Neutral Citation Number: [2021] EWCA Civ 973

Case No: A3/2021/0557

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT (Chancery Division)
The Honourable Mrs Justice Bacon
[2021] EWHC 544 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2021

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
SIR TIMOTHY LLOYD

- -

Between :

Valbonne Estates Ltd	**Appellant**
- and -	
Cityvalue Estates Ltd	**1st Respondent**
United Homes Ltd	**2nd Respondent**

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- -

Mr Gary Blaker QC (instructed by **Howard Kennedy LLP**) for the **Appellant**
Mr Philip Newman (instructed by **Direct Access**) for the **1st Respondent** and **Mr Edward Levey QC** (instructed by **Aliant Law**) for the **2nd Respondent**

Hearing date: Thursday 17th June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 11.00 a.m. on Wednesday 30th June 2021.

Lady Justice Asplin:

1. This appeal concerns the proper exercise of the court's discretion to continue a pre-action interim injunction or to re-grant it, notwithstanding serious non-disclosure by the applicant when seeking the interim injunction on a without notice basis.

2. The underlying dispute is in relation to the leasehold interest in a property known as Beckton Arms, Beckton Road, London E16 1PY (the "Property"). On 10 December 2020 Mann J granted the Appellant, Valbonne Estates Limited ("Valbonne") a pre-action injunction on a without notice basis, restraining the First Respondent, Cityvalue Estates Limited ("Cityvalue") from selling, disposing of, encumbering or otherwise dealing with the Property, restraining the Second Respondent, United Homes Limited ("UHL") from acquiring any interest in the Property, and restraining both Respondents from registering any dealing with the Property.

3. On the return day before Bacon J on 18 and 19 February 2021, Valbonne sought the continuation of the injunction to trial. Cityvalue and UHL, on the other hand, sought to have the injunction set aside on the basis of material breaches of the duty of full and frank disclosure at the without notice hearing before Mann J. Valbonne submitted that even if it were set aside, nevertheless, the injunction should be re-granted, either on an interim or a final basis.

4. The judge held that there had been a material breach of Valbonne's obligation to provide full and frank disclosure to the court in its application for a without notice injunction in relation to four matters which she described as "substantial" and which, if properly disclosed, "might well have affected the outcome of the hearing in a material way": ([66]). The judge discharged Mann J's order and refused to re-impose the injunction. The citation for her judgment is [2021] EWHC 544 (Ch).

5. Having heard argument from Mr Blaker QC on behalf of Valbonne, we announced that the appeal would be dismissed with reasons to follow. These are my reasons for joining in that decision.

Permission to Appeal

6. Valbonne sought permission to appeal both against the judge's decision that there had been serious material non-disclosure and in relation to her refusal to grant further injunctive relief. By an order dated 26 April 2021, Arnold LJ refused permission to appeal in relation to the fifteen grounds which related to the judge's decision on non-disclosure on the basis that they were factual determinations which the judge was entitled to reach on the basis of the evidence before her. He granted permission to appeal, nevertheless, in relation to grounds 16 – 26 which go to the exercise of the judge's discretion not to re-impose an injunction.

7. Before turning to the issues relevant to the appeal and the context in which the judge exercised her discretion to refuse to re-grant injunctive relief, it is important to have a grasp of the underlying factual background to the dispute.

Background

8. The full details of the background to this matter are to be found at [4] – [26] of the judgment. Reference should be made to those paragraphs. What follows is merely a summary of the relevant facts.

9. Valbonne and Cityvalue are both companies owned by members of the ultra-orthodox Jewish community in North London. The leasehold interest in the Property was until at least November 2020 owned by Cityvalue. In January 2015 Valbonne and Cityvalue exchanged contracts for the purchase of the Property by Valbonne for a sum of £495,000, with a completion date of 27 February 2015. One of the conditions for completion was that consent to the assignment should be obtained from the freeholder. As a result of difficulties in obtaining that consent the purchase was not completed. A dispute then arose as to whether the contract had been rescinded. The dispute remained unresolved, when in August 2015, Valbonne registered a Unilateral Notice on the title of the Property, which provided notice that there was a contract for sale between Valbonne and Cityvalue.

10. In 2018, Valbonne and Cityvalue agreed that the dispute would be subject to arbitration before the Beth Din of the Union of Orthodox Hebrew Congregations (the "Beth Din"). Meanwhile it appears that in 2017, Cityvalue entered into an option agreement with UHL (a non-Jewish buyer) giving the latter an option to purchase the Property for over £2 million. Valbonne discovered this in 2019 during the course of the Beth Din arbitration process.

