BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0307

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED
Claimant/Respondent

-and-

(1) TEMUJIN INTERNATIONAL LIMITED
(2) TEMUJIN SERVICES LIMITED
(3) HAKKISAN FINANCE CORPORATION LIMITED
1st Applicant
(4) MYRZALY LIMITED
2nd Applicant
(5) NORGULF HOLDINGS LIMITED
(6) INCOMEBORTS LIMITED
(7) TIGERKHAN LIMITED
3rd Applicant
Defendants

Appearances:

Mr Andrew Sutcliffe QC of 3 Veralam Buildings, Gray's Inn, London and with him Mr James Drake of 7 King's Bench Walk, London and Mr Andrew Thorp of Harneys Westwood and Riegels for the Claimant/Respondent
Mr David Lord of 3 Stone Buildings, London and with him Mr Richard Evans of Conyers Dill and Pearman for the Third, Fourth and Seventh Defendants/Applicants

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2007: December 13
2008: March 3 and 4
2008: July 31, August 25

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** Litigation between these parties has been on foot for the last 20 months. The skirmish continues. On this occasion, there are two applications to be considered. The first application, made by notice dated 3 August 2007 by the Third Defendant ("Hakkisan") and the Fourth Defendant ("Myrzaly") is:

1. to set aside the orders dated 19 December 2006, 30 January 2007 and 5 February 2007 ("the Freezing Orders"). Alternatively, to vary the Freezing Orders by the substitution of the sum of US$540,000 in the case of Hakkisan and US$95,000 in the case of Myrzaly;

2. to discharge the Orders dated 28 February 2007 and 6 March 2007 appointing Mr William Tacon as the Receiver ("the Receivership Orders");

3. to strike out the Re-Amended Claim Form and Re-Re-Amended Statement of Claim against each of them pursuant to CPR 26.3(1)(b) and/or (c) and/or pursuant to the inherent jurisdiction of the Court and/or summary judgment pursuant to CPR 15.2(a).

[2] The second application, made by notice on 21 September 2007 by the Seventh Defendant ("Tigerkhan") is to strike out the Re-Amended Claim Form and Re-Re-Amended Statement of Claim against it pursuant to CPR 26.3(1)(b) and/or (c) and/or pursuant to the inherent jurisdiction of the court and/or summary judgment pursuant to CPR 15.2(a).

[3] MWP trenchantly opposes the applications. Quintessentially, it submitted that (a) the attempt to strike out or obtain summary judgment is misconceived and doomed to fail since these claims are not capable of being determined on a summary basis and (b) there are no grounds for setting aside the Freezing Orders and the Receivership Orders as they were properly made. Moreover, the fact that Hakkisan and Myrzaly continue to breach the Court's Orders is a sufficient ground for refusing to accede to this part of the first application.

Striking out/Summary Judgment test

[4] Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. The court has two distinct powers to achieve this. One is under CPR 26.1 where the Court can strike out a statement of case

or part of it if it discloses no reasonable grounds for bringing or defending a claim[1]; or where the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.[2] The phrase "discloses no reasonable grounds for bringing or defending a claim" addresses two situations:

1. where the content of a statement of case is defective in that, even if every allegation contained in it were proved, the party whose statement of case it is, cannot succeed; or

2. where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

[5] The other power is under CPR 15. It gives the court the power to enter summary judgment against a claimant or a defendant when that party has no real prospect of succeeding on the claim or defence. Undoubtedly, there is a substantial overlap between the two powers and an application can be made under both rules, as the Applicants have done in the present case.

[6] If a party believes he can show without a trial that an opponent's case has no real prospect of success on the facts, or that his case is bound to succeed or the opponent's fail because of a point of law, he can apply either under CPR 26 or CPR 15 or both as he thinks appropriate. When deciding whether or not to strike out, the court takes into account all the relevant circumstances and "makes a broad judgment after considering the available possibilities".

[7] The court can exercise its powers of summary dismissal of issues either on an application of a party or of its own initiative. Even if the application to strike out fails, the court, may, as part of its management powers, consider the question of summary judgment.[3]

[1] See Part 26.3 (b)
[2] See Part 26.3 (c)
[3] O/Donnell and Others v Charly Holdings Inc and Another (2000) Lawtel, 14 March, CA, unreported.

[8] In **Three Rivers District Council and others v Bank of England (No.3)**[4], Lord Hope explained that the difference between the test for an application for summary judgment and an application to strike out a statement of case is ambiguous. He stated (at page 541, paras 91-92):

> "The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In *Swain's case,* Lord Woolf MR (at 92) explained that the reason for the contrast in language between r 3.4 and r 24.2 is that under r 3.4, unlike r 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In *Monsanto plc v Tilly (1999) Times*, 30 November 1999; Stuart Smith LJ said that r 24.2 gives somewhat wider scope for dismissing an action or defence. In *Taylor's* case he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.
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> The overriding objective of the CPR is to enable the court to deal with cases justly: (see rule 1.1). To adopt the language of art 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS71 (1953); Cmd 8969) (set out in Sch 1 to the Human Rights Act 1998) with which this aim is consistent, the court must ensure that there is a fair trial. It must seek to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule (see r 1.2). **While the difference between the two tests is elusive, in many cases the practical effect will be the same** [emphasis added]. In more difficult and complex cases such as this one, attention to the overriding objective of dealing with the case justly is likely to be more important than a search for the precise meaning of the rule."

[9] Lord Hope then referred to **Swain's** case where Lord Woolf stated that:

> "It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that

[4] [2001] UKHL 16; [2001] 2 All ER 513 (22 March, 2001).

> that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible…."Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily." (See [2001] 1 All ER 91 at 94-95.)

[10] In **Robert Conrich v Ann Van Der Elst**[5] Rawlins J (as he then was) after considering the case of **Biguzzi v. Rank Leisure plc**[6] stated that it is only where a statement of case does not amount to a viable claim or defence, or is beyond cure that the court may strike out. He resonated that the aim of the judicial role in this regard is justice to the parties in all of the circumstances.

[11] So, in an application to strike out a statement of case, the Court is to determine whether the claim is bound to fail and in that regard the court is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim while the test for summary judgment is whether the claim has a reasonable prospect of success.

[12] CPR 15 provides a procedure by which the Court may decide a claim or a particular issue without a trial. CPR 15.2 sets out the grounds for summary judgment. Under that rule, the court has a very salutary power to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. In **Swain v Hillman and another**[7], Lord Woolf MR said that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success." At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials.

[5] AXA HCV 2001/0002, Judgment delivered on 13 February 2003,
[6] [1999] 4 All E. R. 934
[7] [2001] 1 All ER 91 at page 92.

They are simply to enable the Court to dispose of cases where there is no real prospect of success. The Court has to caution itself against the exercise of a preliminary trial of the matter without discovery, oral examination and cross-examination.

[13] In **Boston Life and Annuity Company Limited v Dijon Holdings Limited**[8], the Court, in considering an application for summary judgment cited the elucidating judgment of Judge LJ in **Swain**. At page 96a-c, the learned Lord Justice said:

> "To give summary judgment against a litigant on paper without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion to the court to give summary judgment….If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

[14] Therefore, the Court has to be wary since it is a serious step to give summary judgment. Nonetheless, a claimant cannot be permitted to continue to pursue a claim on a statement of case which has no real prospect of being successful. This is also in keeping with the overriding objective of CPR 2000 to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.[9] If the court does not order summary judgment, it may treat the hearing as a case management conference: CPR15.6. It is on these principles that I will consider the merits of the applications. In order to do so, I will outline some background facts and then proceed to set out the statement of case in full.

Background Facts

[15] The background facts have been well encapsulated by Mr Sutcliffe QC and I gratefully adopt them. MWP is a company incorporated in the British Virgin Islands ("the BVI") and

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[8] BVIHCV2006/0070-per Hariprashad-Charles – judgment delivered on 14 May 2007 [unreported].

[9] See Vijay Kirtlal Mehta v Rajesh Kishor Mehta, BVIHCV2006/0176, BVIHCV2006/0177 and BVIHCV2006/0178 –per Joseph-Olivetti J- judgment delivered on 10 November 2006 [unreported].

carries on the business of providing legal services in the Republic of Kazakhstan, Central Asia, the Caucasus, Russia and the Ukraine. Its Managing Director is Michael Earl Wilson. He is an English Solicitor as well as a Solicitor, Proctor and Attorney in New South Wales and a Barrister and Solicitor in Victoria, Australia. Hakkisan, Myrzaly and Tigerkhan (collectively 'the Applicants") are all companies incorporated in the BVI.

[16] The protagonist in this case is John Forster Emmott, an Australian Solicitor who is also admitted to practise in England and Wales. He was a former partner in the law firm of Richards Butler in London. On 7 January 2002, he joined MWP as a director pursuant to the terms of an agreement in writing dated 7 December 2001 ("the Agreement"). The material terms of the Agreement are set out below:

1. By clause 1.4, MWP and Mr Emmott agreed that MWP would "operate a quasi-partnership between them and the Parties shall have and observe the usual partnership obligations and duties to each other."

2. By clauses 2.2.2, 2.2.3 and 2.13 Mr Emmott was required to devote his full time and attention to developing the practice and business of MWP and to bring/refer to MWP as many of his clients and contacts as was possible.

3. By clause 2.4 he was required to cooperate with MWP and "shall not compete in any manner whatsoever."

[17] On 30 June 2006, in repudiatory breach of the Agreement, Mr Emmott sought to terminate it with immediate effect and purported to resign as a director of MWP. By letter dated 20 July 2006, English solicitors (Fox Williams) accepted, on behalf of MWP, that repudiation and terminated the Agreement.

