Neutral Citation Number: [2017] EWHC 3267 (Comm)

Case No: CL-2015-000679

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS**

**OF ENGLAND AND WALES**

**QUEENS BENCH DIVISION**

**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 15 December 2017

**Before** :

MR JUSTICE PHILLIPS

- - - - - - - - - - - - - - - - - - - - -

**Between :**

|  |  |  |
| --- | --- | --- |
|  | **ST VINCENT EUROPEAN GENERAL PARTNER LIMITED** | Claimant |
|  | **- and -** |  |
|  | **(1) BRUCE ROBINSON****(2) WINTERBOURNE PTE LIMITED****(3) PPL WINTERBOURNE LIMITED****(4) POLAD LIMITED****(5) MOLYNEAUX INVESTMENTS****(6) THISTLE AVIATION LIMITED****(7) JENIFER COPELAND****(8) STEPHEN COPELAND****(9) JAMES HOSEASON****(10) DAVID TOMS****(11) ALASTAIR NICHOLSON (deceased, through the administrator of his estate, Alastair David John Nicholson Jr)** | Defendants |

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

**Paul Downes QC and Joseph Sullivan** (instructed by **Trowers & Hamlins LLP**) for the **Claimants**

**Clare Stanley QC** (instructed by **Clyde & Co LLP**) for the First and Third **Defendants**

Hearing dates: 28, 29 September and 6 October 2017.

Further written submissions on 10 and 11 October 2017

- - - - - - - - - - - - - - - - - - - - -

Judgment Approved

**Mr Justice Phillips :**

1. On 16 February 2017 HHJ Waksman QC (sitting as a Judge of this court) made a worldwide freezing order against the first defendant (“Mr Robinson”), the second defendant (“PTE”) and the third defendant (“PPL”) on the without notice application of the claimant (“St Vincent”), freezing their assets up to €20 million (“the WFO”).
2. The following day, and pursuant to its undertaking recorded in the WFO, St Vincent issued an application for an order continuing the WFO on an “on notice” basis, to be heard on 1 March 2017, the Return Date of the WFO (“the Continuation Application”).
3. On 1 March 2017 Mr Robinson and PPL undertook to the court that they would give St Vincent 14 days’ notice before dealing with any one of their assets worth more than £10,000, whereupon Blair J made an order, by consent, that the Continuation Application be adjourned to a later date. By a separate order, Blair J continued the WFO against PTE until further order.
4. On 21 June 2107 Mr Robinson and PPL applied to set aside the WFO and to be released from their subsequent undertakings on the grounds that St Vincent failed in its duty to make full and frank disclosure in its without notice application for the WFO (“the Set Aside Application”).
5. The Continuation Application and the Set Aside Application were heard together by me on the dates set out above, together with an application by St Vincent for an order that Mr Robinson be cross-examined on his affidavit of assets sworn on 23 February 2017 as ordered by the WFO (“the Cross-Examination Application”).
6. It was common ground that the burden was on St Vincent to demonstrate both (i) a good arguable case against Mr Robinson and PPL and (ii) a real risk that they would dissipate assets if not restrained. Mr Robinson and PPL argued that St Vincent have not met either of those requirements. They further contended that it was not just and convenient to continue the injunction by reason of St Vincent’s delay and lack of proportionality. In addition, Mr Robinson and PPL make numerous allegations of material non-disclosure.

The background facts

1. St Vincent is a property investment company incorporated in the Isle of Man. During 2006 and 2007 St Vincent acquired the entire issued share capital of Haussmann Holdings Limited (“HHL”), a company incorporated in Cyprus. HHL’s principal asset was a commercial development project in Zory, Poland, known as the Cross Point Development, held through its wholly-owned subsidiary, Haussmann Developments Polska sp. z.o.o. (“HDP”), a company incorporated in Poland.
2. Mr Robinson and the fourth to eleventh defendants (“the Creditors”) had each invested in the Cross Point Development, their investment taking the form of loans to HHL and HDP: Mr Robinson’s investment was about £200,000. In February 2008 St Vincent agreed to assume liability for that indebtedness. Thereafter St Vincent was unable to repay the Creditors pursuant to the obligations it had assumed. The Creditors commenced proceedings against St Vincent in October 2009 and, on 4 February 2010, obtained judgment by consent for sums totalling £880,563.21 and €751,863.40 (“the Judgment Debt”).
3. On 13 April 2010 the Creditors and St Vincent (among others) executed an agreement (“the Framework Agreement”) pursuant to which St Vincent agreed to provide, as security for the Judgment Debt, a charge over the entire issued share capital of HHL. The Framework Agreement was governed by English law and contained an exclusive English jurisdiction clause.
4. The charge required by the Framework Agreement was provided by way of a deed dated 17 December 2010 (“the Share Pledge”), by which St Vincent charged and pledged its shares in HHL to the Creditors and recorded that it had delivered to them the share certificates, blank share transfer forms and signed letters of resignation from the directors and secretary of HHL. The Share Pledge was governed by the law of Cyprus and provided for the exclusive jurisdiction of the courts of that country.
5. It is common ground that St Vincent defaulted on its obligations under the Framework Agreement, entitling the Creditors to enforce the Share Pledge. The Creditors duly gave notice of such enforcement on 8 March 2011 and thereafter:
	1. countersigned the executed share transfer forms to effect a transfer of the shares in HHL to PTE (a company incorporated in Singapore, owned and controlled by Mr Robinson) as nominee of the Creditors;
	2. completed the signed letters of resignation so as to remove the directors of HHL and replace them with Mr Robinson and another;
	3. procured the removal of Simon Lees, who has been appointed by St Vincent as the President of the Management Board of HDP and replaced him with Mr Robinson.
6. The result was that, from 8 March 2011, the Creditors had full control over HHL and HDP and thereby the Cross Point Development. St Vincent made no complaint about the steps taken at the time.
7. On 18 April 2011 HDP (through its authorised representative, Mr Robinson) petitioned the District Court in Gliwice, Poland, for its own bankruptcy, seeking a composition with its creditors and to be allowed to manage its own assets, subject to a court supervisor. On 10 June 2011 the District Court issued a Decision granting the relief sought in HDP’s petition.
8. On 6 April 2011 Baker & McKenzie LLP, then solicitors for St Vincent, emailed BP Collins, the solicitors then acting for the Creditors, referring to potential new investors with liquid funds available and requesting a full breakdown of the amounts required to repay the Creditors, to include all costs, expenses and interest to 15 April 2011. The matter was not, however, taken any further at that stage.
9. On 10 August 2011 an English company in the same group as St Vincent (St Vincent Cross Point Limited) entered a joint venture agreement with companies named Alterco SA (“Alterco”) and Reinhold Polska AB (“Reinhold”) (“the JV Agreement”). The JV Agreement provided for the formation of a joint venture company under Polish law (“RAS-JV”) for the purpose of “gaining” the Cross Point Development and further investing in it. For this purpose, Alterco and Reinhold agreed that they were able to provide funding of €10.5m, including a minimum cash amount of €6.5m.
10. However, the JV Agreement envisaged that RAS-JV would gain control of the Cross Point Development by purchasing the shares of HHL from PTE. The JV Agreement therefore provided (i) that RAS-JV would not be established until PTE had given written consent to such sale; and (ii) the cooperation envisaged between the parties was conditional on RAS-JV concluding an agreement with PTE for the sale, including the following provisions: (a) an assignment of the debts owed to the Creditors and the security for those debts (including the Share Pledge); (b) the resignation of directors of HHL and HDP appointed by the Creditors and their replacement by appointees of RAS-JV; (c) the agreement of PTE and the Creditors that they had no further relevant claims and would not proceed with the “*settlement plan regarding HDP bankruptcy petition*”.
11. Following the conclusion of the JV Agreement (and presumably in order to give it effect), a representative of St Vincent (and/or Alterco or Reinhold) named Paul Hassall sought to engage with the Creditors (and PTE) through Mr Robinson. On 17 August 2011 Mr Hassall emailed Mr Robinson, stating:

“*… I just wanted to update you on the proposed repayment of your group’s debt, interest and legal fees. I requested and now have received a print off of the total amount outstanding from the accountant of St Vincent which amounts to a figure of a little short of EUR2.1 million.*

*In addition I have been in contact with our JV partners in Poland and a member of the board will be able to fly to London … on Monday 22nd August meet with you. This way you can speak to the cheque writer.*

*Please also note that I have requested proof of funds as you requested and this is being arranged but I can assure you that the JV agreement has been signed and is subject to repaying your debt and your group handing back full control of the shares in HHL and at the HDP level. It is understood by us both that the charges will be left in place on the Cross Point land properties but controlled by our joint venture company and that you will leave us to deal with the courts and other creditors. We are fully aware of the pending bankruptcy and will handle all legal matters directly with the court administrator.*

… *I have been asked, as you will appreciate, the cost of the legal fees and disbursements that you and your group have incurred and perhaps you can obtain this from your lawyers and have this at least ready for our meeting.*”

1. The same day Mr Robinson replied by email, on behalf of PTE, as follows:

“*… Please advise me of the identity and any information you have about your joint venture partner. We will contact them direct to establish their bona fides, and if satisfactory, will arrange for them to meet the administrator if he is willing.*

*I note from your email that your [sic] in touch with St Vincent, who do not reply to any of our correspondence.…*

*Please remember that we are under no obligation to settle with you at the price you indicate. The administrator decides the amount of debt and attributable costs, and in any event his authority does not extend to the ownership of the shares…*

*Please be advised that [PTE] acts for the Polad Group and has the full authority of all members of the Group, who have asked that as you are now in contact with me you do not correspond with them further …*”

1. Mr Hassall responded, again on 17 August 2011, pointing out that matters could be resolved between St Vincent and the Creditors at a level above and without involving the legal process in Poland. He stated:

“*The original Agreement by which St Vincent incurred its original indebtedness was negotiated, agreed and signed in the UK and as such the debt owed to you … is merely indirectly related to the Polish creditors situation currently undergoing bankruptcy proceedings. We are therefore free to agree commercial terms between the parties referred to above. My sole reference point is the original Agreement which outlines the debt and which also details the accrued rate of interest. I have received the figures from St Vincent’s accountant and I confirm that I have checked these.*

*The only missing figure is the amount for the fair and reasonable legal costs incurred by yourself and in this respect please note that as I represent the equity investors I would mention that they are not prepared to pay any sum that cannot be fully substantiated or are not directly relevant to the recovery of your/your group’s aforementioned debt.*

…..

*All that I wish to achieve is to reach a fair conclusion which includes settling your debt and in this respect please note that I will be party and present to all negotiations whether at home or in Poland. As I had mentioned before I wish to conclude this simply, subject to observing any legal requirements and of course with your full cooperation. You receive the money owed under the original Agreement and we take over everything from that point.*”

1. The following day, 18 August 2011, Mr Robinson sent a response to Mr Hassall. It is apparent that Mr Robinson had been irritated by certain comments Mr Hassall had made in his emails (not included above as they are not of real relevance to the present applications). Mr Robinson’s response included the following:

“*… for the avoidance of doubt, we are not obliged to treat with you. You are not in any position to demand anything whatsoever from us.*

*…*

*I will continue discussions with you when I know who I’m dealing with, have been able to establish their credentials, am satisfied with their ability to perform, and have discussed matters with the administrator. In the meantime I will not deal with any further correspondence.*”