11. On 1 October 2020 the Beth Din decided that Valbonne was entitled to complete the purchase; that it had to provide the completion funds within 28 days; and that Cityvalue was then to transfer the property to Valbonne. The decision was provided in writing to the parties in Hebrew and was subsequently translated into English. It has been referred to as the "First Award".

12. The funds were not transferred by Valbonne within the 28 day deadline, and on 19 November 2020 there was a further hearing of the Beth Din. That hearing resulted in an oral decision which was not put into writing. It has been referred to as the "Second Award". The Second Award purported to decide that Valbonne should pay over to the Beth Din the sum of £500,000 by way of completion funds for the purchase of the Property, following which Cityvalue was required to provide Valbonne with a TR1 transferring the Property to it.

13. Cityvalue failed to disclose to the Beth Din that it had in fact already signed a TR1 form on 4 November 2020 transferring, or purporting to transfer, the property to UHL. Notwithstanding that signed TR1, on 20 November 2020 the solicitors for Cityvalue wrote to the solicitors for Valbonne saying "My client has informed me that your client must first send the deposit to the Beth Din and he will then honor his obligations". On 23 November 2020, Valbonne duly deposited the £500,000 completion funds with the Beth Din. No TR1 was forthcoming from Cityvalue, however; instead there was then an exchange of emails between the respective solicitors for the parties as to the conditions under which the completion funds would be released to Cityvalue.

14. Valbonne having been informed on 29 November 2020 that the Beth Din had learned that Cityvalue had purportedly transferred the property to UHL and had signed a TR1 making that transfer, on 30 November 2020, solicitors for Valbonne requested the

urgent return of the completion funds from the Beth Din. Those funds were returned to them on 1 December 2020.

15. The Beth Din then issued a further written decision on 3 December 2020 which has been referred to as the "Third Award". The Third Award was in Hebrew and was subsequently translated into English. It recorded that Cityvalue had informed the Beth Din that a TR1 had been signed in favour of a non-Jewish buyer, and that the Beth Din therefore did not have the power to enforce "anything in this matter". The Beth Din therefore stated that Valbonne could bring proceedings against both UHL and Cityvalue in the secular courts, but that any claim for damages against Cityvalue had to be pursued in the Beth Din.

The Without Notice Application

16. On 10 December 2020, Valbonne filed an application notice seeking a without notice interim injunction against both Cityvalue and UHL, restraining their dealings with the Property. The hearing took place before Mann J at 4.30pm that day. Cityvalue and UHL were notified of the hearing but did not attend.

17. In support of the application, Valbonne adduced a witness statement from Mr Halpert, a director of Valbonne, dated 10 December 2020. He stated that Valbonne had sought amendments to the First Award, including a two-month extension of time for completion, but he did not disclose the existence of the Second or Third Award. He also stated that to the best of Valbonne's knowledge, the sale of the Property to UHL had not occurred. His statement exhibited a translation of the Beth Din arbitration agreement, but not of the First Award.

18. In the skeleton argument for the application filed by Valbonne's counsel at the time, it was stated that although the proposed sale could take place at any time, the Property was owned by Cityvalue, and Valbonne was unaware of any argument to the contrary (other than a point on the signatory of the arbitration agreement which is not relevant to this appeal).

19. Valbonne's note of the hearing records that in response to a query from Mann J about whether Valbonne had the funds to complete the sale, counsel for Valbonne indicated that the Beth Din had provided a second award which had amended the First Award, giving Valbonne unlimited time to complete the purchase of the Property provided it had deposited the completion funds with the Beth Din which it had done. The judge required an undertaking that this be recorded in a witness statement to be served on the Respondents.

20. Valbonne's hearing note records the judgment of Mann J as follows:

> "This is an application made by claimant for injunction restraining D1 from selling the Property and restraining D2 acquiring any interest in that property. Basis of claim is contract and C has decision from BD that contract should be enforced. The award provides that the Property should be conveyed when the specified purchase price has been paid to the BD and I am told that has been done. In the circumstances and reasons given by Mr Hope in his skeleton argument I believe serious question to be

> tried, if not a strong claim in this case, and all conditions of American Cyanamid are fulfilled."

21. In short, Mann J's order provided that until the return day (which at that stage was envisaged to be 16 December 2020): Cityvalue must not sell, dispose of, encumber or otherwise deal with the Property; UHL must not acquire any interest in the Property; and both Cityvalue and UHL must not "in the event that any sale, disposition, encumbrance or other dealing of the Property has taken place which could be registered at the Land Registry, take any steps to register the same."

22. In fact, unknown to Valbonne at the time, a TR1 form in relation to the transaction between Cityvalue and UHL, had been filed at the Land Registry on 10 December 2020, the very day upon which the without notice interim injunction was obtained.

