Neutral Citation Number: [2025] EWHC 1405 (Ch)

Case No: BL-2025-000391

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

16 June 2025

Before :

NICOLA RUSHTON KC

(Sitting as a Deputy High Court Judge)

- -

Between :

PHLO TECHNOLOGIES LTD

Claimant

- and -

TALLAGHT FINANCIAL LTD (t/a CUBEFUNDER)

Defendant

- -
- -

Simon Goldstone and **Jonathan Schaffer-Goddard** (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
David Chivers KC and **Anna Scharnetzky** (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing date: 20 May 2025

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 16 June 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

NICOLA RUSHTON KC:

1. This is the adjourned return date of a without notice interim injunction ("**the Injunction**") originally granted out of hours by Mrs Justice Joanna Smith at 00.47 on 25 March 2025, prohibiting the Defendant lender, Tallaght Financial Ltd (hereafter referred to by its trading name, "**Cubefunder**") from taking any steps to appoint an administrator out of court in respect of the Claimant, Phlo Technologies Ltd ("**Phlo**"). The Injunction was continued by Mr Justice Marcus Smith at the original return date on 1 April 2025 without substantive argument on the merits, with directions for the filing of further evidence and Particulars of Claim ("**PoC**"). This was on the basis that Cubefunder wished to apply for the Injunction to be discharged for alleged breach by Phlo of its duty of fair presentation. Marcus Smith J also required Phlo to provide fortification of its cross undertaking in damages by paying £500,000 into its solicitors' client account, which has been done.

2. The original application notice was dated 24 March 2025 and the application for the return date was issued on 26 March 2025.

3. The grant of the Injunction followed an earlier grant of an interim interdict ("**the Interdict**") in Scotland with a similar effect on 8 January 2025 (case number COS-P13-25) also on Phlo's application. The Interdict was discharged by agreement later in the day on 25 March 2025, there having been a dispute as to whether Scotland or England was the correct jurisdiction.

4. Cubefunder asserts a right to appoint an administrator out of court pursuant to the floating charge under a debenture executed on 4 January 2024 ("**the Debenture**") by Phlo's then Chief Executive Nadeem Sarwar ("**Mr Sarwar**"), intended to secure sums due or to become due to Cubefunder. By its PoC (but not earlier), Phlo raised an issue as to the enforceability of the Debenture. There has always been an issue as to whether the loans said by Cubefunder to be secured by the Debenture are enforceable or void, which Cubefunder accepts for the purpose of this application is arguable.

5. The Injunction only restrains appointment of an administrator out of court under paragraphs 14 to 19 of Schedule B1 to the Insolvency Act 1986 ("**IA 1986**"). It would not prevent an application by Cubefunder to the Court for the appointment of an administrator.

6. The issues before me, which are related, are therefore:

    i) Is the continuation of the Injunction justified on *American Cyanamid* principles?

    ii) Did Phlo breach its duty of fair presentation and/or of full and frank disclosure at the without notice hearing and if so, should the Injunction be discharged?

Background facts

7. These proceedings are at an early stage and are highly contested. I am not in a position to make findings of fact about the substantive case and do not purport to do so. The account of the dispute which follows is primarily based on Phlo's PoC and evidence since

Cubefunder has not yet filed its Defence, and because I am only concerned for the purposes of the injunction application with whether Phlo's case is reasonably arguable.

8. Phlo is a start-up which operates a digital pharmacy business, which its directors say is growing rapidly. Until 30 August 2024 Mr Sarwar was the CEO and a director of Phlo. Although Mr Sarwar started Phlo, it has since acquired a number of shareholders, directors and investors. In March 2024 Phlo held a major fundraising round following which Mr Sarwar's interest was reduced from 53.2% to 33.5%.

9. Mr Sarwar has for many years also had interests in two other companies in this field, unconnected to Phlo, called Universal Pharmacy Ltd ("**UPL**") and UPL Holdings Ltd ("**Holdings**").

