



Neutral Citation Number: [2021] EWHC 1126 (Comm)

Case No: CL-2015-000047

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2021

Before :

Mr Peter MacDonald Eggers QC
(sitting as a Deputy Judge of the High Court)

Between :

- (1) ALTA TRADING UK LIMITED
(FORMERLY ARCADIA PETROLEUM
LIMITED)
(2) ARCADIA ENERGY (SUISSE) SA
(3) ARCADIA ENERGY PTE LIMITED
(4) FARAHEAD HOLDINGS LIMITED

Claimants

- and -

- (1) PETER MILES BOSWORTH
(2) COLIN HURLEY
(3) STEPHEN CLIVE LANGFORD GIBBONS
(4) MARK RICHARD LANCE
(5) STEVEN KELBRICK
(6) SALEM CHUCRI MOUNZER
(7) ARCADIA PETROLEUM SAL OFFSHORE
(8) ARCADIA PETROLEUM LIMITED
MAURITIUS
(9) ATTOCK OIL INTERNATIONAL LIMITED
MAURITIUS

Defendants

~~(10) THE CORNHILL GROUP LIMITED~~

Fionn Pilbrow QC and David Heaton (instructed by **Jones Day**) for the **Claimants**
Tom Sprange QC (of **King & Spalding International LLP**) for the **Fifth and Ninth**
Defendants

Hearing dates: 29th March 2021

Approved Judgment

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

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THE HONOURABLE MR JUSTICE BUTCHER

Peter MacDonald Eggers QC:

Introduction

1. The Claimants were members of the Arcadia group of companies (“the Arcadia Group”) and trade or traded in physical crude oil and oil derivatives.
2. The Claimants initiated these proceedings against the Defendants alleging that they have suffered as victims of a substantial fraudulent conspiracy among a number of natural and corporate persons to divert money, allegedly some US\$340 million, away from the Claimants (the Arcadia Group) and into the hands of companies owned and/or controlled by the individual Defendants, who were former senior executives of the Arcadia Group or their associates. The fraud concerned profits arising from transactions, relating to West African crude oil, involving Arcadia Group companies but which accumulated in entities outside the Arcadia Group, and were diverted into or through the Defendants or other companies associated with the individual Defendants.
3. Claims against four of the Defendants have been settled.
4. The Fifth Defendant, Mr Steven Kelbrick, was an oil trader with the First Claimant (“Arcadia London”), and thereafter a consultant to and trading partner of the Arcadia Group. Mr Kelbrick owns 50% of the beneficial interest in the Ninth Defendant (“Attock”). The other 50% is owned by Mr Salem Mounzer, who had been the Sixth Defendant in the proceedings, but with whom the Claimants have settled their claims.
5. The claims against the Defendants, including Mr Kelbrick and Attock, are grounded in allegations of conspiracy, dishonest assistance of breach of fiduciary duty, knowing receipt and aiding and abetting tortious acts in breach of the Swiss Code of Obligations.
6. The Defendants, including Mr Kelbrick and Attock, deny the claims. Mr Kelbrick’s case is that the trades were legitimate, formed the ordinary course of his business and were undertaken on the understanding that the First and Second Defendants had the relevant authority on behalf of the Arcadia Group.
7. On 12th February 2015, the Claimants applied for and obtained freezing injunctions against the Defendants, including Mr Kelbrick and Attock. The injunctions were later continued at the return date in July 2015. On 13th February 2015, the Claimants commenced these proceedings.
8. At the hearing of those applications, the Claimants gave an undertaking in damages and voluntarily agreed to fortify or secure that undertaking in the sum of US\$2 million.
9. Since 2015, the proceedings have been occupied by challenges to the Court’s jurisdiction made by the First and Second Defendants, which were first determined by the Court in 2015, but from which there have been appeals to the Court of Appeal and Supreme Court, a reference to the Court of Justice of the European Union and, following the return of the case to the Supreme Court, a remittal of a factual issue to the Commercial Court, and a further appeal to the Court of Appeal, which is listed to be heard on 5th and 6th May 2021.
10. In September 2017, Mr Kelbrick applied to the Court to set aside the freezing injunction but the application was dismissed by Cockerill, J.

11. At the hearing before me, Mr Kelbrick and Attock have applied for an increase in the fortification of the undertaking in damages by the Claimants up to US\$10 million. However, by the time of the hearing, the application was pursued only by Mr Kelbrick and not by Attock. Mr Kelbrick's alleged losses (both actual and potential) are said to arise by reason of his shareholding in Attock and a related company, Attock Oil International DMCC ("Attock Dubai").
12. Mr Kelbrick's intention of seeking an increase of the fortification of the Claimants' undertaking was first raised in late 2017 and this application was issued in August 2020.
13. The Claimants resist the application to increase the level of fortification.

The fortification of an undertaking in damages

14. An undertaking in damages is given to the Court by an applicant for an interim injunction to facilitate the compensation of the respondent in respect of any losses caused by the injunction, in particular if the applicant was not entitled to such interim relief. It is a "*very important, if not an essential, means of preventing injustice from being done by the court when it makes an order at an interlocutory stage, before the rights of the parties have been finally determined*" (*Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249, 311-312, *per* Gibbs, J). The provision of such an undertaking, unless the Court orders otherwise, is contemplated by CPR PD 25A, para. 5(1). Whether the undertaking is enforced is a matter for the Court's discretion (*Fiona Trust & Holding Corporation v Privalov (No 2)* [2016] EWHC 2163 (Comm); [2017] 2 All ER 570, para. 11).
15. Given the advantage provided to the applicant for an interim injunction by the grant of the injunction itself, that should be balanced by ensuring that a sufficient level of protection is afforded to the respondent in respect of any losses which are caused by an injunction. That protection resides in the undertaking in damages and if the undertaking requires financial security in the fortification of the undertaking. This is said to be a matter of "*symmetry*" (*Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295; [2015] 1 WLR 2309, para. 52).
16. Provision is made for the fortification of the undertaking in the Commercial Court Guide, at para. F.15.4:
 - (a) *Where the applicant for an interim remedy is not able to show sufficient assets within the jurisdiction of the Court to provide substance to the undertakings given, particularly the undertaking in damages, it may be required to reinforce the undertakings by providing security.*
 - (b) *Security will be ordered in such form as the Judge decides is appropriate but may, for example, take the form of a payment into Court, a bond issued by an insurance company or a first demand guarantee or standby credit issued by a first-class bank.*
 - (c) *In an appropriate case the Judge may order a payment to be made to the applicant's solicitors to be held by them as officers of the Court pending further order. Sometimes the undertaking of a parent company may be acceptable."*

