UCC v Bender

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	10 March 2006
Neutral Citation:	[2006] JRC 34A
Reported In:	[2006] JRC 34A
Court:	Royal Court
Date:	10 March 2006

vLex Document Id: VLEX-793553649

Link: https://justis.vlex.com/vid/ucc-v-bender-793553649

Text

[2006] JRC 34A

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq**., Deputy Bailiff, **sitting alone**.

Between
United Capital Corporation Limited
Plaintiff
and
(1) John Felix Bender
Defendants
(2) John Koonmen
(3) SGI Trust Jersey Limited (in liquidation)
(4) Johan Hendrick Laurentius Bartolomeus Wijsmuller
(6) Dovetail Limited

and

(1) Kleinwort Benson (Channel Islands) Ltd
Parties cited
(2) UBS AG (Jersey)
3) Standard Bank Jersey Limited

Advocate S. J. Young **for the Plaintiff**.

Advocate J. P. Speck **for the First and Second Defendants**

Advocate P. D. James **for the Fifth and Sixth Defendants**.

The Third and Fourth Defendants did not take part in the application.

Authorities

United Capital Corporation Limited -v- Bender and Ors [2006] JRC 004A .

Goldtron Limited -v- Most Investments Limited [2002] JLR 424 paras 14–16.

Interoute Telecommunications (UK) Limited -v- Fashion Gossip Limited (Unreported 23 rd September 1999).

Brink's-Mat Limited v Elcombe [1988] 3 ALL ER 188 at 194.

Gee, Commercial Injunctions 5 th Edition.

Cutner -v- Green [1980] JJ 269 .

Trusts (Jersey) Law 1984.

Paragon Finance Plc -v- D B Thakary & Co [1999] 1 All ER 400 at 408.

Wallersteiner -v- Moir [1975] 1 QB 374 .

Gee, Commercial Injunctions, para 4.009.

The Deputy Bailiff

1 This is a summons to set aside, alternatively vary the interim injunction granted *ex parte* upon the signing of the Order of Justice. The background to the order of justice and the nature of the claims against the various defendants are summarised in paragraphs 3–19 of the Judgment which I delivered on 16 th January 2006 ([2006] JRC 004A) concerning the appropriate forum for resolution of the matter and I do not propose to repeat that background. I propose to use the same defined expressions as in that judgment.

2 There is a freezing injunction against all defendants up to a sum of US$97 million. There are also accompanying disclosure orders which have been stayed pending the outcome of this application. Because of this the only assets known to be restrained are those assets belonging to Dovetail on behalf of the Gemstone A Trust (of which Mr Koonmen is the beneficiary) and Bluebird on behalf of the Gemstone B Trust (of which Mr Philips and others are the beneficiaries). Mr Bender, Mr Koonmen, Bluebird and Dovetail all apply to set aside the injunction, alternatively to vary it so as to reduce the sum injuncted to $45 million or such other sum as the Court thinks fit.

Application to set the injunction aside

3 The defendants submit that the injunction should be discharged altogether on three grounds:-

(i) Good arguable case

(i) The plaintiff has shown no good arguable case;

(ii) There was a failure to make full and frank disclosure in obtaining the injunction;

(iii) There is no evidence of risk of dissipation.

On such an application I must consider completely afresh whether the injunction should be imposed.

4 In view of my finding in the judgment of 16 th January that the plaintiff has a good arguable case against each of the defendants, Mr Speck did not repeat his submissions in this respect but he, quite reasonably, reserved the right to renew those submissions before the Court of Appeal if necessary. Accordingly I need say nothing further on this topic other than to say that, for the reasons set out in my judgment of 16 th January, I find that there is a good arguable case against each defendant.

(ii) Full and frank disclosure

5 It is agreed by all parties that a plaintiff seeking an *ex parte* injunction owes a duty to make full and frank disclosure as summarised in *Goldtron Limited v Most Investments Limited* [2002] JLR 424 at paras 14–16. The defendants assert that the plaintiff failed to fulfil the duty in this case in a number of respects.

6 Firstly they refer to the proceedings instituted in the courts of New York in 2001 by Mr Silverman against Mr Bender where he claimed his 25% share of the Amber fees. They point out that, in his affidavit in support of the application for the injunctions, Mr Silverman stated that, after receiving the complaint in the New York proceedings in 2001, Mr Bender

did nothing. Mr Silverman went on to say he was advised at the time that, because Mr Bender never filed an answer to the New York proceedings and did not have any assets in the United States, a default judgment would be worthless. The inference is that Mr Bender had deliberately ignored the New York proceedings after being duly served. This point was repeated at paragraph 6 of Advocate Young's affidavit in support of the application to serve these proceedings out of the jurisdiction where he said, in respect of the New York proceedings, that Mr Bender had failed to defend the same.

7 In fact, as Mr Bender's second affidavit shows, Mr Silverman never managed formally to serve Mr Bender with the New York proceedings. Thus in his second affidavit Mr Bender exhibits an affidavit sworn by Mr Silverman in the New York proceedings on 3 rd October 2001 in which he (Mr Silverman) stated that it had not proved possible to serve Mr Bender and that Mr Silverman did not know in which country Mr Bender was residing. According to Mr Bender, the latter statement was quite clearly incorrect because, some seven months earlier, he and his wife had been abducted at gunpoint in Costa Rica by persons he believes were instructed by or on behalf of Mr Silverman. Indeed one of them left some papers concerning the New York proceedings with Mr Bender and stated that this amounted to service of them. Mr Bender thus undoubtedly became aware of the New York proceedings at that time although he admits that he had probably been told about them shortly beforehand. Mr Speck submits that Mr Silverman's affidavit in the present case was misleading (in that it gave the impression that the New York proceedings had been served and that Mr Bender simply did not defend them) and it also showed that Mr Silverman was willing to commit perjury when he said, in the New York proceedings, that he did not know in which country Mr Bender was living.

8 In my judgment Mr Silverman's affidavit is misleading. By referring to Mr Bender not filing an answer and to the possibility of obtaining a default judgment, the affidavit gives the clear impression that Mr Bender must have been duly served with the New York proceedings when in fact, as Mr Silverman knew, he had not. A full and frank affidavit would have made it clear that Mr Bender was never validly served with the New York proceedings although it might well have gone on to say that Mr Bender certainly knew about the proceedings.

