Neutral Citation Number: [2016] EWHC 818 (Ch)

Case No: HC 2015 002414

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 14/04/2016

Before :

MR D HALPERN QC
(SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

Between :

(1) DINGLIS PROPERTIES LIMITED **(2) GATEMARK LIMITED (A company incorporated under the laws of Cyprus)**	**Claimants/ Respondents**
- and -	
(1) DINGLIS MANAGEMENT LIMITED **(2) PAUL DINGLIS** **(3) CHERYL CONRAD-JOYCE** **(4) EAGLE SHAREHOLDINGS LIMITED**	**Defendants/ Applicants**

Mr David Peters and Ms Pia Dutton (instructed by **Stephenson Harwood LLP**) for the **Applicants**
Mr Mark Hubbard (instructed by **Howard Kennedy LLP**) for the **Respondents**

Hearing dates: 6th and 7th April 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR D HALPERN QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

Mr D Halpern QC :

1. The Defendants have applied to discharge a freezing order on the grounds (i) that there is no solid evidence of a risk that they will dissipate their assets and (ii) that it was obtained in breach of the Claimants' duty of full and fair disclosure.

The underlying facts

2. The underlying dispute is particularly unfortunate, since it arises out of a complete breakdown in relations between Mr Andreas Dinglis ("Andreas") and two of his children. Without intending any disrespect, I shall refer to the members of the family by their first names. Although the facts are complicated and the bundles prepared for this hearing amount to more than 1600 pages, the facts which are directly relevant to this application lie within a much narrower compass.

The persons and companies concerned

3. Andreas was formerly married to Iris. There are two children of that marriage, who are the Second and Third Defendants ("Paul" and "Cheryl"). There are ongoing proceedings for ancillary relief by Iris against Andreas.

4. It is common ground that the Dinglis family has built up a substantial business of owning and renting out properties, which is conducted through various companies. One of these companies is the First Claimant ("DPL"). Andreas currently holds 76% of the shares in DPL, with 12% held by Paul and the remaining 12% held by the Fourth Defendant ("Eagle"), a company wholly owned by Cheryl. Andreas is a director of DPL and effectively controls it. Proceedings under section 994 of the Companies Act 2006 have been intimated by Paul and Eagle but not yet commenced.

5. The Second Claimant ("Gatemark") is another property-owning company. Gatemark is wholly owned by Andreas.

6. A third property-owning company, which is not a party to the proceedings, is Dinglis Estates Ltd ("DEL"). Andreas holds 52% of the shares in DEL, but subject to an order in the Family Division requiring him to transfer them to Iris. The remaining shares are held by Paul and Eagle equally.

7. The First Defendant ("DML") is another company forming part of the Dinglis property business, but its role is hotly contested. The Claimants allege that it is a property management company which acts as their agent and has a duty to account for all rents received from tenants, subject to retaining a reasonable management fee which they say is 4% in acting for DPL and 5% in acting for Gatemark. I am told that DML has in fact granted tenancies in its own name, even though it does not in every case have the benefit of a head lease which is at least one day longer than the tenancy which it has granted or purported to grant. In contrast, the Defendants' case is that there is a much looser arrangement within the family under which all expenses incurred by DPL or Gatemark

are reimbursed by DML but any surplus profit is retained by DML as a source of income for Paul and Cheryl, who I was told are the only shareholders.

The proceedings

8. The Particulars of Claim contain the following claims:

   (1) Against DML for failure to account for rents properly due to the Claimants;

   (2) Against Paul and Cheryl (i) for breach of their duties as directors of DPL and (ii) for knowing receipt of sums for which DML should have accounted to DPL; and

   (3) Against Eagle for repayment of moneys owed to DPL.

   The claim for knowing receipt is the closest that the pleadings go towards an allegation of dishonesty. The breaches of directors' duties are put on the basis of "knew or ought to have known", which is not a plea of dishonesty.

9. On 10th July 2015 the Claimants made a "without notice" application to Asplin J for a freezing order. The principal evidence was from Andreas, who verified the Particulars of Claim and added that the pleaded facts showed that the Defendants were acting dishonestly. He also referred to evidence which, he said, showed that that the Defendants had actually dissipated their assets by making certain payments in breach of duty (these are payments falling outside the ambit of the Particulars of Claim). Asplin J imposed a freezing order ("the Order") in respect of dealings which reduced the Defendants' assets below £4 million.