1. Mr Hassall replied later the same day, disclosing the identity of St Vincent’s joint venture partners and pressing Mr Robinson to meet their representative (Michael Scully of Reinhold) on Monday 22August 2011, stating that this would be “*a good opportunity to establish a working agreement and show you, not only proof of funds, but the ability to assist you as well as the other investors involved*”.
2. A meeting did take place on 22 August 2011 in London, attended by Mr Hassall, Mr Robinson and Mr Scully, among others. St Vincent alleges (but Mr Robinson denies) that:
	1. Mr Hassall (on behalf of St Vincent) informed Mr Robinson that St Vincent was ready willing and able to pay and discharge the debts it owed to the Creditors, together with all expenses and other sums to which the Creditors were entitled;
	2. Mr Scully confirmed that the funding was available to enable St Vincent to pay the Creditors;
	3. Mr Robinson refused to confirm that the Creditors would accept the payment referred to, stating that a payment in excess of €3m would be required, plus a further “fee” for himself;
	4. Mr Robinson privately indicated that the inflated sum he was demanding would enable him to “carve out a slice” for Mr Hassall, which Mr Hassall took to be the offer of a bribe.
3. The next day, 23 August 2011, Mr Hassall emailed Mr Robinson, stating that it had been good to meet Mr Robinson and to obtain a greater understanding of the ownership situation of HDP. Mr Hassall also stated that he “*did not realise that you had severed the link to St Vincent by selling the share ownership from HHL to a UK company you have set up.*” Mr Hassall further stated as follows:

“*… I am working on putting together a more attractive solution based on what we privately discussed yesterday that will be to our mutual benefit … I know that you do not wish to go down a protracted legal battle … and I would not recommend anyone to do so if we can reach a settlement that is financially attractive to you* ”

1. Mr Robinson replied the same day as follows:

“*To clarify, the link with St Vincent was severed when we took possession of the Cyprus company, the transfer subsequently is an administrative detail…*

*… We have rescued this project while everyone else has done nothing, we are not about to step down or cede control now.*”

1. On 1 September 2011 Mr Hassall again emailed Mr Robinson, expressing surprise that the Creditors had refused to accept the cash offer made on behalf of St Vincent, further stating:

“*Therefore the consensus … is to offer you the EUR 2.1m because it is widely understood that you /Winterbourne are owed no more as a secured creditor, plus reasonable legal fees deemed to be fair and appropriate however you have seized ownership in Cyprus in HHL or made subsequent changes to the ultimate ownership of HDP which is of no relevance in determining the fair and reasonable settlement of EUR 2.1m plus legal costs. Please see the attached basis of calculation to see how the E2.1m has been derived at. Such amount will be paid as soon as the terms are clarified and agreed including exchanging the receipt of funds for total ownership and control of HDP without any action or claims against you by the investors and creditors. The creditors will shortly be providing to the courts (via your close friend the court administrator) evidence substantiating the acceptance of the Joint Venture offer. We will also ensure, as you requested, that employment will continue for the staff currently on site. That deals with 2 of the 3 points you wished me to cover in concluding your acceptance of a cash settlement; the third point was for you to be paid EUR500,000 cash on top, this has not gone down particularly well. Although I have not been directly in contact with John Clark and Alistair McDonald [sic] I understand that inevitably there has been relevant professional fees incurred to date which I have arranged with the JV partners to be fully settled in cash.*”

1. Mr Robinson did not reply to the above email and, indeed, there was no further communication as to St Vincent’s proposals to re-acquire control of the Cross Point Development.
2. On 24 October 2011 HHL sold its shareholding in HDP to PPL, an English company 85% owned and thereby controlled by Mr Robinson, for £1, the agreement recording that “*the shares have no value by reason of [HDP’s] bankruptcy*”. It appears that this was the transfer about which Mr Hassall had been forewarned and to which he was referring in his email of 23 August 2011 (above).
3. In October 2012 Mr Robinson submitted a report to the Creditors entitled “*Proposals for the settlement of debts of [HDP] (In Settlement Bankruptcy)*”, in which he referred to “*the persistent failure of St Vincent to repay you …*”. Mr Robinson stated that HDP was now in a position to settle the Creditors’ debts at 71% of the registered amount. This was on the basis of (i) an offer from Korean Fuel-Tech Poland sp. z.o.o. (“KFTP”), the “anchor” tenant of property forming part of the Development, of €7m for the factory site and (ii) an offer from a UK developer of €3m for the rest of the Development. St Vincent points out that Mr Robinson failed to mention in this document that, through Mr Hassall, it had “offered” to repay the Creditors in full.
4. In about May 2013 HDP entered into an agreement to sell the Cross Point Development to KFTP, for approximately €9.7m, subject to approval of the creditors and of the court.
5. St Vincent (and two associated companies) attempted to stop the sale by commencing proceedings in Cyprus against 19 defendants, including Mr Robinson, PTE and the other defendants to these proceedings and also HHL and HDP. On 5 August 2013 the District Court of Nicosia granted an injunction, purporting to restrain any dealings with HDP’s assets.
6. Notwithstanding the Cyprus order, on 30 September 2013 the creditors of HDP approved the sale to KFTP (St Vincent voting against the proposal). The arrangement was then approved by the District Court of Gliwice on 24 October 2013. The Polish court did not regard the order of the Cyprus court as an impediment to the sale, taking the view that it had exclusive jurisdiction over a Polish company under its supervision.
7. The sale, for approximately €9.7 million, completed in about June 2014. KFTP also paid the following sums: €110,000 to PTE and €150,000 to each of John L Clarke, MacDonald & Partners and Picton Jones (Asset Management) Limited.
8. St Vincent asserts that the above payments were bribes paid to Mr Robinson for arranging the sale to KFTP (at an alleged undervalue), the total notably similar to the sum Mr Robinson is alleged to have requested in his discussions with Mr Hassall. St Vincent further asserts that on 18 July 2014 the executive managing director of KFTP confirmed to representatives of St Vincent that KFTP had paid Mr Robinson in the region of €980,000 (that is to say, €420,000 on top of the payments referred to above).
9. Mr Robinson denies the alleged wrongdoing. The Framework Agreement provided that St Vincent would pay PTE a fee of £10,000 per month for its advice and support in relation to the Cross Point Development and would pay the reasonable fees of MacDonald & partners (as property consultants) and Mr Clarke (an accountant). Mr Robinson’s case is that, as St Vincent defaulted on that obligation, KFTP agreed to pay PTE the sum of $600,000 for those fees and other work performed on the Cross Point Development, payments which were known to and approved by the supervisor and District Court in Poland, the contractors (including Mr Robinson) having been “on the ground” working on the Cross point Development since 2011. Mr Robinson claims that he himself (as opposed to PTE) received only £116,379 by way of a distribution from HDP.
10. The Particulars of Claim served by St Vincent in the Cyprus proceedings alleged fraud, blackmail and the acceptance of bribes by Mr Robinson, including the £980,000 referred to above, and asserted that the sale of the Cross Point Development to KFTP was at an undervalue and that KFTP held that asset on constructive trust for St Vincent. However, the Cyprus court declined jurisdiction over the dispute in or about September 2015.
11. It appears that, in knowledge or anticipation of the decision of the court in Cyprus not to accept jurisdiction, St Vincent took advice from Charles Samek QC on 7 July 2015. The attendance note of the consultation has been redacted in its entirety, save for the following:

“*[Simon Lees of St Vincent] asked whether there was a possibility of a freezing order. CS* *said that he was not convinced by this as they were probably out of time, and also because they were being kicked out of jurisdiction whether there was any point.*”

These proceedings

1. St Vincent issued the claim form in these proceedings on 16 September 2015, serving it on 15 January 2016 together with Particulars of Claim settled by Mr Samek. The claim was put on the following basis (so far as still relevant):
	1. that the Creditors, in failing to accept a “tender” of payment by Mr Hassall on behalf of St Vincent in August and September 2011, had acted in breach of express or implied terms of the Share Pledge;
	2. the Creditors had thereby repudiated or renounced the Share Pledge so that it was “determined or became extinguished”;
	3. the Creditors therefore came under an obligation to return the shares in HHL to St Vincent, and were in further breach of the Share Pledge in failing to do so;
	4. in procuring that HHL transferred its shares in HDP to PPL, the Creditors were in further breach of the Share Pledge and or in breach of implied, resulting or constructive trust;
	5. the Creditors also breached the Share Pledge in removing Mr Lees as President of the Management Board when that was not in connection with the sale of the pledged shares;
	6. the defendants conspired together (using unlawful means) to injure St Vincent by preventing St Vincent from redeeming the pledged shares and then stripping the pledged shares of their value by causing HHL to divest itself of its only valuable asset.
	7. St Vincent thereby suffered the loss of the value of HHL in August or September 2011 and further or alternatively the loss of opportunity to develop Cross Point, a loss not less than €30 million.
2. Mr Robinson and PPL, apparently due to a miscalculation, failed to file their acknowledgment of service in time. On 17 February 2016 St Vincent entered judgment in default against them for damages to be assessed.
3. Mr Robinson and PPL applied to set aside the judgment against them by application dated 26 May 2016. That application was listed for hearing on 1 March 2017.
4. According to Mr Lees of St Vincent, he first received “positive advice” about an application for a freezing order when he spoke to potential new solicitors, Gowling WLG (UK) LLP (“Gowlings”) on 23 November 2016. However, Gowlings were not instructed to represent St Vincent until 1 February 2017. The without notice application was issued on 15 February 2017, the day before the WFO was granted by HHJ Waksman QC.
5. On 1 March 2017 Blair J (in addition to adjourning the Continuation Application as referred to above) made an order, by consent, setting aside the default judgment against Mr Robinson and PPL and giving directions for the exchange of pleadings. St Vincent served Amended Particulars of Claim on 15 May 2017. Mr Robinson and PPL served their Defence on 8 June 2015.

Good arguable case

1. The gist of St Vincent’s case is that Mr Robinson, despite himself being owed only €200,000, leveraged his control of St Vincent’s assets to obtain a far greater and illegitimate return (at least €980,000) by (i) unlawfully refusing to allow St Vincent to redeem the security it had provided; and (ii) abusing his position as director of HHL and President of the management Board of HDP to sell the underlying assets at an undervalue in exchange for secret profits.
2. However, in its skeleton argument for these applications, St Vincent stated that it was content (as it was on the without notice application) to rely on two elements of its pleaded case to demonstrate that it had a good arguable case:

“*a. Its case that, in refusing to accept St Vincent’s tender of moneys to redeem the pledge and in refusing to treat with it and provide it with information it required, the Defendants repudiated the Shares Pledge;*

*b. Its case that the Defendants produced the realisation of security by acting outside the terms of the Shares Pledge.*”

1. Mr Downes QC, who appeared for St Vincent both before me and on the without notice application, explained that the second limb of the above summary relates to the improper stripping of HHL of its assets, most directly in the form of the transfer of HHL’s shareholding in HDP to PPL for nominal consideration. Mr Downes also emphasised on several occasions that he was not relying, for present purposes of establishing a good arguable case, on St Vincent’s allegations of fraud, bribery and conspiracy.

(a) Tender/repudiation of the Share Pledge

1. At the forefront of St Vincent’s case is the contention that in August/September 2011 Mr Hassall, on its behalf, tendered or attempted to tender the full amount of the debts owed to the Creditors.
2. The concept of “tender” usually arises as a defence to a claim for non-performance of an obligation, typically the payment of monies. A debtor who has made an unconditional offer of payment (actually producing the monies required in legal tender) has a defence to a claim for interest and damages and may be awarded his costs, but cannot claim that the debt itself has been discharged (see *Chitty on Contracts* 32nd Ed. §21-085 to 093). In the present case it is entirely clear that St Vincent did not tender any monies to the Creditors and, indeed, at no point did St Vincent state that it had monies readily available in its possession to transfer to the Creditors. Nor did it make any attempt to effect such a transfer or otherwise pay the monies into a separate account or into court.
3. But in any event, it became apparent that the real thrust of St Vincent’s case was not that it had made an actual tender, but that the refusal of Mr Robinson to treat with Mr Hassall constituted a breach of an implied term of the Share Pledge that the Creditors cooperate with St Vincent should St Vincent wish to redeem that pledge. It is further asserted that because the Creditors prevented St Vincent making a tender by their breach, the requirement of actual tender is somehow deemed to be waived or fulfilled.
4. In my judgment such contentions are hopelessly misconceived, both as a matter of the proper interpretation of the facts of the case and (even if the facts were as suggested by St Vincent), as a matter of the relevant legal principles. As for the facts of the case:
	1. St Vincent has not suggested any source of funding for the redemption of the Share Pledge other than the JV Agreement. However, the JV Agreement expressly envisaged that the partners would not simply redeem the Creditors’ security, but would enter into an agreement with the Creditors to purchase the shares in HHL on certain specified terms. Further, the provision of funding, through the joint venture vehicle (RAS-JV), was expressly conditional on the Creditors entering such an arrangement;
	2. It follows that, although Mr Hassall did refer to repaying the Creditors’ debts, his principals were not looking simply at redemption figures but at an agreement of much broader scope, requiring negotiation and at least some drafting. This is made entirely clear in Mr Hassall’s email of 1 September 2011, where he stated:

“*Such amount will be paid as soon as the terms are clarified and agreed including exchanging the receipt of funds for total ownership and control of HDP without any action or claims against you by the investors and creditors …*”

* 1. Therefore St Vincent, through Mr Hassall (assuming he was St Vincent’s authorised agent, of which there is little if any evidence), was seeking a commercial agreement with the Creditors, one which they were not obliged to entertain. Mr Robinson was accordingly perfectly entitled to refuse to “treat” with Mr Hassall and did not thereby place the Creditors in breach of any obligation to St Vincent, let alone repudiate the Share Pledge.
1. Even if (contrary the actual facts) St Vincent was simply offering to redeem the Share Pledge:
	1. There is no arguable basis for implying a term into the contracts between St Vincent and the Creditors as to cooperation in relation to redemption of the Creditors’ security. The entitlement of a debtor to redeem security is well established as a matter of law, it being clear that a debtor can start a redemption action if the creditor does not cooperate. There is nothing unusual about the debts or security in this case which would justify the implication of the term above and beyond the general law. The strict requirement of demonstrating that the implication of the term is necessary for business efficacy or obviously to be implied was re-affirmed by the Supreme Court in *Marks & Spencer plc v BNP Paribar Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72: it is not arguable that the term proposed by St Vincent in this case meets that requirement;
	2. But even if an obligation to “cooperate” was to be implied and even if the Creditors were in repudiatory breach of such term, St Vincent does not even assert that it accepted such repudiation. On the contrary, St Vincent made no complaint about the events of August/September 2011 and did not suggest that the Share Pledge had been breached, let alone come to an end;
	3. In circumstances where even an actual tender of payment would not discharge the debts in question, it is not arguable that a failure to cooperate in the process of redemption has the effect of discharging those debts or the security for those debts.
2. I conclude that St Vincent does not have a good arguable case that the Share Pledge was terminated (or should otherwise be treated as satisfied).

(b) Asset stripping of HHL

1. This aspect of the claim has a more promising starting point as Ms Stanley QC, counsel for Mr Robinson and PPL, did not dispute (for present purposes) that there was an arguable case that the transfer of the HDP shares to PPL for nominal consideration was a breach of the Share Pledge. St Vincent also asserts that the removal of the directors of HHL and the appointment of Mr Robinson was a breach of the Share Pledge because it was not in connection with the sale of the HHL shares, but that allegation does not seem to add anything to the claim at this stage: any such wrongdoing only caused loss by virtue of what was done by the new directors, namely, transferring the HDP shares to PPL.
2. Mr Robinson and PPL’s answer to the above claim is that the party with the primary cause of action against Mr Robinson and PPL for any such wrongdoing is HHL (whose asset was transferred by its director to a company owned by the director): whilst St Vincent may have its own independent cause of action, it would suffer no loss if HHL were to recover in full for the stripping of its assets, and would be over-compensated if it were to recover directly when HHL had other creditors who would be entitled to a share of the assets so recovered. Direct recovery by St Vincent would also give rise to the risk of double liability on the part of Mr Robinson and PPL. In other words, it is asserted that St Vincent’s claim falls foul of the principle that a party cannot recover reflective loss, explained in *Prudential v Newman* [1982] Ch 202, a case in which shareholders were deceived by a fraudulent circular, but their resulting losses were the diminution in the value of their shareholding as a result of wrongdoing to the company. The Court of Appeal held at 222G and 222H as follows:

“*In our judgment the personal claim is misconceived. It is of course correct … that [the defendants], in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting.… But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a “loss” is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only “loss” is to the company, in the diminution in the value of the net assets of the company, in which has (say) a 3% shareholding. The plaintiff’s shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.*

*The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in Foss v Harbottle …*”

1. The above reasoning was approved by the House of Lords in *Johnson v Gore-Wood & Co (a firm)* [2002] AC 1, Lord Bingham of Cornhill summarising the relevant propositions of law as follows at p.35F:

“*(1) where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good diminution in the value of the shareholder’s shareholding where that merely reflects the loss of the by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company’s assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss … (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding…*

1. Lord Millett explained the principal, at p.62E and p.64A, as follows:

“*The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed.*

 …

*The plaintiff sought to distinguish Prudential v Newman by arguing that the defendant was in breach of a duty owed to him personally. But, as I pointed out, that was not the problem. The problem was that the only conduct relied upon as constituting a breach of that duty was the misappropriation of assets belonging to the old companies, so that the only loss suffered by the plaintiff consisted of the diminution in the value of his shareholding which reflected the depletion of the assets of the old companies. The old companies had their own cause of action to recover their loss, and the plaintiff's own loss would be fully remedied by the restitution to the companies of the value of the misappropriated assets. It was not alleged that the plaintiff had been induced or compelled to dispose of his shares in the companies; he still had them. If he were allowed to recover for the diminution in their value, and the companies for the depletion of their assets, there would be double recovery. Moreover, if the action were allowed to proceed and the plaintiff were to recover for the lost value of his shares, the defendant's ability to meet any judgment which the old companies or their liquidators might obtain against him would be impaired to the prejudice of their creditors. The plaintiff would have obtained by a judgment of the court the very same extraction of value from the old companies at the expense of their creditors as the defendant was alleged to have obtained by fraud.*”