9 As to the point on perjury, I am not able to resolve the matter on the conflicting affidavits before me and therefore make no finding in this regard. In any event it is a point which is remote from the issue at hand. Whatever Mr Silverman did or did not know in 2001, he clearly knew in 2005 that Mr Bender resided in Costa Rica and he so informed the Court upon commencement of these proceedings.

10 However, I do not consider that Mr Silverman's misleading account of the New York proceedings was material in relation to the granting of the injunction. Whether Mr Bender had been properly served and chose not to appear or whether he simply knew about the proceedings informally and chose to ignore them is a matter of no real significance in deciding whether the interests of justice required the imposition of an injunction in this case.

11 Secondly, Mr Speck was critical of Advocate Young, who stated in his affidavit in support of the application to serve the proceedings out of the jurisdiction that Mr Bender was 'incarcerated' in Costa Rica. He said that, coupled with the evidence of Mr Hogg, this suggested that Mr Bender's residence was inaccessible and hidden whereas the evidence showed that the plaintiff's agents were quite able to approach the residence when necessary. The affidavits gave the impression that it would be impossible to serve Mr Bender personally. I think that Mr Young might have been more moderate in his language, but in view of the conflicting affidavit evidence as to the exact location of Mr Bender's residence and what has happened on the various occasions when agents of the plaintiff have approached the property, I am unable to find that materially misleading statements have been made. In any event such matters go really to matters of service rather than the question of whether a freezing injunction should be granted.

12 Thirdly, Mr Speck referred to the letter dated 20 th November 1997 from Mr Silverman to Custom House (referred to in paragraph 47(i) of my judgment of 16 th January). This letter was referred to by Mr Silverman in his original affidavit in support of the injunction. The letter notes the 75/25% split of fees between Mr Bender and Mr Silverman and appears to have been initialled and approved by Mr Bender *("OK.* JB").

13 In his fourth affidavit Mr Bender says that he was asked about this letter by the lawyers acting for Mr Silverman's ex-wife (although he does not say when this took place). He says that he stated in the presence of Mr Silverman's legal representatives (presumably those representing him in his American divorce proceedings) that he had no recollection of having written on the letter. Mr Speck says that Mr Silverman should have disclosed this in his original affidavit.

14 On the evidence before me, I do not find that Mr Silverman's failure to refer to this amounted to a lack of full and frank disclosure. In the first place there is no evidence before me that the lawyers told Mr Silverman of what Mr Bender had said; and secondly, it seems to me that a mere assertion by Mr Bender that he had no recollection of having written on the letter is not very powerful and would not influence a judge when deciding in all the circumstances whether to grant a freezing injunction.

15 Fourthly, Mr Speck was critical of the fact that Advocate Young had not produced a note of the hearing before me when the *ex parte* injunction was obtained. It would seem that, in England, there is a duty upon those appearing before a judge to obtain *ex parte* relief to produce a note of the hearing and supply this to those affected by the order. Thus in *Interoute Telecommunications (UK) Limited v Fashion Gossip Limited* (Unreported 23 rd September 1999) Lightman J said:-

> ***"It is the duty of counsel and solicitors, when they make an ex parte application for relief (and most particularly freezing injunctions) to make in the course of the hearing a full note of the hearing, or, if this is not***

possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition to all parties affected by the grant of relief on that ex parte application. This is essential so that the parties may know exactly what occurred and the basis and material on which the order was made, and so that in this way they may be provided with the material to make an informed application for discharge. The sooner that obligation is widely understood and complied with, the sooner the risk of injustice on ex parte applications will be alleviated."

16 I think it is fair to say that this has not hitherto been the practice in Jersey. One of the reasons for this is that the procedure for obtaining an *ex parte* injunction in Jersey is rather different from that in England. It is my understanding that in England there is invariably a hearing at which counsel will explain to the judge what the case is about and why an injunction is sought. In Jersey, the terms of the proposed injunction are set out in the draft order of justice which requires the signature of the Bailiff or Deputy Bailiff. The draft order of justice, together with the accompanying affidavit and exhibits (and sometimes a skeleton argument in cases of particular complexity), are then left at the Bailiff's Chambers. No particular time is fixed for a hearing. The papers are read at his convenience by the judge who accordingly has the opportunity of reviewing them in detail. If he is satisfied on the papers, he may decide to sign the order of justice on the basis of the material put before him without the need for an oral hearing involving the attendance of counsel in person. If he has any queries he will require counsel to attend in order to elaborate on or justify the request; alternatively the applicant's counsel may specifically request a hearing in order to draw some particular point to the judge's attention.

17 It follows that there will often be no note of a hearing because there has been no hearing, although the judge has of course been able to review the papers in considerable detail. However, it does seem to me desirable that, where there is a hearing, counsel should ensure that a note is taken of what is said before the judge and provide such note to the defendant(s) immediately, if so requested. Accordingly counsel should in future ensure that they or someone accompanying them take (and subsequently have typed up) such a note. However, given the existing practice, no criticism is to be made of Advocate Young for his failure to prepare a note on this occasion.

18 The foregoing matters were those raised by the defendants at the hearing which took place on 16th January, following which I reserved judgment. Subsequently, I acceded to the application of Mr Bender and Mr Koonmen on 6 th February to adduce further evidence on the question of non disclosure. I set a timetable for affidavits followed by written submissions from both parties. The last of these was received on 28 th February. I turn therefore to deal with the additional submissions made by the defendants in the light of the further evidence. I have read all the new affidavits and exhibits together with the written submissions and have considered them carefully. However, I propose to deal with the matter comparatively briefly. I should also add that Mr James played no part in these new matters.

19 In his third affidavit, (producing the new evidence), Mr Koonmen exhibited the judgment of the Appellant Division of the Supreme Court of New York dated 20 th February 2003 in respect of the settlement of the financial affairs of Mr Silverman and his former wife following their divorce. It is clear that one of the assets under consideration in those proceedings was Mr Silverman's claim to 25% of the Amber fees. The Appellant Division upheld the decision of the Court of First Instance to award Mrs Silverman one half of anything that Mr Silverman might recover in respect of the Amber fees. The defendants also produced an affidavit from Mr Eric Lewis, a New York attorney, who gave it as his opinion that, in view of the judgment of the Appellant Division, the assignment by Mr Silverman to the plaintiff of his claim in respect of the Amber fees was highly likely to be void or, at the very least, could only be effective in relation to 50% of the claim. In his affidavit Mr Koonmen explained that, although he had had possession of the appellate judgment before the hearing on 16 th January, he had not at that stage spoken to Mrs Silverman. He had subsequently telephoned her and had established that neither she nor her attorney were aware of the assignment by Mr Silverman and he accordingly alleged that the assignment was a fraud on Mrs Silverman.

