents were produced to me to illustrate more graphically the claimants' case and, having been taken through them and the evidence, I am satisfied that the claimants' case in deceit regarding the DT Portfolio Reports has a solid evidential foundation, though of course at this point I cannot and do not determine the relevant underlying factual issues between the parties.

129. The inference that the claimants invite the court to draw is that the DT Portfolio Reports were put forward to avoid questions being asked and the truth being uncovered.

130. Various explanations have been offered. These will have to be considered at trial but at this stage they do not, in my assessment, begin to undermine the claimants' arguable case regarding the DT Portfolio Reports. Thus, the defendant has asserted, which with some justification the claimants characterise as "an outstanding understatement", that the DT Portfolio Reports "may occasionally have contained errors", but that the errors were "inadvertent" and that the errors arose due to the process of compiling the DT Portfolio Reports. As the evidence currently stands, these matters do not begin to persuade. As such I do not consider that there are properly arguable answers to the allegations of deceit (see *Fundo Soberano de Angola v Jose Filomeno dos Santos* [2018] EWHC 2199 (Comm) at para [86](4)).

131. In more detail, (but without setting out every point raised), it has been submitted that the defendant was merely helping out, was not obliged to provide reports and that he did not have the capacity (in terms of resources) to produce such reports accurately, that successful investments are left out of the reports as well as those of which complaint is made, that the defendant's valuation contained in the DT Portfolio Reports is not always higher than the Kendra Portfolio Reports and that it was clear on their face that the DT Portfolio Reports were incomplete. At this stage and on the evidence before me these points do not persuade.

**The alleged causes of action**

132. The particulars of claim assert six causes of action against the defendant:

(a) In negligence under Cypriot or English law;

(b) For breach of fiduciary duty under Cypriot or English law;

(c) In deceit under Cypriot or English law;

(d) For dishonest assistance in the breach of trust by Latimer, the trustee, under Cypriot or English law;

(e) As an alternative to the claims in Cypriot or English law above, a claim under Swiss tort law;

(f) A contractual claim in Swiss law under the Powers of Administration.

133. Although it is accepted (for the purposes of the hearing before me) that the causes of action pleaded are ones as to which the claimants have a "good arguable case", two slightly different points are raised. First, it is suggested that the claims are weak or "implausible". Secondly, it is hotly contested that the allegations are of a kind which justifies any inference that there is a real and current risk of dissipation (in the widest sense) of the defendant's own assets such as to render any judgment unenforceable or more difficult to enforce against him. It is therefore necessary to consider the causes of action in a little more detail. In this respect, the causes of action which are most relevant to establishing a risk of dissipation and which are relied upon by the claimants are those regarding breach of fiduciary duty, dishonest assistance in breaches of trust by Latimer, and deceit.

134. I deal with each of the relevant causes of action alleged for completeness. For these purposes I can largely utilise the descriptions of the causes of actions and the potential issues which will arise for determination at trial as set out by Judge Jonathan Richards in the March 2022 Judgment on the appropriate forum application. In paragraphs 7 and 10 of the March 2022 Judgment, the Judge summarised the pleaded causes of action and issues likely to arise as follows:

> "7. By their claims, the Claimants seek to make the Defendant liable for losses suffered in connection with the Trusts' investments, including those made in Rolaware and Dremoplex. The claims are put in the following ways:
>
> (i) *Claim 1 (negligence)* – C1 and C2 contend that the Defendant assumed personal responsibility to them to take reasonable care to invest funds in accordance with the agreed objective of the Trusts, which was to ensure capital preservation. He breached that duty by giving poor investment advice to Latimer and caused loss."
>
> (ii) *Claim 2 (breach of fiduciary duty)* – C1 and C2 contend that there was a long history of dealings between them and the Defendant and the trust and confidence that they reposed in him caused him to owe fiduciary duties, including a duty to act in good faith, and not to put himself in a position of conflict. He had an involvement with Rolaware and Dremoplex which gave rise to a conflict of interest. More generally he breached his fiduciary duty and caused loss.
>
> (iii) *Claim 3 (deceit)* – C1 and C2 contend that the Defendant lied to them by providing false portfolio reports and making other misrepresentations including misreporting the existence of USD millions in cash which did not exist. Had they known the true position earlier, they would have intervened earlier and prevented much of the loss.
>
> (iv) *Claim 4 (dishonest assistance in Latimer's breach of trust)* – C1 to C8 contend that Latimer breached its duties as trustee by making speculative high-risk investments and failing to monitor them properly and that the Defendant's actions amounted to dishonest assistance in those breaches.
>
> (v) *Claim 5 (alternative tortious claim under Swiss law)*. The Claimants pleaded a Swiss law claim in tort as an alternative. However, since it appears that the Defendant agrees that any claim in tort would be governed by Cyprus law, it appears unlikely that this claim will need to be advanced.
>
> (vi) *Claim 6 (contractual claim under Swiss law)* This claim is made by AAA Group and Hrostenco alone. It is said that AAA Group and Hrostenco executed documents, governed by Swiss law, that gave the Defendant power to place orders on accounts held with a Swiss financial institution ("Kendra"). It is said that the Defendant owed AAA Group and Hrostenco contractual duties of "diligence" and "fidelity" that he breached by causing the challenged investments to be made and caused loss as a result.
>
> ...

10. The Defendant has not to date served any Defence. However, the skeleton argument of Mr Head QC and Ms Jones, and also the witness statement of his solicitor, Mr Woodland provide an indication of the points that he is likely to make in his defence. Predicting the course of litigation such as this is necessarily going to be somewhat uncertain, but I have concluded that the following issues, at least, are likely to arise:

i) *The way in which the Trusts made their decisions to make investments and the legal framework within which those decisions were made.* This issue will be thrown into focus by the Defendant's assertion that it was, in all cases, Latimer's decision, in its capacity as trustee, whether particular investments were made or not. This issue will also involve an analysis of whether the Trusts' investment strategy was intended to protect capital (as the Claimants say) or whether it was intended to be much more adventurous (as the Defendant says). It will also involve some consideration of what investments the Trusts might have made if they had not made the investments that the Claimants criticise.

ii) *The nature and evolution of the relationship between the Defendant and the Claimants and between the Defendant and the Trusts*. That will set out a basis for establishing whether the Defendant did assume a degree of personal responsibility to the Claimants for the selection of successful investments and whether any fiduciary relationship was established. An understanding of that issue will help to address related points that the Defendant looks likely to raise in his defence namely that (i) to the extent he had any duties, they were owed to Latimer (in its capacity as trustee of the Trusts) and not to the Claimants in their capacities as settlors/beneficiaries (ii) that a company the Defendant controlled ("Tiger Capital") was appointed to manage the brokerage accounts of AAA Group and Hrostenco with Kendra, (iii) that the arrangement with Tiger Capital provided Tiger Capital with extensive protection by way of indemnities and acknowledged that investments might be made in assets in which Tiger Capital had an interest or involvement and that (iv) while the Defendant was authorised to place orders on the Kendra accounts, he was not authorised to withdraw funds or assets from those accounts.

iii) As well as helping to establish the nature and scope of any duties that the Defendant owed the Claimants, issues (i) and (ii) will between them shed some light on the claim based on dishonest assistance since they will help to establish whether Latimer was indeed in breach of its duties as trustee in making particular investments and whether the Defendant gave dishonest assistance to any such breaches.

iv) *The commercial wisdom of the Trusts' investments including, but not limited to, investments in Rolaware and Dremoplex and the circumstances in which, whether wisely or not, the decision was made to invest in those companies.* Both issues: the actual commercial wisdom, and the process by which commercial wisdom was assessed, will have a bearing on the claim in negligence and for breach of fiduciary duty. Because it is asserted that the Defendant had a conflict of interest in respect of the investments in Rolaware

and Dremoplex, and because it is said that he had something of an "inside track" as to the true situation of those companies, and so was not simply dependent on information that the companies provided to him, this issue is likely to involve a detailed examination of the actual financial position and businesses of Rolaware and Dremoplex.

v) *The circumstances in which portfolio statements were provided and the accuracy or otherwise of those statements.* This issue will have a direct bearing on the claim in deceit.

vi) *The value of the Trusts' investments at relevant times.* This may need to be established by expert valuation evidence and will go to the questions of the commercial wisdom of making those investments and the question of loss."

135. The defendant makes various points about the asserted causes of action. As regards factual implausibility, I do not consider that the defendant has, at this stage, raised any matters that seriously undermine or call into question the claimants' factual assertions. Of course, at this stage those assertions are untested by full disclosure and cross-examination. The real point is not that I assume they will be made out but that I am satisfied there is an arguable case to the standard required and that I am not satisfied that, factually, the claims are implausible or weak.