1. The fact that the principle is concerned with the question of loss rather than causes of action was emphasised by Neuberger LJ (as he then was) in *Gardener v Parker* [2004] 2 BCLC 554 as follows:

“*49. It is clear, from the analysis and discussion in the cases to which I have referred, that the rule against reflective loss is not concerned with barring causes of action as such, but with barring recovery of certain types of loss. On that basis, there is obviously a powerful argument for concluding, as this court did in Shaker, that, whether the cause of action lies in common law or equity, and whether the remedy lies in damages or restitution, should make no difference as to the applicability of the rule against reflective loss. Furthermore, given that the foundation of the rule is the need to avoid double recovery, there is a powerful case for saying that the rule should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from the defaulting trustee/director.*”

1. Ms Stanley submitted that the present cases falls squarely within the reflective loss principle so explained. The loss in question is that of HHL: St Vincent’s alleged loss is no more than a reflection of such loss. In so far as HHL has not brought its own claim, St Vincent could do so in its name by way of a derivative action, if necessary restoring HHL to the register in Cyprus.
2. Mr Downes accepted that St Vincent’s loss arises “qua shareholder”, engaging the principle of reflective loss, but asserted that St Vincent’s claim arguably falls within the exception to that principle recognised in *Giles v Rhind* [2003] Ch 618, explained by Waller LJ as follows:

“*34. One situation which is not addressed is a situation in which the wrongdoer by the breach of duty owed to the shareholder is actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying, “The company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody.”*”

1. In the same case, Chadwick LJ stated as follows:

“*63. The paradigms case in which, by reason of the wrong done to it, the company is unable, in practice, to pursue its claim against the wrongdoer is one in which the company is obliged to abandon its claim because the wrong has deprived it of the funds needed for that purpose …*

*66. To put the point more starkly, the effect of the judge’s decision – as he himself recognised – is that a wrongdoer who, in breach of his contract with the company and its shareholders, “steals” the whole of the company’s business, with the intention that the company should be so denuded of funds that it cannot pursue its remedy against him, and who gives effect to that intention by an application for security for costs which his own breach of contract has made it impossible for the company to provide, is entitled to defeat a claim by the shareholders on the grounds that their claim is “trumped” by the claim which his own conduct was calculated to prevent, and has in fact prevented, the company from pursuing. If that were, indeed, the law following the decision in Johnson v Gore Wood, I would not find it easy to reconcile the result with Lord Bingham’s observation, at* [*[2002] 2 AC 1*](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2000/65.html)*, 36C-D, that “the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation”.* ”

1. The difficulty for St Vincent in this regard is that it brought proceedings against both the Creditors and HHL in Cyprus between 2013 and 2015. It is unclear why such claim could not have included a derivative claim against Mr Robinson and PPL as equitable shareholder (both the holder of the shares and the company being parties). After the first day of the hearing before me Mr Downes sought permission to adduce a further witness statement dealing with the present difficulties in bringing a derivative claim in the name of HHL. I refused permission to rely on that evidence, the issue having been known to St Vincent for some time and Mr Robinson and PPL having no opportunity to respond. But in any event, I did not understand that evidence to deal with the position in the years 2013 to 2015.
2. Mr Downes referred to s.260 of the Companies Act 2006 (assuming for these purposes that the law of Cyprus is the same as the law of England), which refers to derivative claims by a member of a company, suggesting that such a reference limits derivative claims to those brought by a registered shareholder (in this case PTE, the nominee of the Creditors). Whilst that may be so, I see no reason why an equitable shareholder (as it is accepted St Vincent must be) cannot bring such a claim in the name of the legal holder of the shares, joining them to the proceedings if appropriate so as to perfect the cause of action.
3. Mr Downes also relied on the decision of Knowles J in *Marex Financial Ltd v Sevilleja* [2017] 4 WLR 105, a case concerning permission to serve out of the jurisdiction, that the claimant had the better of the argument that reflective loss does not apply where the claimant sues for knowingly and intentionally inducing a third party to act in wrongful violation of the claimant’s rights. Whilst Knowles J’s view is of course persuasive, it is difficult if not impossible to reconcile that view with the passage from *Gardener v Parker* quoted above. Knowles J did not decide the point and I am in any event satisfied that the reflective loss principle applies with full force to St Vincent’s claims in these proceedings.
4. Mr Downes further relied upon the observation of Blair J in *Malhotra v Malhotra* [2015] 1 BCLC 428 at §63 to the effect that, whilst the court will strike out a claim on the grounds that it is a claim for reflective loss where there is no reasonable doubt that it is such a claim, this presents a “high hurdle”. Whilst that may well be the correct approach, this is not an application to strike out, where the defendant must satisfy that stringent test, but an application for an injunction, where the burden was on St Vincent to establish a good arguable case. This, in my judgment, it has failed to do.

(c) Conclusion on good arguable case

1. For the reasons set out above, St Vincent has failed to persuade me that it has a good arguable case. On that basis alone, the Continuation Application fails and accordingly the Cross-Examination Application does not arise for decision. I will nevertheless consider the other aspects of the Continuation Application and the Set Aside Application below.