[18] MWP alleges that whilst Mr Emmott was a director and owed fiduciary obligations and duties in that capacity to MWP, he acted in breach of the express and/or implied terms of the Agreement and/or the fiduciary duties he owed to MWP in the following respects:

1. From the time that he joined MWP, Mr Emmott was disloyal to MWP and sought to and/or did exploit commercial opportunities and/or information available to MWP for the benefit of himself and others.

2. Mr Emmott sought and received secret profits.

3. Mr Emmott exploited commercial opportunities and/or information available to MWP for the benefit of himself and/or others and/or together with Messrs Slater and Nicholls diverted business from MWP, among other things, to two companies set up by them (possibly with others), namely Temujin International Limited ("TIL") and Temujin Services Limited ("TSL").

4. Mr Emmott conspired and combined with Messrs Slater and Nicholls to defraud MWP and to conceal the fraud and the proceeds of the same from MWP.

[19] On 15 December 2006, MWP initiated proceedings in this Court. The Claim was initially made against three Defendants namely: Temujin International Limited, Temujin Services Limited (conveniently called "the Temujin Companies") and Hakkisan. The claim against these Defendants was for an account of the Temujin Companies dealings in the dishonest assistance of the breach of fiduciary duties owed by Messrs Emmott and/or Nicholls and/or Slater. MWP claims that Hakkisan has received property impressed with trusts in favour of MWP otherwise than a bona fide purchaser for value without notice of MWP's interests and accordingly, such property or its traceable proceeds remains the property of MWP and/or Hakkisan is a constructive trustee thereof for MWP (knowing receipt).

[20] On 5 February 2007, MWP filed an Amended Statement of Claim which included Myrzaly. Its claim against Myrzaly and Hakkisan were put as knowing receipt and dishonest/knowing assistance. In respect of the dishonest assistance, MWP claimed that these two companies dishonestly assisted Mr Emmott in his breach of fiduciary and

other duties, and/or in receiving and attempting to retain the proceeds of his breaches and therefore, they are liable as an accessory in equity.

[21] On 30 March 2007, MWP filed another claim also headed Amended Statement of Claim which introduced Tigerkhan as the Seventh Defendant. MWP's claims against the Applicants were pleaded as dishonest/knowing assistance and conspiracy to injure and in addition, the claim for knowing receipt against Hakkisan and Myrzaly. On 3 May 2007, the claim against Tigerkhan was struck out. MWP did not oppose the striking out application. In fact, it acknowledged at the door of the Court that its claim was fatally flawed. However, the Order gave MWP the liberty to join afresh Tigerkhan to the action on condition that the Re-Amended Claim Form is filed and the proposed draft Re-Re-Amended Statement of Claim is provided to the solicitors for Tigerkhan, Conyers Dill and Pearman ("Conyers") by 31 May 2007. Consequent to the 3 May 2007 Order, MWP filed its Re-Amended Statement of Claim on 30 May 2007 with the necessary deletion of the claim against Tigerkhan. The claims against Hakkisan and Myrzaly remained unchanged.

[22] On 31 May 2007, MWP filed the Re-Amended Claim Form and Re-Re-Amended Statement of Claim which are the subject of these applications. For convenience, I will set out salient aspects of the claims as contained in the Re-Re-Amended Statement of Claim.

The Pleadings -Tigerkhan

[23] The pleaded case against Tigerkhan is set out at paragraphs 73 to 78 of the Re-Re-Amended Statement of Claim. MWP claims that:

1. As part of the allocation of shares in Max Petroleum on 5 August 2005, there was an allocation of six million shares to Tigerkhan AG (as it appears on the Max Petroleum register). There is no such entity: there is Tigerkhan and Tigakhan AG. It is MWP's case that the allocation was to Tigerkhan.

2. The US$540,000 of the US$950,000 paid to Mr Emmott was paid by Mr Emmott to Hakkisan and disbursed by Hakkisan in the manner described; in particular, the sum of US$274,672 was paid by Hakkisan to Pendragon in the UK to buy an Aston

Martin for Myrzaly and/or Mr Rigoll. For reasons unknown to MWP, Mr Rigoll and/or Myrzaly have since sold that car back to Pendragon for £100,000 which funds were paid not to Mr Rigoll or Myrzaly but to Tigerkhan on 14 February 2007 (into its account at HSBC Private Bank in St. James, London).

3. Further or alternatively, it is MWP's case that Tigerkhan, acting in concert with Myrzaly (and in particular Mr Risbey) acquired, without consideration, the Max Petroleum shares owned by Myrzaly; and, further, participated and/or assisted in the sham sale of the Myrzaly shares to Mr Juric.

4. It is to be inferred that the sale of Myrzaly to Mr Juric was manufactured so as to give the impression that it took place in December 2006 before the receivership order of this Court when, if it took place at all, it took place in February 2007 in contravention of the Order. It is to be inferred that the real purpose of Myrzaly and Hakkisan and Tigerkhan and Tigakhan AG - all driven by Mr Risbey - was to disguise the proceeds of the fraud on MWP or, put differently, to render Myrzaly and/or Tigerkhan judgment proof.

[24] At paragraph 78, MWP summarizes its claim against Tigerkhan. It alleges:

a) The US$950,000 paid to Mr Emmott and Eagle Point International Limited ("EPIL") was impressed with a trust in favour of MWP. In receiving payments from Hakkisan and/or Myrzaly and/or Mr Risbey from the said US$950,000, Tigerkhan knew at all times that they were dealing with trust property in breach of trust and so acted dishonestly.

b) Further or alternatively, Tigerkhan knowingly received and dealt with trust property (other than a bona fide purchaser for value without notice of MWP's interest) and/or dishonestly assisted Mr Emmott and/or Hakkisan and/or Myrzaly and/or Mr Risbey in breach of trust in that it was at all times a knowing and willing partner of Mr Emmott and/or Hakkisan and/or Myrzaly and/or Mr Risbey in their dealings with trust property.

c) In the premises, such property or its traceable proceeds remain the property of MWP and/or Tigerkhan is a constructive trustee thereof for MWP, and Tigerkhan is liable to account therefore to MWP for equitable compensation.

d) Further or alternatively, Tigerkhan has conspired with Myrzaly and/or Mr Risbey to injure MWP by unlawful means in the fabrication evidence by Myrzaly and/or Mr Risbey with the object of concealing and attempting to render judgment proof the assets of Myrzaly to which MWP might lay claim in equity and is liable therefore for the loss suffered by MWP in respect of same.

[25] The relief sought against Tigerkhan is for (a) an enquiry into and account of the assistance by it in breach of contractual and fiduciary and other duties of Mr Emmott; (b)

an enquiry into what benefits it has received in breach of trust; (c) a declaration that it is liable to account to MWP as a constructive trustee in respect of all benefits so received including without limitation the £100,000 paid to Myrzaly and/or its traceable proceeds; (d) replacement and/or repayment of all such benefits including without limitation the £100,000 together with interest thereon; and/or (e) damages. It appears that the damages relate to the conspiracy claim.

[26] On receiving the amended claim, Conyers wrote an extensive letter to the solicitors for MWP, Harney Westwood and Riegels ("Harneys") requesting that the claim be discontinued as, whilst worded differently, it does not differ substantially from the struck out claim. They alleged that the factual basis of the claim is precisely the same as the old claim and contains no new facts. They say that the only difference seems to be that the case is now put on the basis of knowing receipt rather than dishonest assistance. Tigerkhan says that MWP's claim (based almost entirely on speculation and suspicion) is ill-founded and if it is not discontinued, then Tigerkhan is seeking proper particulars. Tigerkhan identified several aspects of the claim that required better particulars but to date, it has not received any response from Harneys.

[27] In spite of this, on 8 November 2007, Tigerkhan filed its defence.[10] It acknowledged that Mr Rigoll is its ultimate beneficial owner. It admitted that 6 million shares in Max Petroleum were allotted to it and that it received £100,000 from Pendragon in relation to the sale of an Aston Martin car to it (Pendragon) on 14 February 2007. With respect to paragraphs 76 and 77 of the Re-Re-Amended Statement of Claim, Tigerkhan admitted that it was allocated 6 million shares in Max Petroleum. It further admitted that on 30 November 2006 Myrzaly transferred 18 million shares in Max Petroleum to Tigerkhan. It averred that the fact that transfer had taken place by the end of November 2006 is accepted by MWP and is confirmed by Mr Tacon in paragraph 2.2 of his Report dated 18 September 2007. Tigerkhan however denied that the sale to Mr Juric was a sham and that it took place in February 2007 and not on 14 December 2006. It also denied that the real purpose of the sale was to disguise the proceeds of fraud on MWP or to render

[10] See Tab12 Bundle A

Myrzaly or Tigerkhan judgment proof and that at the date of the sale or any other time Myrzaly or Tigerkhan held any proceeds of fraud on MWP.

[28] At paragraph 7 of the Defence, Tigerkhan denied that the US$950,000 was impressed with a trust in favour of MWP but at the hearing, Mr Lord accepted that there is a triable issue regarding this. In addition, Tigerkhan denied receiving any payment from the US$950,000 and pleaded that if that sum was impressed with a trust in favour of MWP, it is denied that Tigerkhan knew that any payment was impressed with a trust in favour of MWP and that it knew it was dealing with trust property in breach of trust or that it acted dishonestly. It also denied the conspiracy claim and that any evidence has been fabricated with the object of concealing or attempting to render judgment proof the assets of Myrzaly.

[29] Tigerkhan applied to strike out the claim on two grounds namely (a) that the purported claim advanced against Tigerkhan discloses no reasonable cause of action and (b) it is in the interest of justice that the claim be struck out at the earliest opportunity.