20 Based upon the additional material, Mr Bender and Mr Koonmen therefore submit as follows –

(i) The plaintiff has failed in its duty to make full and frank disclosure by not disclosing that Mrs Silverman was entitled to half of the Amber fees and that accordingly Mr Silverman was unable to assign his claim to the plaintiff. The plaintiff therefore either had no title to pursue the claim or at best had title to only one half of the claim.

(ii) In his evidence before the New York divorce court, Mr Silverman had linked his right to remuneration from the Amber funds to the provision of services to those funds subsequent to the commencement of the divorce action by Mrs Silverman in 1998. As no such services had been provided after 1998, he was not entitled to any fees and what he was saying there was quite inconsistent with his present claim that the entitlement to the fees arose out of the 1996 Amber agreement.

(iii) Mr Silverman had asserted before the New York Court that he did not have an earning potential of $175,000 per annum as alleged by Mrs Silverman. This was inconsistent with his claim in the present proceedings to be a sophisticated investor who could be expected to have achieved high investment returns if he had received his share of the Amber fees in October 2000.

21 In response, the plaintiff has filed a sixth affidavit from Mr Silverman and first affidavits from Mrs Silverman and her attorney in the divorce proceedings, Mr Robert Goldstein. Both Mrs Silverman and Mr Goldstein assert that the order of the New York divorce court does not confer any vested interest in the Amber fees themselves upon Mrs Silverman. It merely imposes a duty on Mr Silverman to account to Mrs Silverman for half of such fees as he recovers. Mr Goldstein referred to the text of the order of the divorce court and pointed out that he had personally drawn it up and also that it had apparently not been seen by Mr

Lewis when giving his opinion. The relevant part is as follows –

> ***"4. ORDERED AND ADJUDGED that LINDA SILVERMAN shall receive fifty (50%) per cent of all money or other property ("Property Interests") received (through payment, judgment, settlement or otherwise) by or on behalf of JOEL SILVERMAN, directly or indirectly, at any time after the last disclosed payment from Amber …… he received in or about February 1999 from [Amber]. Such recovery shall be reduced by: (a) litigation and collection costs including reasonable attorneys' fees, actually incurred by JOEL SILVERMAN to recover such fees from Amber; and (b) applicable taxes, if any, associated with such recovery from Amber. In the event JOEL SILVERMAN does collect Property Interests from Amber and his efforts are so time consuming as to interfere with his ability to work at other projects, he is granted leave to apply to this Court for a reasonable allowance for his time and expense, if any, in collecting such money …."***

Paragraph 5 of the order went on to provide that Mr Silverman should provide Mrs Silverman with copies of all relevant papers in any action or proceeding involving Amber and keep her informed of the progress of his collection efforts. It also went on to provide that should Mr Silverman decide that he did not intend to pursue the claims in respect of Amber, he should execute a written assignment of such claims to Mrs Silverman who would thereafter become responsible for any litigation and collection costs and should share equally with Mr Silverman any such recoveries less her litigation and collection costs etc.

22 Mr Goldstein asserts that he specifically drafted paragraph 4 of the order in a manner that was intended to allow for the possibility of Mr Silverman assigning some or all of his contractual rights in respect of the Amber fees to a third party. Mr Goldstein knew that it might well be the best way of seeking to enforce the claim. The divorce court order did not give Mrs Silverman a vested interest in the rights themselves; it merely gave Mrs Silverman a 50% interest in any ultimate recovery that Mr Silverman might obtain, directly or indirectly, in respect of the Amber fees. Mr Goldstein also pointed out that most of the cases relied upon by Mr Lewis involved assignments in violation of a restraining order. He distinguished the other cases. Mr Silverman, Mrs Silverman and Mr Goldstein all agreed that Mr Silverman should have informed Mrs Silverman of the assignment to the plaintiff. However, they did not consider that this affected the validity of the assignment in any way. Mrs Silverman was perfectly happy for Mr Silverman to proceed by means of the assignment to the plaintiff and indeed had, since these matters came to light, entered into an agreement with Mr Silverman and the plaintiff ratifying the assignment for the avoidance of doubt.

23 In the passage from *Goldtron* referred to in paragraph 5 above, the importance of full and frank disclosure on an *ex parte* application is emphasised. However it is also important to recall the cautionary words of Slade LJ in *Brink's-Mat Limited v Elcombe* [1988] 3 ALL ER 188 at 194 –

> ***"The principle [of setting aside an injunction for failure to make full and frank disclosure] is, I think, a thoroughly healthy one.*** It serves the important

purposes of encouraging persons who are making ex parte applications to the court diligently to observe their duty to make full disclosure of all material facts and to deter them from any failure to observe this duty, whether through deliberate lack of candour or innocent lack of due care.

Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in any heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Comrs* principle as a 'tabula in naufragio' alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J, I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J on 9 December 1986".

24 I do not consider that there has been a failure to make full and frank disclosure for the following reasons –

(i) I find that, as put forward in the affidavits on behalf of the plaintiff, Mrs Silverman was not given a proprietary interest in the Amber fees and the claim thereto. This was an asset which, if it existed, arose out of a contract between Mr Silverman and Mr Bender and it remained an asset which Mr Silverman was entitled to claim pursuant to the contract. The divorce court did not envisage that, if he wished to enforce the claim, she would have to join in as co-plaintiff; on the contrary the order specifically envisages that he will continue to enforce the claim in his own name. He may enforce it either in his own name or by assigning it to a third party for such purposes. All that Mrs Silverman was entitled to was 50% of such recoveries as might be made by Mr Silverman. Naturally I note Mr Lewis' affidavit but no reference is made in that affidavit to the actual terms of the order and it appears to be based merely upon the judgment of the Appellant Division. The fact that Mr Silverman may have to account for 50% of any recoveries to Mrs Silverman is not, in my judgment, a material factor for the Court to know when deciding whether to freeze the assets of the defendants in support of a

claim based upon Mr Silverman's rights under the Amber contract.