17. The Court has previously considered the circumstances in which such fortification should be ordered. It is ultimately a matter for the Court's discretion, but the principles which guide the exercise of that discretion are that fortification should follow if the respondent to the injunction (the applicant for fortification) can demonstrate a good arguable case (and not to any higher standard) that:
- (1) The respondent has suffered or will suffer a loss. For this purpose, there must be an intelligent estimate, being informed and realistic but not mathematically or scientifically precise or rigorous, of the likely amount of that loss which has been or might be suffered by the respondent to the injunction by reason of the interim injunction.
 - (2) The making of the interim injunction is or was a cause without which the relevant loss would not have been suffered.
 - (3) There is a sufficient level of risk of loss to require fortification, meaning that if the Court orders that the applicant for the injunction is directed to comply with its undertaking in damages and to compensate the respondent, there is a risk of the applicant for the injunction not satisfying any such order for damages.
18. These requirements guiding the exercise of the Court's discretion are closely related, especially the first and second requirements. In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295; [2015] 1 WLR 2309, after rejecting a higher standard of proof on the balance of probabilities to establish the above requirements, because such a standard would “*encourage wasteful satellite litigation*”, Tomlinson, LJ said (at para. 53):
- “... In my judgment Briggs J was correct in Jirehouse Capital v Beller [2008] EWHC 725 (Ch) to summarise the principles as he did at para 25:*
- “Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant for fortification (here the defendants) by reason of the making of an interim order. They require the court to ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction.”*
- The three requirements are of course inextricably linked. The principles could equally be summarised, as Hamblen J did at para 31 of his judgment, as a requirement that the applicant for fortification show a good arguable case for it. In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific.”*
19. The parties did not dispute these requirements in a general sense. The parties' submissions followed these three requirements, albeit not necessarily in the same order as I have set them out above. I shall consider each of these requirements, recalling that ultimately the Court must step back and ask whether in the circumstances of the case, the increased level of fortification should or should not be ordered.

20. Although these requirements guide the exercise of the Court's discretion, the Court must consider each of these requirements and the weight to be accorded to them and of course any additional factors. That said, in most cases, these requirements are important, if not critical, to the exercise of the Court's discretion.
21. Mr Fionn Pilbrow QC, who appeared with Mr David Heaton on behalf of the Claimants, submitted that in determining whether the standard of a good arguable case has been met in respect of these requirements involves a consideration and scrutiny of the evidence before the Court. However, Mr Sprange QC submitted that the Court should not undertake a detailed and prolonged assessment of difficult questions, particularly as to causation, and that the assessment of any loss might be difficult and imprecise and that the mere absence of particularised evidence does not mean that there is no evidence of a risk of loss (*Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch), para. 24).
22. In my judgment, it is not simply a case of the Court forming a general impressionistic view, but of having careful regard to the witness and documentary evidence, bearing in mind the interlocutory nature of the application and the nature and possible incompleteness of such evidence. The standard of proof is not a high one, although in some respects, especially in the context of causation, there are inherent difficulties. Those difficulties must be weighed in the balance with the evidence itself, but it is the evidence which the Court must take into account in deciding whether the standard is or is not met.

The existence and estimate of loss

23. Mr Sprange QC on behalf of Mr Kelbrick submitted that:
 - (1) Between 2010 and 2014, Mr Kelbrick's average share of net profits in Attock's oil trading activities was US\$2.2 million per annum (para. 9.2 of the first witness statement dated 10th August 2020 of Ms Sarah Walker of Mr Kelbrick's solicitors). Since the freezing injunction was granted in February 2015, Mr Kelbrick has not earned any meaningful income and is unlikely to before the conclusion of these proceedings, which is likely to be in 2024. This translates to losses over an approximate period of ten years of US\$20 million.
 - (2) Mr Kelbrick is an experienced and expert oil trader with a broad network of contacts, having worked with oil majors, sovereign states and leading trading houses over his 25-year career. The loss of the Arcadia business prior to the grant of the injunction did not prevent Mr Kelbrick earning profits from oil trading (Ms Walker's second witness statement dated 14th January 2021, para. 34).
 - (3) Prior to the injunction, Mr Mounzer and Mr Kelbrick estimated that through a related company, Attock Dubai, they would lift an average of one million barrels of oil per month. This estimate was based on *inter alia* the following circumstances (Ms Walker's second witness statement dated 14th January 2021, para. 34):
 - (a) In May 2014, following a tender process, Indian Oil Corporation Limited ("IOCL") accepted Attock as a direct Supplier/Buyer for

participating in IOCL's tenders for the import of crude oil or liquid petroleum gas, as well as the import and export of petroleum products.

- (b) In April 2014, Nigerian National Petroleum Corporation ("NNPC") offered Crudex Oil International Limited ("Crudex") and Azenith Energy Resources Limited ("Azenith"), entities owned and controlled by Mr Kelbrick, each a one year 30,000 barrels per day crude oil contract effective from 1st June 2014 to 31st May 2015.
 - (c) In April 2014, Mr Kelbrick was approached by Vitol with a proposal to lift Attock Dubai's NNPC crude contracts at prices higher than agreed with Arcadia.
 - (d) In June 2014, Attock Dubai and BP Oil International ("BP") entered into an agreement for the sale and purchase of between 650,000 and 1,000,000 barrels of crude oil per month at prices higher than those agreed with Arcadia.
 - (e) In November 2014, Attock Dubai approached Entreprise Tunisienne d'Activités Pétrolières ("ETAP"), with the aim of being included on ETAP's list of business counterparties. At various dates in 2015, Attock Dubai was invited to submit offers for the sale and purchase of ETAP's oil.
- (4) Mr Kelbrick could have secured employment with Vitol, a leading trading house. Mr Paul Himsworth of Vitol confirmed that he and the late Ian Taylor, the former CEO of Vitol, had discussed Mr Kelbrick taking over from Mr Himsworth as Managing Director of Vitol Dubai. The potential financial rewards of this role were significant (Ms Walker's second witness statement dated 14th January 2021, para. 37-39).
- (5) Based on its financial records, Attock Dubai earned US\$224,786.298 in sales in 2015, after the conclusion of its trading relationship with Arcadia, but made no sales whatsoever in 2016 after the service of the freezing injunction when its credit facilities were no longer available. Attock Dubai made a profit in 2015, but a loss in 2016 (Ms Walker's third witness statement dated 19th March 2021, para. 15-16).
- (6) In resisting Mr Kelbrick's application, the Claimants advance arguments which are misplaced (and in the process suggest that a higher standard of proof is required, namely one based on the balance of probabilities):
- (a) The Claimants argue that Arcadia was lost as a client to Mr Kelbrick and his companies by May 2013 and there is no evidence that alternatives would have been secured, but this ignores both the evidence and the fact that oil supplies were still available to Mr Kelbrick's companies and Arcadia was only one customer.
 - (b) The Claimants argue that the evidence relating to Mr Kelbrick and Attock Dubai securing new suppliers is not evidence of "*securing new business*". This argument ignores the chronology: Attock ceased

operations in May 2013, when the relationship with Arcadia ceased, the business was subsequently transferred from Attock to Attock Dubai; for the following 20 months up to the grant of the injunction in February 2015, Mr Kelbrick and Mr Mounzer, established the new business of Attock Dubai; and Attock Dubai's 2014 accounts record sales of US\$971,308,939 and a profit in 2015.

