Neutral Citation Number: [2023] EWCA Civ 417

Case Nos: CA-2023-000021
CA-2023-000021-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Robin Vos (sitting as a Deputy High Court Judge)
[2022] EWHC 3228 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2023

Before:

LORD JUSTICE NEWEY
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

- -

Between:

STEPHEN HUNT (as Provisional Liquidator of Black Capital)	**Freezing Order Applicant/ Respondent**
- and -	
RAVNEET UBHI	**Freezing Order Respondent/ Appellant**

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John Machell KC and Dan McCourt Fritz KC (instructed by **Thursfields Solicitors**) for the **Appellant**
Christopher Brockman and Phillip Gale (instructed by **Francis Wilks & Jones**) for the **Respondent**

Hearing date: 23 March 2023
Further written submissions: 30 and 31 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This is an appeal against a decision by Mr Robin Vos, sitting as a Deputy High Court Judge ("the Judge"), to continue a freezing order against the appellant, Mr Ravneet Ubhi, which had been granted on the application of the respondent, Mr Stephen Hunt, as provisional liquidator of "Black Capital", which was alleged to be an insolvent partnership.

Basic facts

2. The appeal arises out of a petition to wind up "Black Capital". The petitioners are a company of which a Mr John Mitchell is director and secretary, two daughters of Mr Mitchell, a niece and nephew of Mr Mitchell, and companies of which one or both of Mr Mitchell's daughters are directors. Between them, the petitioners claim to have invested a total of £13,702,750 with Black Capital, and they have calculated that they were owed more than £18 million by the date of the winding-up petition.

3. The petition was presented pursuant to article 7 of the Insolvent Partnerships Order 1994 ("the 1994 Order") on 14 September 2022 on the basis that Black Capital was a partnership between Mr Ubhi and a Mr Sarju Patel. That same day, without notice applications were made to Mellor J for the appointment of a provisional liquidator and freezing orders. Both applications were successful. In the first place, at the petitioners' behest, Mellor J appointed Mr Hunt, a licensed insolvency practitioner with Griffins, as provisional liquidator, the petitioners having given a cross-undertaking in damages subject to a limit of £200,000. In turn, Mr Hunt applied immediately for freezing orders to be made against Mr Ubhi and Mr Patel, and Mellor J made such orders, specifying the maximum sum as £19 million. Mr Hunt gave a cross-undertaking in damages, but in a restricted form. The cross-undertaking read:

> "If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make, save that this undertaking shall be limited to the amount of monies and the net realizable value of the unpledged assets of Black Capital (in provisional liquidation) taken into the custody or under the control of the Applicant in the course of the liquidation less the costs, expenses or other disbursements of the liquidation."

The same counsel represented both the petitioners and Mr Hunt.

4. On 28 September 2022, the petitioners presented bankruptcy petitions against Mr Ubhi and Mr Patel. The petitioners subsequently obtained permission to amend the petition in respect of Black Capital to include reference to the petitions relating to Mr Ubhi and Mr Patel. These were stated to have been issued pursuant to article 8 of the 1994 Order.

5. The winding-up and bankruptcy petitions were all the subject of a hearing before Deputy Insolvency and Companies Court Judge Raquel Agnello KC ("the Deputy ICC Judge") on 26 October and 4 November 2022. An application by Mr Ubhi to set

aside a statutory demand which had been served on him on 3 October was also before the Deputy ICC Judge.

6. Mr Ubhi had claimed that he had never been a partner in Black Capital and, as the Deputy ICC Judge explained in paragraph 8 of her judgment, given on 17 November 2022, the question whether there was a dispute on substantial grounds on that point occupied the majority of the hearing. In the end, the Deputy ICC Judge concluded that the evidence "demonstrates a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital": see paragraph 35. Both for that reason and on the basis that the petitioners had not complied with the requirements of article 8 of the 1994 Order, the Deputy ICC Judge dismissed the winding-up petition and the bankruptcy petition against Mr Ubhi and also set aside the statutory demand served on Mr Ubhi. Consequential matters were adjourned to a date to be fixed.

7. A week later, on 24 November 2022, there was the hearing before the Judge. The Judge determined that, under the terms of the order of Mellor J appointing him, Mr Hunt remained provisional liquidator until the Deputy ICC Judge had dealt with matters arising from her judgment. The hearing before the Judge was otherwise concerned with whether the freezing orders (and, in particular, that against Mr Ubhi) should be continued. By this stage, Mr Hunt had given evidence to the effect that he considered Black Capital to have operated a "Ponzi scheme".

8. The Judge gave judgment on 15 December 2022. He concluded that the freezing orders against Mr Ubhi and Mr Patel should continue. In the course of the judgment ("the Judgment"):

   i) The Judge said in paragraph 63 that, "although there are some areas in which criticisms could be made of the way in which the application was presented [before Mellor J], none of these are, in my view, either taken on their own or looked at cumulatively, sufficiently material to amount to a breach of the duty to provide full and frank disclosure";

   ii) The Judge said in paragraph 75 that he had "no doubt that there is a good arguable case that Mr Ubhi was a partner in Black Capital" and that it followed that "there is in my view a good arguable cause of action against Mr Ubhi, being his liability to contribute to any shortfall in the assets of Black Capital";

   iii) The Judge said that he was "satisfied that there is a good arguable case that, although Mr Ubhi may not have had access to the investors' funds, he was aware of and assisted in the Ponzi scheme" (paragraph 86) and that "it can be inferred … that there is a real risk of dissipation of Mr Ubhi's assets particularly in the light of the evidence that both he and companies with which he is connected have received significant sums from Black Capital" (paragraph 88); and

   iv) The Judge said in paragraph 103 that he was "satisfied that … the balance of convenience lies in favour of continuing the freezing orders despite the fact that the cross-undertaking in damages is in this case of limited value".

9. It was also on 15 December 2022 that the Deputy ICC Judge addressed matters consequential on her judgment. Among other things, she stayed the dismissal of the winding-up petition against Black Capital and ordered that Mr Hunt's appointment as provisional liquidator should continue pending an application by the petitioners for permission to appeal against her decision. On 21 December, Leech J further stayed the Deputy ICC Judge's order until the petitioners' application for permission to appeal had been determined and, on 10 January 2023, Leech J granted the petitioners permission to appeal and directed that, while the appeal was pending, the dismissal of the petition to wind up Black Capital should be stayed and Mr Hunt's appointment as provisional liquidator should continue.