(ii) Mr Koonmen and Mr Bender base their point concerning Mr Silverman having linked his right to remuneration with the future provision of services upon what is said in the Appellant Division judgment about the submission of his counsel on appeal. Mr Silverman's affidavit (supported in this respect by Mr Goldstein and Mrs Silverman) suggests that, whatever points may have been taken by his attorney, Mr Silverman's evidence before the divorce court of first instance was not inconsistent with what he is saying before this Court. We do not have a transcript of that evidence and whether there is any difference can of course be explored at trial with a view to testing Mr Silverman's credibility. However I do not consider that there is material before me which justifies a finding of a failure to make full and frank disclosure.

(iii) As to the point that Mr Silverman's assertion before the divorce court that he did not have an earning potential of $175,000 per annum is inconsistent with his evidence as to how he might have invested the Amber fees had he received them, I do not consider that there has been a failure to make full and frank disclosure. In his original affidavit in support of the injunction, Mr Silverman did not specifically touch upon this aspect. In his fifth affidavit, he confirmed that he was very short of money in 2000 and 2001 and had little available for investment and, when referring to the four investment funds which had performed so well, he said that he had only invested in one. This will of course be a point which the defendants can explore at trial but I do not consider that there has been a failure to make proper disclosure.

25 Even if I were thought to be wrong in connection with the plaintiff's failure to disclose details of the divorce court order in that the plaintiff, through Mr Silverman, should have specifically raised the possible defence that an attack could be made upon the assignment, I do not consider that such failure falls into the category which should attract the serious sanction of the discharge of the injunction. I believe that such punishment would be out of proportion to the offence and would cause serious potential injustice. The same goes for the other two matters.

26 The second area covered by the additional evidence relates to Mr Hogg, who initially swore an affidavit about the alleged difficulties of serving documents on Mr Bender in Costa Rica. In his latest affidavit Mr Koonmen asserts that there is a warrant out for Mr Hogg's arrest in Florida in respect of an offence in 1994. He says that this is highly significant because, in certain specified paragraphs of his fourth, fifth and sixth affidavits, Mr Hogg denied that there was a warrant out for his arrest.

27 In his eighth affidavit, sworn in response to Mr Koonmen's third affidavit, Mr Hogg accepts that there is a warrant out for his arrest in Florida and that this has arisen because of a failure to complete payment of certain amounts which were due pursuant to a court order following a conviction in 1994. However, he says that his denial in the various affidavits referred to by Mr Koonmen of there being a warrant for his arrest was of course in the context of an assertion by Mr Bender that there was a warrant out for Mr Hogg's arrest in Costa Rica in connection with attempts to extort money from Mr Bender in Costa Rica. He

was denying the existence of a warrant for his arrest in Costa Rica. Unfortunately, although Mr Hogg's earlier affidavits had been before the Court in earlier hearings, they were not in the court bundle for this particular hearing but I have now been able to obtain them. Having done so, I am quite satisfied that the explanation given by Mr Hogg is correct. Indeed it is hard to see how Mr Koonmen can possibly have read those passages as being other than simply a denial that there was a warrant for his arrest in Costa Rica.

28 In the circumstances I do not find that the plaintiff has failed in its duty of full and frank disclosure so as to justify setting the injunctions aside, either in relation to the matters originally relied upon or in relation to the matters raised subsequent to the hearing.

(iii) Risk of dissipation

29 Mr Speck submits that there is no evidence that Mr Bender or Mr Koonmen would or might do anything to try and dissipate or move the assets in question with a view to defeating the plaintiff's claim if it were to be successful. In my view there is ample evidence to support such a concern. The whole basis of the plaintiff's claim is that Mr Bender, aided and abetted by Mr Koonmen, took steps dishonestly to deprive Mr Silverman of what they knew was his entitlement to 25% of the Amber fees. This was done by setting up AIA Anguilla in place of AIA Cayman in order to receive the Amber fees and then transferring the Amber fees from AIA Cayman and AIA Anguilla to the AEBT, a trust established under the law of Anguilla. Interestingly, in the *Koonmen v Bender* action, when Mr Koonmen brought an action against Mr Bender in order to recover what he said was his 50% entitlement to the Amber fees, Mr Koonmen specifically asserted that the substitution of AIA Cayman by AIA Anguilla was done by Mr Wijsmuller at the behest of Mr Bender in order to defeat Mr Bender's existing creditors, the major one of which was known to be Mr Silverman: thus one of the defendants has himself asserted that defeasance of Mr Silverman's claim was one of the objectives of what was done. Determination of whether the allegations made by the plaintiff are true or not will of course have to await the trial of this action, but I am in no doubt that there are reasonable grounds for fearing a risk of dissipation of the assets should the injunctions be discharged.

30 Mr Speck also submits there was delay between November 2004 (when the *Koonmen v Bender* action came to the plaintiff's notice) and May 2005 (when the order of justice was issued) and submits that this indicates that the plaintiff cannot have been genuinely concerned about a risk of dissipation. However, I accept that the plaintiff needed to look into the position carefully and to do this without tipping off the defendants that it had become aware of the *Koonmen v Bender* action. In the circumstances I do not consider the delay to be material.

31 Mr James submits that Bluebird and Dovetail are in a somewhat different position. He endorses the submissions of Mr Speck but makes an additional point, namely that the receiver of the Gemstone A and B trusts (which own Dovetail and Bluebird and for which those companies hold their assets as nominee) is an official appointed by the High Court of Anguilla pending resolution of a dispute as to who is the trustee of the Gemstone trusts.

Sinel Trust Anguilla Limited (STAL) was the trustee but it is said that Barwys Limited (a company wholly owned by Mr Wijsmuller) has been appointed in its stead. Mr James submits that there can be no question of dissipation of the assets of these trusts as long as a court appointed receiver is in charge.

32 Mr Young submits that the receiver is not as independent as might at first be thought. He is an employee of the trust company of the Anguillan lawyers who act for Mr Koonmen and he was nominated by and agreed the terms of his appointment with Charles Russell LLP, solicitors for Mr Koonmen. Furthermore his appointment could be terminated at any time and Barwys might become trustee. There remained therefore a risk of dissipation.