- (c) The Claimants argue that due to political change in Nigeria, Mr Kelbrick's business would have suffered and, in particular, would not have received cargos from NNPC, regardless of the freezing injunction. This is at odds with the fact that NNPC interacted with Mr Kelbrick following service of the injunction and that cargoes then ceased from April 2015 (Ms Walker's first witness statement dated 10th August 2020, para. 11.2-11.3; Ms Walker's second witness statement dated 14th January 2021, para. 56).
- (d) The Claimants argue that there is no documentary evidence in support of the Vitol employment opportunity, but this is at odds with the evidence of Ms Walker and the contemporaneous documents confirming Mr Kelbrick's meeting with Mr Taylor who discussed Mr Kelbrick's employment with Mr Kelbrick and Mr Himsworth.
- (7) Mr Kelbrick plainly had significant earning capacity before the freezing injunction was served. The evidence demonstrates that not only had Mr Kelbrick secured all the key ingredients for sustained trading success and begun to develop income, but also that this came to an abrupt halt following service of the injunction in February 2015.

24. Mr Pilbrow QC on behalf of the Claimants submitted that:

- (1) Mr Kelbrick does not have a good arguable case of loss in an amount that the Court can intelligently estimate based on the activities of Attock Dubai from 2013, because:
 - (a) Attock's business had been all but exclusively with the Arcadia Group until May 2013, when it ended, and Attock's business was then transferred to Attock Dubai.
 - (b) For the period from 2010 to 2012, Attock was, on Mr Kelbrick's figures and the Attock Dubai Accounts to 31st December 2014, making average annual net profits of US\$7.3 million.
 - (c) After the fundamental change to Attock's and Attock Dubai's business brought about by the end of its relationship with the Arcadia Group: in 2014, Attock Dubai's business was loss-making, and for the period from 2013 to 2015, Attock Dubai made only a very modest profit.
 - (d) Mr Kelbrick has not provided any credible explanation of this collapse in performance, which occurred well before the grant of the injunction.

- (2) Prior to May 2013, Attock's business was exclusively with the Arcadia Group. The suggestion that its business would have continued in a profitable manner is untenable, given that after May 2013, its accounts show that the business became significantly less profitable. There was a substantial decline in profit, from around US\$7.3 million annually in the period from 2010 to 2012 to US\$700,000 in 2013 and a loss in 2013-2014.
- (3) From 2013, Attock Dubai's net profit/loss position was as follows:
 - (a) 2013: a net profit of US\$686,524.
 - (b) 2014: a net loss of US\$709,382.
 - (c) 2015: a net profit of US\$358,549.
 - (d) 2016: a net loss of US\$4,447,725.
- (4) Given Mr Kelbrick's 50% share in Attock Dubai, this represents an average annual profit to Mr Kelbrick of US\$77,467 for the period from 2013 to the grant of the injunction in February 2015 (calculated on an annualised basis favourable to Mr Kelbrick).
- (5) In the absence of any credible explanation for the losses over 2013-2014, before the injunction was granted, there is no basis for the extrapolation of Attock Dubai's profits based on Attock's performance prior to 2013. On the most favourable approach to him, Mr Kelbrick could have expected to earn an annual net profit of at most around US\$77,467 from Attock Dubai as from 2013, before any deductions to take into account the trajectory of the business from 2014 or taxation or any other outgoings.
- (6) Mr Kelbrick argues that the level of profitability for Attock Dubai was suppressed by exceptional start-up costs for "*office rent prepayments, office fitout, acquisition of furnitures and equipments and personnel relocation*" (Ms Walker's second witness statement dated 14th January 2021, para. 33). However, based on documents provided to the Claimants by Mr Mounzer, these costs (other than for relocation) were no more than US\$153,600 and, in any event, would not have been incurred in 2014 (see para. 10-12 of the fifth witness statement dated 4th March 2021 of Mr Barnaby Stueck of the Claimants' solicitors). This accordingly does not explain the significant losses in 2013-2014.
- (7) Mr Kelbrick's reliance on new business opportunities through 2014 and in early 2015 and set out in para. 34 of Ms Walker's second witness statement is not justified, because there is no explanation of why, by more than a year-and-a-half after business with the Arcadia Group had ceased, Attock Dubai (which had taken over Attock's business) was still not making profits close to those profits which Attock had made on its business with the Arcadia Group. Further,
 - (a) As regards IOCL's invitation to tender issued to Attock as a direct Supplier/Buyer, there is evidence that Attock was accepted as an interested party, but not more. There is also the curiosity that Attock, as

opposed to Attock Dubai, had ceased trading by this stage and there is no further documentation adduced by Mr Kelbrick as to the acceptance of the tender or if accepted whether it was profitable.

- (b) There is no evidence of what business was in fact transacted with NNPC and whether it was profitable.
 - (c) There is no evidence that the proposal by Vitol to lift Attock Dubai's NNPC crude contracts at prices higher than agreed with Arcadia was ever accepted.
 - (d) The Attock Dubai / BP agreement was a 3 month contract and there is no evidence of business transacted under it.
 - (e) There is no evidence of any business carried out between Attock Dubai and ETAP.
- (8) As regards Vitol's consideration of appointing Mr Kelbrick as Managing Director of Vitol Dubai, there is no evidence of the earnings attached to this position and this provides no basis on which to make an intelligent estimate of loss.
- (9) Mr Kelbrick has failed to establish a good arguable case that Attock Dubai would, from 2015 onwards, have made profits equivalent to Attock's pre-2013 profits, not least because he could provide documents or full evidence addressing the matters above, but has chosen not to do so.
25. In considering these submissions, I recall that the standard of proof which Mr Kelbrick must satisfy is one of a good arguable case. Moreover, while I accept that the Court's quantification of any estimated loss must be based on the evidence before the Court, which requires the Court to scrutinise that evidence, the Court should recognise and take into account the inherent limitations of the exercise at an interlocutory hearing. Therefore, in *Fiona Trust & Holding Corporation v Privalov (No 2)* [2016] EWHC 2163 (Comm); [2017] 2 All ER 570, Males, J said at para. 49-51:

"49. There was some debate whether a 'liberal assessment' of damages is appropriate. The origin of this phrase is the speech of Lord Wilberforce in a case concerned with damages for patent infringement, General Tire and Rubber Co Ltd v Firestone Tyre and Rubber Co Ltd [1975] 2 All ER 173 at 177, [1975] 1 WLR 819 at 824:

'There are two essential principles in valuing the claim: first, that the plaintiffs have the burden of proving their loss; second, that the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not to punish the defendants.'