Myrzaly and Hakkisan

The Pleadings - Myrzaly

[30] At paragraph 6 of the Re-Re-Amended Statement of Claim, Myrzaly is introduced. It was incorporated in July 2005 in the BVI. Mr Risbey was at material times the sole, alternatively, a director of Myrzaly. From its Register of Directors, Mr Risbey was its director until he was replaced on 25 May 2006 by Tigakhan AG, of which Mr Risbey was the sole director. Its current director is Tigakhan AG.

[31] MWP sets out its pleaded case against Myrzaly at paragraphs 50 to 56 of the Re-Re-Amended Statement of Claim. It states:

1. Myrzaly was formed by Mr Risbey on 10 July 2005 and the shareholders were Messrs Risbey and Rigoll.

2. On 5 August 2005, Myrzaly acquired, by way of an allocation and for non-cash consideration 18 million shares in Max Petroleum, amounting to approximately 9.69% of Max Petroleum's issued share capital.

3. Much of the US$950,000 that was paid by Mr Emmott to Hakkisan was paid to Myrzaly and/or Mr Rigoll as the ultimate beneficial owner of Myrzaly and/or to their benefit, namely:

   a) as to the US$190,000, it was paid out by US$95,000 to Myrzaly and US$100,000 to Mr Rigoll personally; and

   b) as to the US$350,000, (i) 274,672 was paid to Pendragon in the UK to buy an Aston Martin for Mr Rigoll; (ii) US$44,026 was retained by Hakkisan as if a payment by Myrzaly to Hakkisan under the service agreement between Hakkisan and Myrzaly; (iii) US$11,225 to a Nicholas Wilson (not known to MWP); (iv) US$15,075 to a Jeremie Wilson (not known to MWP); US$44,026 retained by Hakkisan as part of its fee under the agreement.

4. Despite the Freezing and Receivership Orders made by this Court against Myrzaly, there has been no disclosure by Myrzaly of its assets and no co-operation with the Receiver.

5. Further, or alternatively, there has been an attempt by Myrzaly to render its assets judgment proof by (1) transferring its shares in Max Petroleum to Tigerkhan without consideration, apparently with a view to sell them to Tigakhan AG and (2) purporting to sell Myrzaly itself to Mr Juric.

6. The sale of Myrzaly shares took place in January/February 2007, after the Court ordered that the assets of Myrzaly be frozen, but the related documents were fraudulently backdated to November 2006 by Myrzaly.

[32] The particulars are set out at paragraph 56 and are as follows:

(a) The US$950,000 paid to Mr Emmott and EPIL was impressed with a trust in favour of MWP. In receiving payments from Hakkisan and/or Mr Risbey from the said US$950,000, Myrzaly knew at all times that Mr Emmott and/or Hakkisan and/or Mr Risbey were dealing with trust property in breach of trust and so acted dishonestly.

(b) Further or alternatively, Myrzaly knowingly received and dealt with trust property (other than as a bona fide purchaser for value without notice of MWP's interests) and/or dishonestly assisted Mr Emmott and/or Hakkisan and/or Mr Risbey in breach of trust in that it was at all times a knowing and willing partner of Mr Emmott and/or Hakkisan and/or Mr Risbey in their dealings with trust property.

(c) In the premises, such property or its traceable proceeds remains the property of MWP and/or Myrzaly as a constructive trustee thereof for MWP and Myrzaly is liable to account therefore to MWP and/or is liable to MWP for equitable compensation.

(d) Further or alternatively, Myrzaly has conspired with Tigerkhan and/or Mr Risbey to injure MWP by unlawful means by fabricating evidence with the object of concealing and attempting to render judgment proof its assets and is liable therefore for the loss suffered by MWP in respect of same.

[33] The relief sought against Myrzaly are: (a) an enquiry into and account of the assistance by Myrzaly in the breach of contractual and fiduciary and other duties of Mr Emmott; (b) an enquiry into what benefits Myrzaly has received in breach of trust; (c) a declaration that Myrzaly is liable to account to MWP as constructive trustee in respect of all benefits so received including without limitation the US$513,698 paid to Myrzaly and/or its traceable proceeds; (d) replacement and/or repayment of all such benefits including without limitation the US$513,698 together with interest thereon; and/or (e) damages.[11] Again, it appears that the damages relate to the conspiracy claim.

[34] Myrzaly and Hakkisan applied to strike out the respective claim against them on precisely the same two grounds as Tigerkhan.

The Pleadings - Hakkisan

[35] Hakkisan is introduced as an International Business Company in the BVI with registered office, c/o Mossack Fonseca and Co (BVI) Ltd. Its sole director is said to be Mr Risbey. The pleaded case against Hakkisan is set out at paragraphs 44 to 49 of the Re-Re-Amended Statement of Claim as follows:

1. Pursuant to the agreement as between Messrs Sinclair, Rigoll and Emmott (and perhaps others) and ODL Securities Limited ("ODL"), ODL agreed to pay and did pay to Messrs Sinclair, Rigoll and Emmott commissions in respect of the funds raised on the flotation of the Max Petroleum shares in AIM. By way of example, by wire transfer on 28 November 2005, ODL made a payment of commission pursuant to this agreement to Messrs Sinclair, Rigoll and Emmott in the sum of £565,290 to Hakkisan's Credit Suisse account in Zug, Switzerland.

[11] See page 38 of the Re-Re-Amended Statement of Claim – Bundle A Tab 8.

2. In November and December 2005, Mr Emmott called for the transfer from EPIL of US$725,000 to his account at Barclay's Bank, London from which funds, Mr Emmott, in turn, paid to Hakkisan's Credit Suisse account the sum of US$540,000(in two tranches: one on 14 November 2005 of US$350,000 and one on or about 1 December 2005 for US$190,000). The transfers bore the reference "*Transfer Ref: Max Agreement 04/05*", in accordance with Mr Emmott's instructions to that effect. (The balance of the funds received from EPIL by Mr Emmott into his Barclay's account in London was applied, in whole or in part, to reduce Mr Emmott's overdraft).

3. Hakkisan has now disclosed that the US$540,000 was received by it and was disbursed by Mr Risbey as follows:

    1) the US$190,000 was (over) paid out:

        i. US$95,000 was paid to Myrzaly;

        ii. US$100,000 was paid to Mr Rigoll personally;

    2) the US$350,000 was paid out:

        i. US$274,672 to Pendragon in the UK to buy an Aston Martin car for Mr Rigoll and/or Myrzaly;

        ii. US$11,225 to a Nicholas Wilson (not known to MWP);

        iii. US$15,075 to a Jeremie Wilson (not known to MWP);

        iv. US$44,026 retained by Hakkisan as part of its fee under the agreement.

4. Without prejudice to the onus which rests on Hakkisan to defeat MWP's title in equity; and/or right to trace such funds, none of the transfers (to or by Hakkisan) pleaded above were to bona fide purchasers for value, or in circumstances which defeated such title….

5. No proper reason has been advanced for the transfers from EPIL via Barclays, but the transfer instructions (details of which would have appeared on the advice of receipt provided to Hakkisan) contained reference to "*Max Agreement in 04/05*". There was no such agreement in existence relating to Hakkisan, as Hakkisan has admitted in its Defence. Hakkisan was therefore aware at the time of the receipt and on the face of the documentation relating to it that the reasons recorded for the transfer to it were false.

6. Hakkisan was managed by Mr Risbey, alternatively FCI and, in particular, Mr Risbey on its behalf. Further particulars of the management arrangements will be given after disclosure in these proceedings.

7. Mr Risbey was closely involved in the transactions concerning Max Petroleum, being a director of a large number of companies holding significant percentages in Max shares. Those companies include: (1) Hakkisan which acquired 607,143 shares in Max Petroleum. Further particulars of the acquisition and of any consideration agreed to be given and actually given will be provided after disclosure….

8. Mr Risbey was well aware of what transactions were taking place and the absence of any proper justification for receiving transfers from Mr Emmott and/or from ODL on behalf of Mr Emmott.

9. Mr Risbey and FCI have been closely involved in giving assistance to the Temujin Companies by assisting them with bank accounts, credit cards and also by transferring money to Mr Emmott in December 2006 at his request, probably to fund Mr Emmott's on-going litigation and arbitration fees and costs, although such have not yet been disclosed.

10. When Hakkisan was ordered by this Court to account for its receipt of the US$540,000, Mr Risbey provided three different false explanations for the receipt…

11. Neither Hakkisan nor Mr Risbey has made any disclosure in respect of the payment of commissions by ODL, including the commissions of £565,290 paid to Hakkisan's Credit Suisse account in Zug, Switzerland for the benefit (in part or in whole) of Mr Emmott.

12. Hakkisan did not admit when it was ordered to account for its assets the existence of anything but approximately 7,000 shares in Max Petroleum and gave no explanation of what had become the proceeds of sale of any Max Petroleum shares previously held by it.

13. Mr Risbey, as sole director of Hakkisan, has failed to make any or proper disclosure in accordance the Disclosure Orders and has failed to co-operate with Mr Tacon.

14. Mr Risbey gave false statements in relation to Hakkisan to Mr Tacon who was told that he (Mr Risbey) had no record of a company called Hakkisan Finance Corporation and that he was not and never have been a director or officer of Hakkisan Finance Corporation.

15. It is to be inferred that the reason for Hakkisan itself, and Mr Risbey in particular, to fabricate evidence in this way was in an effort to conceal and render judgment proof assets of Mr Emmott and/or assets of others including Hakkisan to which MWP might lay claim in equity.

