Claim No: CL-2021-000051
Neutral Citation No [2021] EWHC 276 (Comm)

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday 4 February 2021

BEFORE:

MR JUSTICE CALVER

BETWEEN:

CLAIMANTS LISTED IN SCHEDULE 1

Claimants/Applicants

- and –

(1) NICHOLAS SPENCE
(2) DEREK KEWLEY
(3) ANDREW CRUMP

Defendants/Injunction Respondents

(4) EMERGING PROPERTY INVESTMENTS LIMITED (IN LIQUIDATION)

Defendant/Respondent

(5) EMERGING PROPERTY LIMITED
(6) GREEN PARK HOLDINGS (ILFRACOMBE) LIMITED

Defendants

(7) GREEN PARK (HOLDINGS) LIMITED (IN ADMINISTRATION)

Defendant/Respondent

(8) GP ILFRACOMBE MANAGEMENT COMPANY LTD
(9) GREEN PARKS (WESTWARD HO!) MANAGEMENT COMPANY LIMITED
(10) ALPHA PROPERTIES (BRADFORD) LIMITED
(11) A1 PROPERTIES (SUNDERLAND) LIMITED

Defendants

MR NEIL HEXT QC, MR MATTHIEU GREGOIRE and MISS MELODY IHUOMA (Instructed by Trowers & Hamlin LLP, 10 Colmore Row, Birmingham, B3 2QD) appeared on behalf of the Claimants

J U D G M E N T
(As approved)

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Thursday 4th February 2021

MR JUSTICE CALVER:

1. By this application the claimants, through Mr Hext QC, leading Matthiew Gregoire and Melody Ihuoma, invite the court to make a number of orders against the respondents on an *ex parte* basis without notice. Those orders consist, in particular, of a worldwide freezing order against the first, second and third defendants only (the injunction respondents) who, along with the fourth to eleventh defendants, the claimants wish to be the defendants to the underlying action, as well as supporting disclosure orders against the injunction respondents, and an order permitting the injunction as against the first defendant, if granted, to be enforced by way of parallel proceedings in Florida, United States of America.

2. The application is made without notice and on an *ex parte* basis, it is said to avoid the respondents being tipped off, which could trigger further dissipation of assets and undermine the relief sought.

3. Pursuant to CPR 39.23, I ordered this hearing to be held in private, as I am satisfied that publicity will defeat the object of the hearing and a private hearing is necessary in the interests of justice.

4. The background to this application is set out in the claimants' skeleton argument and is said to be as follows. The claimants are a group of individual investors – either individuals or corporate entities – who invested in holiday accommodation situated in Ilfracombe and Westbeach, Bideford, Devon, and in student accommodation in various locations in England, between 2012 and 2019. The claimants are represented by eight individual investors who are selected to form the Group Action Committee ("GAC") and who have overall responsibility for running the case on behalf of the claimants.

5. The first and second defendants are individuals who were the owners and/or controllers of several companies (together the Alpha Group) involved in the sale, management and letting of the properties at the material time. The Alpha Group includes the sixth to eleventh defendants, which were all incorporated in the United Kingdom. The first defendant presently resides in Florida, USA. The second defendant resides in England. The third defendant was at all material times the director and controlling shareholder, through his interest in XIP Capital Limited and XIP Holdings Limited, of the fourth defendant, and a co-director and shareholder of the fifth defendant, the sole other co-director and shareholder being his wife. The fourth and fifth defendants were estate agents that marketed the properties exclusively at all material times. The fourth defendant has been in a voluntary insolvency process since 15th June 2020.

6. I am told that, given the number of claimants and the fact that instructions are provided by the GAC, where various assertions are made in the affidavit and skeleton argument that particular events followed a pattern, those assertions are derived from instructions from the GAC, evidence from individual claimants, reviews of samples of underlying documents across the relevant sites, and inferences that where no outliers have been identified from sample testing, the event or assertion applies to all claimants.

7. The claimants' investments were structured in the following manner. Firstly, a developer company (being members of the Alpha Group) would enter into an agreement for the sale of a leasehold interest in the property to the investor (the purchase agreement). The developer

company would also enter into a long lease with, or assign a long lease to, each investor (the superior lease). Secondly and in turn, the superior lease was either concluded between a developer company, a designated management company and a claimant, or concluded between a freeholder, a developer company and a designated management company, and then assigned to a claimant. A long lease would then be granted over the property (usually 125 or 250 years), or where the developer company already held a long lease with the freeholder, the leasehold interest would be assigned to the claimant. The investor would then be liable to pay rent and maintenance charges to the designated management company, and the investor was not to underlet the property, other than to a designated Alpha Group company.

8. Thirdly, at the same time as (or shortly after) entering into the superior lease, an investor would also enter into an underlease with a further Alpha Group company (the underlease holder). The underlease (a) provided that the investor let, with full title guarantee, the relevant property to the underlease holder for a fixed contractual term generally of ten years; (b) provided that the underlease holder was to pay to the investor amounts equivalent to the investor's liabilities to the developer company, and a fixed "Additional Rent" of between eight to twelve per cent, commensurate with the yield that had been represented to the investor; and (c) the underlease holder would then grant occupational tenancies to third parties when the properties were available for letting.

9. Each of the developer companies, the designated management companies and the underlease holders were all owned (or majority owned), whether directly or indirectly, and/or controlled by the first and second defendants, both at the time when the alleged representations were made to the claimants, to which I shall come, and at the time when the claimants made their investments. The sixth and eighth defendants were the developer and management company of the Ilfracombe site; the seventh and ninth defendants were the developer and management company for the Westbeach site; the tenth defendant sold or assigned leaseholds to investors in relation to student accommodation; and the eleventh defendant was a seller or assignor of leaseholds to investors of student accommodation.

