



Neutral Citation Number: [2024] EWHC 3439 (Ch)

Claim No: IL-2024-000161

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

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London  
EC4A 1NL

Date: Thursday, 12th December 2024

**Before:**

**MR. JUSTICE MILES**

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**Between:**

**(1) J&J SNACKS FOOD CORPORATION**  
**(2) ICEE CORPORATION**

**Applicants/**  
**Claimants**

**- and -**

**(1) RALPH PETERS & SONS LIMITED**  
**(2) MARK PETERS**

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**Respondents/**  
**Defendants**

**MARK HANDLEY** (instructed by **Duane Morris LLP**) appeared for the **Applicant/Claimants**.

**DAVID CAVENDER KC, BETH COLLETT** and **KATHERINE BOUCHER** (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Respondents/Defendants**.

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**Approved Judgment**

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**MR. JUSTICE MILES:**

1. The hearing arises in the following way. On 23 October 2024, the claimants applied for a freezing order and an imaging order. The applications were heard at a without notice hearing by HHJ Judge Davis-White KC (“**the judge**”) on 3 December 2024. The judge granted both applications. The judge indicated towards the end of the hearing that in his view it would be sensible to have a relatively prompt return date and that the return date would most probably be used for the purpose of giving directions. He ordered the matter to come back before the court in the interim applications list today. Applications in this list are for matters not exceeding two hours including judgment time.
2. The claimants served an application to renew the freezing order and imaging order on 4 December 2024. The parties have largely agreed directions for an adjourned return date to take place on or after 7 February 2025. They have agreed directions for the service of evidence and that the full hearing should take one day plus reading time. The main point of contention today concerns the requirement in the freezing order at paragraphs 9(1) and 10 for the defendants to give asset disclosure.
3. The defendants seek to extend the time for compliance with those paragraphs until after the adjourned return date. As it stands, paragraph 9(1) of the freezing order requires asset disclosure by both defendants within seven days of service of the freezing order. The deadline for compliance is 12 December 2024, as the order was served on 5 December 2024. Paragraph 10 of the freezing order requires asset disclosure by affidavit within 14 working days of service of the freezing order. The current deadline for compliance with this paragraph is 27 December 2024.
4. The defendants have not applied to set aside the freezing order, nor have they offered any security in relation to the freezing order. The limit in the freezing order was set at £10 million so that the order would cease to have effect if the defendants provided security by paying £10 million into court or made other appropriate provision for security.
5. The claimants say that the asset disclosure should be provided in accordance with the terms of the freezing order.
6. There is a long and complicated litigation history.
7. The first claimant, J&J Snack Foods Corporation, is a public limited company incorporated in New Jersey in the United States of America. The second claimant, ICEE Corporation, is a wholly-owned subsidiary of the first claimant. The first defendant is a company registered in England and Wales. It is the parent company of a group of companies which largely trade in frozen soft drinks here and in a number of European states. The second defendant is a British national. He is a director of the first defendant and its majority shareholder.
8. At the hearing on 3 December, the judge gave a judgment, and I incorporate into this judgment by way of background paragraphs 2-24 of his judgment:

“2. I have a large amount of material before me which I have been taken meticulously through and there is a detailed skeleton argument. By way of summary, and to put the position in perspective, and relying largely on the findings of Judge Michael R Barrett made in proceedings in Ohio USA which I will explain later, the Slush Puppie frozen drink business was started by Willard (Will) Radcliff, who founded the Slush Puppie Corporation ('SPC') in Cincinnati, Ohio and built it into a successful international business.

3. From around 1978 until early 2001, SPC owned the trade marks for Slush Puppie along with various logos and designs used in connection with its goods and services. There were dealings between a subsidiary company of Ralph Peters & Sons Limited and SPC, which I will come on to in a moment.

4. So far as the title, as it were, of the claimants is concerned to the relevant trade marks, the next relevant event was that in 2001 Dr. Pepper/Seven Up Inc ('DPSU') purchased the Slush Puppie trade marks and business from SPC. The trade marks relating to the Slush Puppie business were assigned to DPSU after that.