[36] The claim against Hakkisan is summarized as:

a) The commission payments by ODL to Mr Emmott (and others) including without limitation the payment of £565,290 were impressed (in whole or in part) with a trust in favour of MWP. In receiving the commission payments generally and the £565,290 in particular from ODL for and on behalf of (in whole or in part) Mr Emmott, Hakkisan knew at all times that Mr Emmott was dealing with trust property in breach of trust and acted dishonestly.

b) The US$950,000 paid to Mr Emmott and EPIL was impressed with a trust in favour of MWP. In receiving payments of US$540,000 from Mr Emmott from the said US$950,000, Hakkisan knew at all times that Mr Emmott was dealing with trust property in breach of trust and so acted dishonestly.

c) Further or alternatively, Hakkisan knowingly received and dealt with trust property (other than as a bona fide purchaser for value without notice of MWP's interests) and/or dishonestly assisted Mr Emmott in breach of trust in that it was at all times a knowing and willing partner of Mr Emmott in his dealings with trust property.

d) In the premises, such property or its traceable proceeds remains the property of MWP and/or Hakkisan as a constructive trustee thereof for MWP and Hakkisan is liable to account therefore to MWP and/or is liable to MWP for equitable compensation.

e) Further or alternatively, Hakkisan has conspired with Messrs Emmott, Nicholls and/or Slater and/or the other Defendants herein to injure MWP by unlawful means, by fabricating evidence with the object of concealing and attempting to render judgment proof its assets and is liable therefore for the loss suffered by MWP in respect of same.[12]

[37] The relief sought against Hakkisan are: (a) an enquiry into the account of the assistance by Hakkisan in breach of contractual and fiduciary and other duties of Mr Emmott; (b) an enquiry into what benefits Hakkisan has received in breach of trust; (c) a declaration that Hakkisan is liable to account to MWP as constructive trustee in respect of all benefits so received including without limitation the £565,290 (in whole or in part) and US$540,000 paid to Hakkisan and/or its traceable proceeds; (d) replacement and/or repayment of all such benefits including without limitation the £565,290 (in whole or in part) and US$540,000 together with interest thereon and/or (e) damages.[13] Again, it appears that the damages relate to the conspiracy claim.

[12] See page 26 of the Re-Re-Amended Statement of Claim – Bundle A Tab 8
[13] See page 38 of the Re-Re-Amended Statement of Claim – Bundle A tab 8

Analysis of the evidence and the law

[38] Based on the fact that most of the payments went first to Hakkisan and then to Tigerkhan or Myrzaly, it is prudent to deal with Hakkisan's application first, followed by Myrzaly and lastly, Tigerkhan. On a minute examination of the Re-Re-Amended Statement of Claim, it discloses three causes of action namely (i) knowing receipt; (ii) dishonest assistance and (iii) conspiracy, all of which are serious allegations and should only be pleaded if the facts sustain them and with the fullest particulars in support.

Hakkisan - knowing receipt

[39] Paragraph 49(a) – (d) of the Re-Re-Amended Statement of Claim amount to a claim for knowing receipt. The pleaded case is that Hakkisan received the sum of US$540,000 from the US$950,000 paid to Mr Emmott and £565,290 as commissions paid by ODL to Hakkisan. Mr Lord helpfully informed the Court that Hakkisan cannot deny that it received these sums and, for the purpose of this application, it is accepted that there is a triable issue relating to the payment of the $950,000 to Mr Emmott. It follows therefore that in order to determine whether the claim for knowing receipt is hopeless and/or whether this claim has a reasonable prospect of success, I need to consider Hakkisan's knowledge. The issue of knowledge also arises in the cases of Myrzaly as well as Tigerkhan and will be considered here.

[40] The case of **Thomas v Stoutt**[14] is sound authority for the principle that proper particulars of a fraud allegation must be properly and distinctly pleaded and in the absence of such, the claim should be struck out. In delivering the judgment of the Court, Byron CJ stated:

> 'The legal principles which govern the pleadings where fraud is alleged are ancient and well settled, and would apply to both the common land and statutory claims. I would apply three propositions, which accord with long established rules and practice:
>
> > [i] a court ought to disregard general and vague allegations of fraud;
> >
> > [ii] it is necessary to show that the alleged fraud was discovered since the judgment sought to be set aside;

[14] (1997) 55 WIR 112, Court of Appeal, ECSC.

> [iii] the alleged fraud must be shown to relate to matters which *prima facie* would be a reason for setting aside the judgment."

[41] His Lordship found that the allegations of fraud were indeed general and vague. The Statement of Claim did not contain any particulars at all. He concluded that the allegations of fraud lacked distinct and careful particulars and in addition to the failure to particularise how the representations were made or the concealment effected they did not allege definite facts or conduct nor demonstrate any character to the fraud alleged. On that basis, he struck out the Statement of Claim.

[42] The allegation of knowledge is set out in the Re-Re-Amended Statement of Claim as well as the further particulars that were provided to the solicitors for the Applicants. Mr Lord fought hard to demonstrate that the Applicants had no knowledge that the money which they received (barring Tigerkhan whom he alleged did not receive any sums) was paid from funds that Mr Emmott had taken from MWP in breach of his fiduciary duties and was impressed with a trust in favour of MWP. He also referred to several documents which he argued, support the Applicants' position and clearly dispel the bare allegations and speculations made by MWP.

[43] It is not disputed that Mr Rigoll is the ultimate beneficial owner of Myrzaly and Tigerkhan. He was also a shareholder of Myrzaly and is the beneficial owner of Tigakhan AG which is the director of Myrzaly. It is pleaded that he is the Managing Director and shareholder of Sokol.[15] There is evidence that Mr Emmott is a shareholder of Sokol with Mr Rigoll, his nominees and other persons.

[44] In its Re-Re-Amended Statement of Claim, MWP stated that it is entitled to the sum of US$950,000 that was paid to EPIL on behalf of Mr Emmott as this sum is among the benefits received by Mr Emmott as payments or benefits in lieu of fees that were to be paid to MWP in breach of his fiduciary duty and as such, is impressed with a trust in its favour. Mr Emmott informed ScotiaTrust that the cash and 14.78 million shares were "*for services rendered in connection with the organization of Max Petroleum".* From the file

[15] Bundle C2 tab 12 page 32 – Business card from Sokol Holdings Ltd which shows same.

note, he also stated that the sum that he instructed Sokol to send to EPIL as well as the shares were gifts from Sokol. In addition, Mr Emmott mentioned that he participated in the formation and listing of the company and explained that his firm, MWP specializes in that type of work. It is palpably clear (and accepted by Mr Lord) that there is a triable issue in regard to the transfer of the US$950,000 to EPIL for Mr Emmott and that it was in breach of trust. What is also clear is that Messrs Rigoll and Emmott were shareholders of Sokol while Mr Emmott was still working at MWP on the Max transaction. Additionally, MWP had no knowledge that Mr Emmott was a shareholder of Sokol. Mr Rigoll, as Managing Director, must have sanctioned the payment of the funds to Mr Emmott. Some reasonable inferences that can be drawn are (i) Mr Rigoll must have known that Mr Emmott was working for MWP; (ii) he owed fiduciary duties to MWP; (iii) this payment was secret benefit to Mr Emmott and (iv) the payment was in breach of trust. His knowledge can be imputed to Myrzaly as well as Tigerkhan.

[45] With respect to Mr Risbey, he was the director of Myrzaly and is the director of Tigakhan AG which is now the director of Myrzaly. It appears that at all material times, Mr Risbey was the directing mind and will of Myrzaly. At all material times, he was [and is] the sole director of Hakkisan. He was also the director of Tigerkhan at the material time. I believe that his knowledge, if any, is crucial. Mr Risbey was very involved with the Max transaction as he was the director of a large number of companies holding large percentages of Max shares. The payment was said to have been made to Hakkisan pursuant to a "*Max Agreement in 04/05*". Hakkisan has stated that there is no such agreement and an inference can be drawn that Hakkisan was aware that the reason for it receiving the monies was false but still accepted it. In addition, Hakkisan said that the payments were made pursuant to an agreement dated 1 August 2006. The payments were made before the date of this Agreement. When this was pointed out to Hakkisan, it did a volte face. It produced another Agreement dated 1 August 2005. As director of Hakkisan, Mr Risbey would have known that the reason for the transfer was misleading. A reasonable inference that can be drawn is that Mr Risbey knew that Hakkisan received the sum from Mr Emmott in breach of trust.

[46] It seems to me that MWP has a real prospect of success in showing that both Mr Rigoll and Mr Risbey had knowledge of this payment being made from Sokol to Mr Emmott as secret benefits and in breach of trust. It follows therefore that any sums received by Tigerkhan or Myrzaly from the US$540,000 will also be affected by the knowledge of both Messrs Rigoll and Risbey or either of them.

[47] In relation to the Astrakhansky transaction, MWP inferred that the US$190,000 that was paid to Hakkisan from the US$540,000 was used to make up the sum required to invest in this transaction and consequently, any profits received should be held on trust for MWP. Again, it seems to me that there is real prospect of success that the knowledge of Messrs Rigoll and Risbey as it relates to the US$540,000 will also apply to US$190,000 as the latter sum came from the former sum.

[48] In respect of the ODL commission, Hakkisan denied that any part of the commission from ODL related to Mr Emmott. However, on the basis of the involvement of both Messrs Risbey and Rigoll with Mr Emmott and MWP, I believe that they knew that this payment from ODL (if it is found that Mr Emmott was to receive a share) was a secret profit or a benefit as it was received by Mr Emmott not for and on behalf of MWP but for himself. Their knowledge can be imputed to Hakkisan.