136. As regards the legal position, a number of points are made. Among other things, the defendant challenges any direct assumption of responsibility by him personally, given (among other things) the engagement of Tiger Capital by the two Trust companies. He says that the investments of which complaint is made, were, at the time, "very promising investments", that the terms of the Asset Management Mandates expressly permitted him to make investments in companies or funds in which he had interests and that the claimants had long been content for him to recommend and invest the trust funds in substantial high risk investments. The DT Portfolio Reports may have contained errors but he was under no obligation to provide such reports and any errors were not deliberate. Further, any claims should be brought by AAA Group and Hrostenco against Tiger Capital not him, the defendant. As matters stood before me and subject to the pleaded defence, it can be anticipated that these issues will all have to be considered at trial. For present purposes however these points do not undermine the case that the claimants bring or the fact that the defendant has, quite properly and understandably, accepted (for the purposes of the hearing before me) that these claims amount to an arguable case.

137. Nothing that has been said by or on the defendant's behalf persuades me that the arguable case that has been put forward is flawed or to be treated as one that I should not assume and assess (for present purposes) to be arguable. In certain respects, I was shown contemporaneous documents and other evidence which, if anything, not only supports the assessment that the claimants have an arguable case but which suggests that the defendant's points in defence are, at least at this stage, ones that have some difficulty. Further, none of the factors put forward persuade me that the arguable case put forward is one that does not also amount to one demonstrating that there is a real risk of dissipation in this case.

**The history leading up to discovery of the alleged wrongdoing and thereafter**

138. The following paragraphs set out the claimants' case.

139. Communications about the Trusts were with the defendant alone. The claimants were not aware of the legal structures and arrangements in place regarding the Trusts and, for example, did not know of and were not in touch with Latimer until their investigations were underway.

140. In late 2018, Ammar ceased receiving communications from the defendant about the Trusts and indeed more generally. Despite attempts by Ammar to communicate, the defendant did not respond. Ammar became increasingly concerned as all arrangements regarding the setting up and management of the Trusts had been made with the defendant.

141. In March 2019, the claimants' English solicitors, DWF Law LLP ("DWF"), began to send correspondence to the defendant. Among other things, DWF sought an undertaking from the defendant that he would not remove or transfer any assets out of the Trusts. Correspondence between DWF and Peters & Peters Solicitors LLP ("Peters & Peters"), acting for the defendant, followed. By letter dated 13 March 2019, Peters & Peters asserted that the defendant was not a trustee, nor a protector nor guardian of the Trusts and that he had no right nor power to make distributions or payments or to direct the trustee to do so.

142. In the meantime, by letter dated 7 March 2019, Latimer wrote to Ammar (neither Ammar nor Mohamed ever having had dealings with Latimer up to this time). This led to correspondence between Ammar's Cypriot lawyers (Harris Kyriakides LLC ("HK")) and Latimer's Cypriot lawyers (Keane, Vgenopoulou & Associates LLC ("KVA")). Information about the Trusts was sought by HK from KVA but such information was not forthcoming.

143. On 21 March 2019, Ammar and Mohamed each purported to appoint a protector over the relevant Trust. On 28 March 2019, the protector purported to exercise powers to terminate Latimer's appointment as trustee on relation to each Trust and to appoint new trustees. Latimer, through its lawyers, denied the effectiveness of the appointment of the protector and its removal as trustee of each of the Trusts.

144. On 2 April 2019, proceedings in Cyprus were issued by the first to eight claimants (as they are in these proceedings) against Latimer, its directors, the defendant, two Oppenheim companies, Mr Guy Oppenheim and AAA Group and Hrostenco (the "Cyprus Proceedings"). The relief sought was primarily directed to obtaining information about the Trusts and to safeguarding the assets of the Trusts. The relief sought was declaratory relief as regards each Trust regarding the validity of the appointments of the protector and the new trustee and of the removal of Latimer as trustee; orders that Latimer deliver up all relevant books records and documents of the Trusts; and damages for unfair or unjust enrichment, fraud, negligence or breach of duty.

145. On 4 April 2019, the first to eight claimants obtained emergency interim relief in the Cyprus Proceedings. This prevented dissipation of the Trusts' assets and required the provision of certain information and documentation regarding the Trusts.

146. On 19 April 2019, Latimer filed three bundles of documents at court but thereafter attempted to prevent HK from accessing and inspecting the same. This attempt failed. The documentation appeared to show a significant diminution in value of the Trusts' respective assets and indicated that the DT Portfolio Reports had significantly misrepresented the position. However, the documentation was limited and incomplete. In particular, there was an absence of primary and independent evidence as to how the assets of the Trusts and the two asset holding companies (AAA Group and Hrostenco) had been dealt with over the preceding 10 years or so.

147. On 13 January 2020, a settlement was reached between the relevant claimants and the new trustee of the Trusts with Latimer and its directors. Latimer formally resigned as trustee of each of the Trusts on 23 January 2020. On 27 January 2020, about 4,000 pages of documents were delivered to HK by Latimer, said to be all the documents that Latimer retained as trustee of each of the Trusts.

148. The Cyprus proceedings were withdrawn against Latimer, its directors, AAA Group and Hrostenco on 28 January 2020 and discontinued against the defendant on 27 February 2020.

149. There were, however, still significant gaps in the relevant documents that had been provided. In particular, the position with Kendra was uncertain. Kendra would only provide information to its account holders, AAA Group and Hrostenco. It became necessary for control of those companies to be obtained from those that had controlled the same under the regime set up by the defendant. This took until about June 2020.

150. Thereafter, Kendra provided documentation relating to the Trust assets so far as represented by accounts maintained by Kendra. Full control over the relevant accounts and information was not achieved until about November 2020. Thereafter there was an imperative to analyse the information provided, to reconstruct what had happened over the previous 10 years or so and to consider the legal implications, not least under different potentially applicable legal systems.

151. In about December 2020, documents relating to the conduct of the affairs of Rolaware and Dremoplex were obtained from APK. Even after that date, requests for further information and documents continued to be made for several months thereafter.

152. On 27 September 2021, the current English proceedings were commenced. The proceedings were served under cover of a letter dated 1 October 2021 in which undertakings from the defendant were sought.

153. In Peters & Peters' response dated 6 October 2021, directions were proposed regarding a freezing order application which contemplated a hearing in December 2021 (subject to the court's availability). At the same time, it was intimated that there might be a challenge to the English court's jurisdiction.

154. By letter dated 15 October 2021, DWF pressed to have the freezing order application listed forthwith. Shortly after this, the defendant's acknowledgement of service was filed, intimating a jurisdictional challenge.

155. The earliest date available for a 2 day hearing at this time was in March 2022 and the parties agreed to list the freezing order application then.

156. The court itself invited the parties to consider listing the jurisdiction application of the defendant and the freezing order application of the claimants together. The claimants favoured this option but Peters & Peters strongly resisted this course on the basis that it would lead to delay and, if the defendant succeeded on his jurisdiction application, unnecessary costs. The claimants agreed to the two applications being listed separately provided that the jurisdiction application of the defendant could be listed in January 2022 and/or that any listing of that application would not imperil the hearing date of the freezing order application.

157. As it happened, the jurisdiction application could not be listed sooner than 23 February 2022. This was less than a month before the start of the window for the listing of the freezing order application. Various suggestions were put forward by each side as to how to deal with this problem. In the end, Peters & Peters confirmed that no point would be taken on any delay caused by any adjournment of the freezing order application (from the window starting on 22 March 2022), caused by the hearing of the jurisdiction application first.

## The conditions for the grant of a worldwide freezing order

158. There was broad agreement on the applicable law and legal principles. I deal with those matters as relevant to the facts of this case and seek neither to state any all-encompassing statements of principle applicable in all cases nor to reproduce a comprehensive statement of the law which is more suited to a textbook.

159. 37(1) of the Senior Courts Act 1981 ("SCA 1981") provides that:

> *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."*

160. In exercising the discretion under s37 SCA 1981, before making a worldwide freezing order the court must be satisfied that the applicant has a good arguable case, there is a real risk that any judgment in favour of the applicant may go unsatisfied by reason of one or more unjustified or improper dealings with assets, that any assets within the jurisdiction are likely to be insufficient to meet any eventual judgment and it is just and convenient to grant the relief (see *Commercial Injunctions* by Steven Gee QC (7th Edn. 2021) esp at paragraphs 12-032 - 12-052 and cases such as *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272; *Lakatamia Shipping v Morimoto* [2019] EWCA Civ 2203; [2020] 1 CLC 562 and *Ras al Khaimah Investment Authority v Bestford Development LLP* [2017] EWCA Civ 1014; [2018] 1 WLR 1099).