5. In 2006 ICEE Corporation, the Second Claimant ('ICEE'), purchased the Slush Puppie trade marks and business from DPSU and became obligated under the relevant agreements in this case with the subsidiary of the First Defendant.

6. So far as the claimants are concerned, the first claimant is a public limited company incorporated in New Jersey, USA. The second claimant, ICEE, is a wholly owned subsidiary of the First Claimant and is incorporated in Delaware, USA.

7. So far as the defendants are concerned, as I have indicated, Ralph Peters & Sons Limited ('RPSL') is a holding company, registered in England and Wales, with a registered address at a business park in High Wycombe. It is the parent company of a group of companies largely trading in frozen soft drinks but, as I understand it, also trading in other drinks as well. One of its subsidiaries is a company which is now called Frozen Brothers Limited ('FBL'). It was that company that entered into two agreements with, I think it was originally, SPC but effectively the claimants' predecessors in title in the 1990s.

8. The agreements in question were executed in 1996 and 1999. One was a manufacturing agreement and the other was a distribution agreement.

9. The history of the relationship between the owners of the relevant trade marks and companies within the group of which the first defendant is the holding company (or ultimate holding

company) is set out in detail in the primary affidavit before me, which is that of David Wolfsohn of the firm of Duane Morris LLP, he being the lawyer for the claimants and who has been involved in running, effectively, the Ohio proceedings that I referred to earlier on. He explains that the 1996 agreement that I have referred to was a manufacturing agreement. It gave FBL the right to manufacture Slush Puppie syrup and neutral base but not, as it were, all products used in the creation of or for use with the Slush Puppie machines and products. The manufacturing rights were by reference to certain European countries and the United Kingdom.

10. The 1999 agreement was a distribution agreement granting FBL a limited licence to distribute certain Slush Puppie products as defined in the agreement only in the United Kingdom and Ireland and not in any other European countries. The licence included the right to use certain Slush Puppie trade marks and other intellectual property.

11. Between about 2009 and 2017, the defendants, or perhaps more properly FBL, but certainly Mr. Mark Peters, were involved in attempts to renegotiate the scope of the rights granted to FBL under the 1996 and 1999 agreements.

12. In this respect, Mr Mark Phillips seems to have been (and to remain) the guiding force behind the first defendant and its group and the majority shareholder and one of the two directors of the first defendant.

13. The negotiations were directed at providing companies within the first defendant's group with broader rights to distribute and use the Slush Puppie trade marks and products and in particular across Europe. Part of those attempts seem to have originated from allegations that in certain European countries trade marks were being improperly used by persons who had not been licensed. The suggestion seems to have been that Mr. Peters and/or his companies, if assigned the relevant rights in respect of the trade marks, could then, as it were, litigate and vindicate the rights under those trade marks on behalf of the claimants, or on behalf of ICEE Corporation.

14. As it happened, those negotiations came to nothing. However, suddenly, in the sense that it came without any notice, in February 2018, Mr. Peters produced or sent a document or a copy of a document purportedly dated 8<sup>th</sup> August 2000. I will refer to the document as the '2000 Agreement'. That document purportedly, gave him or his companies in effect, all the rights that he had been seeking to negotiate for the previous nine or ten years before its production in 2018.

15. The claimants did not accept that the 2000 Agreement was authentic and genuine and the ultimate result was that FBL, I think, commenced by way of complaint in the Ohio courts, proceedings against ICEE Corporation and maybe others seeking relief really vindicating rights under the 2000 Agreement.

16. I am not now dealing with this chronologically, but for ease of understanding, the next relevant point to note is that the two agreements I have mentioned from the 1990s contained relevant clauses in them allowing the party now being the claimants to terminate those agreements in the event that legal proceedings were commenced against it, at least in one case, other than for recovery of sums due. Relying, therefore, on those provisions, the claimants arranged for the termination of the two 1990s agreements that I have mentioned.