[49] MWP relies on an agreement between Messrs Emmott, Sinclair and Rigoll in relation to what was to happen to the ODL commission when it was received. The difficulty with this is that MWP has no evidence of this agreement; whether in writing or orally but relies on the fact that the usual course of conduct between the parties is that they share the proceeds of the transactions. MWP also relies on two emails between Messrs Sinclair and Harvey but was unable to produce them at the hearing. It also relies on the inconsistent evidence of Mr Rigoll. In his 3rd affidavit, Mr Rigoll averred that he was not involved in negotiating this commission and did not share in it at all. Subsequently, in his 4th affidavit, he deposed that he had an opportunity to discuss the transfer with Mr Risbey and the averment in his 3rd affidavit was wrong. He then conceded that the £563,290 was paid to Hakkisan from ODL for his benefit and was dispensed according to his instructions.

[50] It cannot be denied that the agreement relied upon by MWP is non-existent and that the allegation that Mr Emmott is to share in the commission from ODL is speculative. Additionally, I do not think that MWP can rely on the inconsistent evidence given by Mr Rigoll. On this, Byron CJ in **Thomas v Stoutt** had this to say (at page 120):

> "… the fraud must relate to some matter which would be a reason for setting aside the judgment. Perjury on a matter which is collateral to the issue would not suffice.
>
> The requirement that there must be a reason other than mere falsehood for setting aside the judgment, was referred to in *Flower v Lloyd [1879] Ch.D. 27 at pages 333-334:*
>
>> "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured… Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise form [sic] opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds."

Myrzaly - knowing receipt

[51] Paragraph 56(a) to (c) of the Re-Re-Amended Statement of Claim gives raise to a claim for knowing receipt. The allegation in paragraph 78 (a) [on which the other sub-paragraphs rely] is that Myrzaly received payments from Hakkisan and/or Mr Risbey from the US$950,000 allegedly impressed with a trust in favour of MWP.

[52] Mr Lord conceded that the only sum allegedly received by Myrzaly from Hakkisan and/or Mr Risbey is US$95,000 referred to in paragraph 52(a)(i) of the Re-Re-Amended Statement of Claim. According to Mr Lord, the other payments referred to in the Re-Re-Amended Statement of Claim were never paid to or received by Myrzaly and therefore,

any suggestion of a knowing receipt claim in relation to them is hopeless. Mr Lord referred to the answer given on behalf of MWP in response to certain requests made by Myrzaly. In respect of the other alleged payments to Myrzaly, MWP stated that:

> "These payments alleged by Myrzaly to have been made to or on behalf of Mr Rigoll personally are properly the subject of a claim by MWP against Myrzaly since they form part of the sum of US$950,000 paid to Mr Emmott which was impressed with a trust in favour of MWP. The evidence of Mr Risbey, which is to be further tested on cross-examination, suggests that these payments were channeled through Myrzaly pursuant to what is described as an administration support agreement between Hakkisan and Myrzaly dated 1st August 2006."[16]

[53] Mr Lord submitted that there is no evidence to suggest that those payments were channeled through Myrzaly and there is no pleaded case for the purposes of the strike out application. He reminded the Court that these sums are also the subject of a knowing receipt claim against Hakkisan and it is accepted that they were received by Hakkisan but certainly not by Myrzaly.

[54] He next submitted that whilst Myrzaly received US$95,000, it is not pleaded how Myrzaly knew that it was impressed with a trust in favour of MWP. He accepted (for the purposes of this hearing) that a reasonable inference could be drawn that Myrzaly knew that Mr Emmott was a director and full time employee of MWP and thus owed fiduciary duty to MWP.

[55] He argued, however, that it is unreasonable to infer that because Myrzaly knew that Mr Emmott owed fiduciary duties, it also knew that the US$950,000 was paid to him or his nominees was a secret commission which should have been disclosed to MWP and accounted for by Mr Emmott to MWP. He added that it is not suggested that Myrzaly knew that the US$540,000 came out of the US$950,000 or that it knew anything about the latter sum. He questioned on what basis should somebody who instructs a solicitor in relation to a transaction know that any monies paid to it through that person are secret commissions?

[16] Bundle A, tab 10 at page 5

[56] Mr Lord further submitted that the allegation (which is not pleaded but came out from the request made by Myrzaly to MWP) that Myrzaly received sums or profit from the transaction whereby Max acquired Astrakhansky project through Kazgas is not true. He referred to the Receiver's Report[17] to support Myrzaly's position. In that report Mr William Tacon ("the Receiver") stated that:

> "Mr Rigoll was instrumental in brokering a deal whereby Max acquired the Astrakhansky project through Kazgas. This was the profit in Kazgas from that arrangement. This profit belonged to Mr Rigoll who asked Mr Risbey to pay it into one of his bank accounts and Mr Risbey chose Myrzaly's account."

[57] Mr Lord submitted that any profit received from that transaction by Myrzaly cannot give rise to a cause of action against Myrzaly by MWP because Mr Tacon confirms that this payment back into Myrzaly belonged to Mr Rigoll. He concluded that the knowing receipt claim is limited to only US$95,000 but that claim should be struck out because there have been no particulars of knowledge.

[58] It is accepted that Myrzaly received US$95,000 from the US$540,000 transferred to Hakkisan from EPIL. I am of the view that it is the only sum that MWP can lay claim on as trust property from Myrzaly as the other sums were transferred to Mr Rigoll directly and not to Myrzaly which is a separate legal entity. It follows therefore that MWP has a real prospect of success with respect to the US$95,000 as Myrzaly knew that Mr Emmott was a director and full-time employee of MWP and thus owed fiduciary duties to MWP.

Tigerkhan – knowing receipt

[59] Paragraph 78(a) to (c) of the Re-Re-Amended Statement of Claim amounts to a claim of knowing receipt. At paragraph 78(a) MWP alleges that Tigerkhan received payments from Hakkisan, Myrzaly and/or Mr Risbey from the US$950,000. Mr Lord submitted that MWP did not specifically allege that Tigerkhan has received any sums from the US$950,000 from Hakkisan, Myrzaly or Mr Risbey and consequently, this claim is bound to fail.

[17] Bundle F, tab 5 page 5 and paragraph 5.1 – The Receiver's report dated 18 September 2007

[60] Paragraph 75 referred to the £100,000 which Tigerkhan received from Pendragon. In relation to that, Mr Lord conceded that Tigerkhan received that sum but that it was not from Hakkisan, Myrzaly or Mr Risbey. According to him, the payment was from a third party and the transfer of £100,000 was a bona fide transaction, in that, Mr Rigoll sold his Aston Martin car and the agent who sold it on his behalf deposited the proceeds to one of his accounts.

[61] Learned Counsel further submitted that the allegation of knowledge is in effect an allegation of fraud and as such, full and detailed particulars must be pleaded. He criticised the allegation made by MWP in the Re-Re-Amended Statement of Claim that Tigerkhan knew at all times that they were dealing with trust property, According to him, there is nothing in the pleading that is relied upon to support the bare allegation of knowledge and there are no proper particulars of knowledge despite the fact that MWP was invited to provide those particulars and have declined to do so. He concluded that for the above reasons the claim does not disclose a cause of action and should be struck out.

[62] In order to fully address the knowing receipt issue, I need to briefly refer to the pleaded case of the claim of knowing receipt against Hakkisan wherein MWP pleads that Hakkisan received the sum of US$540,000 from the US$950,000 paid to Mr Emmott and £565,290 as commissions paid by ODL to Hakkisan. Hakkisan has not denied receipt of these sums. It is accepted that out of that sum, US$274,672 was paid to Pendragon to purchase the Aston Martin car for Mr Rigoll. With respect to the claim of £100,000 from the sale of Aston Martin car, it is also accepted that Tigerkhan received that sum from Pendragon. The question which arises here is whether Mr Risbey knew that the monies that were paid to purchase the car were impressed with a trust in favour of MWP. The starting point, I believe, is to look at the two individuals who feature prominently in this case, Messrs Risbey and Rigoll. It seems to me that MWP is able to demonstrate that these two men and particularly, Mr Risbey knew that the monies that were paid to purchase this car were impressed with a trust because (i) Mr Risbey was the director of Tigerkhan at the relevant time and (ii) Tigerkhan received the monies into its account

without providing any consideration for the same. It seems to me that Tigerkhan was not a bona fide purchaser for value as the funds were just paid into its account and it was not an innocent recipient of those monies.

[63] I am therefore of the view that in relation to this claim of £100,000, there is a real prospect of success as the knowledge of Mr Risbey and Mr Rigoll can be imputed to Tigerkhan[18] and as such, the money that was transferred from Hakkisan (which was a part of the US$540,000 which is dealt with above) to purchase the Aston Martin car for Mr Rigoll was impressed with a trust in favour of MWP.

[64] With respect to the US$950,000, this has been dealt with under Hakkisan - knowing receipt. In any event, there appears to be a real prospect of success with respect to the claim of £100,000 by MWP.

Hakkisan and Myrzaly - dishonest assistance

[65] The dishonest assistance claim does not relate to Tigerkhan. It is against Myrzaly and Hakkisan and is said to relate to the Astrakhansky transaction. This claim has been pleaded in the Re-Re-Amended Statement of Claim against Hakkisan[19] as well as the further particulars that were provided by both Hakkisan and Myrzaly. The dishonest assistance pleaded is that both Myrzaly and Hakkisan have been used by Messrs Risbey and Rigoll through which to channel funds which MWP submits, are impressed with a trust in its favour. Specific reference was made to the Astrakhansky transaction.

[66] I have already found that there is a real prospect of success in relation to the knowing receipt claim against Hakkisan for the sum of US$540,000 from which the US$190,000 was transferred out of Hakkisan. There is conflicting evidence as to what happened to the US$190,000. According to Hakkisan, it was used for the purchase price of the Aston Martin car. MWP is of the view that this sum was channeled through Hakkisan and

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[18] This will be dealt with in more details under Hakkisan and Myrzaly.