10. Mr Hunt's investigations to date have led him to conclude that "the creditors (investors) in Black Capital are in the region of £35,000,000 - £50,000,000" (to quote from a witness statement made by Mr Hunt's solicitor on 12 December 2022).

11. What is before us is an appeal by Mr Ubhi against the Judge's decision of 15 December 2022.

The legal context

12. Part IV of the 1994 Order, comprising articles 7 and 8, provides for an "insolvent partnership" to be wound up on the petition of a creditor as an "unregistered company" for the purposes of Part V of the Insolvency Act 1986 ("the 1986 Act"). Article 7 of the 1994 Order applies where the petitioner does not present a concurrent insolvency petition against any member or former member of the partnership in his capacity as such, while article 8 is applicable where there is such a concurrent petition. In the latter case, the partnership's inability to pay its debts is to be established through the service of statutory demands on both the partnership and one or more members or former members: see section 222 of the 1986 Act, as modified pursuant to article 8 of, and schedule 4 to, the 1994 Order. Where, on the other hand, there is no concurrent petition against a member or former member, there is no necessity to serve any statutory demand. The inability of the partnership to pay its debts can in such a case be established in other ways: see article 7 of, and schedule 3 to, the 1994 Order.

13. Where a winding-up order is made in respect of a partnership and there are no concurrent bankruptcy orders against its members, partners can be called on to contribute to the extent necessary to pay its debts pursuant to section 226 of the 1986 Act. In this regard, section 74 of the 1986 Act will apply, but without subsection (2)(a) to (d): see section 221(5) and (6) of the 1986 Act, as modified by schedule 3 to the 1994 Order. Where there is a concurrent bankruptcy order against a partner, which is what the petitioners were seeking by their bankruptcy petition against Mr Ubhi by the time of the hearing before the Judge, the position is less straightforward since the partner will not be treated as a contributory for the purposes of the 1986 Act "unless the contrary appears": see section 221(7) of the 1986 Act, as modified by schedule 4 to the 1994 Order.

14. By virtue of section 150 of the 1986 Act, the power to make calls does not arise until after a winding-up order has been made. Pursuant to section 160 of the Act and rule 7.86 of the Insolvency (England and Wales) Rules 2016 (applied to insolvent partnerships by article 18 of, and schedule 10 to, the 1994 Order), the power to make

a call is delegated by the Court to the liquidator "as an officer of the Court", but exercise of the power by the liquidator requires either the sanction of any liquidation committee or the Court's special permission and, by rule 7.90, the liquidator must deliver a notice of the call to each of the contributories concerned. Rule 7.91 enables the liquidator to obtain an order to enforce payment of the amount due from a contributory.

15. Whether a petition to wind up a partnership is presented pursuant to article 7 of the 1994 Order or article 8, section 135 of the 1986 Act applies: see section 221(5) of the 1996 Act, as modified by schedules 3 and 4 to the 1994 Order. Section 135 of the 1986 Act empowers the Court to appoint a provisional liquidator at any time after presentation of a winding-up petition.

16. In the context of corporate insolvency, it is by no means rare for a provisional liquidator to issue proceedings on behalf of the company and apply for a freezing order. In particular, in the context of tax fraud there have been numerous examples of HM Revenue and Customs ("HMRC") presenting winding-up petitions against companies and obtaining the appointment of provisional liquidators, who, in turn, bring claims against persons who are alleged to be liable to the companies (directors, say) and apply for freezing orders. *QEB Metallics Ltd v Peerzada* [2009] EWHC 3348 (Ch) and *Payless Cash & Carry Ltd v Patel* [2011] EWHC 2112 (Ch) illustrate the point. So too does litigation relating to a company called Abbey Forwarding Limited ("Abbey"). As McCombe LJ explained in *Abbey Forwarding Ltd v Hone (No 3)* [2014] EWCA Civ 711, [2015] Ch 309, HMRC had there made an ex parte application for the appointment of a provisional liquidator and, immediately on the judge acceding to that, counsel for the provisional liquidator had applied in the company's name, and been granted, a freezing order. Both the freezing order and the order appointing the provisional liquidator included a cross-undertaking in damages, and that in the freezing order was backed by an indemnity from HMRC: see paragraph 10 of McCombe LJ's judgment and *Abbey Forwarding Ltd v Revenue and Customs Commissioners* [2015] EWHC 225 (Ch), [2015] Bus LR 882, at paragraphs 1 and 2.

17. In *Revenue and Customs Commissioners v Egleton* [2006] EWHC 2313 (Ch), [2007] Bus LR 44 ("*Egleton*"), HMRC presented a winding-up petition against a company based on unpaid VAT and themselves applied for, and were granted, freezing orders against the company's director and others against whom it was said that the company had claims as a result of their participation in VAT fraud. HMRC did not suggest that they themselves had claims against the respondents, but argued that a liquidator would be likely to bring proceedings in due course for the benefit of the company and its creditors. When, however, HMRC sought the continuation of the relief which they had secured, it was submitted on behalf of the respondents that there was no jurisdiction to make freezing orders since, first, HMRC were "pursuing no cause of action for a money judgment for the effective enforcement of which a freezing order would preserve a fund" and, secondly, the respondents were not alleged to hold or to have custody over any assets belonging to the company sufficient to invoke the extended jurisdiction seen in *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 ("*Chabra*"): see paragraph 14. Briggs J, however, did not accept these submissions. He concluded in paragraph 15 that "the particular nature of the relief sought by means of the presentation of a creditors' winding up petition does not

disable the petitioner from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction upon the court to grant appropriate interim relief, whether by way of freezing order or otherwise". In paragraph 41, he said that "the time has come for the English courts to recognise … that the jurisdiction to grant freezing orders against third parties is not rigidly restricted by the *Chabra* requirement to show that, at the time when the order is sought, the third party is already holding or in control of assets beneficially owned by the defendant", continuing:

> "However attractive that test is as a bright and focused boundary line, it does not seem to me to accord with the dictates of justice and common sense. To take a simple example, it would operate so as to distinguish between a case in which the third party misappropriated an asset of the defendant and held on to it and a case in which in otherwise identical circumstances the third party misappropriated the asset and dissipated it. It makes no sense that the first of those third parties should be amenable to the freezing order jurisdiction whereas the second, however separately wealthy, should not. In both cases the defendant or its office holder would have an equally viable restitutionary personal claim, the frustration of which by yet further asset dissipation by the third party would in turn detract from the efficacy of any order for the winding up or bankruptcy of the defendant and of any prior judgment for which winding up or bankruptcy was a means of enforcement."