17. The proceedings that were commenced on behalf of the Mark Peters companies effectively by FBL were commenced in Ohio because there were Ohio jurisdiction clauses under the 1990s agreements, carried forward into the 2000 Agreement (which Agreement in many respects reflected many of the terms already agreed in the 1990 agreements).

18. However, during the course of the proceedings in Ohio, and I think they were moved eventually to the United States District Court in the Southern District of Ohio, Western Division of Cincinnati, although I think they had been commenced elsewhere in Ohio originally) the position became clear that there were serious questions as to the validity and authenticity of the 2000 Agreement.

19. I will come on to the detail in a moment but in due course FBL withdrew its claim as relying upon the 2000 Agreement and instead amended its claim to rely on alleged breaches of the 1990s agreements.

20. Part of the issue between the parties was whether or not the termination of those agreements by ICEE had been validly effected or not and in effect, as I understand it, the Ohio court decided by way of summary judgment that the clauses in the 1990s agreements were valid and had been validly activated and that the agreements had been validly terminated. As I understand it, though, there may be outstanding claims by Mr. Peters' company FBL in respect of the period prior to termination, although such claims are hotly disputed, and whether or not the relevant claims can properly fall under the 1990s agreements, as I understand it, in part turns on questions of jurisdiction and the geographic areas licensed by the licences.

21. Be that as it may, the result of that is that in this jurisdiction the claimants say that after termination of the 1990s agreements, they have claims essentially for infringement of trade mark, passing off in circumstances I will explain, and unjust enrichment. They say that, essentially, there are two main periods which they have described as Phase 1 claims and Phase 2 claims. There may be some overlap chronologically between the period of the two claims distinguished in that way by reference to Phase 1 and Phase 2.

22. The Phase 1 claims quite simply are said to be infringement of relevant trade marks from the fact that FBL, and possibly other companies within the 1st defendant's group, continued to use the Slush Puppie trade marks, products etc. They continued unauthorised manufacture of relevant products originally permitted under the early 1990s agreement. They advertised, promoted, sold and exported Slush Puppie branded products without authority and effectively continued to trade and operate as if the 1990s licensing agreements had not been terminated. As I have said, that gives rise to claims in breach of section 10(1) of the Trade Marks Act 1994 or, in the alternative, for unjust enrichment.

23. Phase 2 covers a period from when the RPSL group commenced what they described as a 'rebrand' of the Slush Puppie product into something described as Slushy Jack's. The claimants say there is a high degree of similarity between the Slush Puppie trade marks and the Slushy Jack's branding, and that the Slushy Jack's products are either identical or very similar to the Slushy Puppie products and the defendants have taken unfair advantage of the distinctive character or repute of the Slush Puppie trade marks.

24. Accordingly, the Phase 2 claims are said to involve and encompass the trade mark infringement pursuant to sections 10(2) and 10(3) of the Trade Marks Act 1994 and, in relation to trade conducted in the EU and the UK, the tort of passing off and/or unjust enrichment."

9. Hence, in short, the claimants are interested in the well-known Slush Puppie frozen drinks brand. They own the trade marks, including various registered trade marks in the UK and elsewhere. The first defendant, as I have said, is the parent company of a group of companies, largely trading in frozen soft drinks. One of its subsidiaries is a company which is now called Frozen Brothers Limited ("FBL"). That company entered into two agreements with a company in the US which was a predecessor in title of the claimants. The first of those agreements entered into in 1996 was a manufacturing agreement and the second entered into in 1999 was a distribution agreement. The agreements were governed by laws of the state of Ohio.