### (a) Good arguable case

161. The requirement of a good arguable case is conceded on the application before me. Having been taken through the evidence, I can confirm my view that that concession was properly made. As I have said, I do not regard that arguable case as being substantially weakened by the arguments and evidence in defence put forward so far. In particular, having been taken through large parts of the evidence I am entirely satisfied that the causes of action have a good (and not just, as specified by the authorities, a plausible) evidential basis (see *Kaefer v AMS* [2019] EWCA Civ 10; [2019] 1 CLC 143 at [73]-[80]; *Lakatamia* at [38]).

162. The question of the extent to which a real risk of improper dissipation is demonstrated by the underlying causes of action was hotly contested before me, and I therefore return to it after dealing with the issue of the defendant's assets.

**(b) The defendant's assets**

163. The real issues regarding the question of the defendant's assets are (1) whether there is sufficient evidence of assets upon which any freezing injunction will bite (otherwise a freezing injunction would serve no purpose) and (2) given there are apparently assets of the defendant within England and Wales, whether those assets are likely to suffice for the purposes of enforcing an eventual judgment because, if they are, then as a matter of discretion the court will normally confine any freezing relief to such assets.

164. In this case, it appears from the evidence that there is a strong case that the defendant has assets both in this jurisdiction and worldwide. Further, there is evidence giving good grounds for belief that the assets within the jurisdiction are likely to be insufficient to meet any judgment in favour of the claimants.

165. As regards assets with the jurisdiction, the defendant had apparently lived in the UK since at least 2016. His children go to private fee-paying schools in England. He works, as he has done for some years, in an office in St James Square, London SW1 and has a residential address at Lowndes Square, Knightsbridge, London SW1. He has at least one bank account in England. He has shareholdings in at least two English incorporated companies, Oppenheim Capital Limited and Oppenheim Holdings (UK) Limited. He was also, at least comparatively recently, an indirect shareholder in another English incorporated company, Tallon Commodities Limited. The two Oppenheim companies are, on the evidence before me, insolvent or with modest net assets of some £150,000. Tallon Commodities Limited apparently held net assets of just under £3,750,000. Nothing is known of further assets in England and Wales (though there are likely to be some) nor of their value.

166. As regards assets outside the jurisdiction, at the time of the hearing it appeared to be the case that the defendant owned at least the following assets:

(1) Tiger Capital Partners Limited (BVI) and Tiger Equity Limited (BVI) (sole beneficial owner). Tiger Capital and Tiger Equity own shares in Rolaware (Cyprus).
(2) the Oppenheim business in Guernsey (Oppenheim & Co Ltd, Oppenheim & Co (Custody) Ltd, and Oppenheim Holdings Ltd) (of which he is sole owner);
(3) shares in Dremoplex (Cyprus) (495,000 ordinary shares);
(4) land in Greece, being a unit in an apartment building in or around Glyfada in South Athens.

167. As the defendant also lives and works outside the jurisdiction (as well as within it), it is reasonable to assume that he has bank accounts in other jurisdictions. At one time he had a personal account with Marfin Bank, though no more was known by the claimants about this account at the time of the hearing.

168. The claimants' evidence is that, having previously told Ammar that he had some US$2 or 3 million saved away, the defendant told Ammar on 2 April 2021 that his (the defendant's) net worth was "*in the thousands, not millions*". The defendant's position

is that what he in fact said to Ammar was that his liquid net worth (ie. cash) was in the hundreds of thousands and not millions.

169. As a generality, by the time of the hearing before me, the defendant had provided no details (save for a small handful of shareholdings) of where his assets were, what form they took or, where relevant, in whose name or names they were held. Instead, he referred, somewhat vaguely, to unspecified "*accumulated capital*". Also somewhat delphically, the defendant has referred to himself having "*pursued investment opportunities"* in the shipping sector.

170. It is clear that the defendant over the years has a wide practical experience of setting up and managing trusts and companies in many different jurisdictions. There are grounds for considering that he may be connected with a company called Tiger Maritime Holdings Ltd based in the Marshall Islands given that it was connected with the NewLead matter and given its name. In any event however, he is, or has been, connected with companies and entities in various jurisdictions. The Oppenheim "group" of companies is a good example. These companies may not formally be a group in the sense of the Companies Act 2006 but they comprise companies with which the defendant is connected often with the same or similar names and which include or have included companies incorporated in England and Wales, Guernsey, Cyprus, BVI and the Marshall Islands.

171. As regards income, the defendant's evidence was that, on average, his annual gross income and/or dividends from Oppenheim had been in the region of US$500,000, that he expected to receive approximately £100,000 gross per year in fixed salary and discretionary bonuses from Tallon Commodities Ltd, and that on average his annual income from Paralos Asset Management Ltd (Guernsey) had been in the region of US$500,000. He said nothing either way about any income from other sources, whether within or outside the jurisdiction.

**(c) Real risk that judgment may go unsatisfied by reason of unjustified disposal/concealment**

172. As regards the issue of the risk of any judgment going unsatisfied due to improper concealment, transfer or dissipation, the claimants relied upon:

(1) the causes of action alleged against the defendant, in particular so far as they reflect dishonesty and the hiding of the true position, and in relation to which he has accepted that there is an arguable case;

(2) certain misleading statements in the defendant's evidence;

(3) long periods of silence by the defendant in setting out the position, indicative it is said, of a desire to conceal;

coupled with the defendant's experience and opportunity to use sophisticated financial arrangements and e.g. offshore companies and entities to hide assets.

173. The defendant, on the other hand, points to and relies upon:

(1) the consideration that the causes of action alleged are not of the "hands in the till" variety and, he submits, do not disclose any matter demonstrating a risk of improper behaviour to assist in avoiding any judgment against him being satisfied;

(2) the submission that there are no relevant misleading statements in his evidence;

(3) that any absence of explanations is explained by the circumstances at the time, such as personal circumstances or that it was proper to expect others to reply (particularly Latimer, the trustee);

(4) a hitherto unblemished record;

(5) delay in this case which, he submits, demonstrates (a) a lack of belief by the claimants in a real risk of improper disposal/concealment; and (b) no actual improper disposal/concealment during the period of three years or so after he was made aware of claims being against him.

174. I accept and remind myself of Mr Head's submission that a freezing order is one of the law's "nuclear weapons" which should not be granted lightly, that the burden is on the applicants to satisfy the evidential threshold in relation to risk of improper or unjustified dissipation, that solid evidence, not mere inference or generalised assertion, is required, and that the question is whether there is a current risk of dissipation (*JSC Mezhdunarodniy Preomyslenniy Bank v Pugachev* [2014] EWHC 4336 (Ch) at [221]; *Bank Mellat v Nikpour* [1985] FSR 87 at p. 92; *Holyoake v Candy* [2017] EWCA Civ 92; [2018] Ch 297 at [50]; *Fundo Soberano de Angola v Jose Filomeno dos Sant*os [2018] EWHC 2199 (Comm) at [86]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [70]).

175. Further, I remind myself that the test is real risk of dissipation rather than that dissipation is "likely" (*Les Ambassadeurs Club Ltd v Yu* [2021] EWCA Civ 1310; [2022] 4 WLR 1 at [27], [34]-[36]).

176. Finally, in this context, "dissipation" means putting assets that would otherwise be available to meet a judgment out of reach, whether by concealment or transfer. The dealing must be improper or unjustified in the sense that they are not justified as being made for normal and/or proper business purposes (*Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH und Co KG (The Niedersachsen)* [1983] 2 LLR 600 at p. 617; *Congentra AG v Sixteen Thirteen Maritime SA (The Nicholas M)* [2008] EWHC 1615; [2009] 1 All ER (Comm) 479 at [49]; *Fundo Soberano* at [86](1)). The purpose of a freezing order is to protect against improper dealings entered into to thwart or hinder satisfaction of a judgment, not to provide the applicant with security. Hereafter, I use the terms "dissipation" or "improper dissipation" as having the sense discussed in this paragraph.

177. I deal first with the causes of action alleged in this case. Of particular relevance to the issue of risk of improper dissipation of assets to avoid or hamper enforcement of any judgment, are those alleging breach of trust, dishonest assistance in breaches of trust and deceit (including significantly the allegations of hiding the true position by the making of dishonest representations by way of the DT Portfolio Reports).

178. As regards reliance on alleged dishonesty in the past, it is trite law that establishing a good arguable case of dishonesty is not sufficient to establish a sufficient risk of dissipation. It is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that there is a real risk that the defendant's assets will be dissipated. However, where the thrust of the allegations of dishonesty go to the heart of the question of a risk of dissipation the court may well be able to infer the making out, to the necessary standard, of such a risk (see e.g. *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 at [28]; *VTB Capital plc v Nutritek International Corporation* [2012] EWCA Civ 808; [2012] 2 LLR 313 at [177]; *Fundo Soberano* at [86](4); *Lakatamia* at [57]-[60]).