33 In my judgment, the injunction should remain in place in respect of Dovetail and Bluebird. The plaintiff has a proprietary claim in respect of the assets of the Gemstone trusts (and therefore the assets of the companies). In such a situation the Court will normally do what is necessary to ensure that the fund in dispute is preserved until the true owner is determined. Indeed the present situation is not an uncommon one. The receiver is, in effect, trustee of two trusts and believes that he holds the assets for the beneficiaries thereof upon the trusts contained in the trust deed. However the plaintiff claims that, in truth, these assets belong to it. In such a situation the Court will normally freeze the fund in dispute in order to ensure that it is preserved pending a decision as to who is the ‘true’ owner. Indeed the trustee in such cases invariably consents to the imposition of an injunction because it has no personal interest in the matter and is content that the funds should be frozen pending resolution of the dispute, subject only to any interim application for legal costs, living expenses etc. Mr James was completely unable to explain why the receiver in this case was taking a different course and urging that the Court should not freeze the fund pending resolution of its ownership.

34 Additionally, it seems to me that there is a risk that the dispute between STAL and Barwys will be settled or adjudicated upon with the result that the receiver is removed and Barwys becomes trustee. Barwys is owned by Mr Wijsmuller who is a key protagonist in these proceedings. All in all I am satisfied that the interests of justice require that there be a freezing injunction in respect of the Gemstone trusts (and therefore Dovetail and Bluebird) until further order.

Application to vary the injunction

35 The defendants accept that, assuming I am satisfied that an interim injunction to preserve the assets is required, the quantum of such an injunction should be assessed on the basis of the highest amount for which the plaintiff has a good arguable case (see Gee, Commercial Injunctions (5 th Edition) p116). It also has to be borne in mind that the plaintiff has both proprietary and personal claims.

36 The plaintiff's claim is essentially made up of three elements. First it says that it is entitled to 25% of the Amber fees arising in 1998, 1999 and 2000 (until liquidation of the Amber

Funds in October 2000). Secondly, it alleges that it was part of the Amber agreement that, unless either party wished to withdraw Amber fees, such fees would be re-invested in the Amber funds. So, for example, assuming that the 1998 fees were paid at the end of 1998, they would have been re-invested in the Amber funds at the beginning of 1999 and have remained so invested until October 2000. They would therefore have increased in value in proportion to the investment performance of the Amber funds during that period. Thirdly, from October 2000 onwards, the plaintiff claims compound interest at 10% per annum on its share of the Amber fees and the re-investment gains on the basis that such interest is appropriate in order to award full compensation to the plaintiff for the defendants' actions.

37 The defendants argue that the plaintiff's claim is grossly inflated and that the maximum amount for which the plaintiff has a good arguable case is much less than the $97 million which it now claims. The criticism of the plaintiff's claim falls under a number of headings and I will consider each of these in turn.

(i) Would the Amber fees have been reinvested?

38 The defendants submit that there is no evidence that the Amber fees payable to Mr Silverman would have been reinvested in the Amber fund in 1999 and 2000 respectively. They point to the fact that Mr Silverman was paid fees of $1.7 million in respect of 1996 and 1997 and did not reinvest them and that the 1998 fees were not in fact reinvested although the 1999 and 2000 fees were. Reference could also be made to the fact that Mr Silverman's financial position was not strong at the time and he might well have wished to receive the fees. However, in his first affidavit sworn in support of the order of justice, Mr Silverman asserted that he and Mr Bender specifically agreed that the management and performance fees would be reinvested in the Amber fund until such time as they were distributed. Clearly this is not a dispute which can be resolved at this stage but, on the basis of Mr Silverman's affidavit, I find that there is a good arguable case that the Amber fees would have been reinvested. It would be wrong to discount such an argument at this stage. The plaintiff's maximum claim should therefore be calculated on that basis.

(ii) The rate of return on reinvested Amber fees

39 There is no dispute as to the rate of return for 1999 because this appears from the audited accounts of the Amber fund for that year. However there was initially a dispute as to the rate of return for 2000. On behalf of the defendant Mr Gareth Phillips, who was chief financial officer of Blue Edge Technologies KK (BET), which was a Japanese company which provided IT and operational support to AIA Anguilla, and who is one of the beneficiaries of the Gemstone B Trust, swore a first affidavit on 5 th October 2005. He asserted that the gross rate of return of the fund for the period 1 st January to 31 st October 2000 was 148.31%. The plaintiff filed a report by Mr Thayne Forbes of Intangible Business Limited, who pointed out that, in an e-mail dated 10 th January 2001 (i.e. before the present litigation) from Mr Phillips to Mr Brice (of STAL) and Mr Wijsmuller, Mr Phillips had stated that the Amber fund's gross return for the ten-month period in 2000 had been 163%. Having reconsidered the matter Mr Phillips now accepts this figure and accordingly I proceed on

the basis of a gross rate of return for 2000 of 163%.

40 However, there is dispute as to whether, when calculating the investment return upon the Amber fees invested back into the fund, the gross or net rate of return should be taken. The net return is that achieved after deduction of the management and performance fees. The defendants argue that, even assuming reinvestment of the Amber fees, the net return upon them should be taken because management and performance fees would have been payable on those reinvested fees. However the plaintiff points to Mr Silverman's affidavit (which asserts that it was agreed with Mr Bender that there would be no management or performance fees on reinvested Amber fees) and to the e-mail referred to above from Mr Phillips which stated that “It was the understanding that group employees would not be charged for performance and management fees”. In my judgment, on this state of the evidence, the plaintiff has a good arguable case for saying that, for the purpose of calculating the return upon the reinvested Amber fees in 1999 and 2000, the gross rate of return of the Amber fund should be taken.

41 However it is important that there should be no double counting. If the investment return in 1999 and 2000 is to be the gross return, the management and performance fees for those years must be calculated by reference to the value of the Amber funds excluding the reinvested Amber fees. It is my understanding that Mr Forbes has calculated the claim on that basis (see Appendix 2 to his report).

(iii) What was the level of Amber fees in 2000?