10. Under the first of the agreements, FBL had the right to manufacture Slush Puppie syrup and a neutral base. Under the 1999 agreement, FBL was given a limited licence to distribute certain Slush Puppie products, as defined in the agreement, in the UK and Ireland, but not in other European countries. The licence included the right to use certain Slush Puppie trade marks and other intellectual property.
11. The evidence shows that between 2009 and 2017, the second defendant, on behalf of FBL, sought to renegotiate the scope of the rights granted to FBL under the 1996 and 1999 agreements. Those negotiations were directed at providing companies within the first defendant's group with broader rights to distribute and use the Slush Puppie trade marks and products, in particular across Europe.
12. The negotiations did not bear fruit, but in February 2018, Mr. Peters sent to the claimant group a document or a copy of a document dated 8 August 2000 ("the 2000 document"). That purportedly gave him or his companies all the rights that he had been seeking to negotiate. The claimants did not accept that the 2000 document was authentic and genuine and in the result, FBL commenced a complaint in the Ohio courts against the second claimant and other parties.
13. The claimants then relied on rights under the two agreements from 1996 and 1999 to terminate those agreements by reason of the legal proceedings having been commenced. In the course of the proceedings in Ohio, the claimants raised serious concerns as to the validity and authenticity of the 2000 document. At some date in 2020, FBL withdrew its claim relying on the 2000 document and instead amended its claim to rely on alleged breaches of the two agreements I have mentioned.
14. In the course of that dispute, there were a number of other documents produced by Mr. Peters which appear to have been served for the purpose of seeking to justify the authenticity of the 2000 document. The claimants produced a body of evidence, including about the cutting and pasting of documents and metadata relating to certain electronic documents which they say is, to put it mildly, very strong evidence of forgery. As I understand it, there had been no actual ruling on the question whether the documents are forged but, as I say, the claim based on the 2000 document was withdrawn. The claimants say that after termination of the 1990s agreements, they had, first, a claim for breach of contract and infringement of trade marks, and secondly, a claim in respect of infringement of trade mark, passing off and unjust enrichment. The first group of claims is said to arise from the fact that FBL and possibly other companies within the first defendant's group continued to use the Slush Puppie trade marks after the termination of the 1990s agreements. They say that this continued until the end of 2020. That period has been described in the proceedings so far as Phase 1.
15. Phase 2 covers a period when the companies in the first defendant's group commenced what they described as a rebrand of the product into "Slushy Jack's". The claimants say that there is a high degree of similarity between the Slush Puppie trade marks and the Slushy Jack's branding and get-up and that the Slushy Jack's products are either identical, or very similar, to the Slush Puppie products. They say that the defendants have taken unfair advantage of the distinctive character of the Slush Puppie trade marks. The Phase 2 claims are therefore said to involve trade mark infringement pursuant to sections 10(2) and 10(3) of the Trade Marks Act 1994, or passing off or unjust enrichment.

16. In broad terms, the claims against the defendants are put on the basis that they were accessories to the conduct of FBL and other companies in the first defendant's group which were carrying on the actual trading. There are some respects in which, as I understand it, it is also suggested that the first defendant may be directly liable for having used the Slush Puppie trade mark, but the main claims relate to trading by FBL and other trading companies within the first defendant group. It was common ground before me that the first defendant group is a mere holding company and that its assets consist of shares in a number of trading companies, including FBL.
17. The judge at the hearing on 3 December summarised certain of the events and transactions in relation to the 2000 document and in relation to the disappearance of laptops which were said to contain relevant documents for the purposes of the Ohio proceedings. He went into some detail in explaining that in his view there was good prima facie evidence that Mr. Peters was personally involved in forgery of four documents, and that was undertaken in order to advance FBL's case before the Ohio courts. It was common ground before me that the contentions about the forgery of the documents were in play in the Ohio proceedings in 2020; the allegations of forgery and the evidential basis for them had been raised by them.
18. The second matter I have mentioned is the alleged destruction of documents and disappearance of laptops of Mr. Peters. In that regard, it appears from paragraph 40 of the judge's judgment that there had been a direction from the Ohio court to produce laptops and that shortly afterwards Mr. Peters said that two laptops were stolen from his car on 16 August 2020. The judge went on to say that there appeared to be discrepancies in the evidence given by Mr. Peters about that episode. He also referred to evidence given by Mr. Peters in a deposition in October 2020 that another of his laptops had been taken to a repair shop in Monaco and when he went to collect it he was told that the laptop was either beyond repair or had been destroyed. The judge also referred to a hard copy file of documents which Mr. Peters said had been taken to Malaysia and had not been returned and had eventually been lost.
19. At paragraph 47 the judge referred to various comments by the district judge in Ohio about Mr. Peters and his testimony. The judge said that from the admittedly limited material that he had had the opportunity properly to go through in relation to the depositions of Mr. Peters, he would have concluded that Mr. Peters' testimony lacked candour and showed an aversion to answering questions.
20. The judge dealt with the maximum sum on the freezing order at paragraph 51. He summarised the calculation which had been put forward by the claimants, which they accepted was somewhat rough and ready. The claimants said that they had an arguable claim against the defendants of somewhere between £12 million and £15.3 million, but were seeking only £10 million as the maximum sum. At paragraph 53 the judge said this:

“Moving on to a real risk of improper dissipation and a risk that any judgment will go unsatisfied as a result, again it seems to me the case is obvious. The apparent fraudulent creation of the documents, which as I have said seems to be a very strong case, coupled with the unsatisfactory nature of apparent loss of



laptops and loss of an alleged file ... said to have been dispatched from Malaysia all point, it seems to me, to a real risk that any judgment will be sought to be evaded by improper dissipation of assets.”

21. The judge did not, in that paragraph or elsewhere, expressly address the point that the matters referred to, namely, the alleged forgery of documents and destruction of documents that had been the subject of extensive litigation in Ohio in 2020.
22. I should say a little more about the defendants. As I have said, the first defendant is a holding company. I was taken to accounts which showed that its only substantial assets were and are shares in a number of trading companies. It does not appear from the accounts that there has been a practice of dividends being paid by the subsidiaries to the first defendant in recent years. Counsel for the defendants confirmed on instructions that it remains the case that the first defendant is simply holds shares in trading companies. The accounts show that the group has substantial business and turnover, and that it is profitable. It is common ground that Mr. Peters is a director and the ultimate owner of the first defendant. He is also a director of various subsidiaries, including FBL. Mr. Peters has two houses in England and Wales.
23. I turn to the legal principles. I was taken to a number cases, including *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah & Ors* [2014] 2 CLC 636; *VTB Capital plc v Malofeev* [2011] EWCA Civ 1252; *Motorola Credit Corporation v Uzan* [2002] EWCA Civ 989. I should mention that the *Grupo Torras* case dates from 1994, albeit it was reported in 2014. I was also referred to *Raja v Van Hoogstraten* [2004] EWCA Civ 968.
24. The parties essentially agreed about the principles. The first is that it is standard in a freezing order to require disclosure of the respondent's assets. The reason for that is to enable the claimant to police the order and ensure that it has teeth, including by notifying third parties such as banks.
25. Secondly, in cases like the present, where there is a pending dispute about whether the order should have been made, the court has a discretion whether to extend what would normally be the time for compliance with the disclosure order. It was common ground that the usual position is that even where there is a challenge to the original ex parte order, the court will require disclosure to be given before the return date. This is illustrated by a summary given in the *Raja* case given by Chadwick LJ, at [105], where he referred to the need to strike a balance between the prejudice to the defendant if he is required to disclose assets which it is later held he should not have been required to disclose; and prejudice to the claimant if the defendant is not required to disclose assets which it is later held he should have been required to disclose. As he said, the *Motorola* decision shows that there is no general rule that a party against whom a freezing order has been made is entitled to a stay of the disclosure obligations ancillary to that order until after it has been finally determined whether the freezing order should stand. He said,  
  
“Indeed, it provides support for the proposition that in a normal case a stay of the disclosure obligations is likely to be refused, but it is no authority for the proposition that a defendant will

always be refused a stay of the obligation to make disclosure pending the final determination of his application to set aside the freezing order.”