[19] See paragraph 49(c) – Hakkisan knowingly received and dealt with trust property (other than as a bona fide purchaser for value without notice of MWP's interests) and/or dishonestly assisted Mr Emmott in breach of trust in that it was at all times a knowing and willing partner of Mr Emmott in hid dealings with trust property.

Myrzaly to fund 19% of the monies that were used to invest in the Astrakhansky transaction. MWP claims Mr Emmott's portion of the benefit received by Myrzaly arising from that transaction. Mr Wilson relied on the fact that the transfer was done on the same date (6 December 2005) that the deposit was required to invest in the Astrakhansky transaction with no supporting documents. The Court was referred to email correspondence[20] between Mr Risbey, Messrs Emmott and Kappelle on 6 December 2005 on which MWP relies to show that the sum was used to form part of the deposit of this transaction. Though it does not refer to the Astrakhansky transaction, it shows that money was expected to be transferred from Hakkisan urgently and that Mr Risbey was interested in ensuring that it went through. It is noted that on this day, Mr Risbey's company, FCI entered into a sale and purchase agreement under which the company acquired all the outstanding issued shares in the capital of Max Petroleum Astrakhansky Holding Limited. [21]

[67] It seems to me that MWP has shown that the US$190,000 was used to fund 19% of the initial deposit in the Astrakhansky transaction and therefore, it has shown a real prospect of succeeding on its claim against Hakkisan for dishonest assistance.

[68] MWP is claiming 19% of US$1,000,050 that was paid to Myrzaly from the Astrakhansky' transaction. Mr Lord relied on the Receiver's Report to demonstrate that Mr Tacon had concluded that the profit from the Astrakhansky transaction that went into Myrzaly was that of Mr Rigoll. In my judgment, that was not Mr Tacon's conclusion. He was merely reporting what he was told by Conyers. Just before making that statement, he said "*Explanations provided by CDP which draw me to this conclusion includes a number of comments made by them in their letter dated 11 May 2007 which I represent in full below*". It therefore follows that Myrzaly received profits from the Astrakhansky transaction and the question then is whether there is a real prospect of success at trial that MWP is entitled to 19% of that profit. I have already found that that is the case in respect of the US$190,000 that was said to be used to form part of the deposit. It seems

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[20] Bundle C2, tab 6 at pages 2 to 6 of the exhibits to Mr Wilson's 11th affidavit
[21] Bundle C3, tab 12 at page 98 of Mr Wilson's 22nd affidavit - - Published Report of Max Petroleum

to me that any profit made from the investment of this sum will also be impressed with a trust in favour of MWP.

Conspiracy

[69] MWP has pleaded a case of conspiracy against all the Applicants. At paragraph 49 (e) of the Re-Re-Amended Statement of Claim, the claim for conspiracy is pleaded against Hakkisan as follows: "*Hakkisan has conspired with Messrs Emmott, Nicholls and/or Slater and/or other Defendants to injure MWP by unlawful means, by fabricating evidence with the object of concealing and attempting to render judgment proof its assets and is liable therefore for the loss suffered by MWP in respect of same*."

[70] Myrzaly's claim for conspiracy is pleaded at paragraph 56 (d). It mirrors Hakkisan's claim.

[71] The claim of conspiracy against Tigerkhan emerges at paragraphs 76 and 77 of the Re-Re-Amended Statement of Claim. MWP alleges that Tigerkhan (i) acquired without compensation the Max shares owned by Myrzaly; (ii) participated in and/or assisted in the sham sale of Myrzaly shares to Mr Juric (which it alleged took place in February 2007 in breach of the Receivership Order) and (iii) did so in order to disguise the proceeds of fraud on MWP and to render Myrzaly and/or Tigerkhan judgment proof.

[72] There are two types of actionable conspiracy - conspiracy to injure and unlawful means conspiracy. It is accepted by all that the conspiracy that is alleged in the pleading is unlawful means conspiracy.

[73] In **Powell and Another v Boldaz and Others**[22] it was held that (a) it was neither pleaded, nor made out in the facts that the conspiracy was aimed or directed at the plaintiffs; and it could reasonably be foreseen that it might injure him, and did, in fact injure him; and (b) the unlawful act relied upon must be actionable at the suit of the

[22] [1998] Lloyd's Law Reports: Medical

plaintiff; it was not sufficient that it amounts to a crime or breach of contract with a third party. At page 126, Stuart-Smith LJ had this to say:

> "Finally, I must consider the tort of conspiracy….Dr Powers now accepts that damages for personal injuries are not recoverable under this tort. But he submits that the costs of pursuing the appeal to the Secretary of State are economic loss caused by the tort. There are to my mind three answers to this submission. First although in an unlawful act conspiracy it is not necessary to prove that the predominant purpose is to injure, it is necessary to prove that the conspiracy was "aimed or directed at the plaintiffs and it can reasonably be foreseen that it may injure him, and does in fact injure him…This is neither pleaded, nor for the reasons I have already given made out in the facts. Secondly the unlawful act relied upon must be actionable at the suit of the plaintiff. It is not sufficient that it amounts to a crime or breach of contract with a third party…And finally I am quite unable to see as a matter of causation how these expenses can be said to have resulted from the unlawful acts of substituting forged for genuine documents in the medical records. The plaintiffs appealed to the Secretary of State because their complaint that the first four Defendants had failed to treat Robert properly was dismissed by the M.S.C. Although the question of falsification of the documents was apparently raised on the appeal to the Secretary of State, that was not the reason for the appeal."

[74] In **Michaels and Another v Taylor Woodrow Developments Ltd. And Others**[23], it was held that in order to support the existence of an actionable conspiracy to injure by unlawful means, those means must be actionable in their own right against at least some of the conspirators absent the co-operation between them; that where a wrongful act consisted of a breach of the provisions of a statute or of subordinate legislation, it would only support such actionable conspiracy if that were determined to have been the intention of the legislature by way of reinforcement of the statutory provisions, which in the instant case it could not; and that therefore, since the claim disclosed no cause of action it would be struck out.

[75] In **Total Network SL v The Commissioners of Customs & Excise**[24] Lord Justice Ward after referring to several authorities including **Lonrho Ltd v Shell Petroleum Co. Ltd (No. 2)**[25] held that the real point decided by that case is that to establish the tort of conspiracy, the predominant purpose of the agreement for execution of the damage-

[23] [2001] Ch 493
[24] [2007] EWCA Civil 39; Judgment delivered on 31 January 2007
[25] [1982] AC 173

causing acts must be injury to the plaintiff. At paragraph 63 of the judgment after he referred to **Lonrho v Fayed**[26], Ward L.J. stated:

> "Once again it is relevant to note that there is no mention in that passage of a requirement for an overt act to be independently actionable against one of the conspirators. And, in our judgment, *Lonrho v Fayed* does provide some support for the proposition that an actionable act is not a requirement of an unlawful means conspiracy. It certainly provides no support for the reverse of that proposition."

[76] Ward LJ subsequently held that to hold that a conspiracy to cheat with the intention to injure is actionable without more by a person against whom it is aimed, seems to them appropriate and justified. In respect of **Powell v Boldaz**, Ward LJ held that they are unable to say that the decision displayed a manifest slip or error as it was a considered decision and reflects a conclusion reached by Stuart-Smith LJ following a concession made by the appellant's counsel.

[77] These authorities support the proposition that in order to support a claim of conspiracy by unlawful means, MWP has to identify the unlawful means that are by themselves actionable on its part against some of the conspirators. It is therefore essential if MWP is to demonstrate a cause of action in conspiracy for it to plead (and establish) matters that, if proved, would be actionable on behalf of MWP. Mr Lord is of the view that MWP has not identified the unlawful means that are by themselves actionable on its part against some of the conspirators while Mr Sutcliffe QC succinctly submitted that the actionable wrong in this regard is the knowing receipt and dishonest assistance claim against the Applicants.

[78] The principal allegations relied on in respect of the conspiracy claims are that (i) the sale of Myrzaly to Mr Juric took place in February 2007 and not December 2006 and (ii) the transfer of the Max shares to Tigerkhan was not done for valuable consideration. MWP based this allegation on the fact that the Registered Agent of Myrzaly was not told of the transfer of the shares in Myrzaly until February 2007. Mr Risbey stated that the responsibility to inform the Registered Agent was placed on Mr Juric and he did not

[26] [1992] 1 AC 448

know that it was not done until February 2007. He provided a copy of the Agreement which suggested that is the case. On the other hand, MWP has no documentary evidence to support its allegation. In the absence of any documentation, this amounts to a speculative assertion. In **Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited**[27], Rawlins JA, in dealing with a similar assertion stated "*My view is that the deponent, Mr Wilson, drew those inferences from facts which were insufficient to found the inferences.*" In any event, even if the sale took place in February 2007, it pre-dated the Receivership Order.

[79] Then MWP alleged that Tigerkhan acquired without compensation the Max shares owned by Myrzaly. In my view, no complaint can be made by MWP about the transfer of Max shares (to which it makes no claim) from one company beneficially owned by Mr Rigoll to another company which he beneficially owns. In any event, it is common ground that the transfer took place on 30 November 2007 before these proceedings were commenced [28] and therefore, could not amount to judgment proofing.

[80] In addition, MWP pleads a case of conspiracy against all the Applicants. It pleaded that they fabricated evidence with the object of concealing and attempting to render judgment proof their assets. It seems to me that this aspect of the claim must fail because there is no cause of action of judgment proofing either at law or in equity. Such an action if it exists at all could only be a tort. In addition, from the points of claim in the arbitration proceedings commenced in London by MWP against Mr Emmott, there is no claim made against Mr Emmott for conspiracy. Mr Suctliffe QC was very brief in his reply. He said that the claim for conspiracy relates to the dishonest assistance and knowing receipt.