179. The defendant's submission is that the causes of action in this case do not assert that investments were not made as alleged or that the defendant stole money or otherwise enriched himself at the claimants' expense or that this is a "hands in the till" case or "anything approaching it". Instead, the defendant asserts that what the evidence amounts to is a case that poor investments were made and that even if he concealed the investments complained of and that they were made in part in his own interests, that does not suggest a risk of dissipation or concealment of his own assets in the context of the current proceedings and the avoiding of satisfaction of any judgment.

180. The claimants on the other hand say that the risk of dissipation is obvious. Where a person has been guilty of dishonesty in financial dealings in relation to the use or misuse of assets and has then sought to conceal that dishonest dealing, there is obviously a risk that they will seek to dissipate or conceal their assets to avoid satisfaction of any judgment against them. Put bluntly, even if the assets were not siphoned away and retained by the defendant, this is still a "hands in the till" case in the sense that the assets were used by the defendant when not authorised to be used in that manner, apparently for his benefit and in circumstances when he attempted to dishonestly conceal that fact.

181. At the end of the day each case turns on its own facts. Other cases simply describe certain circumstances where a risk of dissipation is found to exist or not to exist. The parties are agreed on the fundamental point, which is that any dishonesty which is established to be arguable must relate to a risk of dissipation if it is to be relevant.

182. I am satisfied on the evidence before me that the underlying causes of action do themselves establish, to the requisite standard, a relevant risk of dissipation such that that relevant pre-condition for the making of a freezing order is met. That is of course subject to the other relevant matters said to bear upon the risk and which have to be weighed with the underlying causes of action.

183. The further generic matter relied upon by the claimants is what they submit to be deliberately misleading statements made by the defendant in his evidence on this application. These matters call into question the honesty of the defendant in his evidence to the court and suggest a continued policy of seeking to mislead and conceal (see by analogy *UCB Home Loans Corp Ltd v Grace* [2011] EWHC 851 (Ch) where, among the factors taken into account in reaching a conclusion of a risk of dissipation, the learned Judge relied on the conduct of the defendants in hiding the true nature of certain transactions both before and after the event (see generally paragraphs [15] to [17])).

184. I have already referred to the statements regarding payments to or for the benefit of or as investments in Lisa Locca and Givol.

185. As regards Lisa Locca, the defendant asserted that his understanding from speaking to Latimer was that the payments were made by Latimer in error through confusing similar account numbers and that the investment was meant to be by another client of Latimer's. However, Mr Partellas of Latimer has confirmed this all to be untrue. The payments were directed by the defendant, as contemporaneous documents substantiate and he now accepts. It is said that the mistake as to how the investment came about is a genuine mistake of recollection over matters that took place some years ago but this does not fit with the explanation he gave that Latimer had comparatively recently (in 2019) told him of the mistake and how it had come about. Mr Partellas denies this and the contemporaneous documents suggest that neither he nor anyone else at Latimer would have proffered the explanation that the defendant asserted, and relied upon, as having been given in 2019. No explanation has been given as to what happened to the money after it was paid away and before like sums were re-deposited with the Trusts nor as to why there was no additional return.

186. As regards the Givol investment, the defendant expressed his confidence that he would not have recommended the investment in an Israeli-related investment (which is what the Givol investment was) given the first and second claimants' background and religious beliefs and that this must have been an error by Latimer, but that again has been disproved by the specific email instruction from the defendant to Latimer.

187. A third matter is a transfer of just over US$5,0000 from AAA Group to Oppenheim & Co (Custody) Limited on 10 April 2012. As regards this, the defendant states in his affidavit that he does not know why this payment was made but surmises that it must be an error by Latimer in confusing the Oppenheim account with his own personal bank account. This explanation is confounded by evidence from Mr Partellas denying the same and producing a copy of the contemporaneous email instruction from the defendant to make the transfer in question and actually stressing (in bold) the name of the transferee company.

188. A fourth matter is a transfer of €40,000 from Hrostenco to Oppenheim Capital Limited (BVI) in May 2013. In his affidavit, the defendant asserts that that company also had an account with Kendra but he does not know why the transfer was made. Again, Mr Partellas has produced a copy of the contemporaneous email instruction from the defendant to effect the transaction.

189. A fifth matter relates to the defendant's ability to provide accuracy within the DT Portfolio Reports. As regards this he says that he personally did not have the resources to pay for commercial portfolio accounting software or staff to help produce reports. This is contradicted by evidence regarding Oppenheim (whose name appears on some of the DT Portfolio Reports, apparently as the author of the same). For example, a brochure from November 2011 refers to Oppenheim having developed "a proprietary multi-asset consolidated portfolio reporting system" and then goes on to speak to its capacities. In any event, this fails to explain the obvious absence of reference to Rolaware and Dremoplex (and indeed the other "investments" of which complaint is made).

190. Finally, there is the assertion in the defendant's affidavit that the relevant investment strategy pursued by the first claimant was one of "aggressive growth" and that this was reflected in the investment profile set by Latimer (in fact on his instruction). This does not fit well with contemporaneous emails, for example one of April 2013 referring to the primary objective of the trust as being "capital preservation".

191. The defendant does not in my judgment satisfactorily explain how what he has said in his affidavit in these six respects came to be made and/or how it squares with the contemporaneous evidence.I cannot at this stage resolve the disputed facts but on the face of it I am satisfied that there is an arguable case that the defendant's evidence itself misleads and seeks to hide the truth.

192. In my judgment, these six examples add to the case that there is a risk of dissipation in the sense that I have used the term.

193. Finally, there is a long history of a failure to answer questions and to engage with the claimants in terms of providing any real information about the Trusts and their assets. I have considered the evidence on these matters with care. The evidence does, in my judgment, support the grounds put forward as to risk of improper dissipation. Again, I cannot resolve the factual case of the defendant that there are proper explanations as to why what appears to be an unsatisfactory silence and/or failure to engage in detail was neither a failure, nor unsatisfactory, and/or that it was right and/or that he had a genuine belief that his course of action was appropriate. Nevertheless, I am satisfied that the claimants' evidence gives solid grounds to support the case on improper dissipation. In my evaluation this is an additional factor not the main basis for the finding of such a risk.

194. A further matter relied upon by the claimants is the defendant's financial expertise, his experience and use of offshore structures and sophisticated financial arrangements. I need not set out the entirety of that experience and use that the claimants identify. It suffices to say that I accept their submission and that the recital of facts earlier in this judgment speaks for itself.

195. Mr Head submits that the mere fact that the defendant is a sophisticated businessman with a wide experience of offshore structures and sophisticated financial arrangements does not of itself demonstrate a risk of dissipation (see e.g. *VTB Capital plc v Nutritek International Corporation* [2011] EWHC 3107 (Ch) at [233] (as subsequently approved by the Court of Appeal)). This is undoubtedly true, but such a flawed approach or line of logic is not the one taken or relied upon by the claimants in this case. Rather, the claimants say that these matters heighten the risk of dissipation which I have found to be established from the underlying allegations in this case which relate to the causes of action asserted taken with the six unsatisfactory matters that I have identified in the defendant's sworn evidence on this application.

196. Mr Head also relies upon the hitherto good character of the defendant. The defendant is, as submitted on his behalf, a professional with an established history, reputation and presence in the financial services industry built up over many years. He has never been the subject of a complaint of this kind nor the subject of any other disciplinary or regulatory proceedings. I take this into account. However, that does not negate the arguable case brought nor the obvious inference that the matters relied upon give rise to a risk of improper dissipation.

197. Mr Head also relies upon what he says is delay by the claimants in bringing this application to a hearing.

198. As regards delay, I did not understand the parties to be fundamentally in disagreement as regards the applicable law and guidance, though obviously each side stressed certain aspects of statements of the law over others.

199. I take the headline points from the authorities as being as follows. In this respect, one of the main cases is *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm); [2012] 2 All ER (Comm) 634 at [151]-[159] (approved in *JSC Mezhdunarodniv Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 906 at [34]):

(1) The mere fact of delay in bringing an application for a freezing injunction or that it has to be heard *inter partes* does not without more mean there is no risk of dissipation. If satisfied there is such a risk (and assuming the other factors point to such an order) the court will usually make a freezing order.