26. The defendants therefore accept that the usual position is that disclosure will be given before the return date. Counsel for the defendants submitted that this was an unusual or abnormal case and that on its particular facts the court should stay the provision of the disclosure required by the order until the adjourned return date. Counsel accepted that the court might require an affidavit of disclosure to be provided in accordance with the timetable set out in the order, but could require it to remain undisclosed to the claimant pending the adjourned return date.
27. The defendants highlighted a number of features of the case which they said took it out of the normal or usual run of cases. They said, first, that the application before the judge should not have been brought without notice. They submitted that given the very long history of proceedings between the parties in relation to trade mark matters, notice should have been given of the application for freezing relief. They say that even if the full notice required for an application under Part 23 of the CPR was not appropriate, at least some notice should have been given.
28. Second, they say that the application did not disclose proper evidence of a risk of dissipation of assets. The first defendant is simply a holding company, and there was no evidence that the first or second defendants have attempted to remove assets or wrongly dissipated assets in anticipation of a judgment. On the contrary, the first defendant has carried on acting as a holding company of a group of companies which have continued to trade in the UK and Europe. While the claimants may complain about some of that trading and say that it infringes their trade marks, that does not, the defendants say, amount to a case of dissipation of assets.
29. As for the second defendant, he continues to be a director of the companies; he continues, they say, to have two houses here and there is no evidence of a risk of dissipation other than the allegations of forgery or the destruction of documents. But those matters were in the open and indeed litigated in 2020, some four years or so ago.
30. The defendants say, third, that there are serious flaws in the case that has been formulated. The claims are essentially or substantially made on the basis of accessory liability against the first and second defendants; and that was how the judge appears to have understood them on 3 December. Leaving to one side questions of how the defendants are said to be liable as accessories, the defendants say that the claims in respect of the profits made by the defendants is difficult to follow. The defendants submit that any claim for an account of profits is limited to the profits made by the first and second defendants themselves personally (see *Lifestyle Equities CV v Ahmed* [2024] UKSC 17 at [132]).
31. They submit that the claimants have not pleaded an intelligible case for saying that the defendants personally earned assets in the order of £14 million or £10 million, or indeed any substantial amount. They say that the real claim is that any profits that may have been made were made by the trading companies, including FBL. The defendants also say that the calculation of the profits is flawed.

32. More generally, the defendants say that the claim is a surprising one as the real complaint is about trading by the trading companies, including FBL, but that that company has not been included within these proceedings. Though this was a point that was discussed with the judge, no satisfactory answer was given to him.
33. The defendants say that it is appropriate to take into account the strength of the applicant's case for freezing relief to which the disclosure order is ancillary (see *Motorola Credit Corporation v Uzan*, at [27]-[30]). They say that in this case, the claimants' case is a weak one.
34. The defendants also relied on the second affidavit of Mr. Charalambous, dated 11 December 2022. That refers to and exhibits a Stipulated Protective Order (“SPO”) made by Judge Michael R Barrett in proceedings between FBL and the second claimant in Ohio. The SPO has provisions for documents disclosed by the parties and others in those proceedings to be designated by the parties as either confidential or highly confidential, attorney eyes only, if they fall within certain descriptions. There is a process for challenging confidentiality to designations under paragraph 3 of that order. The defendants say that by paragraph 1.2 of the order, once a party designates a document as either confidential or highly confidential, attorney eyes only, it falls under the definition of protective material unless or until there is a successful challenge to the designation under paragraph 3.
35. The defendants exhibit a number of documents that were put before the judge on 3 December in the present proceedings, which have been given one or other of the designations under paragraph 1.2 by FBL, and submit that there is no evidence that they have been released from that designation under paragraph 3 of the SPO. The defendants say that this is possibly an abuse of the process of the Ohio court.
36. The claimants submit in broad terms as follows. They say that the prima facie position is that where a freezing order is granted asset disclosure will also be ordered, and this is needed to give the order teeth. They say the case law shows that in a normal case, even where there is a respectable argument to set aside an ex parte order, disclosure will be required in the interim. They say that there is nothing to displace that usual order in the present case. They say that there is strong evidence of dishonesty here which has not been challenged. They say that the present case is similar to a number of the authorities, including *Motorola* and the *Grupo Torras* case, in that the claimant has alleged dishonesty against the defendants and that disclosure is needed in such a case to allow the order to be effective.
37. They say that the application to the judge was made properly without notice, that if notice had been given the defendants would have acted improperly, and (in this regard) they refer to the evidence about the laptops disappearing shortly after an order was made by the courts in Ohio. They say that the judge was of course aware that the application was being made ex parte and he thought it was appropriate. In that regard, the claimants relied upon a decision of His Honour Judge Klein (sitting as a Judge of the High Court) in *Wild Brain Family International Limited v Robson* [2018] EWHC 3168 (Ch), at [10] and [11]. One of the grounds of discharge of an ex parte order was that the injunction would not have been granted on an on notice application because the order in question was in the nature of a search order and the test for making a search order had not been