51. ... Nevertheless I consider that a liberal assessment of the defendants' damages should be adopted, provided that it is clear what this means. It does not mean that a defendant should be treated generously in the sense of being awarded damages which it has not suffered. It does mean, however, that the court must recognise that the assessment of damages suffered as a result of a freezing order

will often be inherently imprecise, for example because the defendant cannot say precisely what it would have done with its funds but for the freezing order; that this problem has been created by the claimant's obtaining of an injunction to which it was not entitled; that in the light of these factors the kind of over eager scrutiny of a defendant's evidence and minute criticism of its methodology to which Norris J referred will not be appropriate; and that it is not an answer for a claimant to say that damages cannot be awarded because the defendant's business venture was to some extent speculative and might have resulted in a loss. Thus the defendant is not absolved from proving its damages, but these factors must be borne in mind in determining whether it has succeeded in doing so."

26. Subject to the issue of causation, which I address below, in my judgment, Mr Kelbrick can demonstrate that he has a good arguable case that he has suffered losses following the grant of the injunction in February 2015 for the reasons largely given by Mr Sprange QC. I have in mind in particular the following considerations:
- (1) Although Attock's/Attock Dubai's trading relationship with Arcadia ended in 2013, Attock Dubai continued to generate substantial sales in the approximate sum of US\$224 million in the period prior to the grant of the injunction, although that was substantially less than the sales generated in 2014 in the approximate sum of US\$971 million. It might well be that this difference is accounted for the cessation of business with the Arcadia Group in 2013.
 - (2) After the service of the interim injunction in February 2015, Attock Dubai generated no sales at all in 2016 when its credit facilities were no longer available.
 - (3) In order to assess losses arguably suffered by Mr Kelbrick, it is not just a question of considering the impact on the profits of Attock Dubai, because even if the company had sustained a loss prior to the service of the injunction, the impact of the injunction may have been to increase the level of such losses. Accordingly, the modest estimate of Mr Kelbrick's share of the profits calculated by the Claimants to be approximately US\$77,000 per year is not justified as the sole criterion by which to assess the relevant losses at this interlocutory stage.
 - (4) There is evidence prior to the grant of the injunction of specific business opportunities available to Attock Dubai, although I accept that the evidence is limited and does not give any indication of the sums to be earned by Mr Kelbrick directly or through Attock Dubai.
27. The quantification of such loss is difficult and as part of the exercise I am undertaking it must necessarily be one which is lacking any logical rigour or one which is inherently tentative. I have in mind that the injunction was granted in February 2015 and that it is likely to continue until the trial of this action, which may be, on Mr Sprange QC's estimate, in 2024, or in Mr Pilbrow QC's estimate, 2023. On either estimate, that is a considerable period of time.
28. Bearing in mind the sales generated by Attock Dubai prior to the grant of the injunction, I can readily see that any losses sustained by Mr Kelbrick following the injunction might be as high as US\$1 million per year, which would equate with US\$8-9 million

for the entire period and that there is a good arguable case for such an estimate. Accordingly, if further fortification were ordered, taking into account the existing fortification in the sum of US\$2 million, the further fortification would be in the sum of US\$6-7 million.

29. There is a question whether the Court has the jurisdiction to order fortification in respect of losses sustained prior to the order for fortification or whether the Court should make such an order in the exercise of this discretion.
30. In *Standing v Power* [2020] EWHC 1173 (Ch), para. 37-38, Mr Michael Green QC sitting as a deputy High Court judge, after considering the requirements which should be established in guiding the Court to exercise a discretion in favour of fortifying an undertaking in damages, said at para. 37-38:

“37. Mr Asquith submitted that the test is satisfied if he shows that there is a real risk of any loss being suffered by Mr Power and there is no basis for applying the loss of a chance principles in this area. If there is a real risk of the sale being lost as a result of the injunction, then an intelligent estimate of the likely loss has to be made. I think he must be right on this and that is the approach I will take.

38. It furthermore seems to me that I have to be so satisfied as at the date of the hearing that the evidence shows that there is a real risk of a loss being suffered from a sale falling through in the future. If the evidence indicates that the sale has already fallen through, then that has happened while there was no added fortification to the cross-undertaking and was a risk that the applicant took in delaying his application. I do not think that fortification should be ordered for losses already incurred by the time the application is heard.”

31. Mr Pilbrow QC initially submitted that on this authority fortification may only be ordered for future (and not past) risks of loss, though he accepted that this aspect of the decision was *obiter*. Mr Pilbrow QC submitted that, as most of the losses for which Mr Kelbrick seeks fortification must have occurred in the past, the Court must not order fortification in relation to such past losses. However, during his oral submissions, Mr Pilbrow QC submitted that this is a consideration which is probably best viewed as one governing the Court’s discretion.
32. I do not accept that the Court’s jurisdiction to order the fortification or further fortification of an undertaking in damages must relate only to losses which may be suffered in the future rather than losses which have already been incurred. If the Court considers that fortification is justified having regard to the factors referred to above, I see no reason why fortification could not be directed in relation to past losses as well as future losses. There are a number of reasons for this conclusion:
- (1) If the Court requires an undertaking in damages to be fortified, as the purpose of the undertaking, if enforced, is to hold the applicant for the injunction to the undertaking to compensate the respondent for losses suffered by the respondent as a result of the injunction, there is no meaningful distinction to be found in whether those losses have been suffered in the past or are likely to be suffered in the future (although past and future losses may differ in the nature of the evidence adduced to support their existence and quantification).

- (2) Fortification is not different in principle from an order for security for costs (*Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch), para. 18). As security can be ordered for incurred costs as well as future costs, there is no reason to restrict the fortification of the undertaking in damages to future losses only.
 - (3) There may be a change in circumstances justifying an order for fortification where such an order was not warranted in the past. For example, it may have been the case that when the injunction was granted in February 2015, there was no justification for fortification at that time, but the financial condition of the applicant for the injunction may have since declined which now justifies fortification. It would be both odd and unfair if the Court's jurisdiction was limited to restrict any fortification to future losses or if the Court's discretion should be exercised against fortifying the undertaking in respect of past losses.
33. There is therefore no reason to restrict any further fortification to be ordered (assuming that the further requirements are satisfied) to future losses.