42 The Court has seen audited accounts of the Amber fund for 1998 and 1999 which show the management and performance fees payable for those years. The plaintiff's claim is for 25% of those figures. Accordingly there is no dispute between the parties as to the Amber fees for those years. Unfortunately, as already mentioned, no accounts (audited or otherwise) for the Amber fund for the year 2000 have been produced to the Court by the defendants. Accordingly the plaintiff has proceeded on the basis of certain assumptions which are set out in Mr Forbes' report. It is known from the audited accounts for 1999 that the value of the Amber fund at 31 st December 1999 was some $338 million. It is also known that the gross return on the fund for ten months to 31 st October 2000 was 163%. There is also evidence that redemptions took place at various times during the year; however there is no detailed or satisfactory evidence as to when these took place and in what amounts. In the absence of any detailed information and for the reasons set out in his report, Mr Forbes has assumed three equal redemptions from the fund in August, September and October 2000, leaving a nil balance in the fund at 31 st October 2000. On this basis (and after making allowance for the fact that for part of this period the management fee was reduced from 2% to 1% and the performance fee reduced from 25% to 20%) Mr Forbes calculates the aggregate management and performance fees for 2000 as something just under $90 million, making Mr Silverman's 25% share just under $22.5 million.

43 The defendants, on the other hand, have exhibited to Mr Phillips' affidavit draft accounts of

AIA Anguilla for the year 2000. These were apparently prepared by SGI although Mr Phillips said that he worked in close conjunction with the relevant employee at SGI. These draft accounts show total management and performance fees for 2000 of just over $52 million (inclusive of the NBC fees to which I shall come in a moment). In addition, however, the draft accounts show a gain on investment of just over $28 million. This is apparently the gain on Amber fees for 2000 paid to AIA Anguilla in the early part of 2000 and reinvested in the Amber fund. The total revenue of AIA Anguilla in 2000 was therefore in the region of $80 million. The defendants argue that this figure can be reconciled with the amounts that were claimed by Mr Koonmen in the *Koonmen v Benderaction* and I was taken through those figures by Mr Speck.

44 However the plaintiff submits that it would be quite wrong and unfair to place reliance on the draft AIA Anguilla accounts when seeking to assess the maximum claim for Amber fees for the year 2000. It argues that the only way of ascertaining the Amber fees payable in 2000 is by reference to the accounts and records of the Amber fund itself, which were kept by Custom House. These however have not been made available by the defendants and it would be quite wrong, says Mr Young, to allow the defendants to suggest that the Amber fees for 2000 were much lower than the sum put forward by the plaintiff without production of the source material upon which the level of such fees can be judged.

45 Moreover the plaintiff argues that there are real concerns about the accuracy of the draft AIA Anguilla accounts for 2000, relied upon by the defendants. In his affidavit Mr Brice of STAL has exhibited draft accounts of AIA Anguilla for 2001. These contain the comparative 2000 figures and yet one finds that the 2000 figures in Mr Brice's accounts bear little relation to the draft 2000 accounts referred to by Mr Phillips. Thus although the management and performance fees only show a $500,000 difference for 2000 the following significant differences emerge as between the draft 2000 accounts themselves and the comparative 2000 figures in the draft 2001 accounts (references below to the 2001 accounts are references to the comparative 2000 figures contained in those accounts, not to the figures for the year 2001 itself):-

(i) The 2001 accounts contain a figure of $20million for legal and professional fees which is not included in the 2000 accounts themselves. The plaintiff suggests that this can only be a provision for Mr Silverman's claim.

(ii) The 2001 accounts show a figure of $58.75 million in respect of employee benefits whereas no such figure appears in the 2000 accounts themselves.

(iii) The 2001 accounts show directors' and office costs of some $812,000 whereas the 2000 accounts themselves show only $1,000 as directors' fees. The administration expenses also differ.

(iv) The 2000 accounts show ‘distributions’ of $31 million whereas there is no such figure in the 2001 accounts.

(v) The net assets for the year in the 2000 accounts are shown as some $48.5 million

whereas the corresponding figure in the 2001 accounts is $25,000.

46 I accept that Mr Forbes' estimate of the Amber fees payable in respect of 2000 contains certain assumptions, particularly in relation to when and at what levels investors redeemed monies out of the Amber fund. However the size of the Amber fund on 1 st January 2000 and the gross investment return in 2000 of 163% are not disputed. It seems to me that the assumptions made by Mr Forbes are perfectly reasonable in the absence of specific information from the defendants. In this respect the defendants, who, either directly or through their various agents such as Custom House, would be expected to be in a position to produce the accounts of the Amber fund, have failed to produce any satisfactory information whatsoever. All they have produced are draft accounts of AIA Anguilla for 2000 which, in the light of the glaring inconsistencies between those draft accounts and the comparative figures contained in the draft accounts for 2001, cannot safely be relied upon. Accordingly, in the absence of the production of any satisfactory information by the defendants, I find that the plaintiff has a good arguable case for the fees for 2000 as estimated by Mr Forbes, namely some $22.5 million as Mr Silverman's share.

(iv) Other criticisms

47 The defendants raise three less significant points in relation to the plaintiff's claim.

In my judgment these three points are not matters which can or should be resolved at this stage. I do not regard the plaintiff's claim in respect of any of them as being so weak that I should fix the maximum injuncted sum on the assumption that the defendants will succeed and that the plaintiff will fail on these points. I therefore decline to make any of the deductions sought by the defendants.

(i) They say that, included in the AIA Anguilla management and performance fees for 2000 is the sum of approximately $4.6 million earned pursuant to an agreement entered into in March 2000 between AIA Anguilla and National Bank of Canada (“NBC”) whereby AIA Anguilla agreed to manage certain funds for NBC. The defendants contend that this agreement is nothing to do with the Amber fund and that accordingly, even if he is entitled to 25% of the Amber fees, Mr Silverman has no claim to any share in the fees earned from NBC. The plaintiff, on the other hand, on the basis of Mr Silverman's fifth affidavit, asserts that it was always understood between Mr Silverman and Mr Bender that some clients (e.g. Mr Soros) might wish to have a separate investment vehicle but that Mr Silverman would still be entitled to his 25% share of such fees.

(ii) They allege that a bonus of $10 million paid to employees in BET by AIA Anguilla should be deducted before calculating Mr Silverman's share. This sum was eventually paid by AIA Anguilla into the Gemstone B trust as part of the settlement agreement between Mr Bender and Mr Koonmen following the *Koonmen v Bender* action. The plaintiff, on the other hand, submits that Mr Silverman never agreed to this bonus (because he was not consulted about it) and that his 25% share cannot be reduced by decisions taken solely by Mr Bender and Mr Koonmen.

(iii) Mr Phillips, in his second affidavit, refers to the sum of $2.2 million which was apparently used in 1999 to set up BET. He says that this sum must be deducted from the Amber fees before calculating Mr Silverman's share. The plaintiff does not accept, on the information presently available, that this sum was paid and states that, if it was, it should not be deducted from Mr Silverman's share for the same reason as set out in paragraph (ii) above in relation to the $10 million bonus.