10. In the period 2012 to 2019, the properties were marketed by the fourth and/or fifth defendants, which were owned and controlled, I am satisfied, by the third defendant at the request of the first and second defendants. As a result, the claimants became aware of the investment schemes through various means between those dates, including through the fourth and fifth defendants advertising the properties on television, on the internet and by email. Further, the fourth and fifth defendants marketed the properties through brochures and other promotional materials such as prospectuses and investor reports which were communicated to the claimants prior to their purchase of the relevant properties.

11. The claimants' case is that the following express representations were made in respect of the student and holiday accommodation. There are five in number: first, representations that investors would receive a fixed return of between eight and twelve per cent for a fixed period of time (normally ten years); secondly, representations to the effect that the contracting counterparties were entities of substance, capable of paying the investors the fixed returns due; thirdly, representations to the effect that the developers had a strong and proven track record and an ability to pay the returns which were advertised; fourthly, representations to the effect that the returns were underwritten and therefore secure (that is, that there was an asset base against which one could enforce the sums due – essentially, a form of security); and fifthly, representations to the effect that the properties which were already operational were fully occupied.

12. Mr Hext QC took me to the relevant brochures produced by the fourth and fifth defendants, where it is said that these representations were made. In light of the representations set out above,

it is said that the brochures also contained various implied representations. These are set out in paragraph 22 of the claimants' skeleton argument. In addition to the representations in the brochures, it is also alleged that many individual claimants had telephone conversations and exchanged emails with the fourth and fifth defendants over the course of which the same representations were in substance reiterated.

13. The GAC is said to have established from the various claimants that on the basis of these representations they invested in the properties, and the investments were duly made between 2012 and 2019. Whilst some of the claimants initially received some payments commensurate with the yields that had been promised, between October 2018 and January 2019 payments ceased completely. At around the same time, the first and second defendants resigned as directors of the relevant underleaseholder companies.

14. Some of the claimants have been exposed to demands by the designated management companies for annual rent and maintenance charges which, according to the representations that it is alleged were made, should have been provided for by way of income from the underleases, but which the claimants were now being required to fund from their own resources.

15. In late 2018, many of the claimants received correspondence from a Mr Sullivan on behalf of Alpha Group Entities or from the fourth defendant, suggesting that the developments were in financial difficulties. Eventually, the administrators were appointed in respect of the underlease-holder to the student accommodation, the parent company of the underleaseholder to Ilfracombe and Westbeach, and the underleaseholder of Ilfracombe. The underleaseholder of Westbeach went into voluntary liquidation on 8th July 2020.

16. The claimants alleged that the representations were false. In particular, they say:

> (1) The Ilfracombe, Westbeach and student accommodation developments were never capable of generating the returns promised to the claimants;
>
> (2) The underleaseholders do not have, and never have had, sufficient assets out of which to pay those returns;
>
> (3) The returns are not, and were never, underwritten by any other entity, and there is no contractual recourse to any other entity or asset;
>
> (4) Prior to the collapse of the investment schemes of which the properties form part, the returns paid to the claimants were funded, it appears, by the purchase consideration paid by other subsequent investors who bought properties – in other words, it was a pyramid scheme;
>
> (5) A number of the developments (or phases thereof) are in disrepair or are incomplete; and
>
> (6) The properties are and were at all material times worth substantially less than the amounts the claimants paid for them. In a number of cases the properties, it is said, are worthless, and the total estimated value of the properties is £10.5 million, which is £44-odd million less than the total amount paid by the claimants.

17. The claimants' claim against the injunction respondents is for deceit and conspiracy to injure, as particularised in the draft Particulars of Claim. There is also a negligence claim.

18. I turn to the test for freezing orders. The court's jurisdiction to grant freezing orders derives from section 37 of the Senior Courts Act 1981. As Haddon-Cave LJ said in *Lakatamia Shipping Company Limited v Toshiko Morimoto* [2019] EWCA Civ 2203 at [33] to [34]:

> "33. The basic legal principles for the grant of a WFO are well-known and uncontroversial and hardly need re-stating. It nevertheless is useful to remind oneself of the succinct summary of the test by Peter Gibson LJ in *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 at [21] where he stated that, before making a WFO, the court must be satisfied that:
>
> > '… the applicant for the order has a good, arguable case, 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 that it would be just and convenient in all the circumstances to grant the freezing order.'"

19. It follows that, before making a worldwide freezing order ("WFO"), the court must be satisfied that:

(1) The applicant for the order has a good arguable case;

(2) There is a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. There must be a plausible evidential basis for believing that any judgment would go unsatisfied by reason of the dissipation of assets; and

(3) It would be just and convenient in all the circumstances to grant the order.

20. I shall take each of these three conditions in turn.

(1) Good arguable case

21. The requirement for a good arguable case is not a particularly onerous one. The applicant need only establish a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than a 50 per cent chance of success: see *Lakatamia Shipping*.

22. The claimants will be bringing claims against the injunction respondents in the tort of deceit and unlawful means conspiracy. The ingredients for the bringing of an action in deceit were summarised by the court in *Schenk v Cook and Others* [2017] EWHC 144 (B) at [83] as follows:

> "… To found an action in deceit: (i) there must be a clear misrepresentation of present fact or law; (ii) the misrepresentation must be made knowingly, or without belief in

> its truth, or recklessly; (iii) the representation must be intended to be acted upon by the representee; and (iv) the representation must be relied on by the representee."