(2) The significance of delay may be two-fold: it may amount to evidence, first (a) that the claimant does not genuinely believe that there is a real risk of dissipation which requires to be safeguarded against by an injunction and/or (b) that the factors said to demonstrate such a risk are not as persuasive as they first appear. Secondly, it may show that the injunctive relief sought is likely to be pointless, and therefore unjustified.

(3) As regards delay, the significance of any delay will depend upon the individual facts of each case (*Anglo Financial SA v Goldberg* [2014] EWHC 3192 (Ch) at [53]; *Fiona Trust Holding Corpn. v Privalov* [2007] EWHC 1217 (Comm) at [70]).

(4) The mere fact that an application is made on notice does not of itself demonstrate that there is no risk of dissipation (*Antonio Gramsci Shipping Corporation v Recoletos Limited* [2011] EWHC 2242 (Comm) at [28]-[29]); *Madoff* at [156]; *PJSC Bank "Finance and Credit" v Zhevago* [2021] EWHC 2522 (Ch) at [174]; *Public Institution for Social Security v Al Rajaan* [2019] EWHC 2886 (Comm) at [63]).

(5) It will often be:

> "*no answer for a defendant to come to the court to say his horse may have bolted before the gate is shut and then put that forward as a reason for not shutting the gate. That would pray in aid his own efforts to make himself judgement proof-if that, indeed, is what has occurred-and to avoid the effect of any court order which the court might make. If he can show that there is no risk of dissipation on other grounds, that is one thing. If he can show that the claimants do not consider that there is such a risk by virtue of the delay in seeking the order, that again is a relevant factor. However, if the court is satisfied about those matters in favour of the claimant, there is no reason why the court should not shut the gate, however late the application, in the hope, if not the expectation, that some horses may still be in the field or, at the worst,*

*a miniature pony" (Antonio Gramsci Shipping Corporation (supra) at [29]).*

(6) "*The order for disclosure of assets normally made as an adjunct to a freezing order is an important aspect of the relief sought, in determining whether assets have been dissipated and, if so, what has become of them, aiding in subsequent enforcement of any judgment."* (*Madoff* at [156]).

(7) Indeed, the fact that there may have been dissipation by attempted concealment may still leave a situation where the horse has bolted from the stable into the paddock (whether or not leaving a pony, miniature or otherwise) but is still in the paddock and the court can close the paddock gate onto the main road.

(8) Leaving aside the issue that delay may make the court look more carefully into the allegation of risk of dissipation and may suggest that the grounds are not strong, on the whole, in my judgment, the significance of an applicant's lack of belief in a real risk of dissipation (if established) amounts to, or borders on, an allegation of abuse of process in the sense that the applicant in such circumstances has no genuine belief that the application has proper grounds and/or is seeking the relief for the improper collateral purpose of, for example, bringing unfair pressure on the respondent through the obtaining of such an order.

(9) Nevertheless, the longer the delay as a matter of fact and the less satisfactory the explanation for any delay, the more likely that it will be a factor weighing against the making of an order (see e.g. *Cherney v Neuman* [2009] EWHC 1743 (Ch), where the applications were brought some 8 months after proceedings were issued and the Judge found the relevant facts were known to the claimants before then and in circumstances where the case on risk of dissipation was otherwise one that was not strong). Leaving aside the decision on the facts of that case, I note also that some of the discussion by the learned Judge which might suggest that applications for freezing orders on notice are of themselves seriously weakened because the horse would then have bolted may go too far in the light of the subsequent authorities that I have referred to.

200. Mr Head asserts both delay prior to the issue of proceedings and delay thereafter. I deal first with delay prior to issue of the proceedings. Mr Head argues for unjustified delay from March 2019 at the earliest and then at various stages thereafter as information was received by the claimants or their advisors.

201. In this case, on the basis of the evidence before me, I am satisfied that any apparent delay in this case is not unjustified. Although it is true that the Cypriot proceedings included claims for damages in respect of unjust enrichment, negligence, fraud, breach of fiduciary and statutory duty, breach of contract and conspiracy, the main thrust of the proceedings was obtaining control of the Trusts' assets and the obtaining of information.

202. Much reliance was placed by Mr Head on a DWF letter of 19 March 2019 to Peters & Peters but that letter does not identify any particulars and in effect draws an inference from continuing silence that there must have been improper activity by the defendant and asking him for information that would disprove that.

203. I am satisfied that the evidence, on the face of it, shows solid grounds in support of the conclusion that the claimants have not unduly delayed in the launching of these proceedings. In summary, I consider that the facts demonstrate that this case falls within the categorisation described by Steel J in *Fiona Trust v Privalov* [2007] EWHC 1217 at [69]:

> *"(b)…the applicant is entitled to take up time in making reasonable enquiries prior to launching an application, the more so where the nature of his case is based on fraudulent or dishonest activity (see Grupo Torras v Al-Sabah, C/A, 16 February 1994): the fact that thereafter the application is made inter partes is scarcely prejudicial to the respondent".*

204. That an applicant may need time properly to investigate, take advice upon and prepare a case and that, even if the work could have been done more quickly, the rate at which work has been carried out may be reasonable such as to result in a finding of no unjustifiable delay, is shown by cases such as *Public Institution for Social Security v Al Rajaan* [2019] EWHC 2886 (Comm) at [63]; *Ras al Khaimah Investment Authority v Bestfort Development LLP* [2017] EWCA Civ 1014, [2018] 1 WLR 1099 at [56]; and *Sukhoruchkin v Van Bekestein* [2013] EWHC 1993 (Ch) at [93].

205. The scale of some of the work in this case is reflected by the electronic bundle before me of over 5,500 pages. For the claimants, that included affidavits from Ammar and Mohamed; Ms Michaelidou of HK (dealing with the position in Cyprus and the Cypriot proceedings); Mr Poyiadjis (two affidavits dealing with forensic accounting matters); Mr Twomey of DWF (two affidavits dealing with the overall case and the application for a freezing injunction and also the manner in which investigations had proceeded, and a witness statement regarding jurisdiction but which was also relevant to the application before me); Mr Woodland (two witness statements dealing with jurisdiction) and Mr Partellas. In addition, there was expert evidence from Dr Dracos (on Cypriot law), Ms Middleton (on valuation), and Ms Conrad Hari (on Swiss law).

206. Mr Head appeared to criticise the bundle as demonstrating that the claimants had put forward too much material, as if they were litigating the underlying factual issues in detail which is not appropriate on an application such as this. However, in my judgment the approach was entirely justified and without it there must be at the least a very strong suspicion that the concession regarding an arguable case would not have been made and that a number of points raised by the defendant would not have been capable of being dealt with as convincingly as they were.

207. Again, the evidence traces in some detail the various stages at which information came through and its failure at that stage to form an adequate evidential basis for an application for a freezing order. I accept the claimants' evidence on these points, at least as providing solid grounds for saying that the claimants acted with reasonable speed and that the suggestion that, at various stages, it had sufficient material to bring an application for a freezing injunction at a much earlier stage than they in fact did is simply incorrect or, at the very least, that they acted reasonably in presenting the application when they did.

208. In summary, only by about late June 2020 had necessary materials been obtained from Kendra. Prior to that, control had had to be taken of Hrostenco and AAA Group to

obtain that information. Information had come out in stages and there is, in my judgment, no obvious evidence of unjustified delay by the claimants and their advisors in pursuing the information in question. Once obtained, the information as a whole was voluminous and had to be sorted through not only to identify what was relevant but what was irrelevant. There was a need to consider and take advice about potentially applicable foreign laws regarding the causes of action as well as (for example) regarding the legal structures set up in connection with the Trusts in connection with gaining control of the same. There was a need to take valuation advice, not least (for example) as a result of the defendant's assertion in March 2020 that Rolaware and Dremoplex (and therefore the Trusts' investments in them) retained value. Such valuation would clearly impact on the issue of the value to be frozen under a freezing injunction.

209. Furthermore, the need for the evidence that the claimants did in fact obtain and put together for the purposes of reaching a judgment call as to whether to bring a freezing injunction application is justified by, among other things, the facts that (a) only in evidence in answer was there any admission of an arguable case on the causes of action asserted (and even then that was downplayed to suggest the case was on very shaky evidential and legal grounds) and (b) points raised by the defendant were able to be dealt with and answered by the provision of detailed evidence (see, for example, the matters raised by the defendant in his evidence and relied upon by the claimants as further grounds in respect of a risk of improper dissipation as outlined above).

210. Even if criticism of unjustifiable delay can be levelled at the claimants, contrary to my view, as regards the period after June 2020 until issue of the proceedings, it is, in my judgment, not such as would cause me to conclude that freezing relief should not now be granted.