satisfied. The second ground was that the making of a without notice application was not justified. HH Judge Klein appears to have concluded, in [11], that where the complaint is that the application ought not to have been entertained without notice, the appropriate remedy is by way of appeal rather than the respondent seeking to set aside the original order.

38. The claimants also submit that there was evidence of a risk of dissipation because of the evidence showing Mr. Peters' propensity to forge documents and destroy documents which shows that he lacks commercial morality and has a propensity to take steps to undermine court processes.
39. The claimants also submit that the real complaint about timing went to delay and that in a case where the defendants have not been tipped off of the intention to bring proceedings, delay is not an answer to an injunction being granted. They referred to *AcelorMittal USA LLC v Essar Steel Limited* [2019] EWHC 724 Comm, at [66].
40. In relation to the underlying cause of action, the claimants submit that they were entitled to choose which defendants to sue. The reason they have not sued FBL in the present proceedings was a concern they would be met by an argument of abuse of process in light of the existing US proceedings. They say that the present proceedings were properly constituted without the joinder of FBL, and in relation to quantum they said that there was substantial evidence of Mr. Peters personally profiting through consultancy fees paid to a company called "Eskimo Joe's" and various loan agreements involving his vehicles. They submit that the evidence showed him deriving large profits from the first defendant group of companies. They submitted that overall, this is a case where there were good grounds for the original order, that there is nothing unusual about this case and that the default position should be applied.
41. As to the use of the documents designated as confidential under the SPO, the claimants had a number of answers, including that the documents in question could not have fallen within the relevant categories of confidential information or confidential documents and that some of the documents were referred to during the hearing before the Ohio courts and in the presence of Mr. Fachner, the CEO of the two claimants.
42. They also pointed out that they themselves had many of the documents as their own customers had provided them with copies and that they could have used those. They also observed that the defendants themselves, in their skeleton for the present hearing, had relied on some of the documents. They said that if there was any breach of the SPO, at most it was inadvertent and was not material. They also said that under section 92 of the Trade Marks Act, trade mark infringement is a criminal offence and that there can be no confidence in the documents in any event under the iniquity exception.
43. I turn to my conclusions.
44. I am not persuaded that there is any rule as submitted by the claimants based on the *Wild Brain* case, that where there is complaint about the ex parte character of the original order, the respondent must appeal that order rather than this being a

ground for setting aside an order. It seems to me that it must always be open to a respondent in a proper case to be able to seek to set aside an order made ex parte on the grounds that the procedure was contrary to the requirements of natural justice. That is not to say that this order was improperly made, but I do not accept that there is any rule that a respondent in that position is required to appeal in order to complain about the procedure. By definition, the respondent does not have the opportunity at the ex parte stage to complain about his or her absence from the hearing.