23. As required by Mann J, Valbonne's solicitor, at that time a Mr Silver, signed a witness statement later on 10 December 2020, and filed it with the court. This described the Second Award, which he asserted had been made on 30 November 2020, in the following way:

> "2.2 In addition to the translated decision of the Beth Din dated 1 October 2020 there has been a subsequent award made by the Beth Din Tribunal dated 30 November 2020 which can be seen at pages 3–4 of exhibit SS1.
>
> 2.3 The decision provides that
>
> > 2.3.1 The Claimant deposit £500,000 with the Beth Din to be held in accordance with the provisions of their decision;
> >
> > 2.3.2 The [first] Defendant is ordered to transfer the property to the Claimant forthwith;
> >
> > 2.3.3 The completion monies will be held by the Beth Din with the full amount to be released to the [first] Defendant upon successful completion of registration of the transfer;
> >
> > 2.3.4 The Defendant immediately instruct a named solicitor to communicate with the London Borough of Newham to assist in obtaining consent to the transfer; and
> >
> > 2.3.5 That this award of 30 November 2020 replaces the previous award dated 1 October 2020.
>
> 2.4 The Claimant deposited the requisite sum of £500,000 with the Beth Din in accordance with this decision.
>
> 2.5 The award of 1 October 2020 required that the parties '*conclude the purchase within 28 days from the date of signing [that] judgment*'.
>
> 2.6 However, as the 30 November 2020 decision supersedes and replaces the 1 October 2020 decision there is no longer a time limit imposed upon completion of the transaction for the transfer to the Applicant to take place and therefore consideration of any such timeframe is no longer an issue for the Court."

24. Mr Silver's statement exhibited two documents purporting to be translations of the First Award (headed "Decision") and the Second Award (headed "Final Award"). The latter set out the terms of the Second Award in the following terms:

> "1. The Claimant is ordered to deposit with the Beth Din the sum of £500,000.00 ("the Completion Sum"), being the total amount due from the Claimant to the Defendant for the Property, to be held by the Beth Din in accordance with the provisions of this Award.
>
> 2. The Defendant is ordered to transfer the Property to the Claimant forthwith, by instructing solicitors and procure that they provide a duly executed TR1 to the Claimant's solicitors.
>
> 3. The Completion Sum will be held by the Beth Din on terms that the full amount will be released to the defendant upon successful completion of registration of the transfer of the Property to the Claimant at HM Land Registry.
>
> 4. The Defendant is ordered to immediately instruct Mr Jonathan Zeckler of Taylor Rose TTKW Ltd to write to the solicitors acting for the London Borough of Newham to confirm that the Defendant has transferred the Property to the Claimant, and to ask the Council's solicitors to liaise with the Claimant's solicitors in obtaining the council's consent to the transfer of the Property. A draft of the email/letter of instructions to Mr Zeckler is first to be seen and approved by the Beth Din.
>
> 5. This Award shall replace the previous (Hebrew-language) award of the Beth Din dated 01 October 2020 ("the Previous Award"). For the avoidance of any doubt, the time limit for compliance imposed on the Claimant by the Previous Award is dispensed with, and the Beth Din now acknowledges receipt of the Completion Sum from the Claimant."

25. The following day, 11 December 2020, Valbonne issued a claim form against Cityvalue seeking enforcement of the First Award "as amended on 2 November 2020". UHL was not named as a defendant and Valbonne did not seek to join them to that claim.

26. On 17 February 2021, the day before the return date, Valbonne issued a separate claim against UHL seeking, amongst other things, a declaration that UHL holds the Property on trust for Valbonne, an order that the sale of the Property dated 4 November 2020 be set aside, equitable compensation (and equitable interest), and/or damages for unlawful means conspiracy or for procuring a breach of contract. This, together with draft Particulars of Claim, was emailed to UHL's solicitors in the morning of 18 February 2021, the hearing in relation to the injunction being due to commence at 2pm.

27. The draft Particulars of Claim contain a passage at paragraphs 61 – 67, headed "Dishonest assistance". In short, those draft paragraphs contain the following assertions: that once Valbonne had exchanged contracts for the purchase of the Property, the Property was held on constructive trust for it; in selling the Property, Cityvalue had acted in breach of that trust; UHL had assisted in that breach of trust and had done so dishonestly being aware of the exchange of contracts, the arbitration proceedings in the Beth Din, the Beth Din's award of 1 October 2020 deciding that Valbonne had a contractual right to purchase the Property, and having attempted unsuccessfully to remove the Unilateral Notice on the Register; and that as a result of

the dishonest assistance UHL holds the Property as a constructive trustee on behalf of Valbonne.