48 For the reasons given I find that the plaintiff has a good arguable case for the sums claimed in Mr Forbes' report. I appreciate that these differ in certain respects from the calculations set out in the order of justice but the latter were prepared at a time when the plaintiff did not have as much information as is now available. In one respect, Mr Forbes' report could be said to understate the plaintiff's claim. As stated in para 43 above it has emerged from Mr Phillips' second affidavit sworn for this hearing that some Amber fees in respect of 2000 were actually paid out to AIA Anguilla in the course of 2000 and reinvested in the Amber fund. This was a time when the fund was extraordinarily successful and AIA Anguilla made a gain on its 2000 fees of just over $28 million by 31 st October 2000. It would seem that, consistently with the rest of his case, Mr Silverman would have a good arguable claim to 25% of that sum. I shall revert to this point later.

(v) Summary of the claim to 31 st October 2000

49 The plaintiff's claim up to October 2000 is therefore as follows:-

(i) **1998 fees**

There appears to be no dispute that the Amber fees for 1998 were $19,297,798 so that Mr Silverman's 25% share would be $4,824,450. There appears to be no dispute that the gross rate of return on the Amber fund for 1999 was 56.15% so that, on the assumption that these fees were reinvested, they would have grown to $7,573,379 by 31 st December 1999. A gross return of 163% for 2000 means that this sum would have grown to $19,812,787 by 31 st October 2000. That sum is therefore the claim in respect of the 1998 fees.

(ii) **1999 fees**

The agreed fees for 1999 were $25,750,316 making Mr Silverman's share $6,437,579. On the assumption that these were reinvested in 2000 a gross return rate of 163% would have produced an aggregate sum of $16,930,837 by 31 st October 2000, which is therefore the plaintiff's claim in respect of the 1999 fees.

(iii) **2000 fees**

On the basis of the assumptions made by Mr Forbes and set out in his report, the Amber fees for 2000 would come to $89,893,985, largely because of the exceptional performance of the fund. Mr Silverman's share would therefore be $22,473,496.

50 Adding these three sums together produces a total of $59,217,120. There is in addition Mr Silverman's share of the investment gain of $28,037,654 made by AIA Anguilla in 2000, namely $7,009,414. Given that this gain has been put forward by the defendants, one ought really to include it as part of the plaintiff's maximum possible claim. However I am conscious that if these gains were in fact made, it means that some of Mr Forbes' assumptions must be incorrect because there must have been some redemptions before August 2000 so that fees could become payable early enough in order to be reinvested and produce these gains. However, in the absence of proper evidence (such as ledgers, accounts etc) concerning the fund in 2000 and given the uncertainties as to the AIA Anguilla accounts described earlier, I am not willing to proceed at this stage on the basis that Mr Forbes' assumptions are wrong. However, it would clearly be inappropriate potentially to double count by assessing the plaintiff's claim on the basis that Mr Forbes' assumptions were correct and that Mr Silverman was also entitled to 25% of the investment gain of $28 million apparently made by AIA Anguilla in 2000. If Mr Silverman's is ultimately successful, it would seem that he ought to be entitled to 25% of that gain with a corresponding reduction in the figure for the Amber fees for 2000. However, in the absence of any satisfactory evidence produced by the defendants, I propose at this stage simply to proceed on the basis of Mr Forbes' assumptions and not to make any allowance for the alleged investment gains made by AIA Anguilla. Thus the total maximum claim as at 31 st October is assessed at some $59.2 million.

(vi) Interest from 31 st October 2000

51 The plaintiff claims interest on the sum of $59.2 million from 31 st October 2000 at the rate of 10% compounded annually. This produces an additional sum as at 30 th November 2005 of some $37 million, making a grand total of just over $96 million. The plaintiff asserts that this is a conservative estimate in respect of interest. It is said that this is effectively a claim for breach of trust and the Court should therefore ensure that the plaintiff is put back in the position that would have existed had the defendant not acted as it did. It is said that Mr Silverman is a sophisticated investor who would have achieved returns well in excess of ordinary investors by investing in specialist funds such as hedge funds. In his fifth affidavit he gives examples of four funds which have achieved returns of over 25% per annum in the period after 2000. He only actually invested in one of them because he was short of funds but he recommended investors to invest in the others. As an alternative measurement for a sophisticated investor, Mr Forbes has suggested the ‘cost of equity’ which he gives as 19.17% per annum. In short the plaintiff alleges that a 10% compound rate is a conservative measurement of the true loss which has been suffered by the defendants' diversion of Mr Silverman's share of the Amber fees.

52 The defendants argue that compound interest may only be awarded in cases of breach of an express trust such as in *Cutner v Green* [1980] JJ 269. Mr Speck submits that the equitable remedy applied by the court in *Cutner* is now reflected in Article 30(2) of the Trusts (Jersey) Law 1984 (“the 1984 Law”) which provides that a trustee in breach of trust is liable for any profit which would have accrued to the trust property if there had been no

such breach. He accepts that this clearly allows for an award of compound interest where the circumstances so require. Conversely, submits Mr Speck, compound interest may not be awarded in cases of dishonest assistance or knowing receipt. Although such persons are commonly referred to as being constructive trustees, they are not in fact trustees in the strict sense so as to fall within Article 30(2). He referred to the comments of Millett L J in *Paragon Finance Plc v D B Thakary & Co* [1999] 1 All ER 400 at 408:-

> ***"Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations.*** The first covers those cases already mentioned, where the defendant, although not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff. …… The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally although I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief' ……."