18. Turning to discretion, Briggs J considered that "there are powerful reasons why, if freezing orders are to be obtained against potential judgment debtors of the company pending the making of a winding up order, it should be a provisional liquidator rather than a petitioning creditor who seeks and obtains them": see paragraph 48. "[W]here an application is made by a petitioning creditor for a freezing order in advance of the hearing of a winding up petition", Briggs J said in paragraph 51, "the court should in general require cogent reasons why that course is to be preferred to the ordinary and well established alternative of seeking the appointment of a provisional liquidator".

19. Briggs J gave these reasons for considering that an application for a freezing order should generally be made by a provisional liquidator:

> "48. … The first reason is that, generally, the obtaining of a freezing order necessitates a commitment not merely to freeze the assets of a potential wrongdoer, but to proceed diligently with the establishment of a claim against him, and the obtaining of a judgment to be satisfied out of those frozen assets. In any case where a freezing order is obtained against an intended defendant, the court as a matter of routine extracts an undertaking to issue a claim form and a claimant who is dilatory in pursuing that claim runs the risk of having the freezing order set aside without regard to the merits of his claim. In the present context, the person with the duty and the power to decide and to resolve to pursue litigation against potential judgment debtors of the company is the office holder, not the petitioning creditor. True it is that the petitioning

> creditor may have a powerful influence if he has a sufficient majority on any creditors' committee, and that his financial support may be a sine qua non to the prosecution of hostile litigation against third parties by the office holder. But the most that he can offer as part of the price for the grant of a freezing order is a promise to use his best endeavours to persuade the office holder to institute the substantive proceedings, rather than an undertaking to do so. By contrast, if the applicant for the freezing order is the provisional liquidator then, in the likely event that if there is a winding up order he will be appointed as liquidator, the same difficulty does not arise.
>
> 49. Secondly, and closely related to the first point, is the point that it is the office holder rather than the creditor who, as the guardian of the interests of all the company's stakeholders, is best placed to make an independent judgment as to the wisdom of bringing proceedings against third parties, and as to the appropriateness of obtaining interim measures including freezing orders pending the conclusion of those proceedings. Of course there will be cases, and the present is one, where the petitioning creditor is itself a responsible body performing a public function, and may be the only creditor of substance. But in general, this second point will militate against the grant of freezing orders on the application of creditors rather than office holders.
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> 50. Thirdly, there will be an inevitable element of duplication involved in any application for a freezing order by a creditor rather than an office holder, because of the creditor's inability to bring the substantive proceedings. His freezing order will always be temporary, designed merely to hold the fort until the office holder decides to apply for a freezing order himself. By contrast, proceedings instituted on the company's behalf by a provisional liquidator will simply continue after the winding up order, even if a different liquidator is thereafter appointed."

20. On the particular facts, Briggs J nonetheless decided to continue the freezing orders which had already been granted to HMRC. This, however, was only because there was now less than a week before the hearing of the winding-up petition and "no useful purpose would be achieved by the respondents in securing the discharge of the present orders" since "discharge of the present orders would very shortly thereafter be followed by the obtaining by a provisional liquidator of more or less identical orders against the same respondents": see paragraph 52. In paragraph 54, Briggs J concluded:

> "In the ordinary course, creditors should not expect to be able to obtain freezing orders against potential judgment debtors of the company sought to be wound up, save in entirely exceptional cases (and I cannot envisage what they might be) where the ordinary course of the appointment of a provisional liquidator with the duty and power to make those decisions on

> behalf of the company and all its stakeholders is either impossible or impracticable."

21. Against that background, Mr Ubhi accepts that, in principle, the Court can grant a freezing order where there are pending winding-up or bankruptcy proceedings which, if successful, would lead to a process by which the respondent might be found liable to contribute to the insolvent estate. The present case is, however, unusual, at least in my experience, in the fact that a freezing order has been sought by a provisional liquidator within the winding-up proceedings rather than in a separate claim. Briggs J noted in *Egleton* that "proceedings instituted on the company's behalf by a provisional liquidator will simply continue after the winding up order" (paragraph 50) and that "the court as a matter of routine extracts an undertaking to issue a claim form" where a freezing order is obtained (paragraph 48). In the present case, however, there is only one relevant originating process: the winding-up petition. Mr Hunt has neither instituted any proceedings nor given (or been asked to give) any undertaking to issue a claim form. That suggests that, had the Deputy ICC Judge made a winding-up order, the freezing order would have lapsed as the winding-up proceedings were concluded. It also makes the form of the freezing order which is now under appeal somewhat inapt. The freezing order is expressed to continue "[u]ntil judgment or the further order of the court", but (a) the Deputy ICC Judge had already given judgment on the winding-up petition, (b) the petitioners had not yet obtained permission to appeal against her decision and (c) Mr Hunt had not issued an independent claim which could be the subject of a judgment. No future "judgment" was obviously in prospect.

The issues

22. The appeal gives rise to the following main issues:

    i) Was the Judge wrong to accept a limited cross-undertaking from Mr Hunt? [Issue (1)]

    ii) Should the Judge have set aside the freezing order and refused further relief on account of breaches of the duty of full and frank disclosure? [Issue (2)]

    iii) Was the Judge wrong to hold that there was a good arguable case that there was a relevant cause of action against Mr Ubhi justifying the grant of a freezing order against him? [Issue (3)]

Issue (1): The cross-undertaking

The parties' positions

23. Mr John Machell KC, who appeared for Mr Ubhi with Mr Dan McCourt Fritz KC, argued that the Judge misdirected himself when deciding to grant a freezing order notwithstanding the restricted nature of the cross-undertaking Mr Hunt was prepared to offer. Mr Machell submitted that, in the circumstances, we should consider the matter afresh, conclude that the cross-undertaking given by Mr Hunt is not acceptable, and set aside the freezing order against Mr Ubhi. In contrast, Mr Christopher Brockman, who appeared for Mr Hunt with Mr Phillip Gale, stressed that the Judge's decision involved an exercise of discretion and said that there was no basis for this

Court to interfere with it. The Judge can be seen, Mr Brockman maintained, to have taken the relevant factors into account.