10. The Defendants issued their application to discharge the Order on 13th November 2015. The Defendants have an explanation for the delay, which is not entirely accepted by the Claimants. However, after some persuasion from me, both counsel accepted that the delay in making the application and the reasons for that delay were unlikely to make a material difference to the outcome of this hearing; accordingly I say nothing further about these matters.

11. The Defendants accept, for the purpose of this application, that the Claimants have a good arguable claim as pleaded in their Particulars of Claim, i.e. one with a real prospect of success. One of the issues before me is as to the effect of that admission.

Is there a risk of dissipation?

The law

12. In *Thane Investments v. Tomlinson* [2003] EWCA Civ 1272 at [21] Peter Gibson LJ said:

> "It is clear on the authorities that what the court must be satisfied about before making such an order is that the applicant for the order has a good, arguable case, that there is a real risk that judgment would go unsatisfied by reason of the disposal by

> the defendant of his assets, unless he is restrained by the court from disposing of them, and that it would be just and convenient in all the circumstances to grant the freezing order. It is important that there should be solid evidence adduced to the court of the likelihood of dissipation."

It was agreed between the parties that the "likelihood" of dissipation means the risk, not the probability, and that the risk must be real, rather than fanciful, but if it is not much above the level of being fanciful, that will be relevant to the exercise of the court's discretion.

13. Mr David Peters, who appeared with Ms Pia Dutton for the Defendants, submitted as follows:

    (1) Dissipation of assets is relevant only if (i) it is dissipation otherwise than in the ordinary course of business and (ii) if it has the effect of reducing the assets below the minimum limit set by the court (in this case, £4 million).

    (2) The claimant has to show that the defendant has both the propensity to dissipate assets and the ability to do so. (I use the term "claimant" with a small "c" to mean the party seeking the freezing order.)

    (3) Propensity may be established by evidence of (i) actual dissipation and/or (ii) dishonest conduct, but it is not sufficient simply to assert dishonest conduct without showing that the claimant is the sort of person who is likely to dissipate his assets.

    (4) Ability is established by showing that the defendant's assets are the kind of assets which are capable of being dissipated.

14. This formulation was agreed on behalf of the Claimants, and I accept it. However, there was a dispute of law as to the consequence of the Defendants' acceptance that the Claimants have a good arguable case. Mr Peters initially submitted that the pleadings were sovereign, that the Claimants should be confined to their pleaded case which did not allege fraud, and hence that they were precluded from deploying the allegations in the pleadings as evidence of a propensity to dissipate. However, he rightly withdrew this submission when his attention was drawn to *The Lord Chancellor v. Blavo* [2016] EWHC 126 (QB) at [34]. In that case Garnham J concluded that there was a real risk that the defendant would dissipate his assets, even though the pleaded allegation was simple breach of contract.

15. Conversely, Mr Mark Hubbard, who appeared for the Claimants, submitted that the Defendants, having accepted that there was a good arguable case on the allegations in the Particulars of Claim, must also be taken to have accepted that these allegations provided the necessary solid evidence of propensity to dissipate. I consider that there are two flaws in this approach:

    (1) It assumes that the pleaded facts are sufficient, not only to establish breach of duty, but also to establish dishonesty; and

    (2) It assumes that there are no countervailing considerations which might negative the alleged propensity to dissipate.

16. In my judgment the consequence of the Defendants' admission that the Claimants have a good arguable case on the merits is as follows:

(1) I start with the three basic matters of which any claimant must satisfy the court when seeking a freezing order, viz:

(a) Is there a good arguable case on the merits?

(b) Is there a risk that, unless he is restrained, the defendant will dissipate his assets by reducing them, otherwise than in the ordinary course of business, below the financial limit fixed by the court?

(c) Is it just and convenient to make the order?

(2) Where, as here, the claimant must prove at trial that the defendant committed a simple breach of duty which is not dependent on dishonesty, it is unnecessary to plead dishonesty in order to succeed at trial. This was also the position in *Blavo*.

(3) In this case the Defendants have conceded that there is a good arguable case on the merits. If the proper inference to be drawn from the pleaded facts alone is that the Defendants' breach of duty was dishonest, then that inference is itself capable of providing evidence of a propensity to dissipate. In that sense the pleaded facts are capable of doing double duty, in showing both a good arguable case and a propensity to dissipate. However, if the pleaded facts are consistent with a breach of duty which might be either innocent or dishonest then, in order to show a propensity to dissipate, the claimants will need further evidence, which is open to them to adduce.