[81] I agree with Mr Lord that it is not alleged that any of the above matters (if proved) could give rise to any cause of action on the part of MWP against Tigerkhan or that any of those assertions involve any assets that have any connection with the alleged proceeds

[27] Civil Appeal No. 8 of 2007[British Virgin Islands]- Judgment delivered on 29 October 2007, paragraph 43.

[28] See paragraph 19 of Mr Wilson's eleventh affidavit and paragraph 2.2 of Mr Tacon's Second Report dated 18 September 2007.

of breaches of fiduciary duty by Messrs Emmott, Nicholls or Slater. In addition, no connection is alleged at all between those matters and the matters alleged to amount to breaches of fiduciary duties.

[82] I can also quickly dispose of the conspiracy claims against Hakkisan and Myrzaly which amounts to fabricating evidence with the object of concealing and attempting to render its assets judgment proof. Mr Lord has correctly submitted that there is no tort or actionable wrong as concealing and attempting to render assets judgment proof.

[83] I am of the considered opinion that the claims for conspiracy as pleaded against the Applicants are devoid of particulars and ought to be struck out. In passing, I am left to wonder why a claim in conspiracy was not brought against Mr Emmott in the arbitration proceedings as he appears to be the mastermind behind the alleged fraud on MWP.

The Applicants' Reverse Summary Judgment

[84] In a nutshell, a defendant (or a claimant) cannot be permitted to continue a case on a defence (or claim) which has no real prospect of being successful. As I have already alluded to, if the Court does not order summary judgment, it may treat the hearing as a case management conference.

[85] In respect of MWP's claim against the Applicants, I have already considered the legal principles as well as the facts. In my judgment, MWP has a real prospect of being successful on the claim for knowing receipt against all of the Applicants and a claim of dishonest assistance against Hakkisan and Myrzaly. In the premises, those aspects of the claims will proceed to case management.

[86] In light of my findings, the conspiracy allegations which are set out at paragraph 49 (e) in respect of Hakkisan, at paragraph 56(d) in respect of Myrzaly and at paragraphs 76 and 77 of the Re-Re-Amended Statement of Claim are all struck out.

Application to discharge or vary the Freezing Orders against Hakkisan and Myrzaly

[87] In light of the fact that the claims against Hakkisan and Myrzaly were not struck out and/or were not summarily dismissed, it is apposite that I now consider the applications to discharge the Freezing Orders against these two Applicants. In passing, I observe that Hakkisan had already applied to discharge the freezing injunction. That application was dismissed.[29] However, I am not precluded from hearing another application by Hakkisan if it is supported by additional evidence or a different argument. This point was elucidated in the treatise, Spencer Bower, Turner and Handley *The Doctrine of Res Judicata* [30] where the learned authors stated:

> "Although some interlocutory orders may finally determine some question and be binding in later stages of the proceedings, the dismissal of an interlocutory application is not final and will not bar a further application on the ground of *res judicata*, although the further application is not likely to succeed unless supported by additional evidence or a different argument."

[88] Additionally, Mr Lawrence Cohen QC who previously appeared as Counsel for MWP made it clear that the sum caught by the Freezing Orders may and can be reviewed at a later date. This is exactly what Hakkisan is attempting to do now. Myrzaly has never applied to discharge the Freezing Order made against it and this is therefore, its first attempt.

Myrzaly's Transcript

[89] A generous amount of time was engaged in representations on the transcript of the *ex parte* hearing when the Freezing Order was made against Myrzaly (30 January 2007). It was not provided to the solicitors for Myrzaly until after the adjourned hearing of this application on 9 January 2008. It is apparent from the correspondence which was exhibited to Ms Rees' 5th affidavit that a request was made by Blake Lapthorn to Harneys for a copy of the transcript as well as the skeleton argument in respect of the ex parte hearing for Myrzaly as early as April 2007.[31] In June 2007, Harneys, in a letter written to Conyers referred to Conyers' letter of 11 May 2007 and stated that they trust

[29] See judgment [unreported] delivered on 9 March 2007.
[30] Third edition, 1996, page 82, paragraph 172.
[31] Bundle D1 tab 1

that Conyers have received the relevant transcript and skeleton argument. It appears that Conyers did not respond to this letter stating that it is still awaiting the requested documents. The matter was however clarified in Ms Rees' affidavit of 3 August 2007 wherein she deposed that they still do not have the transcript. Despite this, Harneys did not request the transcript until after the December 2007 hearing. It was finally given to Conyers on 9 January 2008. This is not good. It was incumbent on Harneys to provide the transcript forthwith after the *ex parte* hearing

Whether Hakkisan and Myrzaly have a Good Arguable Case

[90] The applications by Hakkisan and Myrzaly to strike out and/or for reverse summary judgment were comprehensively dealt with above. At the end of the day, I found that MWP has a real prospect of success in some of its claims against these two Applicants. In an application to discharge a freezing order, the threshold test is "a good arguable case".[32] In **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)**[33], Mustill J described a good arguable case as "*one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success*".

[91] Based on my findings above, I am of the considered opinion that MWP has a good arguable case against Myrzaly and Hakkisan.

Complaints by Myrzaly

[92] Mr Lord made several complaints about the evidence which MWP presented to the Court on the *ex parte* application for a freezing order against Myrzaly. I will deal with them under the generic heading of lack of full and frank disclosure although some of them fall outside the scope of what may properly be described as a failure to dislcose but may only be matters that were unusual on this application. These can be summarized as:

1. There was no skeleton argument – Harneys was unable to state with precision whether a skeleton argument was provided to the Court. [34]

[32] See Lord Denning in *Rasu Maritima v Perusahaan Pertabangan [1978] Q.B. 644.*
[33] [1983] 2 Lloyd's Rep. 600 at 605.
[34] Supplemental skeleton argument bundle, Tab 5

2. There was no pleading in support – Myrzaly was not a party to the proceedings before and was not mentioned in the Statement of Claim, no draft pleading was provided and no undertaking was offered to produce an amended pleading.

3. The Freezing Order states that the evidence relied upon was the 3rd affidavit of Mr Wilson but on perusal of that affidavit, it does not purport to have been made in support of the application for the Freezing Order against Myrzaly – It only made brief reference to Myrzaly and did not suggest that MWP has any claim against Myrzaly.

4. The cause of action justifying the Freezing Order was knowing [sic] or dishonest assistance and there was no attempt on the part of MWP to address any of the necessary ingredients to such a claim nor did it point to the evidence in support of each ingredient.

5. There was no explanation of or justification for the quantum frozen.

Material non-disclosure

[93] It is trite law that because an injunction is obtained without notice, the applicant has a duty to make full and frank disclosure to the Court of all material facts and to present fairly matters which the respondent might rely upon by way of defence.[35] The rule that an injunction without notice will be discharged if it was obtained without full and frank disclosure has a dual purpose. It will deprive a wrongdoer of an advantage improperly obtained. It also serves as a deterrent to ensure that persons who make applications without notice realize that they have this duty of disclosure.

[94] Gee on Commercial Injunctions stated:

> "Any Applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider. It is part of the duty of an applicant for without notice relief to present the application fairly…. This rule applies with special force to applications for Mareva or Anton Piller relief, which by their nature are particularly liable to cause substantial prejudice to a defendant or other parties. Thus Donaldson LJ in *Bank Mellat v Nikpour* said:[36]

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[35] Commercial Injunctions by Steven Gee, 5th edition, 2005, Chapter 9.001.
[36] [1985] F.S.R. 85 at 92.

> "The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the Draconian remedy of the Mareva Injunction. It is in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. "If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked."

[95] Therefore, the applicant is permitted to apply without notice only on the basis that he has complied with this duty, which has been described as being governed by the same principles which require an applicant for insurance to act in the utmost good degree of good faith. The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same." [37]

[96] The duty of disclosure 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. The extent of the inquiries that 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 the application is made and the probable effect of the order on the defendant.

[97] In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is pertinent that the court assess the degree and extent of the culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. If the duty to disclose is not observed, the court may discharge the injunction.

[98] A court must also take all the relevant circumstances into account when it is determining the consequences for the breach of the duty to make full and frank disclosure. The circumstances should include the gravity of the breach. It should also include the excuse

[37] Commercial Injunctions by Gee, Chapter 9, paragraph 9.002

or explanation offered and the severity and duration of the prejudice occasioned to the defendant. This latter should involve the consideration whether the consequences of the breach were remediable and were in fact remedied. The court must also bear in mind the overriding objective and the need for proportionality in accordance with the overriding objective of CPR 2000.

[99] The discharge of the order is not automatic on a finding of any material non-disclosure.The court has a discretion to discharge the order or not to discharge it. It may also decide to grant fresh injunctive relief if it determines that justice requires it to protect the applicant. The court should note that, by its very nature, an application without notice usually requires a lawyer to take instructions and prepare drafts and pleadings in some haste. The court should weigh this against the need to uphold and enforce the duty to disclose as a deterrent to those who withhold material facts. At the end of the day, an interlocutory injunction may be discharged for serious and culpable non-disclosure.[38]

Absence of a Skeleton Argument

[100] There was no skeleton argument before the court on the without notice application. In its absence, a very high duty is placed on the advocate to explain clearly all the necessary ingredients to establish an entitlement to the order and to satisfy the court that there is evidence to support the submissions made. A skeleton argument should always be provided to the court especially at without notice hearings. The all-encompassing question then is: did Mr Cohen QC discharge this burden? Mr Lord respectfully submitted that he did not. This question is answered below.