Risk of Dissipation

1. The burden was on St Vincent to establish, with solid evidence, that there is a real risk, judged objectively, that any future judgment would not be met because of an unjustifiable dissipation of assets: see the recent affirmation of the test in *Candy v Holyoake* [2017] EWCA Civ. 92 per Gloster LJ at §34.
2. St Vincent asserted that Mr Robinson is a dishonest man who has asked for and (separately) accepted substantial bribes, taken steps to protect assets from creditors (being the reason he gave in his evidence for having transferred HDP shares to PPL) and taken steps to defraud both St Vincent and the other Creditors (hiding from the latter St Vincent’s offer to repay them in full). I make no findings in relation to such matters, but I accept that there is more than sufficient evidence to justify a conclusion that Mr Robinson, at least in 2013 and 2014, had the means, motive and inclination to dissipate assets, not least because of his overseas interest, control of both UK and offshore companies and willingness to move assets to such companies without consideration.
3. It follows that, had St Vincent applied for a freezing injunction in 2013 or 2014, particularly in the light of evidence that he was to or had received significant sums from KFTP, its case as to there being a risk of dissipation would have been highly arguable.
4. However, the application for the WFO was, in the event, made over three years after proceedings had been commenced in Cyprus (and an injunction, but not a freezing order, obtained in respect of same the matters as raised in these proceedings) and over two years after St Vincent learned of the payments by KFTP. It was also made 19 months after St Vincent had been advised by leading counsel that it was “out of time” to seek a freezing order and 17 months after these proceedings had been commenced.
5. Mr Downes argued that delay in bringing the application was not a bar to the grant of an injunction, referring to *Antonia Gramsci Shipping v Recoletos* [2011] EWHC 2242 (Comm)in which Cooke J stated at §29:

“*In my judgment it is no answer for a defendant to come to the court to say that his horse may have bolted before the gate is shut and then to put that forward as a reason for not shutting the gate … However, if the court is satisfied about those matters in favour of the claimant, there is no reason why the court should not shut the gate, however late the application, in the hope, if not the expectation, that some horses may still be in the field or, at the worst, a miniature pony ...* ”

1. In *Madoff Securities International Ltd v Raven and others* [2012] 2 All ER (Comm) 634 Flaux J followed that reasoning, stating at §156:

“*The mere fact delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean there is no risk dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it.*”

1. However, the Court of Appeal in *Candy* (above) recognised that the “stable door” point might be a powerful militating factor against a conclusion that there is a real risk of dissipation. In that case the first intimation of proceedings had been in May 2014. There had then been a detailed letter of claim in December 2014, with a revised claim ultimately issued in August 2015. The application for an injunction was not made until February 2016. Gloster LJ concluded that it was inherently unlikely that the respondents would unjustifiably dissipate their assets in the future, having not done so by that point.
2. In the present case St Vincent first commenced proceedings against Mr Robinson and obtained a non-freezing injunction as long ago as 2013. Not only does that make it inherently unlikely that Mr Robinson would unjustifiably dissipate assets in the future if he had not done so already, but it also casts considerable doubt on the genuineness of St Vincent’s asserted belief that that there is a real risk that he would do so. Certainly by July 2015, leading counsel took the view that it was too late to seek a freezing order and so advised St Vincent. No explanation has been given as to why, having received such advice from a silk with considerable experience of this area of law and practice, St Vincent came to believe that it was appropriate to apply for the WFO nearly two years later. It is not suggested that anything had changed, other than that the application was even more belated.
3. St Vincent’s case in this regard is further undermined by its inability to identify any significant assets belonging to Mr Robinson or PPL which might be dissipated in the absence of an injunction. Mr Robinson has disclosed only limited assets (including a pension policy he is obliged to transfer to his ex-wife and his potential interest under his father’s will), explaining that he has transferred over AUS$400,000 to his ex-wife pursuant to a divorce settlement. His solicitors in these proceedings have confirmed that they are acting without funds on the basis that Mr Robinson is a long-standing client whom they are prepared to extend credit in the expectation of recovering costs from St Vincent.
4. Mr Downes submits that there is reason to believe that Mr Robinson has not given full disclosure of his assets, for which reason St Vincent applied for an order that Mr Robinson be cross-examined in that regard. However, in my judgment St Vincent cannot point to any concrete evidence from which the existence of other assets can be inferred. The poverty of its arguments in this regard is demonstrated by the fact that it seeks to draw an adverse inference from Mr Robinson’s offer to agree to the continuation of his undertakings if the orders for disclosure of assets were rescinded “ab initio”. Far from indicating that Mr Robinson is hiding assets, I consider that his approach is more consistent with having too few assets to be concerned about them being frozen above a certain limit, but at the same time not wishing to be subjected to persistent questioning and applications by St Vincent and its representatives.
5. I therefore conclude that, far from there being solid evidence of a risk of dissipation, there is little if any basis for a finding that Mr Robinson or PPL will in future dissipate unknown assets, assuming they have not already done so in the last several years.

Just and convenient

1. In my judgment St Vincent applied for this injunction far too late and without any specific or identifiable concerns as to the unjustifiable dissipation of assets. In the context of a long-running dispute in which the claim is put at in excess of €20 million, the relief sought was disproportionate and inappropriate, particularly when sought on a “without notice” basis.
2. Such matters are already reflected to some extent in my conclusion as to the absence of a real risk of dissipation. But to the extent that it is a separate question, I would refuse to continue the WFO as a matter of my discretion.

Material non-disclosure

1. The principles applicable in considering whether there was material non-disclosure in an application for a without notice freezing injunction were summarised by Cooke J in *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm) as follows:

“*65. ... The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made. The question of materiality is a matter for the court and not the subjective judgment of the applicant or his lawyers.*

*66. There is a high duty on the applicant which can be summarised as follows, by reference to CPR 25.3.5 and authorities there referred to:*

*“(1) The duty on the applicant in such circumstances goes beyond merely identifying points of defence which might be taken against him, important though that is.*

*(2) The applicant has to show the utmost good faith, identifying the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents.*

*(3) The applicant has to investigate the nature of the claim asserted and the facts relied on before applying, and has to identify any likely defences. He has to disclose all facts which reasonably could or would be taken into account by the Court. The duty is not restricted to matters of fact but extends to matters of law.*

*(4) The applicant also has a duty to investigate the facts and fairly to present the evidence.*

*(5) There is a high duty to draw the Court's attention to significant factual, legal and procedural aspects of the case.*

*(6) Full disclosure has to be linked with fair presentation. The judge has to have complete confidence in the thoroughness and the objectivity of those presenting the case for the applicant.*

*(7) It is the undoubted duty of counsel to draw to the judge's attention weaknesses in his case and to make sure the judge understands what might be said on the other side even if the judge says he has read the papers.”*