The Judgment and Order

28. When the matter came before Bacon J on the afternoon of 18 February 2021, she was concerned with two issues: (i) whether Valbonne had materially breached its obligation to provide full and frank disclosure to the court in its application for a without notice interim injunction; and (ii) if it had, whether she should nevertheless exercise her discretion to continue the order or if it is discharged, to re-impose it immediately.

(i) Full and Frank Disclosure

29. The judge noted that "[i]t is well established that in an application for a without notice injunction the duty of full and frank disclosure requires the applicant to draw the court's attention to "significant factual, legal and procedural aspects of the case: *Tugushev v Orlov* [2019] EWHC 2013 (Comm) at [7] per Carr J" and stated that in that paragraph, Carr J (as she then was) had set out "13 propositions regarding the nature and depth of the enquiry that has to be made to satisfy that duty, and the circumstances in which an order, once made, will be set aside for material non-disclosure." ([28]). The judge went on as follows:

> "29. The propositions set out by Carr J are not contentious and I do not need to repeat them here. I merely emphasise the following points:
>
> i) Where there has been a material and significant failure by an applicant to give full and frank disclosure, the starting point and the general rule is that the injunction obtained on that basis should be discharged, without renewal. That is for two reasons, as explained by Balcombe LJ in *Brink's Mat v Elcombe* [1988] WLR 1350, at p. 1358. The first is to deprive the wrongdoer of an advantage improperly obtained; the second is to serve as a deterrent to others.
>
> ii) The court nevertheless has a general discretion to continue the order or to grant a fresh injunction, notwithstanding a failure to disclose. That discretion should be exercised sparingly, but the overriding consideration will always be the interests of justice.
>
> iii) The relevant factors to take into account in that regard will include the degree of culpability with regard to non-disclosure, the relative importance to the application of the matters that were not disclosed, and the injustice to the claimant if the order is discharged, although Carr J emphasised that a strong case on the merits will never be a good excuse for a failure to disclose material facts."

30. The judge went on to consider the question of non-disclosure. Valbonne has been refused permission to appeal against this aspect of the judge's decision, but given that the seriousness of Valbonne's non-disclosure is relevant to the judge's exercise of discretion in relation to the continuation or re-grant of injunctive relief, it is necessary to outline the judge's conclusions in this regard, albeit briefly.

31. First, she held that the evidence in relation to the Second Award was "comprehensively inaccurate" and that the purported translation of it, which was exhibited to Mr Silver's

witness statement was a "complete fabrication" ([38]) and that there was no evidence before her that the Second Award, even in oral form, was in the terms set out in Mr Silver's witness statement ([40]). Accordingly, the judge came to what she described as "the inescapable conclusion" that the court had been "seriously misled in what it was told about the Second Award". In this regard, she noted that the substantive claim against Cityvalue "only got off the ground" if the 28-day time limit in the First Award had been formally and validly amended, as Valbonne had contended and that, "[T]he form and content of the Second Award were therefore essential facts in the establishment of a serious issue to be tried for the purposes of the *American Cyanamid* test." ([41]). Furthermore, she did not accept that the inaccuracy of the information given to the court could have been inadvertent or accidental ([42]).

32. Secondly, the judge held that the non-disclosure of the fact that the sum of £500,000 had been returned to Valbonne by the Beth Din before the hearing before Mann J was a "highly material matter to take into account in determining whether to grant the order sought" ([52]) and that the breach of the obligation to make full and frank disclosure in this regard could not be described as inadvertent or accidental ([53]).

33. Thirdly, the judge held that the failure to disclose to Mann J the fact that Valbonne had been told, on 29 November 2020, that the Property had, in fact, already been sold to UHL was "material", that some of the statements made in this regard were "manifestly untrue" and were "seriously and materially misleading." ([56]) and that it was "utterly fanciful to suggest that this fact was immaterial for the purposes of the without notice application" ([57]). She went on as follows:

> "58. Moreover, even if Mr Halpert did genuinely believe that the sale to UHL had not completed, the fact that both he and the Beth Din had been told the contrary was a critically important fact to disclose to the court, since the court would then inevitably have had to enquire whether there was indeed a serious issue to be tried in the claim to enforce the First Award, notwithstanding the Beth Din's own decision that it was unable to enforce that award following the supposed sale to UHL. The court would also have had to consider whether Valbonne's arguments on balance of convenience and the status quo had any merit in those circumstances."

34. Fourthly, the judge held that assertions had been made as to connections between Cityvalue, UHL and others, at the without notice hearing, were without any evidential basis which she also considered to be material ([62] and [63]).

(ii) Exercise of discretion to continue or re-grant the injunction

35. The judge held that she was unable to conclude that there was a sufficiently clear and compelling case of injustice to Valbonne, if the injunction were discharged, such that she should exercise her discretion to continue or to re-grant the injunction that was obtained on the basis of serious and substantial breaches of the duty of full and frank disclosure ([78]). Her reasoning was as follows.