The Judgment

24. The Judge turned to consider "whether the freezing orders should be continued despite the fact that the cross-undertaking in damages given by Mr Hunt is limited to the liquidation estate" in paragraph 95 of the Judgment. In paragraph 103, the Judge concluded that the question should be answered in the affirmative, explaining that, overall, he was satisfied that "the balance of convenience lies in favour of continuing the freezing orders despite the fact that the cross-undertaking in damages is in this case of limited value".

25. The Judge observed in paragraph 97 of the Judgment that the petitioners accounted for "a significant proportion of the amounts currently estimated by Mr Hunt to be due to the investors as a whole", but he noted that "the total amount ultimately found to be due to investors may be higher than the current estimates" before saying in paragraph 98:

> "This is not a case where there is a single investor who accounts for the vast majority of the funds said to be due from Black Capital. Instead, there are a large number of creditors and Mr Hunt is acting in the interests of all of them. It would not therefore in my view be appropriate to expect the Petitioners to stand behind any cross-undertaking in damages. The likelihood is (even on the current figures) that they are in the minority both in terms of the number of creditors and the amount owed."

26. The Judge referred in paragraph 99 of the Judgment to the possibility of a liquidator being funded by a third party, but said that "[i]t is not suggested on behalf of Mr Ubhi that this is the case". In paragraph 100, the Judge expressed the view that "in circumstances where the assets which Mr Hunt has been able to identify are minimal and all the evidence suggests that there will be a significant shortfall" it would not be proportionate to require Mr Hunt to incur the costs of investigating the possibility of obtaining insurance to back up the cross-undertaking in damages. In paragraph 101, the Judge said that counsel for Mr Ubhi "did not suggest … that there were any specific losses that he was likely to suffer as a result of the freezing order".

27. Earlier in the Judgment, when addressing whether there had been a failure to give full and frank disclosure to Mellor J, the Judge had made reference to the decision of the Court of Appeal in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 ("*Pugachev*"). The Judge noted that in *Pugachev* Lewison LJ had said that "[t]he default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages", that there is a possible exception "where the applicant has no personal interest in the litigation and is bringing the action on behalf of others" and that "the burden is on the applicant to show why they should not be required to give an unlimited cross-undertaking in damages": see paragraphs 57-59 of the Judgment.

The Pugachev *decision*

28. *Pugachev* is nowadays the leading authority on the provision of cross-undertakings in damages. In *Pugachev*, an insolvent bank and its liquidator had been granted a freezing order in aid of proceedings which they had brought against Mr Pugachev in Russia. One of the questions before the Court of Appeal was whether Rose J had been wrong to make continuation of the freezing order conditional on the provision of a cross-undertaking in damages that was not limited as to amount. Lewison LJ, with whom Arden and Christopher Clarke LJJ agreed, concluded that Rose J had been entitled to exercise her discretion in the way that she had.

29. The following points seem to me to emerge from Lewison LJ's judgment and the cases to which he referred:

    i) The extent of the cross-undertaking in damages which an applicant for an interim injunction is required to give is a matter of discretion for the judge who hears the application (paragraph 69 of Lewison LJ's judgment) and so the judge's decision will not be upset by the Court of Appeal except on the usual grounds for interfering with the exercise of judicial discretion (paragraph 70);

    ii) The "default position" is, however, that a person applying for an interim injunction must give an unlimited cross-undertaking in damages, that being the price for interfering with the defendant's freedom before he has been found liable for anything (paragraph 68);

    iii) A cross-undertaking is not required when the applicant is a law enforcement agency simply enforcing the law in the public interest (paragraph 68);

    iv) It may also be appropriate to depart from the "default position" where the applicant has no personal interest in the litigation and is bringing the claim on behalf of others (paragraph 68). That being so, the fact that the claimant is a liquidator of an insolvent company is a highly relevant factor (paragraph 69);

    v) Even so, the mere fact that litigation is being brought by a liquidator of an insolvent company does not compel the conclusion that the cross-undertaking should be capped (paragraph 69). The burden lies on the applicant who says that he should not be required to give an unlimited cross-undertaking to demonstrate why that is so (paragraph 85);

    vi) In that context, it can be relevant to consider whether one or more creditors could be expected to indemnify the applicant. Where there are numerous small creditors, it may be impractical to obtain an indemnity, but the position may be different where there are larger creditors (paragraph 81) and, if the liquidator is being funded by a creditor, that may put a "different complexion" on matters (paragraph 82 and *Franses v Al Assad* [2007] EWHC 2442 (Ch), [2007] BPIR 1233, at paragraph 81). In *Pugachev* itself, Rose J had been entitled to conclude that the liquidator had failed to discharge the burden on it given "the lack of evidence about what efforts the [liquidator] had made to persuade substantial creditors, for whose benefit the recoveries would enure, to back the cross-undertaking" (paragraph 85);

vii) The availability of insurance can also be of significance (paragraph 68 and *In re DPR Futures Ltd* [1989] 1 WLR 778, at 785);

viii) A defendant need not show that the freezing order is likely to cause him a loss before a cross-undertaking of unlimited amount is required (paragraph 78). "It is … fairness rather than likelihood of loss that leads to the requirement of a cross-undertaking" (paragraph 77); and

ix) Whether a cross-undertaking should be of unlimited amount is a separate question from whether an applicant should fortify the cross-undertaking by the provision of security.

Discussion

30. As the Judge recognised in paragraphs 57 and 58 of the Judgment, the burden is on an applicant for a freezing order to show why it is appropriate to depart from the "default position" that an unlimited cross-undertaking in damages is required. It was thus incumbent on Mr Hunt to explain why the Judge should make a freezing order without his giving such an undertaking. When, however, the Judge came to the section of the Judgment in which he dealt with this issue, he lost sight of this principle.

31. Very little evidence of any relevance to the issue was put before the Judge. In his first witness statement, Mr Hunt simply confirmed that he was prepared to "undertake to meet any award of compensation that the Court may make save that this undertaking shall be limited to the amount of money and the net realised value of the unpledged assets in the estate of Black Capital less the costs, expenses or other disbursements of the liquidation".