(4) Even if the pleaded facts (or the pleaded facts as bolstered by other evidence) are sufficient to support an inference of dishonesty, that is not the end of the matter. The court will look at any other relevant evidence in order to see whether it rebuts that inference.

(5) The claimant must also establish that the defendant's assets are the kind of assets which are capable of being dissipated.

Is there evidence of actual dissipation?

17. At the hearing before Asplin J, the Claimants relied on evidence of actual dissipation. However, in his submissions at this hearing, Mr Hubbard conceded that there is in fact no evidence of actual dissipation. Accordingly, one of the major planks of the case as presented to Asplin J has fallen away, and I have to consider whether the remaining evidence is sufficient to show a propensity to dissipate. I shall return to the issue of actual dissipation when considering non-disclosure.

Is there evidence of a propensity to dissipate?

18. The Claimants rely primarily on their pleaded case as showing a propensity to dissipate. The evidence from Andreas attaches the label of dishonesty to these pleaded facts but does not add significant additional evidence of dishonesty.

19. Mr Peters made two submissions. Firstly, he pointed to the detailed Defence which the Defendants have served, as well as to their detailed Reply to a Request for Further Information, and he forensically expressed astonishment that the Claimants had not thought fit to answer these pleadings in a Reply. However, it is trite law that a claimant is deemed to join issue with every allegation in the defence and hence has no need to serve a reply unless he wishes to rely on additional facts or matters. It would be inappropriate to expect the court at this interim hearing to form any assessment of the strength of the Defence, particularly given the Defendants' concession that the case is a good arguable one. Nevertheless, I do accept his submission to this extent: (i) the Defendants have not conceded that the pleaded case is actually true, as opposed to being a good arguable one and (ii) they have not conceded that the pleaded facts alone are sufficient to establish dishonesty.

20. Secondly, Mr Peters relied on the Defendants' conduct to date as rebutting any inference of dishonesty. The parties have been at war with each other since 2012, but he said that the Defendants have never taken any steps to dissipate their assets. The corporate structure remains as transparent as it was before 2012, and no steps have been taken to move assets offshore. The Claimants' case before Asplin J was that the Defendants had actually dissipated their assets following receipt of the letter before action. Now that it can be seen that there was no actual dissipation, the point goes the other way: the Defendants did not dissipate their assets in response to the letter before action, and this is evidence that they have no such intention.

21. Mr Hubbard did not dispute the submission made by Mr Peters but instead submitted that the Defendants had refused to give disclosure of their assets at any time before the Order and hence that it was impossible to know whether the snapshot provided by their affidavits of disclosure represented a stable picture. I regard this as smacking of a fishing enquiry made in the hope that something might turn up; it does not answer the submission made by Mr Peters.

22. In my judgment the case for showing propensity to dissipate is very considerably weakened by the removal of any evidence of actual dissipation. I accept that there remains some basis in the pleadings for alleging a propensity, although I doubt whether it would have been sufficient if it had stood alone and not been rebutted. However, I do not need to decide that issue, since I am satisfied that any inference which might be drawn is rebutted by the evidence of the Defendants' conduct since 2012. I therefore conclude that there is insufficient evidence of a propensity to dissipate assets.

Is there evidence of an ability to dissipate?

23. The conclusion I have reached as regards propensity is sufficient to require the discharge of the Order, but for the sake of completeness I shall also address the question of ability to dissipate.

24. The Defendants' assets include the 12% shareholdings in DPL held by each of Paul and Eagle. The last filed accounts of DPL show net assets exceeding £23 million. Mr Hubbard informed Asplin J that DPL's financial position had not changed since those accounts. On this basis, the value of the shareholdings of each of Paul and Eagle is at least £2.8 million. This makes a total of £5.6 million, which is considerably above the limit of £4 million stated in the Order.

25. Mr Peters submitted that it was fanciful to suggest that these assets could be dissipated without the knowledge or consent of Andreas as the director and majority shareholder in DPL. Mr Hubbard accepted that no transfer of the shares could be completed without registration on DPL's share register but he submitted that there was a real risk that the Defendants might enter into some equitable dealing falling short of a registered transfer.