36. First, the judge observed that "as Carr J had noted in *Tugashev* at §7(xi), the court will in principle discharge an order made following a substantial non-disclosure even if the order would still have been made had the relevant matter been brought to its attention

at the without notice hearing." ([66]). She went on to hold that the four instances of non-disclosure and inaccurate representations to which I have referred were ". . .all, in my judgment, substantial matters, all the more so when taken together" and that if the relevant facts had been properly disclosed, they might well have affected the outcome of the hearing before Mann J in a material way which she considered "render[ed] the inaccuracy of the information given to the court at, and immediately following, the without notice hearing in this case all the more serious." She also reiterated that she had rejected the suggestion that the breaches of the duty of full and frank disclosure were inadvertent or accidental and concluded that her starting point had to be the discharge of the injunction. ([66] and [67]).

37. She encapsulated the remaining question before her, as "whether there is such a compelling case of injustice to Valbonne, if the injunction is discharged, that the court should exercise its discretion to continue or re-grant the injunction notwithstanding the serious breaches of the duty of full and frank disclosure that occurred in this case." ([68]). She concluded that there was no such injustice whether in relation to Valbonne's claim against Cityvalue or its prospective claim against UHL ([69]).

38. Regarding the claim against Cityvalue, the judge noted at [70] that the evidence from its solicitor indicated that the sale to UHL had completed on 4 November, the TR1 had been signed on the same date and then had been filed with the Land Registry on 10 December 2020. She went on:

> "70. . . None of that is disputed, in terms, by Valbonne in its evidence. On the face of the evidence, therefore, the sale enjoined by the injunction has taken place and the continuation (or re-grant) of the injunction against Cityvalue will therefore be of no practical effect.

Instead, Mr Blaker QC's response on behalf of Valbonne was to submit that UHL may not have paid the full purchase price: the TR1 in favour of UHL indicated consideration of £1.1m, which was significantly less than the option price of around £2m in UHL and Cityvalue's original option agreement. If that was correct, it was said that the sale had not completed. The judge noted, however, that "the fact that the completion price ultimately paid may have been lower than the price specified in the option agreement [did] not of itself allow an inference to be drawn that completion has not occurred" and that Valbonne did not rely on any other evidence suggesting that completion has not taken place. Having recorded that Cityvalue's counsel had pointed out that there was no evidence that Valbonne had made any enquiries of Cityvalue or UHL in this regard, the judge rejected this submission as "pure speculation" which "[did] not come close to establishing a compelling case of injustice if the injunction is discharged" ([71]).

39. In relation to the claim against UHL, the judge noted at [72] that the same problem (that the sale of the Property had already completed) arose in respect of the aspect of the injunction that prevented UHL acquiring an interest in the Property. However, she went on that even leaving that aside, Valbonne's request for the continuation (or re-grant) of the injunction was "fatally undermined by the fact that the cause of action establishing any proprietary interest of Valbonne in the property remains entirely unclear."

40. She explained that in the without notice hearing (or at least in the undertaking provided immediately thereafter), it was implied that UHL would be a party to its claim against Cityvalue to enforce the Beth Din's decisions; but ultimately that claim had been

brought only against Cityvalue. By the return day, no claim had been served on UHL. All Valbonne had done was issue a very different claim against UHL on the day of the hearing, alleging dishonest assistance in breach of trust. The judge was highly critical of this approach:

> "75. I agree with Mr Levey's submission that this is simply not good enough. More than two months elapsed between the without notice hearing and the return date before me, which gave Valbonne ample time within which to formulate and plead its case against UHL, issue its claim, and serve that upon UHL in good time before the hearing. I have not seen any satisfactory explanation of why this was not done. Mr Blaker's submission that the basis of the claim against UHL was at least set out in his skeleton argument is not an answer to this: the outline of points relevant to the proposed claim against UHL in Mr Blaker's skeleton argument (which was in any event not filed until the afternoon of 15 February 2020) fell far short of what was required to plead a proper claim against UHL."

41. The judge recorded at [76] three further objections made by UHL to the dishonest assistance in breach of trust claim pleaded by Valbonne: there was no evidence of dishonesty by UHL before the court; the facts pleaded in the Particulars are demurrable, as they did not show UHL was dishonest (rather than negligent or innocent); and even if dishonest assistance was established, it would not give rise to a proprietary remedy that would justify continuation of the injunction.