32. The key factor which led the Judge to accept a cross-undertaking of that kind was evidently that Mr Hunt was acting in the interests of all the creditors while the petitioners were likely to be "in the minority both in terms of the number of creditors and the amount owed". It is clear from *Pugachev*, however, that the fact that an applicant is a liquidator does not of itself excuse the absence of an unlimited cross-undertaking, and in the present case there was no evidence that Mr Hunt had even asked the petitioners to give him an indemnity, let alone that they were unable or unwilling to do so. To the contrary, the petitioners had supplied a cross-undertaking in damages in respect of Mr Hunt's appointment as provisional liquidator, albeit one subject to a £200,000 cap, and in that context Mr Mitchell had exhibited to a witness statement accounts for the corporate petitioners and confirmed that the individual petitioners "each own property and … would be able to meet any award of compensation that the Court may make". There was thus every reason to think that the petitioners were in a position to provide Mr Hunt with at least a limited indemnity. On top of that, the evidence indicates that a large proportion of the aggregate amount invested in Black Capital came from the petitioners: they are said to have invested in excess of £13 million and to be owed more than £18 million, while Mr Hunt has estimated that "creditors (investors) in Black Capital" total "in the region of £35,000,000 - £50,000,000". In the circumstances, it is not surprising that the petitioners have been prepared to expend effort and money on the petitions against Black Capital, Mr Patel and Mr Ubhi, and to give a cross-undertaking to facilitate the appointment of a provisional liquidator. By the same token, however, the petitioners

might have been expected to support the provision of a cross-undertaking in relation to the freezing order: they had both a substantial stake in the outcome of the proceedings against Black Capital, Mr Patel and Mr Ubhi and significant financial means. It is also noteworthy that the petitioners could themselves have sought freezing orders and that, had they done so, they would inevitably have been required to give a cross-undertaking. It may be (although there is no evidence to this effect) that the petitioners preferred to obtain Mr Hunt's appointment as provisional liquidator and for him to apply for a freezing order because of the powers that a provisional liquidator has. The fact, though, that the petitioners would have had to supply a cross-undertaking had the application for a freezing order been made by them tends to confirm that they could be expected to furnish an indemnity for the purposes of Mr Hunt's application.

33. All in all, I do not think the fact that Mr Hunt was acting in the interests of all creditors, of whom the petitioners were a minority, constituted a sufficient reason to depart from the "default position".

34. It appears from paragraph 101 of the Judgment that the Judge may also have attached significance to the lack of "any specific losses that [Mr Ubhi] was likely to suffer as a result of the freezing order". If so, however, he was mistaken in doing so. As Lewison LJ said in *Pugachev*, "[i]t is fairness rather than likelihood of loss that leads to the requirement of a cross-undertaking". While, therefore, probability of loss may strengthen the case for a cross-undertaking, absence of it cannot be a justification for dispensing with one.

35. Another problem with the Judge's approach is that it is not apparent that he appreciated quite how worthless Mr Hunt's cross-undertaking is. The Judge spoke of the cross-undertaking being "limited to the liquidation estate" (paragraph 95) and "of limited value" (paragraph 103). Aside, however, from the fact that it affords priority to "the costs, expenses or other disbursements of the liquidation", the cross-undertaking bites only on the value of "unpledged assets of Black Capital (in provisional liquidation) taken into custody or under the control of [Mr Hunt] in the course of the liquidation". Mr Brockman argued that Mr Hunt might succeed in recovering substantial assets of Black Capital and so that the cross-undertaking is of real value. However, the most obvious circumstance in which Mr Ubhi might wish to claim on the cross-undertaking would be where the petition to wind up Black Capital had failed because (as the Deputy ICC Judge has held to be the case) there is substantial dispute as to whether Mr Ubhi was a partner and, hence, whether Black Capital was a partnership at all or, putting matters slightly differently, whether "Black Capital (in provisional liquidation)" existed. Mr Brockman submitted that that would be of no importance in the light of rules 7.38 and 7.39 of the Insolvency (England and Wales) Rules 2016. Rule 7.38 provides that, where a provisional liquidator has been appointed but no winding-up order has been made, the remuneration of the provisional liquidator and the amount of any expenses incurred by him are to be met "out of the property of the company", while rule 7.39 states that, if a provisional liquidator's appointment terminates, whether in consequence of the dismissal of the winding-up petition or otherwise, "the court may give such directions as it thinks just relating to the accounts of the provisional liquidator's administration or any other matters which it thinks appropriate". If needs be, Mr Brockman suggested, these provisions (and especially rule 7.39) would enable Mr Hunt to have resort to assets

which he had recovered even if it transpired that they could not be assets of the "company" (or firm) in respect of which he was appointed because no partnership in fact existed. It is far from clear, however, that that is correct, not least because rule 7.38 is primarily drafted so as to apply in the case of a company to which a provisional liquidator has been appointed, where the very existence of the company is unlikely to be in issue.

36. There are further ways in which, in my view, the Judge approached matters on an erroneous basis. In the first place, he dismissed funding by a third party as a relevant factor on the basis that such funding had not been suggested. However, (a) the burden was on Mr Hunt to show why he should not give an unlimited cross-undertaking, not on Mr Ubhi to demonstrate why he should, (b) Mr Hunt's funding arrangements were within his knowledge, not Mr Ubhi's, (c) there was no evidence that Mr Hunt was not in receipt of third party funding and (d) we were told by Mr Brockman that Mr Hunt has in fact received funding from the petitioners, albeit, Mr Brockman explained, that it has been exhausted. Secondly, I am not convinced by the basis on which the Judge dismissed the potential relevance of insurance. He said that it would not be proportionate to require Mr Hunt to incur the costs of investigating the availability of insurance when "the assets which Mr Hunt has been able to identify are minimal and all the evidence suggests that there will be a significant shortfall". However, (a) there was no evidence about investigation costs, (b) there was no evidence, either, to explain why the petitioners could not bear the costs and (c) it is not obvious that the costs would have been significant. I can quite see that a liquidator needing to obtain injunctive relief in a hurry might not be in a position even to investigate the possibility of insurance. By the time of the hearing before the Judge, however, more than two months had passed since the hearing before Mellor J and so there had been ample time for inquiries to be made.

37. An overarching difficulty with the Judge's analysis is, I think, that he does not seem to have kept in mind the need for Mr Hunt to justify any departure from the "default position" that an applicant must give an unlimited cross-undertaking in damages. He referred to passages in *Pugachev* to that effect when discussing whether there had been full and frank disclosure before Mellor J, but it is not apparent that he applied them when deciding whether Mr Hunt's cross-undertaking was adequate. There is no real indication in that section of the Judgment that the Judge was conscious that the "default position" should obtain unless Mr Hunt showed why that should not be so and, in that context, of the significance of the dearth of evidence on the issue.