45. Turning to the question whether disclosure should be adjourned here, I start from the general principles which I have already set out above. In the usual case disclosure will be ordered pending the challenge.
46. However it seems to me that this is an unusual or abnormal case in which the defendants are entitled to the extension of time which they seek. I do not of course reach any concluded views about whether the original order should stand. That is a matter for the adjourned return date and neither party asked me to treat today as the effective return date of the order. That said, it seems to me that there are at least some serious potential concerns about the process which has been followed here.
47. First there was the decision to apply ex parte. It may be that the claimants were justified in making the application in that way. However, it is striking that there was a period of four years from the time when the dishonesty which they rely upon came to light and was litigated in the Ohio courts and the making of this application. Those proceedings are still on foot and there has been hotly contested litigation between the parties. Moreover, there is no direct evidence that the way that the first defendant group of companies has conducted its business has changed in any material way over that period. There is, of course, the complaint that some of its activities have infringed the trade mark marks of the claimants, but that is contested and it appears to me not to amount to independent evidence of a risk of dissipation.
48. This leads to a second point. It appears from the passage that I have already read that the judge was persuaded that it was sufficient to show that the second defendant had a propensity to forge documents and destroy evidence. I can well understand the direct relevance of that to the imaging order that was made. However, when it comes to risk of dissipation, the authorities show that a close analysis of the relationship between allegations of dishonesty and whether the defendants have a propensity to dissipate their assets is required. The two things are not the same and a mere allegation of dishonesty is generally not considered sufficient to amount to evidence of the kind required to show a risk of dissipation.
49. I have not heard complete argument on this point but there are, to my mind, some concerns about the allegations of risk of dissipation, not least given the passage of time since the alleged dishonesty arose in 2020. This did not seem to me to be a case like the *AcelorMittal* case where the judge was satisfied that the defendants had not been in any way tipped off about the proceedings. Here, the proceedings have been going on for many years in contested litigation and some explanation, it seems to me, is required as to why it is said that the defendants are now likely to dissipate their assets if they have not been likely to do so in the past. Again, I am

not reaching a final view on this, but I should record that I do have serious concerns about the process which has been followed.

50. Third, it also seem to me that there are real concerns about the maximum sum order of £10 million in this case. The way that this has been calculated seems to be on the basis of the revenues and gross profit margins in relation to the trading companies in the first defendant's group. However, there does not seem to have been much, if any, separate analysis of the way that the two defendants who have been selected and joined as parties here have profited from the alleged wrongdoing. I accept that at an early stage in proceedings, one cannot expect to see detailed particulars of the calculation of profits or damages, but there appeared to be very little here to justify the maximum sum order of £10 million imposed on the defendants.
51. The imposition of freezing relief is a serious matter and requires careful analysis. It appears that the claimants have placed great weight on the allegations of dishonesty and wrongdoing, but have not to my mind gone as far as they need to in justifying the imposition of freezing orders on this scale against these particular defendants.
52. The next point is that the first defendant is, it is common ground, a holding company. The disclosure of its assets, it seems to me, may well amount to little more than a list of the shareholdings that it has in the trading companies. The evidence put forward by the claimants before the judge was to the effect that it is indeed a holding company and there was no suggestion that underlying assets of the trading group would have to be disclosed. It does not therefore seem to me that it is likely that that information is needed in order to police the order.
53. As to the position of the second defendant, I take into account the point made earlier that he does not resist an order for an affidavit to be produced in accordance with the timetable set out in the judge's order, but for that to remain closed until the adjourned return date. It seems to me that would impose a form of discipline on the second defendant as he would be required to state his assets as at the date of the affidavit and that would, in itself, place an obvious restriction on his ability to deal with assets between now and the adjourned return date in such a way as to defeat any judgment that may later be given.
54. I also take into account that the provision of information by an individual defendant is in general terms an invasion of privacy and should only be ordered where it is necessary for the purpose of policing the order. I am not satisfied that it is necessary for that information to be provided now, rather than after the adjourned return date, as long as the second defendant is required to produce an affidavit in accordance with the existing timetable.
55. I do not place any weight on the dispute about the use of the documents and the SPO. It is unclear whether there has been a breach of the SPO and, if there has, whether that breach is to be treated as a serious one or not. Nor was there any evidence before the court as to whether the documents had been used in breach of a collateral use requirement under the procedural law of Ohio.

56. Overall I consider that this is an appropriate case, on the particular facts, for extending time for the provision of the disclosure affidavit until the adjourned return date. The defendants are required to swear such an affidavit in accordance with the existing order but shall not be required to serve it pending that hearing. I emphasise that I am not finally deciding whether the order should have been made or whether it should be continued. That will be a matter for the court at the adjourned return date.

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