211. On the evidence as a whole, I am satisfied that the claimants have (or that it cannot be demonstrated that they do not have) a genuine belief in the risk of improper dissipation and the consequent need for a freezing order. In this connection it was suggested by Mr Head and Ms Jones in their skeleton argument that threats to report the matter to the FCA and the relevant criminal authorities and a text message sent by WhatsApp asking if the defendant was "going to try and find a way to make this right" showed that the real motivation behind the application for a freezing order was to extract a settlement by jeopardising his standing and reputation. I do not accept this submission.

212. Further, I have considered carefully whether the grounds relied upon to support the case of a risk of improper dissipation are solid and have concluded that they are, notwithstanding any alleged delay.

213. Finally, in this context, I note the submission of Mr Head that there is no evidence of actual dissipation or attempted dissipation during the years since 2019. As regards that, the disclosure orders that I made may throw light upon that submission. I accept that there is no positive evidence of attempted or actual dissipation (which there may sometimes be) but in my judgment it is frequently the case that the applicant for freezing relief has insufficient information about and an inability to get information about the respondent's assets and what he or she has done with them. In my judgment, the question is whether the claimants could be expected to have details of such improper dissipation or attempted improper dissipation if it had occurred, such that their lack of evidence on the point is significant. Here, there is no reason to consider that the

claimants would or should have known of the same. Accordingly, I accept that there is nothing in this respect to add to the balance in favour of an inference of a real risk of improper dissipation but equally there is nothing to add in favour of the balance against such an inference.

214. The other alleged delay that the defendant relies upon is in the period after proceedings were commenced. I have set out the history earlier in this judgment. It is submitted, in particular, that there was a gap of 9 days between the defendant's refusal to provide undertakings in relation to his assets and DWF's response that, in that case, the application should be listed for hearing. In the overall scale of things, I do not consider that this alleged delay is significant. Further, it seems to me that the manner in which the procedural steps and applications developed do not display relevant delay on the part of the claimants such as to call into question the evaluation of real risk of dissipation and the appropriateness of relief being granted. I accept that what in isolation may appear minimal delay may have to be considered together with the overall picture and history but that wider consideration does not alter my assessment.

215. A number of further points of detail were made by each side in favour or against an inference or evaluation of real risk of dissipation. In my view they are not central to my conclusion and I need not deal with them in detail. I have taken them into account but remain of the view that there is a real risk of improper dissipation which is based on solid evidential grounds.

216. On the evidence as a whole, I am satisfied that the claimants have (or that it cannot be demonstrated that they do not have) a genuine belief in the risk of improper dissipation and the consequent need for a freezing order.

217. Further, I have considered carefully whether the grounds relied upon to support the case of a risk of improper dissipation are solid and have concluded that they are, notwithstanding any alleged delay.

218. Finally, I consider that the history of this matter does not cause me to withhold the interim relief sought.

**Discretionary factors**

219. In their skeleton argument, Mr Head and Ms Jones rely upon matters going to the quantum of the claim as going to the issue of whether or not relief should be granted. However, it seems to me that the issues raised go to the terms of the order rather than whether a freezing order should be made.

220. More relevantly, they also raise the issue of whether the imposition of a freezing order on the defendant will cause not only the usual difficulties that such an order can subject a respondent to but that, given his (and his companies') regulated status in multiple jurisdictions, it will cast significant doubts on his ability to earn a living. These submissions are in very general terms. No concrete detailed evidence is put forward identifying the difficulties (rather than difficulties created by reports made to regulators) and no matters put forward as a way of any order minimising whatever the concerns are. I am not satisfied that this submission should prevent me making a worldwide freezing order.

## Conclusion

221. In all the circumstances and accordingly, the freezing order was made in this case.

## COSTS

222. Having granted the freezing relief, the order that I made reserved the costs of the application. I now expand upon the brief reasons given for that order at the time that the order was made.

223. In the case of interim or interlocutory injunctions the starting position is now well established that the costs of the application will usually be reserved, though there may be factors, or as it has been put, special factors (which I do not consider to amount to exceptional factors) justifying some other costs order (see *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1, CA; *Picnic at Ascot Inc v Derigs* [2001] FSR 2 and *Melford Capital Partners (Holdings) LLP and others v Wingeld Digby* [2020] EWCA Civ 1647; [2021] 1 WLR 1553).

224. Such special factors may include (for example) the situation identified in *Picnic at Ascot Inc* at paragraph 12(4):

> "*Thus there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for the interlocutory injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes).*"

225. The reasons underlying the general starting costs principle regarding interim injunctions is because it is wrong to view the application as a self-standing application on which the person obtaining the interim injunction has "won" and therefore should, under CPR r44.2(2), and as a starting proposition, receive his/her costs:

> "*It is quite plain from the passage in the judge's judgment from which I quoted that he granted or continued the [injunction] on the basis of the balance of convenience in order to hold the ring until the dispute between the parties could be properly decided at a trial. It is inconsistent with an order such as that, that there should be successful or unsuccessful parties for the purposes of the rules either new or old*" (*Desquenne* at [12]).

226. Morritt LJ (as he then was) went on to say:

> "*there were no successful or unsuccessful parties at that stage*".

227. In *Picnic at Ascot* Neuberger J (as he then was) considered these passages from *Desquenne* and said:

> "*One can see the force of that, particularly when one bears in mind that the balance of convenience will often be determined by reference to facts which may be contested, and the court may at trial conclude that it had been persuaded to grant an interlocutory injunction on the basis of assumed facts which turn out to be inaccurate, or even in the context of a claim which should never have been brought*."

228. In *Bravo v Amerisur Resources plc* [2020] Costs LR 1329, the court had to consider the question of the incidence of costs in the context of a freezing injunction having been obtained.

229. There had been a first *inter partes* hearing (but no earlier *ex parte* hearing) at which a freezing injunction had been granted by Steyn J. The amount subject to the freezing order was considerably less than that sought because, in setting that amount, the Judge was prepared to take into account the claims of a further 72 potential claimants whom the existing claimant's solicitors confirmed had given instructions to be joined to the claim but not the other 430 or so potential claimants that might join the claim. The Judge had required a cross-undertaking in damages from the claimants (which had not been offered unconditionally). The question of risk of dissipation was fought, but the Judge found that there was such a risk.

230. An undertaking was shortly after offered and accepted not to dispose etc, of assets in an increased amount given an apparent imminent joinder of a significant number of new claimants with their own claims.

231. There was then a further hearing before Steyn J in the following month in which she allowed the joinder of new claimants and varied the freezing order so as to increase the amount frozen.

232. The matter then came before Martin Spencer J on what would have been the return day for final consideration of the application for a freezing order but which had been resolved, leaving only the issue of costs.

233. He stated the issue of principle as being:

> "*whether this is an application which is akin to normal interim injunctions where the court makes assumptions on the facts and makes reference to the balance of convenience, both of which ta the final hearing may be considered quite differently when the full evidence and trial has been heard, so that it is appropriate to reserve the costs so that the position when the interim injunction was made can be viewed retrospectively in the light of the matters which have emerged at trial and in respect of which the court has made its adjudication; or whether applications for freezing orders are a discrete form of order upon grounds which are not susceptible to significant re-evaluation at trial so that an order for costs can and should be made in relation to the freezing injunction rather than await the outcome of the trial*".

234. Having considered, among other cases, *Picnic at Ascot*, and the passage in Neuberger J's judgment that I have cited above, Martin Spencer J went on to say:

> *"[52] It seems to me that this is enough to show that the decision in Picnic At Ascot is not wholly apposite [in] claims for freezing orders where the balance of convenience is not an issue, and where in relation to the merits of the case the court has regard to whether there is a good arguable case on behalf of the claimants or not. That is sufficient for the court to determine whether a freezing order should be made, and even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. On the contrary, those two findings are wholly consistent with each other, or may be wholly*

> *consistent with each other. Nor is there any reference to the balance of convenience. The question is whether it is just and convenient to make an order.*
>
> *[53] Therefore I agree with Mr Lord that the regime for the making of freezing order is different to the general position where interim injunctions are sought based upon balance of convenience and holding the ring pending the trial. There are, obviously, overlapping features, holding the ring being one of them. The purpose of a freezing injunction is to avoid a successful claimant being unable to enjoy the fruits of his success because there are no assets left against which judgment can be enforced, but that is a different kind of holding of the ring to that which is involved in the usual interim injunction a balance of convenience type case.*"

235. The Judge then went on to award costs to the claimants on the basis that they had been the successful party, but with various discounts to reflect aspects of the case that they had not succeeded on (for example, quantum at the first hearing and the need for a cross-undertaking in damages and, as regards the last hearing before Steyn J, the fact that the claimants had been granted an indulgence where they had not complied with the court rules).