38. In all the circumstances, I agree with Mr Machell that the Judge's decision on the cross-undertaking issue is wrong in principle and cannot stand and that, exercising the discretion afresh ourselves, we should allow the appeal and set aside the freezing order as against Mr Ubhi. It seems to me that Mr Hunt has not shown any sufficient reason to depart from the "default position" and, accordingly, that his cross-undertaking in damages is inadequate.

39. At the end of the hearing before us, Mr Brockman said that, if we considered that the existing cross-undertaking is deficient, he would like an opportunity to consider whether something better could be offered. In my view, however, it is too late for that. When the Judge raised a similar point during the hearing before him, Mr Brockman agreed that the injunction "will be granted with the cross-undertaking as it is or it will

not be granted at all". Moreover, Mr Hunt has not filed any respondent's notice seeking to sustain the Judge's order on an alternative basis.

Issue (2): The duty of full and frank disclosure

40. Someone applying for a freezing order on a without notice basis has, of course, a duty to make full and frank disclosure. The relevant principles were summarised in these terms by Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (at 1356-1357):

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 48 , 514, *per* Scrutton L.J.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, *per* Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.
>
> (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93.
>
> (5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:' see *per* Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91, citing

> Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486 , 509.
>
> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:' *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.
>
> 'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:' *per* Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp. 1343H–1344A."

41. In *Memory Corporation Plc v Sidhu (No. 2)* [2000] 1 WLR 1443, Mummery LJ observed at 1459-1460 that "[i]t cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order … there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case". In *Fundo Soberano De Angola v Dos Santos* [2018] EWHC 2199 (Comm), Popplewell LJ noted in paragraph 52 that, "although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects".

42. In the present case, Mr McCourt Fritz, who argued this part of the appeal for Mr Ubhi, submitted that the duty of disclosure was breached when Mr Hunt obtained the freezing order against Mr Ubhi from Mellor J in relation in particular to (a) the cross-undertaking in damages Mr Hunt was offering, (b) the need for there to be a good arguable case against Mr Ubhi and (c) the need for "solid evidence" of a risk of dissipation by Mr Ubhi.

43. With regard to the first of these, the counsel who appeared for the petitioners and Mr Hunt before Mellor J (who was not Mr Brockman or Mr Gale) dealt with the freezing order application quite briefly in his skeleton argument for the hearing and said only this about the proposed cross-undertaking:

> "Mr Hunt offers an undertaking in damages. Since as an office-holder he is not expected to put his own money up, it is submitted that the undertaking should be limited to the assets in the liquidation."

44. Not much more was said about the cross-undertaking at the hearing. The relevant section of the transcript of it records as follows:

> "[COUNSEL]: … On the freezing injunction, just on the undertaking that is given by the provisional liquidator if you appoint one, … it is proposed that the undertaking be limited to the assets in the estate, effectively … and, in my submission, that is usual and the courts do not require Mr Hunt to put up his own money for the purposes of that.
>
> MR JUSTICE MELLOR: I mean, what happens if he finds, basically, there is nothing left? …
>
> [COUNSEL]: Well, as matters stand, he is in Milton Keynes, I think sitting outside the office waiting to go in. I mean, the one thing that struck me about Mr Hunt's investigations that might give some cause for hope is that they appear to be operating from quite established, quite plush offices, actually, in Milton Keynes and, at the least, I think there is some expectation there might be things of value in those offices, including for some reason a Formula 1 car, I noticed. … Maybe that is where all the money has gone. I do not know. But there is some hope from that, but also because it does appear to be, you know, well-established offices, then, really, books and records are where the real value of the appointment in the short term is likely (inaudible),
>
> MR JUSTICE MELLOR: Okay. Good, Thank you."

45. The Judge said in paragraph 61 of the Judgment that "it is apparent that Mellor J considered the adequacy of the cross-undertaking in damages". Referring to the contention that there had been a breach of the duty of disclosure in what Mellor J was, and was not, told about the proposed cross-undertaking in damages, the Judge continued in paragraph 62:

> "Whilst a failure to refer to the default position explained in *Pugachev* and the need for the applicant to show why an unlimited cross-undertaking was not appropriate, the Judge clearly had these principles in mind and [counsel] did explain (on behalf of Mr Hunt) why an unlimited undertaking was not appropriate. There is nothing in the judgment or in the transcript which would indicate that the Judge was unduly influenced by the suggestion that it was usual for a cross-undertaking given by a liquidator to be limited to the liquidation estate. In any event, in context, I do not consider that what [counsel] said was misleading."

46. In my view, however, what was said to Mellor J about the proposed cross-undertaking was not adequate and, in fact, was misleading. It is certainly the case that liquidators are sometimes excused from giving unlimited cross-undertakings, but counsel overstated the position when he told Mellor J that it was "usual" for the undertaking required of a provisional liquidator to be limited to the assets in the estate. *Pugachev* shows that even a liquidator of an insolvent company has to justify a departure from the "default position" that the grant of a freezing order depends on the provision of an unlimited cross-undertaking. The Abbey litigation I mentioned in paragraph 16 above provides an example of a provisional liquidator giving a cross-undertaking supported by an indemnity from a creditor (there, HMRC).

47. I do not think Mellor J necessarily had to be taken to *Pugachev* nor even that it was vital that the case be cited by name. If, however, Mellor J was not to be shown *Pugachev*, he needed to be told of the principles which emerge from it, including that the "default position" is that a person applying for an interim injunction must give an unlimited cross-undertaking in damages, that the mere fact that litigation is being brought by a liquidator of an insolvent company does not compel the conclusion that the cross-undertaking should be capped, and that it can be relevant to consider whether one or more creditors could be expected to indemnify the applicant and whether the liquidator is being funded by a creditor. Counsel should also have commented on the application of those principles to the particular facts, drawing attention to matters bearing on whether the petitioners might be expected to stand behind Mr Hunt and to the fact that they were providing him with funding.

48. I consider that the Judge was wrong to infer that Mellor J had the *Pugachev* principles in mind. If he had, I would have expected to see some recognition of those principles in the Judgment, together with an explanation of why the default position did not apply in this case. As it is, nothing was said by Mellor J about this. No doubt that reflects what he had been told, that is to say that the order proposed was the usual order.