Causation

34. Mr Sprange QC on behalf of Mr Kelbrick submitted that:

- (1) As to causation, it is enough for the Court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered. The freezing order need not be the sole or exclusive cause of the loss, but must be an effective cause.
- (2) There is more than a good arguable case that the injunction is an effective cause of Mr Kelbrick's losses.
- (3) Where credibility, creditworthiness and access to significant finance facilities are key ingredients to the success of an oil trading business, the freezing injunction, rather than the proceedings themselves, is the effective cause of loss. That is not to suggest that the proceedings themselves are not significant in terms of the existence of ongoing business activities but the injunction is the dominant cause of the loss of finance facilities and the ability to trade and earn income.
- (4) Mr Kelbrick, Attock and Attock Dubai are almost entirely reliant on trade finance to conduct their business (Mr Kelbrick's third affidavit dated 25th June 2015, para. 23-24). The transactions entered into by Attock Dubai would require financial security, for example by way of a deposit, bonds or letters of credit
- (5) Mr Kelbrick and Attock Dubai had extensive financing facilities in place, including with Credit Suisse, Société Générale, Credit Agricole and ING, but these facilities ceased shortly after the service of the interim injunction (Mr Mounzer's first witness statement dated 8th March 2017, para. 33-39; Ms Walker's second witness statement dated 14th January 2021, para. 50-51).
- (6) When considering the effective cause of losses, the focus should be on the financing facilities available to Mr Kelbrick and Attock for a number of years

and what caused those facilities to be withdrawn. The evidence is that it was the injunction, not the proceedings, which was the cause.

- (a) The Claimants served the injunction on every conceivable party associated with Mr Kelbrick, Mr Mounzer and Attock, including Credit Suisse, ING and Credit Agricole, their trust companies and lawyers, along with suppliers such as NNPC (Ms Walker's second witness statement dated 14th January 2021, para. 49.1).
 - (b) By way of an example of the reaction to the service of the injunction, Mr Sprange QC referred to an email from Crudex's agent in Mauritius, Trident Trust Company (Mauritius) Limited, who stated in an email dated 26th February 2015 that the injunction "*implies that the latter entity [Crudex] may presently not engage in any transaction. Given the implication and seriousness of the above matter, we would appreciate if you could please enlighten us thereof, for completeness of our compliance requirements. Kindly treat as urgent*". Similarly, soon after the service of the injunction, Mr Kelbrick received a call from a member of the Nigerian House of Representatives enquiring as to the meaning of the freezing injunction (Ms Walker's second witness statement dated 14th January 2021, para. 49.1.5).
 - (c) Attock Dubai's Geneva banks refused to continue providing credit facilities in 2015-2016, and expressly referred to the injunction as a basis for so doing (Mr Mounzer's first witness statement dated 8th March 2017, para. 33-36). Emirates NBD, Banque Cantonale Vaudoise and Pictet have either ended or made clear their intention to bring their banking relationship with Mr Kelbrick to an end (Ms Walker's first witness statement dated 10th August 2020, para. 11.2.3).
 - (d) National oil companies are less likely to be interested in foreign civil proceedings in which no allegations are made against them, because they create no legal impediment on the undertaking of commercial activities, nor impact on the respondent's ability to securing financing. By contrast, receipt of a freezing injunction served on them, endorsed with a penal order that explicitly states that any reader could be imprisoned, fined or have their assets seized if they are deemed to have infringed it, is very likely to raise immediate concern for the recipient, who may assume that the injunction poses a threat to business continuity and gives credence to fraud allegations (Ms Walker's second witness statement dated 14th January 2021, para. 47-48).
- (7) The causative effect of the injunction is supported by the fact, according to Mr Himsworth, that both he and Mr Taylor of Vitol viewed the existence of the injunction (rather than the proceedings themselves) as adversely impacting Mr Kelbrick's ability to undertake work as a trader and ultimately precluded Vitol from hiring him, even though they regarded Mr Kelbrick as a well-known participant in the industry, with a good reputation as a trader and who was highly respected and successful (Ms Walker's second witness statement dated 14th January 2021, para. 39).

- (8) The evidence indicates that it was service of the injunction that was the effective cause of Mr Kelbrick and Attock's loss of crucial banking relationships and related financing facilities. Once they were lost, Attock was simply unable to trade given the nature of the arrangements with suppliers of hydrocarbons. Further, the suppliers and Vitol as a potential employer of Mr Kelbrick were concerned with the injunction, rather than the proceedings.
- (9) The Claimants' response to this argument is that financing banks are sophisticated institutions with large legal teams with a depth of expertise and understanding who would understand that third party institutions would have protections by reason of the *Baltic* and *Babanaft* provisos in the injunction. This is not a sustainable contention, because:
- (a) It is contrary to the evidence on which Mr Kelbrick relies (see above) and to Ms Walker's own experience in a long career acting for banks and advising them on the terms of freezing injunctions (Ms Walker's third witness statement dated 19th March 2021, para. 12).
- (b) It ignores the views of Mr Taylor and Mr Himsworth of Vitol (see above).
- (c) There is recognition in the authorities of the different effect of a freezing injunction from that of the proceedings in which the order is made. In *Al-Rawas v Pegasus Energy Limited* [2008] EWHC 617 (QB), at para. 35, Jack, J in the context of a claim made against an undertaking in damages concluded:

"I consider that there is a close analogy between the stopping of a cheque by a bank and the obtaining of a freezing order. In each case there is an interference with the party's ability to use its money as it wishes. It goes to the heart of the party's ability to use the banking system, which is at the heart of trade. To be on the wrong end of a freezing order is undoubtedly a stigma — see the Booker McConnell case referred to above: it suggests that the defendant has failed to pay its debts and has been found likely to try to dissipate its assets"

See also *Bloomsbury International Limited v Hollyoake* [2010] EWHC 1150 (Ch), para. 25.

35. Mr Pilbrow QC on behalf of the Claimants submitted that:

- (1) The evidence of Mr Glyn Rees of Mr Kelbrick's and Attock's solicitors in his first witness statement dated 13th September 2017, at para. 11, 13-14 and his third witness statement dated 30th October 2017, at para. 18 and 21, recognised that Mr Kelbrick's business and ability to undertake further work is the result of a combination both of the stigma attaching to the proceedings, in particular the allegations of fraud, and the freezing injunction. Indeed, it has been said that the injunction gives credence to the allegations of fraud made in the proceedings. There is no suggestion in the evidence that the only cause of any losses arguably suffered by Mr Kelbrick is the freezing injunction. See also Ms

Walker's second witness statement dated 14th January 2021, para. 48. This is further supported by Mr Mounzer's first witness statement dated 8th March 2017, para. 36 and 39.1. There is evidence to similar effect in connection with the possibility of Vitol employing Mr Kelbrick (see Ms Walker's second witness statement dated 14th January 2021, para. 38-39).