236. In *PJSC Pharmaceutical Firm "Darnitsa" v Metabay Import/Export Limited* [2021] EWHC 1472 (Comm), Sir Michael Burton, sitting as a Judge of the High Court, again considered the issue of costs in the circumstances where the court had granted a freezing injunction. In that case, he had heard the return day for an application for a worldwide freezing injunction, such an injunction having been made *ex parte* at an earlier hearing. The application had been made under s25 Senior Courts Act 1981 as ancillary to proceedings to be taken and since issued in the Commercial Court in Kyiv, Ukraine. The defendant resisted the injunction. The Judge treated such opposition as either an application to discharge the injunction and/or opposition to its continuation. The Judge decided that the injunction should continue and that the claimant had established (a) a good arguable case on the cause of action in the Ukraine proceedings; (b) risk of dissipation; and (c) no failure to give full and frank disclosure (such failure having been contended for by the defendants) (see earlier decision reported at [2021] EWHC 1441 (Comm)). The injunction was continued.

237. In his costs judgment, Sir Michael Burton referred to the *Bravo* case (paragraphs [53]-[54]), part of which he cited including the passage that "*I do not consider that a judge at trial is going to be in any better position than I am to adjudicate upon the costs of these applications.*" He went on to say that he was not persuaded that the fact the order before him was a s25 order made any difference, indeed it made the case stronger for determination. He noted that there had been no *ex parte* hearing in the *Bravo* case and considered that it was appropriate to sever the *ex parte* application and the costs specifically attributable to it (which he reserved) and ordered that the balance of the costs (including the *inter partes* hearing and the costs of preparation and evidence for the *ex parte* hearing, other than those specifically attributable to the *ex parte* hearing ) should be paid by the unsuccessful defendant.

238. In *Rosler v Microcredit Limited, sub nom In re Microcredit Limited* [2021] EWHC 1904 (Ch), Ms Penelope Reed QC, sitting as a Deputy High Court Judge, dealt with the question of costs, having granted a freezing injunction. She does not appear to have been referred to *Bravo*. The Judge set out the general principle applicable in interim

injunctions as set out in *Desquenne*. She then referred to an exception, referred to in the White Book, by reference to the costs decision of the Court of Appeal in *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1263. (The substantive decision is reported at [2020] EWCA Civ 1263; [2021] 1 WLR 170.) The Judge cited the passage from the judgment of Popplewell J at paragraph [4] of his judgment when, referring to the *Desquenne* principle and *Picnic at Ascot Inc*., he said:

> "*Neuberger J's reasoning [in Picnic at Ascot Inc] was that an interlocutory injunction was normally to hold the ring until trial, and the resolution of the issues at trial would often cast light upon the merits of the respondent having resisted the injunction at the earlier stage. In this case, however, the injunction is not of a holding the ring type, and the issues which were ventilated upon the application will not be revisited as part of the substantive dispute*."

239. He then went on in the same paragraph to say:

> "*That was the very complaint which underpinned the appellants' resistance to the application. Moreover, we are concerned with the costs of an appeal, not of the application at first instance. The appeal involved the appellants re-running the same arguments and failing on them. Koza Altin is entitled to the costs of that exercise which we have decided was not justified by the arguments the appellants chose to advance on the appeal."*

240. In *Koza*, the issue had been an appeal from the making of an injunction which prevented the first claimant from funding arbitration proceedings against the first defendant. The background was that the first defendant was the first claimant's holding company. The second claimant was a director of the first claimant. He had sought to take control of the first claimant and changed its constitution and share structure to that end. The substantive proceedings involved declaratory and other relief regarding the management of the first claimant. Certain interim relief was obtained by the claimants on an undertaking by the first claimant that it would not use its assets other than in the ordinary and proper course of business or on reasonable legal expenses for its own benefit. An application had been made for declaratory relief that the funding of the arbitration proceedings was not prevented by the undertaking. On an appeal from the first instance Judge's decision, the Court of Appeal had declined to make an order as sought by the claimant and said it would act at its risk if it funded the litigation. Subsequently, a further application was made for an injunction preventing the first claimant from funding the arbitration proceedings and the second claimant from causing it to do so. The Judge had made that order. The current appeal was against the making of that order. The main grounds of opposition to the order had been that (i) the application was an abuse of process in that it should have been brought at an earlier stage and that it amounted to a collateral attack on the earlier decision of the Court of Appeal, and (ii) it was contrary to principle to grant an injunction to restrain breach of an undertaking. As is clear from the costs judgment, the Court of Appeal was only dealing with the costs of the appeal.

241. In the *Microcredit* case, the Judge expressed the view that *Koza* did not quite cover the situation before her but that the principle she deduced from the case was that there is an invariable rule that costs in an interlocutory injunction application should always be reserved.

242. She went on to say that the resistance in the instant case had been unusual in that it focussed entirely on the misconduct of the liquidator in failing to provide full and frank disclosure on the first hearing of the application which was dealt with by undertakings. There was also an allegation of lack of clean hands on the part of the liquidator and an argument that, therefore, as a matter of discretion, relief should not be granted. She went on to say:

> "*[7] It seems to me that these are discrete issues which are not going to be determined on the final disposal of this application when it comes to trial….the application is going to focus on matters which occurred before the Liquidator was appointed and will not focus on his behaviour in any way.*
>
> *[8]* [Counsel for the Respondent[1]] *makes the point that these are all issues that might have an impact on quantum, but I fail to see that. .As a matter of law, it seems to me that the substantive hearing will be dealing with what is the company's property and the recovery of that property. What the liquidator might be under a duty to do with that property once it has been recovered is a pragmatic and practical matter that is unaffected by the legal issues; therefore I consider that [counsel for the applicant liquidator] is right that these are not issues that are going to be re-visited when the substantive matter is heard"."*

243. She then went on to say that she considered that there was some room for the application of the principle that the usual rule is that costs should be reserved where the injunction is granted to hold the ring until the merits of the claim are explored so far as concerned the costs of the drafting of the application, the evidence in support and the first hearing of the matter. However, the grounds for resisting the freezing order were unjustified and the respondent was ordered to pay the costs of the two day hearing.

244. In *Kumar v Sharma, sub nom In re Saka Maka 2 Limited* [2022] EWHC 1008 (Ch), Mr Jonathan Hilliard QC (sitting as a Judge of the High Court) dealt with the costs of a without notice application and the return date on an application for the making of a freezing order which had succeeded. On the return date the Judge found there was a good arguable case, a real risk of dissipation and that it was just and convenient to continue the freezing order. However, he continued the order freezing a maximum value of £35,000 rather than £65,000 for which it had originally been granted and for which the applicant contended on the return date. Further he found that there had been, albeit innocent, breaches of the duty of fair presentation but that that did not justify refusing to continue the freezing order. The Judge decided that the costs of the return date should be assessed there and then but that the costs of the without notice application should be reserved.

245. As regards the costs of the return date, the Judge set out 9 considerations which led to his conclusion (the "Considerations"). In summary:

(1) a freezing order does not hold the ring in the same way as other types of interim injunction;

[1] The references to representation on the front sheet appear to be incorrect, see para [2] of the Judgment and the sense of the submissions reported.

(2) the defendant has a choice to resist continuance of a freezing order and cause the costs of the return date to be incurred;

(3) the test for a freezing order is different to the test for whether the claim should succeed at trial;

(4) it is therefore possible to say in most cases on the return date who is the winner or loser in a way that it is often not on an interim injunction that truly holds the ring;

(5) the fact that the evidence as to good arguable case will overlap or be the same as that relevant at trial to whether the claim succeeds is not decisive. If on the return date the respondent challenges good arguable case and loses then it has lost that issue and irrespective of the position at trial he should pay the costs and this is consistent with *Bravo*;

(6) By analogy, when a claim for reverse summary judgment is brought and fail, it is no answer to the claimant's claim for costs that the defendant might ultimately succeed at trial;

(7) Were it otherwise, the defendant would have a free shot at opposing a freezing order continuance on the good arguable case ground, knowing it would not have to pay the costs if it ultimately succeeded at trial or unless and until the trial was decided;

(8) The Judge was in a position to deal with the issue of full and frank disclosure and the duty of fair presentation and was in better position to do so than the trial Judge;

(9) Various issues were raised as to value and the conduct of the applicant, but those two issues arose in relation to whether the ordinary requirements for a freezing order were satisfied.

246. As regards the costs of the return date, he decided that (a) the applicant succeeded in establishing the requirements for a freezing order and should obtain his costs of that; (b) but the maximum sum was £35,000 rather than £65,000 and that the respondent was justified in fighting the issue of quantum, and (c) the issue of the applicant's conduct on the application, although resolved as being innocent, should be reflected in a costs order given the importance of ensuring the duty of fair presentation is complied with. He then awarded the applicant two thirds of his costs of the return date to reflect the fact that on the two issues of quantum and conduct of the applicant, the respondent succeeded to some extent but not wholly.