42. At the request of the judge, the parties provided further written submissions following the hearing. In its submissions, Valbonne did not contest UHL's objections in relation to the dishonest assistance claim, but instead submitted that it retained a proprietary interest in the Property on the basis of knowing receipt of property transferred in breach of trust. The judge noted, however, that this was a different case to that pleaded in Valbonne's draft Particulars of Claim, and that no draft amendment reflecting the new case had been produced. She held at [77] that "this serves only to emphasise the absence of any clearly articulated proprietary claim against UHL."

43. In all those circumstances, she refused to continue or to re-grant the injunction which was obtained at the without notice hearing.

Applicable tests

(i) Appeal in relation to the exercise of a discretion

44. The sole issue before us is whether Bacon J's decision not to re-impose injunctive relief having discharged Mann J's order was wrong. That decision was made in the exercise of her discretion. There is no dispute about the test to be applied when determining whether an exercise of judicial discretion should be set aside. We must be satisfied that: "no judge who was properly instructed as to the law with regard to the relevant facts could have reached the relevant conclusion": *Re MTI Trading Systems Ltd* [1998] BCC 400 at 404D-F, per Saville LJ. The test has been expressed in a number of other ways. It is clear that the court may only interfere in the exercise of a discretion where the judge below has "exceeded the generous ambit within which reasonable disagreement is possible": *G v G* [1958] 1 W.L.R. 647 at 652E, per Lord Fraser. It is not for us to

remake the decision and we must bear in mind that "different judges might give different weight to the various factors does not make the decision one which can be overturned": *Clearance Drainage Systems v Miles Smith* [2016] EWCA Civ 1258 at [68], per Sir Terence Etherton MR.

45. Accordingly, it is necessary for Mr Blaker, on behalf of Valbonne, to be able to demonstrate that the judge was wrong in law, failed to take account of relevant matters or took account of irrelevant ones and that she exercised her discretion in a way which no reasonable judge could have done in the circumstances.

(ii) The test in relation to the exercise of discretion to continue or re-grant the injunction

46. In relation to the test to be applied when determining whether an injunction should be continued or re-granted where there has been material non-disclosure, Mr Blaker submitted that the judge did not set out the relevant principles fully enough at [29] and that she misapplied them. He did not go as far as to suggest that the distillation of the principles in *Tugashev v Orlov & Ors* [2019] EWHC 2031 (Comm) at [7], to which the judge referred, were wrong in any way. Furthermore, given that the judge described those principles as not contentious and not in need of being repeated, he accepted that she should be treated as having had them fully in mind and should be taken to have intended to apply them.

47. Those principles set out in the *Tugashev* case, where directly relevant to the judge's decision in relation to the discharge and refusal to re-grant the injunction, are as follows:

> "7. . .
>
> ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;
>
> x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
>
> xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
>
> xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether

> or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
>
> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure. . . . "

48. Nevertheless, Mr Blaker submitted that the judge had failed: to take a broader view and take into account the relevant policy considerations, referred to in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350; to determine whether Valbonne had actually obtained an improper advantage and whether there had been harm to the administration of justice; to follow the paradigm advocated by Christopher Clarke J (as he then was) in *In the Matter of OJSC ANK Yugraneft* [2008] EWHC 2614 (Ch); and looked back too much, therefore, rather than also looking forward to the position of the parties if the injunction was not continued or re-granted. He submitted that she had failed to consider the overall justice of the matter and had erred in over-emphasising Valbonne's culpability for the non-disclosures and as a result had failed to approach the offence and the punishment in a proportionate way. As a result, he submitted that the judge's exercise of discretion fell outside the generous ambit within which reasonable disagreement is possible and that she had failed to take relevant matters into account.

49. He also referred us to *Franses v Al Assad* [2007] BPIR 1233 in which Henderson J (as he then was) discharged a freezing injunction for non-disclosure, imposed indemnity costs and granted a fresh injunction in relation to other property. He accepted in oral submissions, however, that the *Franses* case was merely an example of the application of the correct principles to different facts. On that basis, I shall make no further reference to it.

50. In the *Brink's Mat* case Balcombe LJ described the "two-fold purpose" of the "rule that an ex parte injunction will be discharged if it was obtained without full disclosure" as first, to "deprive the wrongdoer of an advantage improperly obtained" and secondly, to serve as "a deterrent" to ensure that persons who make ex parte applications realise that they have such a duty and the consequences of failing to adhere to it: 1358C-D. The rule was described by Slade LJ at 1359B as "essentially penal". Those principles are reflected in Carr J's distillation at [7xi] of the *Tugashev* case and there is no doubt as to their relevance.

51. In the *Yugraneft* case, Christopher Clarke J set out what he described as a helpful review of the principles applicable in circumstances in which there has been material non-disclosure, in the following terms at [102]:

> ". . .
>
> (1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.