26. As Mr Peters said in answer, the only cause for concern would be in the event of a dealing in good faith and at arms' length. Although I regard it as fanciful to suggest that any third party acting bona fide would purchase this minority shareholding in a family company which is afflicted by internal strife, I can just about conceive that a bank or other lender might take the shares as a makeweight additional security for a loan, though not as principal security. However, that is not the end of the enquiry. The value of a share lies in the shareholder's right (i) to receive dividends, (ii) to receive capital on a winding-up and/or (iii) to vote at general meetings. In practice, even if Paul were to encumber his shares with a charge to a third party, it is difficult to see how that third party could strip the economic value out of these shares, given that (i) DPL is most unlikely to declare a dividend from which Paul will receive any money, since it claims that he owes it substantial sums; (ii) the only likely route by which Paul will acquire capital is via the minority shareholders' petition which he has not yet presented; if such petition is brought and succeeds, that will be the time (if at all) to consider whether there is a risk of dissipation of the capital value of DPL; and (iii) Andreas retains 76% of the shares which is sufficient to block a special resolution. I therefore conclude that in practice Paul does not have the ability to dissipate the economic value of his shareholding.

27. The same considerations largely apply to Eagle's 12% shareholding in DPL. One difference in the case of Eagle is that, absent the Order, there would be no legal impediment to Cheryl completing a transfer of her 100% shareholding in Eagle to a third party. Nevertheless, for the reasons given above, I am satisfied that Cheryl does not have the ability to dissipate the economic value of Eagle's shareholding in DPL.

28. Additionally, Paul and Eagle each own 24% of the shares in DEL. Moor J, in the Family proceedings, recently valued DEL at over £13 million. The position in relation to DEL is slightly different from that of DPL, both because Andreas's shareholding is only 52% and because it is intended that his shares will be transferred to Iris. However, I do not need to consider the DEL shares in detail, nor the other properties and assets owned by the Defendants, since I have already concluded that their shareholdings in DPL are sufficient to satisfy me that there is no real risk of dissipation to a figure below the level of £4 million. I merely note that these further assets provide additional comfort.

Did the Defendants breach their duty of disclosure?

29. I intend to deal with this issue with a broad brush for two reasons. Firstly, I have already decided that the Order should be discharged on the ground that there is no sufficient risk of dissipation. The issue of non-disclosure does not arise unless that conclusion is wrong. Secondly, I am directed by the Court of Appeal to deal with this issue concisely. In *Kazakhstan Kagazy plc v. Arip* [2014] EWCA Civ 381 at [36] the Court of Appeal approved the following statement by Toulson J in *Crown Resources AG v. Vinogradsky* (unreported, 15th June 2001):

> "...issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself.
>
> Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion.
>
> I would add that the more complex the case, the more fertile is the ground for A raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees.
>
> In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion."

30. The wisdom of this approach is clear in a case such as the present, which in my experience is not untypical. On the one hand, Andreas appears to have convinced himself that everything which the Defendants do in relation to the family business is motivated by dishonesty. His original affidavit is littered with allegations of dishonesty, although the factual basis does not go much beyond the bald facts pleaded in the Particulars of Claim, except for the allegations of actual dissipation which have now been shown to be unfounded. On the other hand, the Defendants appear to have convinced themselves that Andreas is motivated by dishonesty and that anything which he should have disclosed, but failed to do so, was the result of a deliberate and dishonest breach of his duty to the court. It may turn out at trial that one side is justified in attributing dishonesty to the other, but it is not possible at this interim stage to reach any such conclusion on the

documents drawn to the court's attention and within the constraints of a two-day hearing, nor is it proportionate to attempt this exercise. The prospect of the court making a finding of dishonesty is rendered still more remote by the order of Judge Keyser QC on 17th March 2016 refusing to permit cross-examination of Andreas. However, these considerations did not deter Mr Peters from submitting that I should make a finding that Andreas dishonestly misled Asplin J.

The law

31. Mr Peters referred me to the following authorities which set out the relevant principles: *Siporex Trade SA v. Comdel Commodities* [1986] 2 Lloyds Rep 428 at 437 (Bingham J); *Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350 at 1356F-1357G *per* Ralph Gibson LJ; and *Arena Corp Ltd v. Schroeder* [2003] EWHC 1089 (Ch) at [213-4] (a decision of Mr Alan Boyle QC which was followed by Christopher Clarke J in *Millhouse Capital UK Ltd v. Sibir Energy plc* [2008] EWHC 2614 (Ch) at [103-4]). I bear in mind all the passages to which I was referred, but I do not set them out in this judgment, for the reasons given above.