247. As regards the costs of the original without notice application, the Judge considered that the question of whether the respondent should pay the costs would be capable of being affected by the resolution of the issues at trial. As an example, he referred, by way of testing the point, to an assumed situation where Mr Kumar's, (the applicant's), claim was firmly rejected at trial which he said would, in his judgment, affect the question of whether he should have the costs of the original freezing order application and that such costs had not been caused by the respondent's opposition to the freezing order. Accordingly, the costs of the original without notice application were reserved to the trial Judge and he noted a similar approach was taken in the *Darnitsa* case.

## Discussion

248. The normal test for an interim injunction on *American Cyanamid* grounds is the well known test of (a) is there a serious issue to be tried? If yes ,then (b) would damages be an adequate remedy for a party injured by the court's grant or failure to grant an injunction? And, if not, (c) where does the balance of convenience lie or, as it is put in more recent cases, the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other?

249. Of course, there are cases where these *American Cyanamid* principles do not apply and also where the costs position may not be reserved. I leave those to one side.

250. In short form, the requirements for the grant of a freezing injunction (considered by me in the main part of this judgment) are: (a) that the applicant for the order has a good arguable case, (b) that there is a real risk that judgment would go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them, and (c) that it would be just and convenient in all the circumstances to grant the freezing order.

251. In both *American Cyanamid* applications and freezing order applications (although I accept with slightly different effect and operation) the effect of the order is to hold the ring. If the applicant in either case loses on the merits at trial then the interim injunction will be discharged. Indeed, in such circumstances, an inquiry as to damages may be ordered on the cross-undertaking usually given by the applicant for the original interim order.

252. As regards interim injunctions granted under the *American Cyanamid* principle, it is no answer to an application for the costs of the application to be reserved to say that the respondent failed to establish that there was not a serious issue to be tried and that whatever the position at trial the respondent has failed on the assessment of the merits test as they stand and apply at the interim stage. Indeed, that was the flawed approach adopted in cases such as *Melford Capital Partners.* The reason is because the claim has not then been established. In my judgment, the same is true in principle as regards a freezing injunction. The court has simply decided that there is an arguable claim, not that the claim succeeds. If the claim fails at trial, then the freezing injunction should (with the benefit of hindsight) not have been made.

253. This implicitly seems to have been the reasoning underlying the decision of Mr Hilliard QC in the *Saka Maka 2* case as regards the costs of the original *ex parte* freezing order application and hearing. It is also consistent with the decision of Ms Reed QC. The decision of Sir Michael Burton is more difficult to understand as he does not in terms explain why the costs of attending the *ex parte* hearing should be reserved but not all the other costs associated with that hearing and he does not explain how that fits with the *Bravo* reasoning.

254. Once one gets to the balance of convenience under the *American Cyanamid* test, it is because there is a serious issue to be tried. The question of the balance of convenience is in many cases not revisited at trial. It is the merits of the underlying claim which are definitely revisited. I do of course accept that features considered under the heading "balance of convenience" may have further light thrown upon them by the trial process and decision. The passage in Neuberger J's judgment that I have cited refers not only

to the trial shining a light on factors that go to the balance of convenience but also the possibility that it demonstrates that the claim should not have been brought. This confirms my view that the merits not being determined is a reason why costs are usually reserved (at least as a starting point). There is also the following passage in his judgment which appears to me to apply equally to the making of freezing injunctions:

> "(7) …*On the other hand, if the court is faced with disputed facts, and believes the claimant's version of the facts is more likely to be accepted, it may be dangerous to take that into account in the claimant's favour when deciding what to do about costs. It is obviously conceivable that at trial the court's preliminary, even its strongly held, view as to the likely outcome of the dispute on fact may turn out to be wrong. It would be adding insult to injury if an unfavourable order for costs is made against the defendant, in addition to the injunction being granted at the interlocutory stage, on the basis of a wrong (as it turned out) view of the facts by the court*".

I do not see that statement as limited to disputes of fact regarding balance of convenience issues and consider that it also encompasses disputes as to the underlying claim itself.

255. In any case, on the facts of this case the trial is going to shed light on the risk of dissipation because that risk is largely founded upon the causes of action or at least the facts asserted in support of them. This is likely to be the case in many situations.

256. Of course, if there is a discrete issue which is not going to be revisited at trial and on which the trial is going to shed no relevant light which could lead to a change in the interim order made, then one can quite see that a party may be ordered to pay the costs in relation to those issues if he has lost on them, whether the context is an application governed by *American Cyanamid* or one for a freezing order (see e.g. *Koza*, *Microcredit* and *Saka Maka 2 Limited*).

257. Neuberger J in the *Picnic at Ascot* case identified a number of situations in which the starting point of the costs being reserved would not or might not be the appropriate costs order. One of those is where the court is satisfied that the cause of action effectively has no defence. Even in such a case, care needs to be taken for the reasons that he gives.

258. As regards the 9 Considerations relied upon by Mr Hilliard QC in support of his conclusion regarding the costs of the *inter partes* hearing in that case and which I refer to above, I have therefore dealt with Considerations (1), (3), (4) and (5). In short, the tests under *American Cyanamid* and for a freezing order are different but in my view they are sufficiently analogous and are sufficiently dealing with the same position that the starting costs position should be the same notwithstanding (a) the tests are in slightly different terms and (b) the holding of the ring is in a slightly different manner. So far as it is suggested that in a freezing injunction application that succeeds the court can say who has won, the answer is that at that stage the court cannot say who has won. The decision is interim. Considerations (4) and (5) are answered by the reasoning in the *Picnic of Ascot* line of authority. I note also that, as I have said, there seems to be at the least a tension between some of these numbered points and Mr Hilliard's decision regarding the costs up and until and including the first *ex parte* hearing. Consideration (9) does not appear to take matters any further.

259. As regards Consideration (6) and the analogy with a reverse summary judgment application, with respect, the analogy is not an apt one. A reverse summary judgment application is determined once and for all, it is not in any sense an interim decision that holds the fort until trial in any sense.

260. As regards Consideration (8), the fact that a Judge may be able to deal with an issue, that that issue will not be revisited and that the costs of it can be dealt with, does not, with respect, say anything about what the *other* costs should be: in the *Saka Maka 2* case it could have been ordered, for example, that only a certain proportion of the costs were reserved with no order as regards the balance rather than that a certain proportion was paid to the applicant and no order as regards the remainder.

261. In the case before me, the hearing was an *inter partes* hearing with no previous *ex parte* hearing at all. The points made by Mr Hilliard QC at what I identify as Considerations (2) and (7) therefore fall to be considered. As I understand it, these must be the main reason for the Judge in that case distinguishing between the costs of the *ex parte* application and the costs of the *inter partes* hearing.

262. As regards these points, the same logic applies to *American Cyanamid* cases and yet in those cases the starting point is that costs will be reserved. It seems to me that there is a distinction between the costs of an application (even if broken into *ex parte* and *inter partes* hearings) and a case where the hearing is an entirely different process (such as an appeal as in *Koza*). From the applicant's point of view, the two stages are as much part of the application as the other. The same is true for the respondent (though the respondent may have incurred no or small costs prior to the order being received that was made following the *ex parte* hearing). Normally, a party is entitled to have an *inter partes* hearing.

263. Further, Consideration (7) is mitigated by the point made by Neuberger J in *Picnic at Ascot*:

> *"(4) There will obviously be circumstances where it is right to depart from the general approach. Thus, there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for the interlocutory injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes)."*

**This case**

264. In this case, it seems to me that the general approach to costs which applies in the *American Cyanamid* context should be applied. In short, is it fair that the defendant should pay the cost of an injunction against him to assist in preserving assets and preventing improper dissipation so as a possible judgment against him will be satisfied, if at the trial it turns out there is in fact nothing for which he is liable and no judgment against him? My answer is "No".

265. If I am correct in this, there are no relevant circumstances which arise which cause me to depart from the basic starting position. Although the defendant did eventually

concede that there was a good arguable case, that was after the evidence had been put in against him which had to be prepared for the court anyway and which also had to be gone into for the very full debate before me as to risk of improper dissipation.

266. If I am wrong about the starting point, and the starting point is that the claimants should receive their costs as the "winners", then in the circumstances here I would not make such an order and would still reserve the costs. That is because of the position in this case that the risk of dissipation is so closely tied up with the issue of the underlying factual issues said to establish the causes of action and which will have to be considered by the court at trial. The trial may throw a very different complexion on the issues canvassed on the application before me.