Pleading at the hearing did not mention Myrzaly

[101] It is not disputed that Myrzaly was not a party to the proceedings at the stage when the without notice application was made and that there was no pleading in the Statement of Claim which disclosed a cause of action against Myrzaly. I must however disagree with

[38] See BVIHCV2007/0209 – Eton Consultants Holdings ltd et al v Dorot Properties and Holdings Ltd, written judgment delivered on 7 January 2008, paras. 63-77 [unreported] and BVIHCV2007/0311 – Robelco Limited et al v Svoboda Corporation – written judgment delivered on 28 January 2008[unreported]

Mr Lord that there was no undertaking to produce an amended pleading. Pages 14 to 16 of the Transcript of Proceedings clearly demontstrate that Mr Cohen QC undertook to amend the pleading to include Myrzaly and to plead the claims of knowing receipt and dishonest assistance. There was even a discussion as to the time within which the Amended Statement of Claim should be filed and it was agreed that, it will be filed by the following Monday. It is plain that there was an undertaking that MWP would amend their Statement of Claim accordingly.

Lack of evidence to support application

[102] Mr Lord complained that there was no evidence in support of the application. From the transcript, Mr Cohen QC relied on Mr Wilson's 1st, 2nd and 3rd affidavits. At the hearing, the court was told that Myrzaly is a BVI company and that Mr Risbey (who was very familiar to the court and the role he allegedly played in the massive fraud against MWP that was purportedly perpetuated on it by Messrs Emmott, Slater and Nichols) was its director. MWP told the court that Myrzaly had received money from Hakkisan and that Hakkisan is Myrzaly's banker and as such, MWP would have a claim against it for knowing receipt. Mr Lord accepted that this would unquestionably be the sum received by Myrzaly from the US$540,000 that Hakkisan had received and MWP would have shown that it had a good arguable case of knowing receipt against Myrzaly for US$95,000. This must also be put in its proper perspective in that a moment ago, I had heard an application to continue the freezing order against Hakkisan. It was plain that there is a good arguable case against Hakkisan that it had received the sum of US$540,000 and that it held it in trust for MWP.

[103] Of some concern however, is the claim for the 18 million Max shares. Mr Cohen QC told the Court that Myrzaly received 18 million Max shares. Undoubtedly, that was used as a yardstick to obtain the freezing order. It is now clear that MWP does not claim (and plead) to be entitled to these shares. It was incumbent on MWP to have made it known to the Court that it was no longer relying on the claim for 18 million shares or that the reliance on it was a mistake. It is plain that MWP was aware of this information from 31 May 2007 or before as there is no claim in the Re-Re-Amended Statement of Claim for

these shares. It is accepted that there is a good arguable case for the US$95,000 and therefore, a basis to continue the Freezing Order. MWP should have applied to the Court to have the sum caught by the Freezing Order reduced as much was made of the value of those shares when the Order was made. Gee on Commercial Injunctions make good this point. It states: "*If a claimant (in this case MWP) has obtained ex parte relief on a basis which he knows he can no longer support, he should apply to the court either to discharge the order, or to continue the order on a new basis.*" [39]

Dishonest Assistance were not properly presented to the Court

[104] Mr Lord submitted that the Court was not shown the necessary ingredients of the cause of action of dishonest assistance. He criticised the answer given by Mr Cohen QC in response to my request that he should explain what was meant by knowing assistance. His response was that it was part of the accessory liability and that *"knowing assistance has become accessory liability. Knowing assistance still to most of us, and knowing receipt has become unconscionable receipt. It is almost indistinguishable.*"

[105] I must state that I was familiar with the causes of action of knowing receipt or dishonest assistance[40] and had I needed further explanation I would have requested it. Sometimes, judges do make inquiries of lawyers even if they are familiar with the subject-matter. The dishonest assistance claim mentioned at that hearing was in relation to the 18 million Max shares. As I iterated earlier, I had just completed a hearing in respect of Hakkisan where the allegations surrounding the Max shares were dealt with extensively so at that time, I was of the view that if Myrzaly got these shares then it assisted Mr Emmott and others in this fraud as MWP was claiming that it is entitled to these shares. Matters have moved on since and it is now clear that this is no longer the case.

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[39] Fifth Edition page 259 and paragraph 9.022

[40] See BVIHCV2005/0174 –Sibir Energy PLC v Gregory Trading SA et al –written judgment delivered on 29 November 2005 –per Hariprashad-Charles J. The Court dealt with the causes of action of knowing receipt at paras. 64 to 87 and dishonest assistance at paras. 94 -116.

[106] There is one additional point that I need to make in respect of the dishonest assistance claim. Mr Lord has persistently repeated that MWP makes no such claim in its pleadings. This is not so. It is in fact pleaded in relation to both Myrzaly and Hakkisan but appears to relate to the Astrakhansky transaction and not the Max shares.

The Quantum of the Claim against both Myrzaly and Hakkisan

[107] The quantum of the claim against the Applicants is of paramount importance. The amount of the Freezing Order should not exceed the amount claim. At the hearing of Myrzaly's application, Mr Cohen submitted: "if it is a knowing assistance, it comes to the value of the full claim. Because by reason of the participation in the whole it is liable for all not a part." He also relied on the value of the Max shares to quantify the claim against Myrzaly. This was palpably wrong. Mr Cohen QC was under a duty to identify any defences, which would have been available to be taken by Myrzaly had it been present at the application. However, Mr Cohen did declare that the sum should be set at US$30 million and that it can be reviewed at a later stage. He did not make it clear that there might be some doubt with MWP's entitlement to the shares and the possible defences that Myrzaly might have.

[108] It appears that there is non-disclosure in this regard but MWP can be penalized for this by reducing the sum caught by the Freezing Injunction to an appropriate amount. There is no need to discharge the entire injunction as there is an arguable case in relation to the US$95,000.

[109] The sum for both Myrzaly and Hakkisan has to be reviewed. I have found that MWP has a good arguable case against both Applicants in the sum of US$95,000 and US$540,000 respectively. In addition, I have found that MWP also have a good arguable case in respect of 19% of the sums received by Myrzaly and Hakkisan in respect of the Astrakhansky transaction. This has to be calculated and added to the above US$95,000 and US$540,000. It is conceded that there is a triable issue with respect to the $950,000: see paragraph 39 [supra].

[110] In light of my finding in respect of the ODL commission, the amount claimed should not be added. It follows therefore that the sum caught by the Freezing Orders should be reduced accordingly. Both Counsel could do the mathematical calculations so that the Court may finalise the Order.

Risk of Dissipation

[111] Mr Lord submitted that there is no risk of dissipation. I have just delivered a lengthy written judgment showing a torrent of outstanding requests by the Receiver with which Hakkisan and Myrzaly have failed and/or refused to comply with. It was evident from that judgment that despite the Freezing and Receivership Orders being in place, both Hakkisan and Myrzaly were taking actions with the knowledge of Mr Tacon. This clearly shows that the persons behind these two companies have no regard for the Orders of this Court. Take an example, a Receiver was appointed and Myrzaly was transferred and a new director appointed without his knowledge. Then, Hakkisan was trading without the Receiver's knowledge. This shows that if the Freezing Order (and Receivership Order) are not in place, there is a real risk that MWP will not be able to get the fruit of its judgment if it succeeds at trial. However, the Freezing Orders ought to be substantially reduced.

Application to discharge Receivership Orders

[112] It was submitted that since Myrzaly has no assets and the amount caught by the Freezing Order is only US$95,000, then the Receivership Order should be discharged. It is clear from the Receiver's Report that he does not believe that he has gotten control of all the assets of Myrzaly. In the past, Myrzaly has failed to give full and proper disclosure. It has also stated that it has no other assets and Mr Risbey came and gave evidence to that regard. However, in the Receiver's Report dated 5 December 2007, it appears that it has a bank account that is a liability. At the hearing of the compliance application, Mr Tacon did not have full access to the Credit Suisse account. He stated that he required this information as monies from Myrzaly's account could have been used to purchase property although not in the name of Myrzaly are assets belonging to it. I agree with Mr Tacon and until he has complete access to all the bank accounts, he

has to remain in place. If at any later date, Mr Tacon is able to report favourably to the Court about Myrzaly, I will be prepared to discharge the Receivership Order.

[113] Hakkisan is a trading company and the Court has approved a trading protocol that is working well. Hakkisan also conducted trading without the knowledge of Mr Tacon while he was in place. This shows that Hakkisan has slight regard for this Court's Order and that was the reason why the Receiver was appointed in the first place. At this point in time, the Receivership Order has to remain in place.

Conclusion

[114] In light of my findings, the Order of this Court will be as follows:

1. The application dated 3 August 2007 by the Third Defendant, Hakkisan Finance Corporation Limited and the Fourth Defendant, Myrzaly Limited to strike out the Re-Re-Amended Claim Form and the Re-Re-Amended Statement of Claim and/or for summary judgment is hereby dismissed.

2. The application dated 21 September 2007 by the Seventh Defendant, Tigerkhan Limited to strike out the Re-Amended Claim Form and Re-Re-Amended Statement of Claim and/or for summary judgment is hereby dismissed.

3. The claim should proceed to case management for directions.

4. The application to set aside the orders against the Third Defendant, Hakkisan Finance Corporation Limited and the Fourth Defendant, Myrzaly Limited is dismissed. The amount of the Freezing Orders against Hakkisan and Myrzaly is accordingly reduced as reflected in paragraphs 109 and 110[supra].

5. The application to discharge the receivership orders is dismissed.

6. Costs to MWP to be assessed, if not agreed. The Parties are to file submissions 21 days after the final order is obtained.

[115] The Court is grateful to all Counsel for their immeasurable assistance.

Indra Hariprashad-Charles

High Court Judge