> (2) Notwithstanding that general rule, the Court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.
>
> (6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the Court should therefore have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the Court should take into account all relevant circumstances."

52. Christopher Clarke J went on to note that the question of whether an order should be set aside and, if so, whether it would be renewed in the same or an altered form is "pre-eminently a matter for the Court's discretion" to which "the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant" ([103]). He went on to note (also at [103]) that: "[I]n exercising that discretion the Court, like Janus, looks both backwards and forwards." (This appears to be the foundation of much of Mr Blaker's submissions.)

53. In relation to looking back, Christopher Clarke J stated that the court looks back in order to examine "to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence" and noted that:

> "104. . . The obligation of full disclosure, an obligation owed to the Court itself, exists in order to secure the integrity of the Court's process and to protect the interests of those potentially affected by whatever order the Court is invited to make. The Court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and

> others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him."

54. In relation to looking forward, he stated:

> "105. As to the future, the Court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the Court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.
>
> 106. As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

55. This is another clear and helpful expression of the principles to be applied. It is also a helpful exposition of the way in which a judge may choose to go about the task in hand. The latter is no more than an expression of the way in which the issue can be approached. It neither sets out a mandatory framework for the exercise of discretion in such a case, nor did Christopher Clarke J purport to do so. As Christopher Clarke J himself pointed out at [102(9)] of his judgment, there are no hard and fast rules which must be applied and the court should take into account all relevant circumstances.

56. On more careful analysis, it seems to me, therefore, that there is very little in Mr Blaker's complaint about the test which the judge applied. He does not say that the principles in the *Tugashev* case are wrong and accepts that the judge should be taken to have had them all in mind. He also accepted that a failure to follow precisely the framework in *Yugraneft* is not in itself a misdirection.

57. In fact, Mr Blaker's complaint is that too much emphasis was placed upon the non-disclosure and not enough upon the justice of the matter going forwards. He also says that various matters were omitted altogether from the judge's reasoning or were wrong in law. With this in mind, I move on to the application of the relevant test to the facts and the judge's exercise of discretion.

Application of the relevant test to the facts

58. Valbonne's challenge to the judge's exercise of discretion has a number of strands. It is said that: she did not deal with the question of whether there had been completion of the sale of the Property to UHL in accordance with the relevant law and therefore, was

wrong, merely to conclude that it was a matter of Valbonne's speculation whether completion had, in fact, taken place; she erred in law in the way in which she dealt with whether the Property is held on a constructive trust for Valbonne, whether Valbonne has a claim to a proprietary interest in the Property and took a narrow view of the pleadings despite the fact that there was a serious issue to be tried in this regard; she should not have been influenced in the way she was by the issue of proceedings against UHL and the provision of draft Particulars of Claim shortly before the hearing and should have dealt with the issue by way of costs only; and that she considered the issue of completion and the proprietary interest in too much detail for the purposes of an interlocutory hearing.

59. The grounds of appeal and Mr Blaker's skeleton argument also contain reference to the overall justice of the matter and the failure to consider whether the breaches of the obligation to give full and frank disclosure could have been dealt with by the payment of £500,000 into court.

60. In oral submissions, Mr Blaker also submitted that the judge took no account of the allegations of threats of violence made during the Beth Din arbitration process and she failed to take account of the fact that the Second Award had been mentioned before Mann J.

Conclusions

61. In my judgment, the judge was well within the generous ambit of the proper exercise her discretion in this matter and none of Valbonne's challenges come close to being sufficient to surmount the high hurdle necessary to set it aside.

62. First, as Christopher Clarke J pointed out, where there are breaches of the duty of full and fair disclosure on a without notice application, the general rule is that the order should be discharged and the court should refuse to re-grant it. Unsurprisingly, Carr J adopted the same approach at [7] in the *Tugashev* case and the judge reiterated the principle at [29i)] of her judgment. In this case, there were four instances of non-disclosure and inaccurate representations, all of which were in relation to substantial matters which the judge found might well have affected the outcome of the without notice hearing in a material way. Furthermore, she found that they were neither inadvertent or nor accidental. In such circumstances, she was entitled to take as her starting point, that the injunction should be discharged. This cannot be characterised as looking back overly much.

63. Secondly, in that context, and in the light of the judge's finding that the substantive claim against Cityvalue could not get off the ground unless the First Award had been amended in the manner which had been alleged and therefore, the form and content of the Second Award were essential facts in the establishment of a serious issue to be tried ([41]), it seems to me that there is nothing in Mr Blaker's submission that there had been no attempt to take unfair advantage because the Second Award was mentioned before Mann J. Nor is there anything in his submission that the judge failed to take a proportionate view of the breaches and the penalty imposed. The judge found that the evidence in relation to the Second Award was "comprehensively inaccurate" and the purported translation was a "complete fabrication" ([38]). In such circumstances, Mr Blaker's submissions in this regard are hopeless. Both of the policy reasons referred to in the *Brink's Mat* case applied.