23. The claimants submit that the affidavit evidence produced by them on this application, which I have read, demonstrates a good arguable case against the defendants in deceit. It is necessary to take this submission in stages against each of the relevant defendants.

Alleged representations of fact

24. So far as the relevant representations are concerned, I consider that there is a good arguable case on the evidence before me for alleging the following:

> (1) That each of the return representation, the substance representation, the underwritten representation, and the other express representation (that is the claimants' description of those representations in their skeleton argument) was made. In particular, as is apparent from the affidavits before me of the individual investors, as well as the affidavit of their solicitor, Mr Kenkre, that all claimants received an express representation to the effect that they would receive between eight and twelve per cent net yields on the proposed investment made in the following form:
>
> > "Byers receive an effortless ten per cent net income fixed for ten years, with zero costs during this period."
>
> There are a number of formulations of this wording, such as "an effortless and reliable income stream", "a fixed ten per cent income", but the gist is clear and is repeated in a number of the different brochures to which I have been taken.
>
> (2) That the promotional materials contained in these representations, and marked "emerging properties" were provided to the claimants by the fourth and fifth defendants, and repeated in emails by their representatives. Accordingly, for the purposes of the cause of action in deceit, I am satisfied that the representations can be said to be made by the fourth and fifth defendants.
>
> (3) That it is to be inferred that the information set out in the promotional materials, including the representations to which I have referred, was provided by or derived from information provided by the first and second defendants, who were the owners and/or controlled the development companies at the material times. Mr Hext has referred me to the *Libyan Authority Investments v King* [2020] EWHC 440 (Ch), where the court said at [104]:
>
> > "… where a representation had been made indirectly to a third party with the intention that it would be passed on to the claimant to be acted on by him, the representation was no less an actionable representation. …"
>
> I agree.

(4) That in circumstances where the fourth and fifth defendants were acting as marketing agents for the development companies, an inference may be drawn to the effect that the first and second defendants intended that representations about the developments provided to the fourth and fifth defendants were to be passed on to potential investors. It is sufficient that the claimants are within the class of persons within their contemplation as likely to be deceived: see *Standard Chartered Bank v Pakistan National Shipping Corporation* [1998] 1 Lloyd's Rep 684 (at 696). Accordingly, the representations are to be treated as actionable representations made by the first and second defendants for the purposes of the claimants' claim in deceit.

(5) That the third defendant, as director and controlling shareholder of the fourth defendant, and a co-director with his wife, and a shareholder of the fifth defendant, will be held responsible for representations made by the fourth and fifth defendants if it can be shown that he directed, procured, or authorised the making of those representations.

The claimants have, in my judgment, a good arguable case that this requirement is satisfied. The third defendant was the sole director of the fourth defendant and co-director with his wife of the fifth defendant. It is likely, therefore, that brochures produced by the fourth and fifth defendants would have been issued with his authority. Indeed, his personal involvement is also suggested by his emails, to which I have been referred, that he sent to the investors. Moreover, it is apparent from an email, dated 2nd February 2016, from the second defendant to the third defendant that the second defendant himself gave the third defendant information about the development at the Box, Preston, including details of the underlease, and advised him to start to market the scheme.

Alleged falsity of the representations

25. Secondly, I turn to the falsity of the representations. I consider that that is a good arguable case that the representations were false. The claimants' investigations so far have revealed that that is likely to be so. As Mr Kenkre explains in his affidavit, the claimants instructed a company called CBRE to prepare a valuation report in respect of the properties which form part of the claimants' claim. As part of the process of valuing the properties, CBRE has reported on the likely levels of yield achievable by the properties. In short, they conclude – and the evidence does strongly suggest – that the investment schemes could never have produced yields of the levels represented in the promotional materials. There is also some powerful evidence to suggest that the first and second defendants must have known that to be so, not least the second defendant's own email to Quantuma, dated 24th June 2019, where he recognises the flaws in the business model. Furthermore, it appears that the properties are and were at all material times worth substantially less than the amounts than the amounts that the claimants paid for them.

26. CBRE's findings mirror those of Quantuma, who were appointed as administrators for, amongst others, A1 Alpha Properties (Leicester) Limited, the underleaseholder in relation to the student accommodation, and Green Parks Holidays (Ilfracombe) Limited, the underleaseholder in respect of the Ilfracombe properties:

(1) By letter dated 29th May 2020, Quantuma concluded in respect of the Alpha properties that:

> "What became apparent is that AlA had never generated sufficient profits in the past to meet the costs of ground rent and

> service charge, and pay the additional rent. A1A had previously relied upon capital injections from associated development companies, presumably generated from the ongoing sale of further leasehold properties." (That is again a reference to the probability that this was a pyramid scheme.)

(2) By email dated 9th June 2020, Quantuma concluded in respect of the Ilfracombe site that:

> "Financially the park never made a profit and returns to investors were not paid from genuine profits, but from funds paid in by Green Parks Holdings (Ilfracombe) Limited. As has been confirmed in writing, paying a fixed return is not a viable business model (never was), and as soon as sales of new units stopped, the entire scheme came crashing down."

Again, two points are made by Quantuma. The first is that this has all the hallmarks of a pyramid scheme; and the second is that the business model itself was flawed – something which the second defendant himself recognised in the email of 24th June 2019, to which I have referred.

(3) Furthermore, it also appears that the contracts were not underwritten, as had been maintained in the promotional materials, and the underleaseholder was frequently not the developer and was never likely to be in the position to pay the supposedly fixed returns.