53 Mr Speck further submits that the position of a constructive trustee is governed solely by Article 33 of the 1984 Law which provides as follows:-

> ***"(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be trustee of that profit, gain or advantage.*** …….
>
> ***(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it.***
>
> ***(4) This article shall not be construed as excluding any other circumstances in which a person may be or become a constructive trustee."***

He submits that a constructive trustee is not liable to account for the profit which would have been made in the absence of the breach of trust (as per Article 30(2); he is only liable to account for any profit which he has actually made. In my judgment it is strongly arguable

that this is far too restrictive a reading of Article 33. It is clear from Article 33(4) that this is not meant to be a codification of the position of a constructive trustee and, as Millett L J makes clear, the expression is one which is used to cover a wide variety of different circumstances. Indeed in *Paragon* itself, Millett L J makes it clear that a constructive trustee in the second category is liable to account as if he were a trustee which, in my judgment, makes it clearly arguable that he is liable to account to the same extent as a conventional trustee. Furthermore, in *Wallersteiner v Moir* [1975] 1 QB 374 the English Court of Appeal made it clear that there is a general equitable jurisdiction to award compound interest whenever money is misused by someone in a fiduciary position (in that case a director of a company). That is exactly the allegation here. Mr Speck was unable to point me to any authority which states that compound interest may not be awarded under the Court's equitable jurisdiction in cases of dishonest assistance or knowing receipt and in the circumstances I consider that the plaintiff has an arguable case that it is entitled to compound interest if it succeeds in its main claim.

54 The next question is as to the rate of interest. The defendant submits that the maximum possible rate is that which was awarded in *Cutner* i.e. the rate which would have been earned on a one-month fixed bank deposit rolled over and compounded monthly. Mr Clapham, an employee in the finance department of Mourants, has sworn an affidavit giving certain calculations by reference to LIBID as being an appropriate measurement by which to calculate deposit rates in dollars. However *Cutner* did not purport to lay down a rule. Furthermore, the decision was given before the introduction of the power to award interest under the Interest on Debts and Damages (Jersey) Law 1996. Under that Law the Court regularly awards interest (for the period both before and after judgment) at the court rate, which is fixed by Practice Direction at 2% over base rate. Admittedly that is simple interest but it shows that a rate is regularly taken which is not reflective of the amount which would be earned on deposit. Given the circumstances of this case it seems to me perfectly arguable on the part of the plaintiff that it should be entitled to compound interest at 2% over LIBID compounded on a monthly basis. I do however regard a rate of 10% as not being seriously arguable.

55 Neither party has calculated interest on this basis and accordingly I propose to release this judgment in draft and to ask the parties prior to formal delivery of the judgment to calculate interest from 1 st November 2000 at the rate of 2% over LIBID compounded monthly. As it seems to me that this case may well take up to two years to resolve, I also request that the calculations be carried forward (on the assumption that the latest LIBID figure continues) for a further two years from the date on which I propose to deliver judgment.

56 In my judgment no distinction is to be drawn between the assets of the various defendants. Although the claims against Bluebird and Dovetail are proprietary claims only, the plaintiff asserts that their assets are available to meet the personal claims. Thus in the case of the Gemstone A trust (for which Dovetail holds assets as nominee) the assets are effectively held for Mr Koonmen. Under the settlement agreement, which effectively constituted the Gemstone A trust, monies are payable out of the trust to Mr Koonmen on an instalment basis during the 'Risk Period' which is defined as a period ending on the date when the

AEBT trustee declares with Mr Bender's consent that there is no risk of the Indemnified Persons (being Mr Bender and others) incurring liability in respect of (*inter alia*) the Silverman claim. The assets of Bluebird are held as nominee for the Gemstone B trust and it appears that the ability of Mr Phillips and others to benefit under that trust is effectively subordinated to the Silverman claim. In the circumstances I find it to be in the interests of justice that the assets of Bluebird and Dovetail be restrained pursuant to the injunctions; it is of course the case that at present these are the only assets known to have been caught by the injunction. As to the position of Bluebird and Dovetail, I did indicate during the hearing that I found it somewhat surprising that the trustee of the AEBT and the trustees of the two Gemstone trusts have not been joined as defendants on the basis that, where it is said that assets in a purported trust in truth belong to someone else, it is usual to sue the trustee rather than a nominee company in which the trustee happens to have placed the assets. However, that is a matter for the plaintiff.

57 Accordingly, were I considering solely a Mareva injunction, I would reduce the maximum sum to an amount calculated in round terms by taking $59.2 million, adding interest at 2% compounded monthly from 1 st November 2000 to a date two years hence, making a provision for the costs of this action and rounding the resulting sum up to the nearest million.

58 However, this is a case where the plaintiff also brings a proprietary claim. In such cases rather different principles apply to those applicable from Mareva injunctions. As *Gee, Commercial Injunctions*, puts it at para 4.009:-

> ***"The practice of inserting a financial limit for a Mareva injunction can be contrasted with a freezing injunction granted over assets to which a proprietary claim is made.*** Normally the whole of the property claimed will be preserved by the injunction and a financial limit will not be appropriate."

59 It is of course true that the plaintiff only claims 25% of the Amber fees. But, until discovery is given, the plaintiff cannot tell into which part (if any) of the defendants' assets it can trace so as to vindicate its proprietary claim. If the maximum sum is reduced, the defendants would be free to dispose of assets over the maximum sum and this might enable the defendants to dispose of those assets over which the plaintiff has a proprietary claim, leaving injuncted only those assets which are not subject to the proprietary claim. For example, suppose the plaintiff is ultimately successful in its proprietary claim against Bluebird and Dovetail. Let us suppose further that, applying the relevant rules of tracing, the proprietary claim would be successful in respect of bank account A but unsuccessful in respect of bank account B. If, by reducing the maximum, the defendants have been able to pay away assets in bank account A, leaving assets only in bank account B, the plaintiff could well suffer injustice.

60 The position will of course become clear once discovery is given because at that stage it will be possible to ascertain, applying the relevant tracing rules, those assets in respect of which the plaintiff has an arguable proprietary claim. At that stage, if it was clear that a maximum sum could be restrained whilst protecting the plaintiff's proprietary claim, it would

be appropriate to reduce the sum. Alternatively, it might be that the defendants could agree not to insist on strict tracing and to agree that a sum restrained in accordance with the reduced maximum amount would be made available to meet any proprietary claim, regardless of tracing rules. However these are matters for the parties to consider. At this stage, in the absence of any disclosure on the part of the defendants, I consider that the injunction must be retained in the present sum so as to avoid any risk of the 'wrong' assets being paid away if the maximum sum is reduced to the sum which would result from the calculations I have set out earlier in this judgment.

61 I therefore dismiss this application to discharge or vary the injunction.

62 Following release of the judgment in draft, Mr Clapham has helpfully carried out the calculations requested at para 55. The total claim comes to $86,023,321. Accordingly, had I been considering solely a Mareva injunction, I would have reduced the sum injuncted to $88million, applying the principles set out in para 57.