64. Thirdly, the same is true of Mr Blaker's complaint that the judge makes no mention of the offer to pay £500,000 into court or of the possibility that the breaches of the obligation to make full and frank disclosure might in some circumstances, be dealt with by an award in costs. Although the judge might have referred to them as a matter of completeness, in the light of her evaluation of the seriousness and significance of the breaches and her consideration of whether there was a compelling case of injustice if the injunction was discharged and not re-granted, it seems to me that she was entitled to proceed as she did in the proper exercise of her discretion. The fact that she did not mention those alternatives, does not lead to the conclusion that she failed to take account of something relevant or that the exercise of her discretion, based upon all relevant matters, was not within the generous ambit afforded to her.

65. Fourthly, in my judgment, when considering whether injustice would be suffered if the injunction was not continued or re-granted, the judge was equally entitled to take the view she did in relation to whether the sale of the Property by Cityvalue to UHL had been completed. At the hearing before her, there was no evidence in relation to the purchase monies which had actually been paid. Mr Blaker was merely able to draw attention to the difference between the purchase price in the option agreement and the transfer. In the circumstances, the judge was entitled to conclude that the question of whether the full purchase price had been paid, was a matter of speculation and that Valbonne's submissions in that regard, did not come close to establishing a compelling case of injustice if the injunction were discharged.

66. In any event, the judge was entitled to conclude as she did at [70], namely that the evidence before her showed that the sale of the Property by Cityvalue to UHL had been completed in the sense that the TR1 had been filed with the Land Registry on 10 December 2020. Accordingly, on the face of it, the transfer had taken place and therefore, the continuation or re-grant of the injunction against Cityvalue in the terms which had been granted by Mann J (which was what was being sought and which, amongst other things, prevented Cityvalue from selling, disposing of, or otherwise dealing with the Property) was "of no practical effect." The issue in relation to the completion monies was, therefore, beside the point.

67. As the judge pointed out at [72], in the light of the TR1 having been filed, the same was true in relation to the continuation of the same relief against UHL, to the extent that the order prohibited it from acquiring any interest in the Property or filing documents with the Land Registry.

68. Furthermore, in relation to UHL, in my judgment, the judge was also entitled to take into account that Valbonne's claim to a proprietary interest in the Property remained unclear.

69. First in this regard, there is nothing in Mr Blaker's submission that the judge failed to apply the correct test in relation to the Valbonne's claim to a proprietary interest. There is nothing to suggest that the judge sought to determine that issue or to address it in a way which would be inappropriate at the interlocutory stage.

70. Secondly, in my judgment, the judge was entitled to take into account the changing nature of the proprietary claim and the fact that it had not been pleaded by the time the matter came before her. The case as pleaded in the draft Particulars of Claim was one of dishonest assistance in a breach of trust for which there is a personal remedy (rather

than knowing receipt of trust property in breach of trust which is the basis for a proprietary claim). Although the essence of the proprietary claim was in the draft, it was not articulated in that way. Despite seeking to re-characterise the claim in the written submissions provided following the hearing before Bacon J, no amendments were made to the draft pleading. I do not consider that the judge's approach was one of form over substance as Mr Blaker would have it. She was fully entitled to take into account the fact that there was no pleaded proprietary claim before her and to treat it as a factor in the exercise of her discretion as she did.

71. I do not consider that the displeasure in relation to the way in which the proceedings against UHL were issued at the last minute and very late receipt of draft Particulars of Claim which the judge expressed at [75], affects that conclusion.

72. Lastly, Mr Blaker drew attention to the failure of the judge to mention the fact that it was alleged that threats and possibly threats of violence had been made during the arbitration process when considering whether there was a compelling case of injustice. It seems to me that such threats were not directly relevant to the question which the judge had to decide and her failure to mention them does not affect her decision.

73. Therefore, in my judgment, there are no grounds which would justify us interfering with the judge's exercise of discretion. As Sir Terence Etherton MR pointed out in the *Clearance Drainage* case, the fact that different judges might give different weight to the various factors relevant to an exercise of discretion does not make the decision one which can be overturned. Her decision is unimpeachable. She took account of all relevant matters, was not misdirected in the law and exercised her judgment within the generous ambit afforded to her.

74. In the circumstances, it is not necessary to address the matters referred to in the Respondent's Notice.

75. It was for all these reasons that I joined in the decision to dismiss the appeal.

Sir Timothy Lloyd:

76. I agree.

Lord Justice Lewison:

77. I also agree.