Defendant's knowledge

27. Thirdly, I turn to whether there is a good arguable case that each of the defendants is guilty of deceit. It is important to analyse the case against each of them separately. As against the first and second defendants, I accept that there is a good arguable case that the first and second defendants knew or must have known that the representations identified above were false; alternatively, that they had no honest belief in those representations, or at the very least were reckless as to whether those representations were true by reason of the fact that the first and second defendants were at all material times the owners (alternatively, the majority owners) and controllers of the Alpha Group, and were therefore the architects of the investments schemes, and were the sources of, or authorised the representations made by the third to fourth defendants. There is evidence, as I have said, that this was a pyramid scheme, and that they did not care whether or not the returns were capable of being made. On any view, there is a good arguable case, therefore, that they were reckless. They may say that they can rely upon the disclaimer in the Sales Contracts, to which the Alpha companies were party; and that the investor has not relied upon any representation or statement by the seller. However, I accept the submission of Mr Hext in this regard, that such a disclaimer does not displace the serious allegation of deceit, which is advanced on the material in this case – certainly not so as to defeat a good arguable case argument.

28. They may also rely upon, as can be seen from correspondence between Quantuma and the first and second defendants, the Property Solutions Ltd 2015 Report on the Ilfracombe development, which suggests a return of eight to ten per cent to the investors, but there is significant doubt as to what materials the findings in that document are based upon. Indeed, neither the first nor the second defendant could justify the contents of that report when each was confronted about it by Quantuma.

29. Likewise, in relation to the Westbeach development, there is a Planning Solutions Consulting Limited document, also prepared by the same gentleman who prepared the Property Solutions Limited 2015 Report (a Mr Michael Stickland, about whom nothing is known), which raises the same sort of point about the return. However, that also suffers from the same failings as the Property Solutions Limited Report, in that it is difficult to understand, and certainly difficult to verify, the assumptions and the numbers which are contained within it.

30. Had the first and second defendants had a reasonable explanation as to how those assumptions and numbers were arrived at, no doubt they could have said when they were asked about it, but they did not. Accordingly, Mr Hext, for the claimants, says that it is not credible that the first and second defendants could have relied on these reports, or, if they did so, they were reckless to have done so. I accept that submission, certainly to the good arguable case standard.

31. So far as the third defendant is concerned, as director of the fourth defendant and co-director of the fifth defendant, it is said by the claimants that he knew the representations to be false; alternatively, that he had no honest belief in them; alternatively, that he was reckless as to whether they were true, such that the third, fourth and fifth defendants are liable in deceit.

32. What is the basis of this allegation? This is said to be so by reason of the fact that the third defendant was the sole director of the fourth defendant and co-director with his wife of the fifth defendant, which were the estate agents that marketed the properties exclusively at all material times.

33. It is then said that the fourth and/or fifth defendants' relationship with the developer companies was described in the brochure material as an "exclusive partnership". Indeed, in an email, dated 18th January 2016, to which I was referred by Mr Hext from Ross Thompson of Emerging Property to Janet Gafferana, an investor, the fourth and fifth defendants describe themselves as "sole marketing agent" and they refer to what the partnership allowed them to do; indeed they refer to the fact that Alpha only became "involved in the PBSA industry with us from 2012". It is, therefore, presented that the fourth and fifth defendants are part of a partnership with the Alpha group to promote these schemes, and that this is not a normal vendor-estate agent relationship.

34. There is evidence, therefore, before me that the fourth defendant was involved in the scheme from the start, and that this was a collaborative venture with the first and second defendants.

35. The claimants also rely upon the fact that the Property Ombudsman found that there was no evidence to suggest that the fourth defendant had undertaken due diligence to ensure that all information presented in their marketing campaign was accurate and not misleading.

36. The response of Mr Crump (the third defendant) to this was to deny this. However, the difficulty with his response is that he accepted that he was provided with the terms of the contractual documents (the lease agreements) before he, the fourth and fifth defendants started to sell the units. If that is so, one asks the question: why did he not seek to correct his sales literature, because these documents fundamentally diverged in very important respects? Indeed, it can also be seen that his company was actually responsible for providing draft contracts to investors and arguably misleading them on this point: see the email of 1st June 2018, to which I was referred.

37. The documents put before me suggest that Mr Crump knew that the guaranteed rent was

only as secure as the financial standing of the underlessee. That is apparent from Emerging Property's email of January 2016, to which I was referred, where it is stated that it is the developers' asset base which provides the security. But that appears to have been false. Mr Crump was at the very least, on a good arguable case basis, reckless as to whether or not this was true. Indeed, in one of Emerging Property's brochures there is a reference to competitors of Emerging Property signing contracts with SPVs, which is said to be not a secure method to adopt, precisely because those SPVs may subsequently have significant financial difficulties which render the investors' investments liable to be forfeited. In this case what was being said was that, in contrast, the investors had the security of the developers' strong financial standing to ensure that their investments were safe; whereas it is strongly arguable that Mr Crump would have known, having seen the relevant lease documentation which purported to give effect to the representations that had been made in the brochures, that that was not the case.

38. From all of this, I consider that to a good arguable case standard it can be inferred that the third defendant knew that the representations were false, or at the very least elected not to confirm that the representations were true and that he was therefore reckless as to their truthfulness.

39. The brochures of Emerging Property (the fourth and fifth defendants), to which I was taken by Mr Hext, contained, as I have mentioned, similar statements of fact, such as the contracts having been signed directly with the established developer. I have already referred to the fact that it is strongly arguable that Mr Crump knew or ought to have known that that was not so when he received copies of the relevant underlying lease agreements. They also contained statements that there would be no third party shell companies, to which the same point applies. They also contained statements that ten per cent is to be paid by the developer (a company with assets). Again, the same point applies: it is strongly arguable that he knew, or ought to have known, that that was not true. The brochures also refer to these being "hand-picked properties" by the fourth and fifth defendants, "after thorough research underpinning our reports", and that buyers will "always receive their yields as expected, with the contracts aligned directly to the developer".