*67. I take into account the comments made in Brinks Mat v Elcombe [1988] 1 WLR 1350 at paragraphs 6 and 7 of the judgment of Ralph Gibson LJ and at pages 1358C-G and 1359C-E in the judgments of the other Lords Justices in the context of the consequences which should be visited or not visited upon the applicant who fails in his duties. The authorities show that the interests of justice must be paramount and that a due sense of proportion is required in relation to the assessment of the seriousness of the breach. Moreover, caution must be observed when the non-disclosure in question depends on proof of facts which are in issue in the action and the court must not conduct a mini-trial.*”

1. It is relevant to note that the without notice application in the present case was not made in the context of an asset tracing exercise or otherwise in urgent circumstances, but was made at a time of St Vincent’s choosing, when it had had years in which to formulate its case and analyse potential defences.
2. Mr Robinson and PPL advanced numerous allegations of material non-disclosure, many of which go to the fairness of the presentation to HHJ Waksman QC of the case that Mr Robinson had acted dishonestly or improperly in his dealings with St Vincent and/or creditors. I consider it unnecessary to undertake the task of analysing the details of those allegations because I am satisfied that neither of the two key grounds on which I have found above that St Vincent does not have a good arguable case were sufficiently disclosed to HHJ Waksman QC, if they were disclosed at all.

(a) The allegation of tender/repudiation of the Share Pledge

1. St Vincent’s skeleton argument for the without notice hearing and the transcript of the hearing reveal no attempt to analyse the claim under this heading or the potential defences. The skeleton simply stated at para 36: “*Mr Robinson refused to cooperate in the redemption of the share pledge because he wanted to extract sums over and above the actual sums due. That was not permissible*”. The law as to tender was not addressed. Nor was the question of the right to start a redemption action, the basis for the implication of a term as to cooperation or the question of how and when any repudiatory breach was accepted.
2. As for the factual aspects of the allegation, although the existence of the JV Agreement was referred to in paragraph 15 of St Vincent’s skeleton argument for the without notice application, it was simply said that Alterco and Reinhold had “*agreed to provide funding of €10.5 million for the Cross Point Development. This was sufficient to enable St Vincent to discharge the Secured Indebtedness …*” The JV Agreement was not mentioned in oral argument before HHJ Waksman QC, and so he was not informed that it expressly provided that an agreement would have to be negotiated with HHL and that such an agreement was a condition of funding being provided to the joint venture vehicle. Neither was it pointed out that certain references in Mr Hassall’s emails demonstrated that what was under discussion was a wider commercial agreement in which the Creditors were being asked to do more than simply accept repayment and release their security.
3. In my judgment the terms of the Joint Venture Agreement provided an obvious starting point and the crucial context for considering the email correspondence between Mr Hassall and Mr Robinson. The failure to refer to and analyse that document was undoubtedly a most material omission.
4. Looked at as a whole, St Vincent made a bare assertion that it had a good arguable case as to tender/repudiation, without properly investigating, let alone addressing, the relevant facts and the applicable law.
5. St Vincent relies on the fact that it had obtained default judgments against Mr Robinson and PPL at the date of the application. If this is a purported justification for failing to disclose the defences which might have been available to those respondents, it is without merit. The hearing of the application to set aside was fixed for only two weeks after the without notice hearing and St Vincent must have known that it was not going to oppose the application. But in any event, with such an application pending and being pursued with vigour, St Vincent was clearly obliged to explain its causes of action and to disclose all potential defences. This it wholly failed to do.
6. St Vincent states that it ensured that HHJ Waksman QC had read Mr Robinson’s statement in support of his application to set aside the default judgment, in which he referred to his contention that offers from St Vincent were conditional. In my judgment that is no answer to the failure to engage in the key factual issues when making the application and is certainly no answer to the failure to deal with the legal aspects of the case.

(b) Reflective loss

1. The Defences served by (i) the fourth, sixth and eleventh defendants; (ii) the ninth defendant; and (iii) the tenth defendant each pleaded that losses claimed by St Vincent were barred by the reflective loss principle. Further, Clyde & Co (solicitors for Mr Robinson and PPL) had expressly raised reflective loss as a central plank of their clients’ defence to the claims against them in a letter sent to St Vincent’s solicitors in April 2016.
2. Notwithstanding that reflective loss was therefore a real issue in the case, it was not drawn to the attention of HHJ Waksman QC in the skeleton argument for the without notice application or orally at the hearing. Indeed, the skeleton argument purported to summarise the defences of the other defendants, but omitted to refer to reflective loss.
3. In my judgment this was a further and inexcusable failure to properly analyse and disclose the claims being made and the potential defences, all the more egregious because of the late stage at which the application was made.
4. St Vincent again suggests that it fulfilled its duty by ensuring that HHJ Waksman QC had read Mr Robinson’s witness statement, in which he had pointed out that the victim of the alleged wrongful acts was HHL or HDP, not St Vincent. That is, of course, a different point, addressing the cause of action rather than the entitlement to sue for the losses claimed. But in any event, it is clear that the duty is to explain legal defences and weaknesses in the applicant’s case to the judge, not merely to rely on pre-reading of factual evidence.

(c) Conclusion on material non-disclosure

1. The real legal and factual difficulties in St Vincent’s case were not raised with HHJ Waksman QC on the without notice application, let alone addressed. I do not find that that was intentional, but was a result of a failure to properly analyse the claims and their potential weaknesses and to ensure that they were deployed and addressed. Given the late stage of the dispute at which the application was made, such failure cannot be excused. As I have found, on a proper consideration of the arguments, that St Vincent does not have a good arguable case, I assume that HHJ Waksman QC may well not have granted the WFO had full disclosure been made to him. Certainly the matters not disclosed to him would have had a material bearing on his decision.
2. The Set Aside Application therefore succeeds.

Conclusion

1. For the reasons set out above I set aside the WFO (as varied on the giving of undertakings) and dismiss the Continuation Application. In my judgment the without notice application should not have been made and was only successful because of a failure to engage properly with the claims and the potential defences.