32. In the light of these authorities, there are two questions which I have to consider:

    (1) Did the Claimants commit a serious breach of their duty to disclose to Asplin J all facts which they knew or could with reasonable diligence have discovered and which were material to her judgment? The burden of proof is on the Defendants to establish such a breach of duty, and to do so concisely.

    (2) If so, are the Claimants able to persuade the court not to discharge the Order? The burden of proof is on the Claimants.

Did the Claimants commit a serious breach of their duty to disclose facts material to the claim?

33. Mr Peters submitted that a claimant may be found to be in breach of duty, even though the disclosure would have made no difference to the judgment (see *Siporex* at page 437 and *Arena* at [219]). By contrast, Mr Hubbard submitted that it could never be appropriate for a court to investigate alleged non-disclosure of the merits of a claim where the defendant has admitted that the claimant has a good arguable case. In my judgment the correct position lies between these two extremes. I accept that the duty extends to all facts and matters which are material to the court's decision at the "without notice" hearing, even if they are not determinative, and that the jurisdiction to discharge is penal in nature and should take account of the need to protect the administration of justice and to uphold the public interest in requiring full and fair disclosure (*Arena* at [213](3) and (8)). Nevertheless, I also bear in mind that applications to discharge for non-disclosure should be dealt with concisely and that in the present case any non-disclosure of the merits is unlikely to be at the egregious end of the spectrum, given that the Defendants have accepted that the Claimants have a good arguable case.

34. The facts and matters which the Claimants will seek to prove at trial are the same as those on which they relied before Asplin J to establish propensity to dissipate assets (in addition to the evidence of actual dissipation); the same facts and matters were also relevant to the exercise of her discretion whether it was just and convenient to grant the Order. Although the Defendants have conceded a good arguable case, they have not conceded that the facts pleaded are true (as distinct from being well arguable) for the purpose of showing a propensity to dissipate assets.

35. Mr Peters relied on four groups of facts or matters which he says (i) were material, (ii) were known to, or should have been discovered by, the Claimants, and (iii) were not disclosed to Asplin J.

36. (1) His first group was the pleadings and evidence in the proceedings for ancillary relief. He submitted that this material indicates that all concerned, including Andreas, had previously proceeded on the basis that DML was not under a duty to account to DPL. Mr Hubbard submitted that the extracts which Mr Peters showed me had been taken out of context. I am unable to reach any conclusion on this, without embarking on a detailed examination of the evidence in the Family proceedings, which would be inconsistent with Toulson J's guidance (see also *Arip* at [23] and [46] *per* Longmore LJ and [69] and [70] *per* Elias LJ).

37. (2) Mr Peters referred me to a paragraph in Andreas's first affidavit which asserts that DML was intended to provide an income for Paul and Cheryl. He said that this was inconsistent with the Particulars of Claim, which allege that DML should be confined to a reasonable management fee and that a reasonable fee would be 4% or 5%. He pointed out that such a fee would amount to approximately £120,000 a year, which was plainly insufficient to provide the required income for Paul and Cheryl, particularly if DML's general overheads had to be paid out of this money. I agree with Mr Hubbard that this is a forensic point to be made at trial; it is not a matter which needed to be drawn expressly to Asplin J's attention.

38. (3) Mr Peters said that it was counter-intuitive to suggest that Paul and Cheryl would have defrauded DPL, since they both had major shareholdings in DPL and since Paul had given an unlimited guarantee of DPL's liabilities to the Bank of Cyprus. I am not impressed by this as an example of non-disclosure in respect of the merits, since (i) it is a forensic argument to be advanced at trial, not a matter which needed to be disclosed on the "without notice" application and (ii) in any event, there is no pleading of fraud.

39. The argument that Paul and Eagle are major shareholders in DPL did not impress me greatly, since Andreas's shareholding is more than three times the size of Paul's and Eagle's combined. However, I do see the force of the guarantee point in respect of risk of dissipation. Mr Hubbard rightly accepted that disclosure of the guarantee was potentially relevant as tending to rebut any propensity to dissipate. In my judgment it should have been disclosed.