40. I agree with Mr Hext that there is at least a good arguable case to say that Mr Crump must have known those statements to be false when they were made; or at least he must have been reckless as to their truth. In many cases it is clear that the contracts were not underwritten by the developers' large asset base, as was represented in the brochures; rather, the contracts, if underwritten at all, were underwritten by SPVs, whose financial standing was not reliable, as indeed has transpired. There is a good arguable case that Mr Crump either knew that, or ought to have known that, in the light of the fact that he received the underlying lease documentation.

41. I accordingly consider that there is a good arguable case that each of the defendants is guilty of deceit.

Inducement

42. I turn next to inducement. It is plain from the nature of the misrepresentations and from the circumstances in which they were made, namely in the actual marketing promotional materials for the investment schemes, that they were made by the injunction respondents in a bid to induce the claimants to enter into the investment schemes. I accept, on a good arguable case standard, that the claimants have acted to their detriment in so doing.

Unlawful means conspiracy

43. The claimants also have a case in unlawful means conspiracy. I do not intend to say too much about that, other than because it is essentially based upon the same factual material, I consider that there is a good arguable case for an unlawful means conspiracy on the facts to

which I have referred.

Quantum

44. So far as quantum of the claimants' loss is concerned, at present, on the basis of CBRE's analysis, the claimants maintain that they have sustained losses in the sum of almost £45 million in total, although there may be some reduction on that figure to take into account VAT. However, as Mr Hext says, the claimants also suggest that they have additional losses, which have not yet been particularised. That sum of around £45 million represents the difference between the value of the investment properties, assessed as at 9th September 2020, and the sums paid by the claimants. The claimants also seek rescission of the purchase agreements and the superior leases.

Real risk of dissipation

45. I come next to the question of whether the claimants can prove a real risk of dissipation to the good arguable case standard. The claimants rely in particular upon paragraphs 346 to 374 of Mr Kenkre's affidavit, as well as the oral submissions made to me by Mr Hext today. The relevant principles were rehearsed by the Court of Appeal in *Lakatamia*, adopting the summary of the key principles applicable to the question of risk of dissipation by Popplewell J (as he was) in *Fundo Soberano de Angola v Santos* [2018] EWHC 2199 (Comm). Those principles, in short, are:

> (i) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets;
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> (ii) The risk of dissipation must be established by solid evidence, mere inference or generalised assertion is not sufficient;
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> (iii) The risk of dissipation must be established separately against each respondent;
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> (iv) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty. It is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
>
> (v) The respondents' former use of offshore structures is relevant, but does not itself equate to the risk of dissipation;
>
> (vi) What must be threatened is unjustified dissipation. The purpose of a worldwide freezing order, I remind myself, is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of or concealing assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof.
>
> (vii) Each case is fact specific, and the relevant factors must be looked at cumulatively.

46. In assessing the risk of dissipation, is important to keep the defendants separate. The question is whether the risk of dissipation here is sufficiently solid. I consider that it is. As against each of the first, second and third defendants, I accept the claimants' general submission

that the Defendants have been shown (to the requisite standard on this application) to have engaged in dishonest conduct, namely the perpetration of a fraud with the use of various company structures and that the fraud in question is such that it tends to show the defendants to be individuals who know how to use structures in a way which leaves victims with no recourse to funds. I emphasise, of course, that this is the interlocutory stage, when I have not heard from the defendants.

47. In *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808, Lloyd LJ at [177] said:

> "We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, where … the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. …"

I so find here. In this case the alleged fraud was perpetrated through the use of a complex contractual structure which in the case of each investor involved at least three companies: the developer, the superior leaseholder, the designated management company and the underleaseholder, whereby the underleaseholder (the company with the obligation to pay investors returns on the investment and to discharge investors' liabilities under the leases) was a shell company holding no assets, contrary to the representations which had been made to the claimants.

48. In addition, Mr Kenkre points to the fact that the £55 million worth of funds invested by the claimants have been dissipated and that there are specific payments of those monies which merit particular concern, including service charge payments for the Alpha properties of £830,000, in comparison to revenue of £1.3 million. Moreover, Mr Spence has paid in the region of $4.6 million in cash for three properties in Florida between March 2017 and January 2019 – the period of time with which we are most concerned; and Mr Kewley has also purchased a property in Florida. The timing of those transactions arguably corresponds with the relevant events with which we are concerned here, concerning the student and the holiday accommodation.

49. There is also some evidence to suggest that sums of money may have been moved by the first and second defendants to a new business operation in Florida, after the development schemes collapsed. Furthermore, once problems with each of the development schemes became apparent, the first and second defendants resigned their directorships of the relevant companies in or around late 2018, and for some time made themselves, it appears, uncontactable – certainly in December 2018.

50. So far as the third defendant is concerned, I originally had some qualms about whether the case was sufficiently proved to the relevant standard in so far as the risk of dissipation of assets on his part is concerned. However, having heard Mr Hext, I am persuaded that that risk to the relevant standard does also exist so far as the third defendant is concerned. In particular, he also used a relatively complex contractual structure to shelter his beneficial interests arising out of the scheme. He also has a serious case to answer regarding the dissipation of dividend payments to a company owned by him.