49. I have not, however, been persuaded that there were any other breaches of the duty of disclosure. So far as the requirement for a good arguable case against Mr Ubhi is concerned, the skeleton argument for the hearing before Mellor J both cited *Egleton* and said that, "this being a partnership case, the partners are obliged to contribute to the assets of the partnership in the event of a shortfall". It may be that, as the Judge thought (see paragraph 49 of the Judgment), there is reason to believe that the implications of *Egleton* were not fully appreciated, but, as the Judge observed in paragraph 51 of the Judgment, there was "a cause of action identified (the ability of a liquidator to enforce the obligation of the partners to make up a shortfall in the partnership assets) as well as the facts which support the contention that Mr Ubhi was a partner in Black Capital". It seems to me, therefore, that Mellor J was told enough about the basis for the claim against Mr Ubhi. Turning to what was said about the need for "solid evidence" of a risk of dissipation by Mr Ubhi, I do not think it was incumbent on Mr Hunt to expand on the basic legal requirements for a freezing order, such as the need for a risk of dissipation, when applying to Mellor J: a Chancery judge can fairly be assumed to be familiar with them. Moreover, in the course of his submissions to Mellor J, counsel observed that "Mr Ubhi was not the person with responsibility for the investments or so it appears", that "Mr Ubhi has not disappeared", that "very recently [Mr Ubhi] contacted Mr Mitchell to invite him to a

meeting" and that the evidence "may well prove that Mr Ubhi is innocent of any dishonesty in respect of all of this"; the requisite risk of dissipation was said to exist because "there must be a risk that [Mr Ubhi] will dissipate just by continued trading". In the circumstances, counsel appears to me to have taken pains to ensure that the case on risk of dissipation on the part of Mr Ubhi was presented fairly.

50. Do, however, the deficiencies in what Mellor J was told about Mr Hunt's cross-undertaking mean that the freezing order against Mr Ubhi should be discharged, not only for the reasons I have given in relation to Issue (1), but on account of breach of the duty of disclosure? With a degree of hesitation, I have concluded that they do not. While it is clearly the case that even an innocent non-disclosure can justify the setting aside of a freezing order, the fact that, as here, a failure to comply with the duty of disclosure was not deliberate is an important consideration. Further, it seems to me, as I have said, that the duty was breached only in relation to the cross-undertaking, not on the wider basis for which Mr McCourt Fritz contended. Supposing that Mr Hunt had in all other respects justified the continuation of the freezing order against Mr Ubhi, I would not, on balance, have thought it in the interests of justice to discharge the order which the Judge made.

Issue (3): Good arguable case

51. My conclusions on Issue (1) make it unnecessary for me to address Issue (3), and I think it better not to do so.

Other comments

52. As I have mentioned, in *Egleton* Briggs J explained that "there are powerful reasons why, if freezing orders are to be obtained against potential judgment debtors of the company pending the making of a winding up order, it should be a provisional liquidator rather than a petitioning creditor who seeks and obtains them". Briggs J will, however, have had in mind the usual case in which a provisional liquidator applies for a freezing order in the context of a new originating process, not within the winding-up proceedings. It may well be that the Court should be slower to make a freezing order in favour of a provisional liquidator where no separate claim is being initiated by him and, in particular, in circumstances such as those in the present case where not only is the provisional liquidator issuing no originating process himself, but the petition relates to a partnership and it would be open to the petitioners to make direct claims against the partners individually and to obtain freezing orders against them in those proceedings.

53. Another point is that, where it is proposed that a provisional liquidator of a partnership should be granted a freezing order, thought needs to be given to whether the terms of the order for the provisional liquidator's appointment permit that, and any uncertainty in that regard should be brought to the attention of the judge hearing the application. In the present case, it is very much open to question whether the powers granted to Mr Hunt as provisional liquidator were such as to allow him to apply for the freezing orders he obtained against Mr Ubhi and Mr Patel. Paragraph (2) of the order provides for Mr Hunt's functions to extend to "tak[ing] possession, collect[ing] in and protect[ing] all the assets property and/or things in action to which the Partnership is or appears to be entitled including any third party or trust monies, or any assets in the possession of or under the control of the Partnership in this country

or abroad" and paragraph (7) authorises Mr Hunt to continue or commence an action for the purposes set out in paragraph (2). However, as I have mentioned, the power to demand a contribution from a partner in an insolvent partnership arises only after a winding-up order has been made (see section 150 of the 1986 Act) and then is vested in its liquidator "as an officer of the court" (see section 160 of the 1986 Act and rule 7.86 (1) of the Insolvency (England and Wales) Rules 2016), not in the partnership as such. It is not apparent that, in applying for a freezing order against a partner, the provisional liquidator would be protecting anything to which "the Partnership is or appears to be entitled", both because no liability to pay a call would yet exist and because, if and when it did, the claim would be that of the liquidator rather than "the Partnership". Mr Brockman suggested that any problem could be cured by adding to the list of functions in the order appointing Mr Hunt, "To bring or defend any legal action or other legal proceedings in the name of the Partnership to preserve the ability of any liquidator to pursue any claim against any partner or former partner". That, though, may not resolve the issue when (a) Mr Hunt obtained the freezing orders against Mr Ubhi and Mr Patel in his own name rather than that of the alleged partnership and (b) that may well have been the correct course to adopt given that any power to make a call would be vested in a liquidator rather than the partnership. On the basis, however, that the appeal is being allowed for other reasons, it is not necessary to explore the point further.

Conclusion

54. I would allow the appeal.

Lord Justice Males:

55. I agree that this appeal should be allowed on the basis explained by Newey LJ, that is to say (in short) that Mr Hunt has failed to discharge the burden upon him to justify the grant of a freezing order without giving a cross-undertaking unlimited in amount. On that issue I would only add that in a case such as this, where a provisional liquidator seeks to bring a claim for the benefit of creditors who have themselves a cause of action and are in a position to obtain a freezing order for which an unlimited cross-undertaking would be required, strong reasons will be needed to justify the grant of a freezing order to the provisional liquidator without such a cross-undertaking being given.

56. I agree also that there was a failure to make a fair presentation of the correct legal position concerning the requirement for a cross-undertaking, but not in the other respects alleged, and that this failure does not in itself mean that the freezing order against Mr Ubhi should be discharged. In this regard I would draw attention to the fact that there are other ways in which such a failure may be marked where the interests of justice require that a freezing order be continued despite a failure of fair presentation, for example by a suitable order as to costs (see for example *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] and [77] to [86]).