- (2) The freezing injunction cannot be considered other than in conjunction with the allegations of fraud in the proceedings. When the Claimants' solicitors served the injunction on banks and others, it was stated that "*This Order was granted in support of proceedings commenced by the Claimants in relation to frauds allegedly perpetrated upon them by the Defendants. It contains a Freezing Injunction, a Proprietary Injunction and Document Retention Order*".
 - (3) On that evidence, Mr Kelbrick's application fails in that there is no good arguable case on causation, because he cannot demonstrate that, but for (or without) the freezing injunction, as opposed to the serious fraud allegations, he would not have suffered loss through damage to Attock Dubai's business.
 - (4) The evidence does not show that the injunction is a "but for" cause of the cessation of Attock Dubai's banking facilities. It is to the opposite effect. There is no evidence that the financing facilities would not have been withheld had the injunction not been granted. There is no documentary evidence of any bank or any other counterparty acting on the basis of the freezing injunction, which Mr Kelbrick would be in a position to provide.
 - (5) The fact that Mr Kelbrick's evidence is that banks ended relationships with him after service of the injunction (such as Ms Walker's second witness statement dated 14th January 2021, para. 49.2, which refers to two institutions seeking "*almost immediately to close accounts and limit banking services previously available to Mr Kelbrick*") does not assist him on causation: they would have been aware both of the allegations and the injunction.
 - (6) Ms Walker's evidence of her experience is inadmissible and irrelevant opinion evidence.
36. It is clear that the undertaking in damages is concerned with losses caused by the interim injunction, not losses caused by the proceedings in which the injunction is ordered or by allegations made in those proceedings. Thus, in a decision of the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249, Gibbs, J said (at pages 312-313):

"... it is perfectly clear, and it appears from the words of the undertaking themselves, that the only damages to which a defendant is entitled are those which he has sustained by reason of the grant of the injunction. The generally accepted view is that the damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice ... However, in the present case the question is not whether loss caused by an injunction was a natural consequence of making it, but whether any loss which the appellant suffered was caused by the making of the injunction ..."

In a number of authorities the court has distinguished between loss which was caused by the injunction and loss which arose from the litigation ... There is no reason to doubt that it is correct in principle to draw such a distinction if the facts warrant it. If the pendency of the litigation, rather than the making of the order, was the cause of the plaintiff's loss, the terms of the undertaking have no application, since the plaintiff has not sustained loss by reason of the order. Moreover, except in certain cases analogous to malicious prosecution, a defendant is not entitled to recover damages for loss resulting from legal proceedings brought against him - the only liability of the unsuccessful plaintiff is to pay costs. The court should no doubt scrutinize with care an assertion by a plaintiff that loss which has been suffered by a defendant has resulted from the litigation rather than from the making of the interlocutory order, since a plaintiff should not be allowed to evade payment of the price which he has agreed to pay for the grant of the injunction. In the end however the question becomes one of fact: did the making of the order cause the loss? The onus of proof must, in accordance with general principles, lie on the defendant who asserts that he sustained damage by reason of the order."

37. Gibbs, J then considers how to weigh in the balance the causative effect of the proceedings or the litigation on the one hand and the interim injunction on the other hand:

"It was submitted on behalf of the appellant that it is enough that the making of the order should have been a cause of the damage, so that if both the making of the order and the continuance of the litigation are concurrent causes the undertaking will be applicable. However, in almost every case in which an injunction is granted the injunction will play some part in causing the party bound by it to act in accordance with its terms. To order a plaintiff to pay damages where it appears that the party bound by the injunction would have acted as he did even if the injunction had not been granted, would be to give the undertaking an effect obviously not intended. The party seeking to enforce the undertaking must show that the making of the order was a cause without which the damage would not have been suffered. It was further submitted that the onus lies on the plaintiff, against whom the undertaking is sought to be enforced, to disentangle any damage arising from the litigation from that which was caused by the making of the order. However, the onus of proof does not shift in this way; the defendant, who seeks to enforce the undertaking, must prove that the damage he has sustained was caused by the making of the order."

38. In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295; [2015] 1 WLR 2309, Tomlinson, LJ said at para. 54:

*"As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered, as Gibbs J put it in the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty* (1981) 146 CLR 249, 313. That was said in the context of an application to enforce the undertaking. At the stage of considering whether fortification of the undertaking is required, the proposition could be restated as it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would*

not be or would not have been suffered. That is the hurdle which the applicant must surmount. It is of course open to the defendant to demonstrate that it has not been surmounted, as by demonstrating that there is no causal link between the granting of the injunction or order and the loss in question. If however, disproving the asserted causal link as to which a good arguable cause is shown requires the deployment of extensive contentious evidence and argument, that is not an exercise to be attempted at the interlocutory stage ...”

39. Tomlinson, LJ approved the judgment of Floyd J, at para. 18 and 25, in *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), where it was recognised that each case must be assessed on the evidence before the Court and that the evidence before the Court at an interlocutory hearing such as this may not be easy to assess with a view to determining the respective causative effect of the proceedings on the one hand and the injunction on the other hand. However, there must be evidence to support the good arguable case that there are actual or potential losses caused by the grant of the injunction (see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139; [2016] 1 WLR 160, para. 99).

40. In *Fiona Trust & Holding Corporation v Privalov (No 2)* [2016] EWHC 2163 (Comm); [2017] 2 All ER 570, Males, J said at para. 48:

“Thus, in summary, the freezing order need not be the sole or exclusive cause of the loss in question, but must be an effective cause; the burden is on the party who obtained the freezing order to demonstrate a failure to mitigate; and the type of loss (but not the particular loss within that type: Hone at [66]) must be within the reasonable contemplation of the parties. The courts have recognised that a freezing order can have the effect of ‘ruining a thriving business’ and, in that context, have described such orders as one of the law’s ‘nuclear weapons’ ...

41. I should also refer to the decision of the Court of Appeal in *SCF Tankers Ltd v Privalov* [2017] EWCA Civ 1877; [2018] 1 WLR 5623, where Beatson, LJ said (para. 41-42):

*“41. If the court decides to enforce a cross-undertaking, the decision of the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 has been influential in relation to the approach to causation and the burden of proof. Mason J stated at p 325 that it is “for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction”. Although Mason J dissented as to the result, on burden of proof there was no division of view: see *Gibbs and Stephen JJ* at pp 313 and 320. The approach in the Ansett case has been followed by a number of decisions in this jurisdiction. They include the decision of this court in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309, a case concerned with whether a cross-undertaking as to damages should be fortified. Referring to the judgment of Gibbs J, in the Ansett case as to what was required to enforce the undertaking itself, Tomlinson LJ stated, at para 54, that “As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered”.*

42. The person who seeks to do so must show that the loss would not have been suffered “but for” the order; that is, on the facts of this case, that the freezing order and the security undertakings were an effective cause of the Standard Maritime parties’ loss ...”