51. As I have mentioned, the fourth defendant's majority shareholder is a company known as

XIP Capital Limited. XIP Capital Limited and XIP Holdings Limited are jointly owned by Mr Crump; but the fourth defendant is the sole shareholder and director of XIP Holdings Limited – so, it all comes back to Mr Crump. The fourth defendant's Statement of Affairs shows that as at 1st June 2020 the only asset available for distribution to creditors was cash in the bank in the sum of some £22,000. That appeared to be offset by way of an unsecured loan owing to XIP Invest Limited, creating a net deficit of £27,000. The fourth defendant's accounts reveal that as at 31st August 2018, it had over £3 million in assets – debtors and cash at bank in hand – and over £2.5 million owed to creditors. So, as at 31st August 2018, the net current assets were some £515,000. As at 31st August 2019, it only had a net current asset position of £26,000. It appears that significant funds had been paid out to XIP Capital Limited (Mr Crump's company) by way of dividends. So, in particular XIP Capital Limited's accounts for the year ending 31st March 2017, which showed a positive balance of £499,000, contained a note that dividends of £589,000 were paid from Emerging Property Investments Limited. At the year end, Emerging Property Investments Limited owed a balance of £300,000.

52. A year later, XIP Capital Limited's accounts for the year ended 31st March 2018 showed a positive balance of £1.191 million and a note that dividends of £780,000 were paid out, and that at the end of the year Emerging Property Investments owed a balance of £991,500. Finally, in the following year, ending 31st March 2019, XIP Capital Limited's accounts showed a positive balance of just £3,000 odd. Section 5, entitled "Debtors", indicates that the amount of £991,500 that was owed by the fourth defendant in 2018 was no longer owed by 2019. It is not known where those funds have gone, and the claimants allege that it is be inferred that the above fund movements were instigated by the third defendant, since he is the effective owner of XIP Capital Limited. Indeed, the timing of the removal of the money, when problems with these schemes were emerging, would appear to be significant. The fourth defendant then placed itself in voluntary liquidation, and the claimants invite the court to draw the inference that Mr Crump was aware of the potential for claims to be brought against him and the fourth defendant. So, he has taken steps to shield the fourth defendant from those claims: see paragraphs 369 to 370 of Mr Kenkre's witness statement.

53. It is true to say that there are factors which tend against any inference that the defendants are likely to dissipate their assets. In particular, so far as the third defendant (Mr Crump) is concerned, upon the collapse of the investment schemes early in 2019, and when the underleaseholders ceased to make payment under the underleases, he was contacted by a number of investors who wanted to know why payments had stopped. He wrote to the Ilfracombe investors via an email dated 4th January 2019, in which he said that he had been chasing the first and second defendants since 22nd December 2018 to confirm that they would pay, but had had no response. He said that he had had a meeting with a Mr Sullivan, who I mentioned earlier and who was at that point the director of various Alpha Group companies. He then provided various updates to the investors. He will no doubt say that he sought to be helpful to the claimants, that he would disassociate himself from the actions of the first and second defendants, and he may say that this suggests that he did not know of any fraudulent scheme and was not a party to it. He would also no doubt say, as he said at the time in early 2019, that he lost money as well in the collapse of the scheme, and that he was not the cause of this.

54. The claimants, however, say that this was all too little too late; that what he was trying to do was position himself as the innocent party; and that it does not exonerate him from what went before, which is that he was involved in an arguable case of deceit and conspiracy.

55. Secondly, since July 2019 there has been press coverage, including in the Financial Times in relation to the matters which form the factual basis of the claimants' claim, and complaints

have been raised by investors since early 2019. Indeed, there has been a settlement of some claims during this period, such that the defendants may well say that they have been aware for some time that a claim for fraud might be advanced against them, and so they are hardly likely now to seek to dissipate assets; that if they had proposed to do so, they would have it before.

56. In response to that argument, Mr Hext says: "We know they still have some assets, because they have been identified, and the issuing of proceedings against them is of a different magnitude to correspondence and press coverage and the like, and once proceedings are issued, bearing in mind the serious allegations of fraud which are central to the claim, makes it nonetheless likely that they will seek to dissipate their assets".

57. I accept the submission that the issuing of proceedings is of a different order of magnitude to the fact that there have been press reports of the investors' complaints and some discussions between the third defendant and the claimants. This fact, as well as the fact that there has been a settlement of some similar claims involving different claimants, is not sufficient to displace the other factors that I have referred to as supporting the solid inference that these defendants may well seek to dissipate their assets once proceedings are issued. Ultimately, the strongly arguable case in fraud which the claimants have established is at the heart of this claim and persuades me to draw the inference that these defendants are likely, once proceedings are issued and brought to their attention, to dissipate their assets or make it more difficult for the claimants to enforce any judgment entered against them.

58. Thirdly and finally, there is the issue of delay in the seeking of relief. Mr Kenkre has set out in his affidavit the steps that have been taken since Trowers and Hamlin were formally instructed in November 2019 by the GAC. Those steps led up to the claimant list being finalised on 11th September 2020. That list comprises 448 investors (treating joint owners as one investor), who collectively own 672 properties across three types of development. Whilst there arguably has been some delay since the claimants' list was finalised on 11th September 2020, with this application not being launched until 27th January 2021, I accept the submission of Mr Hext that in circumstances where one is dealing with 448 investors, who collectively own 672 properties over three types of development, there is obviously a substantial burden upon his instructing solicitors to ensure that all of the relevant points that each of the investors wish to make are properly marshalled and placed before the court in a coherent series of affidavits, which is what has happened in this case. I accept that explanation.