57. As it is unnecessary to do so for the determination of this appeal, I prefer to express no opinion about the other matters discussed by my Lords. They will need careful consideration in the event of any future application for a freezing order by a provisional liquidator in circumstances, comparable to the present case.

Lord Justice Snowden:

58. I also agree that the appeal should be allowed for the reasons given by Newey LJ and Males LJ.

59. As Newey LJ has indicated, because Mr Machell KC was prepared to accept, purely for the purposes of this appeal, and subject to arguments on discretion, that the Judge had the power to grant a freezing injunction on the application of the provisional liquidator, and because the appeal is being allowed on Issue (1) for reasons related to the provision of a limited cross-undertaking in damages, it is unnecessary to address Issue (3) and the other issues to which the facts of this case gave rise. I consider, however, that it would be useful to identify a number of those unresolved issues for future reference.

60. The first issue concerns Mr Brockman's contention that if a winding up order were to be made in relation to the alleged Black Capital partnership, Mr. Ubhi would be a contributory liable to a call to make payment of such amounts as would be necessary to satisfy the debts and liabilities of the partnership, including, in particular, the debts of about £18 million said to be owing to the petitioners.

61. Mr Brockman's argument that Mr Ubhi would be a contributory depended upon the application of sections 74, 79 and/or 226 of the Insolvency Act 1986 to the winding up of an insolvent partnership by virtue of section 221(5) of the 1986 Act, as modified and applied by Article 7 of the Insolvent Partnerships Order 1994 and paragraph 3 of Schedule 3 to that Order. Article 7 was the relevant article of the 1994 Order when the original application was made to Mellor J because there was, at that date, no concurrent bankruptcy petition in relation to Mr Ubhi.

62. However, by the date of the hearing before the Judge, the petitioners had also presented a bankruptcy petition against Mr Ubhi. If Mr Ubhi had been made bankrupt on that petition, the relevant provisions of the 1994 Order would have been Article 8 and Schedule 4. As a result, section 221 of the 1986 Act would have been modified so as to include section 221(7) which provides that "unless a contrary intention appears, a member of a partnership against whom an insolvency [i.e. bankruptcy] order has been made by virtue of article 8 of the [1994 Order] shall not be treated as a contributory for the purposes of this Act."

63. The meaning and effect of Article 8 and section 221(7) of the 1986 Act was not debated before the Judge or in argument before us, and remains unresolved.

64. The second issue arises because any liability of Mr Ubhi as a contributory, and the power of the court to make a call on him under section 150 of the 1986 Act, would only arise after a winding up order had been made. Moreover, such power would only be exercisable by a liquidator pursuant to the delegated power under section 160 of the 1986 Act and rules 7.88 to 7.91 of the Insolvency (England and Wales) Rules 2006. At the time of the grant and continuation of the freezing injunction, therefore, Mr Ubhi was under no liability, and no-one had any power to make a call against him. These features of the case raised two issues.

65. The first issue was that Mr Hunt's powers as provisional liquidator were defined and limited by the order appointing him, and for the reasons outlined by Newey LJ, it is

not easy to see how those powers extended to making an application for a freezing order based upon Mr Ubhi's prospective liability to a call. In the wording of the order appointing Mr Hunt, his application was not seeking to collect or protect any existing "assets, property and/or things in action to which the Partnership is or appears to be entitled".

66. In that regard it is important to note that the application made by Mr Hunt for a freezing order sought to prevent Mr Ubhi from dissipating his own assets so as to frustrate a future judgment against him on a call. The application was not for an injunction to prevent dealings by Mr Ubhi with any identified assets belonging to the partnership (i.e. a proprietary injunction). Nor was it based upon any identified cause of action which was said to constitute an asset or property of the partnership (e.g. for damages or compensation for misappropriation or misapplication of partnership assets).[1]

67. As such, nothing in this judgment should be taken to cast any doubt upon the ability of a provisional liquidator to make an application for an injunction to preserve identified assets of the company or partnership over which he is appointed, or to safeguard the ability of the company or partnership successfully to enforce a claim for damages or compensation which constitutes an asset or part of the property of the company or partnership. Instead, as Newey LJ has indicated, what this case illustrates is that when a provisional liquidator is appointed, and also when he proposes to apply for injunctive relief, full attention should be paid to the scope of his powers as defined in the order appointing him and the precise nature of the relief which he intends to seek.

68. The second issue was that neither Mr Hunt as provisional liquidator, nor the alleged partnership, had any cause of action against Mr Ubhi in relation to a call which could support a freezing injunction. Mr Brockman's answer to this point was to rely on the approach to the grant of freezing injunctions recently outlined by the majority of the Privy Council *Convoy Collateral Ltd v Broad Idea International Ltd* [2022] 2 WLR 703, and applied (in a very different context) by this court in *Re G* [2022] EWCA Civ 1312, [2022] 3 WLR 1339 at [54]-[61]. Mr Brockman contended that those cases show that it is not necessary for an applicant to have an existing cause of action against the respondent to justify the grant of a freezing injunction: instead what is required is (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies the court exercising the power to order the defendant to do or not do something.

69. Mr Brockman contended that Mr Hunt had an interest meriting protection and that the court would be justified exercising the power to grant a freezing injunction because (i) there was a sufficient prospect of a liquidator being appointed to wind up the alleged partnership and obtaining permission to make a call on Mr Ubhi, and (ii) Mr Hunt's duty as provisional liquidator to act in the interests of creditors required him to preserve the ability of any subsequent liquidator successfully to enforce such a call.

[1] In written submissions after the hearing of the appeal, Mr Brockman contended that if a winding up order was made, Mr Ubhi would be an "officer" of the partnership who might be exposed to a claim for misfeasance or fraudulent or wrongful trading. That was not, however, an argument advanced to either judge at first instance and no such claim was identified on the facts.

70. Although Mr Machell was prepared, purely for the purposes of the appeal, and subject to arguments on the exercise of discretion, to accept that the court had the power to grant a freezing injunction notwithstanding the absence of an existing cause of action, we did not hear argument on these issues, and for my part I would not wish to express any views on them. They raise important questions relating to freezing injunctions and insolvency law and practice which must await more detailed consideration in an appropriate case.