42. As to causation, the following observations may be made in reliance on these authorities:
- (1) The burden rests on the applicant for fortification (the respondent to the injunction) to establish that there is a good arguable case that any losses were caused by the grant of the injunction, rather than the proceedings to which the injunction relates. (It has also been said that issues of remoteness and mitigation may arise in this context, but as I have not heard argument specifically on such matters, I would prefer to say no more about them.)
 - (2) There is a recognition that it can be difficult to determine whether or not the proceedings (especially in which allegations of fraud are made) and/or the grant of the injunction causes the loss in respect of which the respondent seeks fortification.
 - (3) This is especially so where the proceedings were instituted and the injunction was granted at the same time or at approximately the same time. If the proceedings were instituted well in advance of the injunction, it might well be easier to determine the respective causative effects of the proceedings and the injunction.
 - (4) Nevertheless, the loss must have been such that it would not have arisen had no injunction been granted. This is the so-called “but for” cause.
 - (5) That is not to say that the injunction must be the sole cause of the loss; the injunction can operate as a concurrent cause of the loss along with the proceedings. If the proceedings and the injunction combine cumulatively to give rise to the loss, in the sense that the loss would not have been caused at all or to the same extent by the proceedings themselves, the respondent will have demonstrated to the requisite standard that the loss would be caused by the injunction.
43. In my judgment, Mr Kelbrick has demonstrated that there is a good arguable case that losses have been sustained by him as a result of the grant of the interim freezing injunction for the following reasons.
44. First, it seems to me plain that any losses suffered by Mr Kelbrick would have been caused at least both by the proceedings and the injunction; it may well be that the losses were effectively or chiefly caused solely by the injunction. There is a palpable impact on Mr Kelbrick’s earning opportunities whether directly or through Attock Dubai before and after February 2015. In this respect, I refer to my conclusion above about the estimate of Mr Kelbrick’s loss.
45. Second, it is readily understandable how financial institutions and counterparties might be concerned with the impact of a freezing injunction on the business to be done with the respondent and, indeed, there is supporting evidence of the potentially adverse or at

least concerned reaction of some financial institutions and oil producers to the grant of the injunction.

46. Third, insofar as the injunction gives credence to the fraud allegations in the proceedings, that does not give priority to the causative effect of the proceedings, because without the injunction, there would be the allegations of fraud, but without the perceived (even if erroneous) justification provided by the injunction.
47. I therefore conclude that Mr Kelbrick has demonstrated a good arguable case of causation.

Risk of non-satisfaction

48. Mr Sprange QC submitted that:

- (1) Arcadia has financially deteriorated since the injunction was granted in February 2015 and fortification was set at US\$2 million:
 - (a) Arcadia's trading sales have declined from US\$4.4 billion in 2014 to US\$146 million in 2020, there being a decline of some \$3.6 billion in the year between the accounts presented in early 2015 and the following year.
 - (b) Arcadia's net profit has declined from US\$56 million in 2015 to losses of US\$16.4 million in 2018, US\$14.7 million in 2019, and US\$4.8 million in 2020.
- (2) The Claimants will have to fund a further 3 to 4 years of hard fought, high value litigation. If they are unsuccessful, they will have substantial costs liabilities to the remaining Defendants, who are represented by two separate law firms. It is not clear from the available evidence whether the Claimants can meet that liability, leaving aside any damages for loss.
- (3) The current fortification of US\$2 million applies across all the remaining Defendants. It is not unreasonable to expect that the First and Second Defendants, both highly successful and once wealthy individuals, will also pursue claims for damages pursuant to the undertaking if they are successful. In that event, the current fortification of the undertaking in the sum of US\$2 million will not go far at all.
- (4) In 2014, Arcadia paid a US\$14 million regulatory fine arising from dishonest conduct and recently it has been implicated in serious corruption allegations relating to Petrobras (Ms Walker's third witness statement dated 19th March 2021, para. 24).
- (5) Arcadia does not possess tangible assets, such as real property, production facilities or rights to valuable commodities. It is not a professional service business that has the benefit of future receivables. If faced with insolvency, there are unlikely to be any assets of substance left.

- (6) The annual accounts for Arcadia London from 2014-2020 are before the Court, but there is a limit to what the Court can meaningfully glean from Arcadia London's most recent accounts.
- (7) Arcadia London is "*moribund*", faces significant legal costs the funding of which is not clear and there are material risks as to its ongoing financial viability. Arcadia London has provided an undertaking that on the face of it would be of little value to a successful claimant for damages such as Mr Kelbrick given the low amount of fortification. This is exactly the type of risk that increased fortification is designed to alleviate.

49. Mr Pilbrow QC on behalf of the Claimants submitted that:

- (1) Mr Kelbrick cannot establish a good arguable case of any real risk that the Claimants will not satisfy any award of damages pursuant to the undertaking, even the US\$8 million additional fortification claimed, even if he could satisfy the other requirements. The Claimants have, and have since 2014 had, more than ample assets in the jurisdiction.
- (2) The evidence on the Claimants' financial position shows that they have ample assets in the jurisdiction to meet any damages award:
 - (a) There are before the Court seven sets of accounts for Arcadia London for the years ending 31st March 2014 to 31st March 2020 and in addition interim accounts up to 31st December 2020 ("the December 2020 Accounts"). In their letter dated 23rd March 2021, the Claimants' solicitors have said that there has been no material change to the position stated in the December 2020 accounts.
 - (b) The December 2020 Accounts show that as at 31st December 2020 Arcadia London has:
 - (i) Cash at bank and in hand of US\$48,808,000.
 - (ii) Current assets totalling US\$83,862,000 (including cash at bank and in hand, and including also US\$19,847,000 in current debts and US\$15,936,000 in financial instruments held for trading).
 - (iii) Current liabilities totalling US\$36,558,000, comprising current debts and financial instruments held for trading.
 - (iv) Net current assets of US\$47,304,000.
 - (v) An overall surplus (overall net assets) of US\$53,205,000, across current and non-current assets and liabilities.
 - (c) The December 2020 Accounts further show that, for the partial period from 1st April to 31st December 2020, Arcadia London:
 - (i) Had gross sales on trading of US\$382,664,000, resulting in a gross profit of US\$48,541,000.