59. In any event, delay per se is not a reason to refuse freezing injunction relief. As I shall mention, there remain sufficient assets which would make a freezing injunction worthwhile. In my judgment, the defendants are unlikely to be expecting to have their assets subjected to a freezing order. Since it is arguable to the requisite standard that they have shown themselves to be well capable of dishonest behaviour, once proceedings are issued, then as I have said I am willing, on the present evidence available to the court, to draw the inference that they are then likely to do whatever is necessary to shield their assets, including by seeking to render any judgment of the court valueless by an unjustified disposal of the same.

Existence of assets

60. I turn to the existence of assets. It is necessary for the claimants to establish that there are grounds for belief that the defendants hold assets on which the injunction will bite, and I am satisfied that they do so. In particular, there are grounds for believing that the first defendant holds valuable assets, including four residential properties in Florida, USA, and by him jointly with his wife, Kerry Spence, with an estimated current value in the region of $5.2 million which, as I mentioned, he paid for in cash; four cars, including two Teslas, located in Florida; a Harley Davidson motorcycle, located in Florida; four boats in the USA, which were

relevantly purchased between 2018 and 2020; an interest as a general partner of Alpha Developments (Orlando) LLP; and an officer of Colonial Apartments LLC in Florida. In particular, it appears that Alpha Developments (Orlando) purchased two lots at 3330 West Colonial Drive for almost $4 million cash in June 2019. Those lots were then transferred to Colonial Apartments in October 2019. That entity operates a motel business in Florida. It appears that he also has a 50 per cent shareholding in Barstow Projects Limited in the United Kingdom, and a 20 per cent shareholding in another company, F M Solutions Limited. In addition, of course, he has his interests in various Alpha Group companies.

61. The claimants also have grounds for believing that the second defendant holds valuable assets jointly with his wife, Kendra Kewley: in particular, 37 Ardsley Road, Stockton-on-Tees, which was purchased for £695,000 in November 2018; 33 Whitton Road, Stockton-on-Tees, which was purchased in 2006; a property in Florida, 14501 Grosvenor Resort Avenue, which was purchased in August 2017 for $324,000 in cash; and a Porsche car. He also has interests in various companies, separate from the Alpha Group companies, in which he also holds interests. Indeed, it is interesting to note that, as with the first defendant, he appears to have an interest in Alpha Developments (Orlando) LLP and Colonial Apartments LLC, although the nature and value of his interest is unclear. It appears that that is a business in Florida in which he has an interest together with the first defendant, Mr Spence.

62. Finally, the third defendant and his wife purchased a property at Red Acre, Godalming in April 2016. That property is estimate to be worth around £1.5 million, although there appears to be a charge over it in favour of the Coventry Building Society. He may also be the owner of two BMW vehicles. The claimants believe that he may well also have assets in Romania, as is explained in Mr Kenkre's affidavit at paragraph 395. It also appears that he has paid out to companies which he owns, as I have mentioned, over £1.3 million in dividends declared by the fourth defendant. The timing of those payments is suspicious. It is not currently known where that money has gone. He also holds interests in various companies, although those interests do not appear to be particularly valuable.

Full and frank disclosure

63. I have taken account of the matters in paragraphs 76 to 101 of the claimants' skeleton argument, under the heading "Full and Frank Disclosure", and I have also heard Mr Hext's full submissions today, which have included, quite properly, a number of matters to which he has drawn my attention in terms of full and frank disclosure being made to the court on this application. But I am satisfied that none of those matters should lead me to refuse to grant the freezing injunction which is sought.

64. I am satisfied that it is just and convenient that the relief be granted in this case. These are very serious allegations of dishonesty. I was told that the FT reported in June 2019 that more than 1,000 investors invested in these schemes a total sum of around £100 million. I am satisfied that these serious allegations meet the necessary evidential threshold for the granting of relief. If they are proven to be true, they have clearly caused very serious financial loss to numerous individuals. The fruits of this alleged dishonest course of conduct are easily dissipated, and I am satisfied that the balance of convenience weighs in favour of the order being granted, subject to the claimants' providing a cross-undertaking in damages, backed by an insurance policy provided by an A-rated insurer, GAC, which will provide an indemnity of up to £500,000 in the event of the undertaking being called upon, and which accordingly provides a safeguard against the risk of the injunction having been wrongly granted, as indeed will the draft order, which will allow the defendants to come back before the court to seek to have it discharged within a relatively tight timetable.

65. There remains also the points on which Mr Hext is to take instructions, as to whether or not the undertaking should extend to the wives of the defendants in view of the fact that they have interests, in particular, in some of the properties which are owned by the defendants.

66. I will hear Mr Hext on that, but those are my reasons for granting the freezing injunction relief.

(There followed a discussion on the order)

MR JUSTICE CALVER:

67. I shall briefly explain my thinking behind the service of the claim form and the ancillary documents and permission to enforce the injunction in Florida.

68. So far as service of the claim form is concerned, for all of the defendants domiciled in England, save for the first defendant who, as I have said, resides in Florida, the claimants intend to serve the claim form on those defendants who reside within the jurisdiction by leaving it at their usual or last known residence or, where they are corporate entities, at their principal office or any place of business of the company within the jurisdiction which has a real connection with the claim, in accordance with CPR Rule 6.9.

69. Although he is resident outside the jurisdiction, the first defendant is a director of a number of English companies and so the claimants are entitled to serve the claim form on him at the address under which he is registered at Companies House, under section 1140 of the Companies Act 2006: see *Idemia France SAS v Decatur Europe Ltd & Ors* [2019] EWHC 946 (Comm). Since the first defendant can be served with the claim form and particulars of claim within the jurisdiction, permission is not required to serve these injunction-related documents on the first defendant personally out of the jurisdiction: see CPR 6.2(c) and the note at paragraph 6.2(3) of the CPR. The reference to "claim" includes an application before action. A pre-action application is treated like a claim form.