40. (4) The Particulars of Claim allege that DML paid fraudulent invoices purportedly submitted by a non-existent company called GBD Construction Ltd. Mr Peters submitted that Andreas should have disclosed that he had worked, and continued to work, with a Mr Ioannou, who is said in the Defence to have been one of the two men behind GBD. Andreas has admitted that he knows and works with Mr Ioannou, but denies that he knew

anything about any entity with the initials GBD. As with much else in this case, this is a dispute of fact which can only be resolved at trial.

41. I therefore conclude that the Defendants have failed to establish, for the purpose of this interim hearing, that there was serious non-disclosure in relation to the merits. That does not, of course, preclude any of these issues from being fully considered at trial if appropriate.

Did the Claimants commit a serious breach of their duty to disclose facts material to the risk of dissipation?

42. The Claimants' affidavit evidence before Asplin J alleged actual dissipation by DML (i) in paying two sums totalling £250,000 to Apollo Management Ltd ("Apollo") and (ii) in paying 15 sums totalling some £406,000 to various undisclosed payees. (Apollo is another family company on the fringes of these proceedings, but it is not a party.) However, in the light of the extensive evidence filed by the Defendants, the Claimants now accept that there was no actual dissipation as alleged.

43. The Defendants' strongest point on this aspect of the case is that eight of the 15 payments in question were in fact made to the Claimants themselves. There can be no excuse for the Claimants not to have checked their own records before making this wild allegation of dissipation, and Mr Hubbard wisely accepted that there was no excuse. What he did, however, was to seek to downplay this issue by saying that the payments (and, by inference, the only payments) on which the Claimants relied before Asplin J were the Apollo payments. I cannot accept that, since Andreas's affidavit plainly refers to both groups of payments, whilst Mr Hubbard's skeleton for that hearing did not say that he was relying only on the Apollo payments.

44. As with much else in these proceedings, the position in relation to the Apollo payments is rather more complicated. Mr Peters submitted that I should infer that Andreas knew the true position in relation to Apollo, since its bank statements were sent to an address which he used as his own office. However, Andreas has denied that he saw the statements and I am unable to reach any conclusion on this dispute of fact. Mr Peters was on stronger ground when he took me to an email from Andreas to Cheryl dated 13th March 2014 in which Andreas said that he was able to transfer £500,000 into Apollo to enable it to buy a property, and he asked whether Cheryl was able to arrange for DML to transfer to Apollo the balance required for the purchase. The first of the two payments to Apollo was in fact the very thing which he had contemplated in his email. I am satisfied that Andreas should not have jumped to the wild conclusion that the payments by DML to Apollo amounted to dissipation.

Culpability

45. I have concluded that there were at least three matters which were not, but should have been disclosed to Asplin J in relation to the risk of dissipation, viz. (i) that a number of payments by DML to undisclosed parties were in fact payments to the Claimants; (ii) that at least one of the two payments by DML to Apollo was a legitimate payment; and (iii)

that the existence of an unlimited guarantee by Paul of the liabilities of DPL was a factor pointing strongly against any intention to defraud DPL and hence against any propensity on the part of Paul to dissipate assets. The failure to refer to these matters was very serious. In the first place, the Claimants should have realised that it would be wrong to jump to the conclusion that there had been wholesale dishonesty by the Defendants without further investigation. Given that the dispute had been brewing for a long time, the Claimants could have taken more time to investigate before issuing proceedings. Secondly, the case as presented to Asplin J would have looked very different without the evidence of actual dissipation and with evidence rebutting any propensity to defraud DPL.

46. I have no hesitation in rejecting Mr Peters' invitation that I should treat the non-disclosure as deliberate, since I am in no position to make any such finding on the evidence I have seen. However, I am satisfied the non-disclosure was the result of a serious failure by the Claimants, through Andreas, to discharge their duty to make full and fair disclosure as to the risk of dissipation, and that this failure was motivated at least in part by Andreas having convinced himself that anything for which he did not have a ready explanation must be the result of fraud on the part of the Defendants.

Disposition

47. Accordingly I conclude that the Order should be discharged on the ground that there is no serious risk that the Defendants will dissipate their assets below the minimum level of £4 million previously fixed by the court. If I had not been satisfied on this issue, I would have discharged the Order in any event for serious and culpable failure by the Claimants to make full and fair disclosure as to the risk of dissipation. I will hear Counsel as regards costs and any other consequential relief.