- (ii) Made a total profit of US\$29,297,000 (and a pre-tax profit of US\$30,763,000).
- (d) Ms Walker in her third witness statement dated 19th March 2021, para. 21, sets out in a table the gross and net profits of Arcadia London, but it is the current assets, particularly cash, and net assets which are of immediate relevance. Arcadia London has consistently had ample cash on hand (and net assets) to meet a claim of US\$8 million (or a larger claim). With those amounts, and the addition of the most current information (the partial year to 31 December 2021), Ms Walker’s table would appear as follows (in US dollars):

Year	Sales on Physical Trading	Gross Profit	Net Profit (Pre-Tax)	Current assets	Cash at bank and in hand	Net Assets
2014	4,407,917,000	30,105,000	-32,322,000	258,447,000	26,379,000	-56,947,000
2015	759,049,000	48,058,000	56,133,000	364,330,000	16,693,000	34,857,000
2016	540,724,000	36,505,000	19,816,000	330,288,000	268,674,000	54,120,000
2017	644,141,000	43,220,000	22,283,000	171,822,000	30,395,000	76,081,000
2018	560,476,000	-8,148,000	-16,422,000	95,560,000	86,967,000	53,675,000
2019	340,455,000	-6,051,000	-14,735,000	184,393,000	147,168,000	28,735,000
2020	146,552,000	9,335,000	-4,834,000	93,385,000	48,661,000	23,908,000
2021	382,664,000	48,541,000	30,763,000	83,862,000	48,808,000	53,205,000

- (3) On a fair view of the figures, including the most recent evidence and including the figures most relevant to satisfying a damages award, there is no basis for the contention that the Claimants do not have sufficient, readily accessible assets, located in the jurisdiction, available to meet any damages awarded under the undertaking. Arcadia London is itself located in and operates from the jurisdiction. Accordingly the case is on all fours with the decision in *Tarasov v Nassif*, unreported, 29th June 1994 (CA): there is no risk of non-payment in the circumstances.
- (4) The suggestion that the Claimants are “*moribund*” is not explained and is incorrect having regard to the above-mentioned figures and the December 2020 Accounts, which state: “*The Company is continuing to expand its trading teams across the crude and oil products markets*”.
- (5) There is no evidence that Arcadia London has financially deteriorated. The suggestion that there are unlikely to be any assets of substance left is clearly wrong: since 2015, Arcadia London’s assets have exceeded its liabilities by between US\$24 million and US\$76 million, and currently do so by US\$53 million.
- (6) Mr Kelbrick has adduced no evidence of his costs of the claim, nor the costs or possible claims which might be recoverable under the undertaking by the other Defendants. The Court is accordingly not in a position to take them into account. In any event, even if they were substantial, on the figures above there is no reason to think (and no good arguable case) that Arcadia London cannot meet a costs or a damages claim.

- (7) As to the corruption allegations in connection with the Claimants, which were inappropriately raised by Mr Kelbrick, the Claimants' solicitors in a letter dated 23rd March 2021 stated that these related to an investigation by Brazilian authorities into commission payments made to Petrobras and that, so far as they are aware, no Arcadia Group entity is or has been under formal investigation or has been the subject of any court ruling in relation to the allegations, that in 2019 the Arcadia Group produced trading records, unsolicited, to the US Department of Justice ("the DOJ"), that a representative of the Arcadia Group met with the DOJ in January 2020 and answered questions arising from these documents, that the Arcadia Group has not been contacted by the Brazilian or US authorities about these matters since then, and that there has been no adverse finding against the Arcadia Group. As to the "*fine*", this was in fact a settlement reached with the Commodities Futures Trading Commission in 2014 and was paid and any trading restrictions relating to this settlement lapsed in 2017.
- (8) As Mr Kelbrick cannot establish a risk of non-payment of a claim under the cross-undertaking so as to justify fortification, his application should be dismissed.
50. In my judgment, Mr Kelbrick has not demonstrated a good arguable case that there is a real or sufficient risk that the Claimants will not satisfy any award of damages pursuant to the undertaking they have given which would justify the making of an order for further fortification. In this respect, I have regard to the financial position of Arcadia London who would be responsible for such damages in accordance with the undertaking together with the other Claimants.
51. In *Tarasov v Nassif*, unreported, 29th June 1994, Dillon, LJ referred to the predecessor to para. F.15.4 of the Commercial Court Guide, which now provides that "*Where the applicant for an interim remedy is not able to show sufficient assets within the jurisdiction of the Court to provide substance to the undertakings given, particularly the undertaking in damages, it may be required to reinforce the undertakings by providing security*", and said in respect of this guideline "*That emphasises that the key question is whether there are assets within the jurisdiction ...*".
52. I accept Mr Pilbrow QC's submission that the important question for determining whether there is a real or sufficient risk of non-satisfaction depends, at least on the facts of this case, not or not only on the profitability of Arcadia London, but on or also on the current and net asset position.
53. It is true that Arcadia London's financial position has declined since 2015, when its current assets were approximately US\$365 million and its net assets were approximately US\$35 million, compared to the position in 2020, where Arcadia London's current and net assets were approximately US\$93 million and US\$24 million respectively. However, the most recent figures concerning Arcadia London's assets, including cash in bank and at hand, are sufficient to cover an award of damages of US\$6-7 million or even US\$8 million. As to the prospect of the fortunes of Arcadia London declining yet further so that there is no prospect of it satisfying an award of damages in 2023-2024, there is no evidence that I have seen which convinces me that there is a good arguable case that that will be or is likely to be the position.

54. I have taken account of Mr Sprange QC's submission that the available assets may be depleted by the ongoing litigation and the fact that the other Defendants may claim compensation pursuant to the undertaking, but without evidence of the costs of future litigation and the other Defendants' losses, I am unable to give this consideration much weight.
55. In these circumstances, I am not convinced that there is a good arguable case that there is a real or sufficient risk that the Claimants will not satisfy an award of damages recoverable pursuant to the undertaking. As a result, in circumstances where I regard that the risk of non-satisfaction is a highly material consideration in deciding whether or not to grant Mr Kelbrick's application, there is no justification for further fortification for the Claimants' undertaking in damages.

Conclusion

56. Although Mr Kelbrick has a good arguable case that he will suffer losses caused by the grant of the interim injunction, in my judgment, he has failed to demonstrate that he has a good arguable case that there is a risk that any award of damages pursuant to the undertaking given by the Claimants will not be satisfied by the Claimants. This is an important consideration in the exercise of the Court's discretion and absent a real risk of non-satisfaction, further fortification should not be ordered.
57. Therefore, Mr Kelbrick's application for further fortification of the Claimants' undertaking in damages is dismissed.