70. In case that is wrong, then the court grants permission to serve all the documents associated with the worldwide freezing injunction, including any freezing order that is granted, on the first defendant personally out of the jurisdiction in Florida.

71. In order to obtain permission, the claimants are required to establish that there is a serious issue to be tried on the merits of the claimants' claim against the first defendant; that there is a good arguable case that one of the gateways set out in Practice Direction 6B applies; and that England is clearly and distinctly the appropriate forum to try the case. I have already found that there is a serious issue to be tried on the merits of the claim for the same reasons that there is a good arguable case on the merits. The claimants are then entitled to rely on two of the gateways set out in the Practice Direction 6B. First of all, Practice Direction 6B, 3.1(3) which states:

> "(3) Where a claim is made against a person (...) on whom a claim form ... will be served and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or

proper party to that claim."

72. The second gateway is the tort gateway, Practice Direction 6B, paragraph 3.1(9):

> "(9)A claim is made in tort where –
>
> (a) damage was sustained, or will be sustained, within the jurisdiction; or
>
> (b) damage which has been ... sustained results from an act committed ... within the jurisdiction."

73. I consider that both of these gateways are satisfied. So far as the first gateway is concerned, the second defendant is domiciled in England and there is a real issue between the claimants and the second defendant which it is reasonable for the court to try. The first and the second defendants are said to have been parties to a dishonest, fraudulent scheme, and so that gateway, it seems to me, is satisfied.

74. Secondly, the tort gateway is also satisfied. The loss sustained upon entry into a transaction as a result of a misrepresentation is the loss upon the making of the financial instrument, and the claimants have sustained economic loss here in paying monies to the fourth and fifth defendants, and indeed to companies operated by or on behalf of the first and second defendants. In any event, damage has also been sustained as a result of misrepresentations made within the jurisdiction. In a case that is based on misrepresentation the relevant act is committed where the misrepresentation is made. So the damage here is the results of acts committed within the jurisdiction.

75. Similarly with the unlawful conspiracy claim, it seems to me that there is a good arguable case that the conspiracy was hatched within the jurisdiction, within England. Two of the parties to the conspiracy were domiciled in England at the relevant time and it is likely that any communications between them would have taken place in England. That is clearly the appropriate forum for the trial of the dispute. English law is the applicable law of the claim and Article 4 of Rome II provides that the law applicable in respect of a tort shall be the law of the country in which the damage occurred which, as I say, is England. Indeed, the facts relevant to the causes of action in deceit and conspiracy to injure all took place in England. Most of the witnesses will clearly be based in England as well, although that is a lesser consideration these days with the use of technology. It is likely that identical (or substantially identical) facts will be alleged against the first defendant to those that are alleged against the second defendant. Since the second defendant is domiciled in England and will be served here, the court will have jurisdiction in respect of the claim against the second defendant, and it is obviously sensible that the first defendant should be tried in the same action to avoid the risk of inconsistent judgments. I do not think I need to grant permission to serve out, but if I do, I grant it.

76. So far as permission to enforce the injunction by parallel proceedings in Florida is concerned, I grant that application. The principles which govern the application are set out in the Court of Appeal's judgment in *Dadourian Groups International v Simms* [2006] EWCA Civ 399 [25]. The claimants have obtained advice from an attorney practising in Florida, Mr Rodz, who is a partner at Shoots & Bowen LLP. His advice is that the courts of Florida routinely enforce injunctions entered by foreign jurisdictions, applying principles of comity, and it is understood that a foreign order is entitled to comity where the parties have been given notice and the opportunity to be heard; secondly, where the foreign court had original

jurisdiction; and, thirdly, where the foreign decree does not offend the public policy of the State of Florida. Two and three are satisfied here, I am told. As far as the first of those requirements is concerned, that is also satisfied because Florida law allows for the issuing of *ex parte* injunctive relief, provided that the respondents to such an order will later receive notice and have an opportunity to challenge the order before the foreign court, as they can here.
77. I accept that it is just and convenient to grant permission to enforce the worldwide freezing order against the first defendant, and indeed the second defendant in Florida, in circumstances where a substantial proportion of the first defendant's assets are held in Florida and indeed he resides there. Similarly, the second defendant, as I have mentioned in my earlier judgment, has assets in Florida. The urgency which justifies the making of the freezing injunction application also provides the basis for the claimants' application without notice to the first defendant and the second defendant for permission to enforce the freezing injunction in Florida.

78. Accordingly, I grant this application and, as I understand it, the intention of the claimants is to obtain the *ex parte* order in Florida and, having obtained that, then to serve all of these proceedings upon the defendants in England and in Florida.

79. Finally, so far as permission to bring a claim against the fourth defendant is concerned, I do not grant that application. It seems to me that it would not be appropriate to make such an order on a conditional basis and without knowing the precise circumstances which currently obtain in the liquidation and indeed hearing, if necessary, from the liquidators. In any event, the claimants can serve their proceedings against the fourth defendant because I am told that they have no reason currently to believe that there is any impediment in that respect.

80. So far as the permission to bring a claim against the seventh defendant is concerned, I am not minded to grant that application. It seems to me that the claimants should seek permission from the court with jurisdiction over the insolvency of the company for those proceedings to be brought. I do not consider it appropriate to determine that application at this stage on an *ex parte* basis.