10. Cubefunder is an FCA-regulated lender which has a particular focus on making shorter term loans to small businesses, usually for sums up to £100,000. Its CEO and majority shareholder is Gary Miller-Cheevers ("**Mr Miller-Cheevers**"). Cubefunder has lent very substantial sums to UPL, starting in about May 2018.

11. Phlo's case is that there was an unduly close business relationship between Mr Sarwar and Mr Miller-Cheevers, which manifested in Cubefunder making an unsustainably large number of loans to UPL, at high rates of interest, and then from about January 2020 accepting repayments by Mr Sarwar using funds belonging to Phlo, which had been separately invested in Phlo for the development of that company. It is alleged that Mr Miller-Cheevers knew, from contemporaneous emails and from the clandestine way in which this was done, that these were Phlo's funds and that this was being done without the knowledge of Phlo's other directors. On 29 June 2022 Mr Sarwar caused Phlo to execute a guarantee of UPL's liabilities to Cubefunder, also said to be without the knowledge of Phlo's other directors. From April 2023 to August 2024 it is alleged that loans were made by Cubefunder direct to Phlo to a "secret" Tide bank account, which were then used to repay UPL's liabilities. Phlo's case is that all these loans were taken out by Mr Sarwar without authority and that Mr Miller-Cheevers and so Cubefunder were on notice of this lack of authority. This case is disputed but Cubefunder accepts it is reasonably arguable.

12. On 4 January 2024, Mr Sarwar executed the Debenture. At the without notice hearing before Joanna Smith J, at the hearing before Marcus Smith J and in the Claim Form, Phlo acknowledged the existence of the Debenture and did not dispute its validity. In the PoC by contrast, it is alleged that Mr Sarwar did not have actual authority to execute the Debenture on behalf of Phlo, that Cubefunder knew or ought to have known that he did not, and that it and the floating charge in it are unenforceable. Since the hearing before me, Phlo has filed a draft amended Claim Form which also asserts that the Debenture is void and unenforceable.

13. On 18 June 2024 Mr Sarwar caused Phlo to execute a guarantee of Holdings' liabilities to Cubefunder. Again, Phlo's case is that the guarantees of UPL's and Holdings' liabilities were unauthorised and Mr Miller-Cheevers knew or ought to have known of this lack of authority.

14. In mid-July Mr Sarwar admitted some of the alleged misappropriations, to Adam Hunter ("**Mr Hunter**"), a director of Phlo, and Paul Munn ("**Mr Munn**"), a director of Par, one of the main investors in Phlo. On 7 August 2024 a meeting took place between Mr MacMillan (a director of Phlo and Par), Mr Munn, Mr Sarwar and Mr Miller-Chivers. There is a significant dispute between the parties as to what was said at that meeting and whether any implicit or explicit admissions of liability for any sums were made on behalf of Phlo. On 30 August 2024 Mr Sarwar's employment by Phlo was terminated for gross misconduct.

15. There were further negotiations between Cubefunder and the remaining directors of Phlo during the rest of 2024. On 7 December 2024 Phlo's solicitors sent an email to Cubefunder's solicitors, headed "Without Prejudice" but since brought into evidence on this application by Phlo, which offered to settle all of Cubefunder's claims against Phlo for a total payment of £532,122. This was said to be made on the basis of the figures for the outstanding principal quantified by Cubefunder in the sum of £483,747 plus interest at 10% p.a. of £48,375. That offer was not accepted. Cubefunder however relies on that letter as an admission at least of that sum and/or as meaning that Phlo has no reasonably arguable defence at least to a claim for that sum.

16. On 3 January 2025 Cubefunder sent 3 demand letters for sums said to be due under loans to Phlo, and under loans to UPL and Holdings secured by the guarantees given by Phlo. These demands were received by Phlo on 6 January 2025. Shortly after that, on 8 January 2025, Phlo applied in Scotland and obtained the Interdict.

17. On 17 March 2025, Cubefunder lodged a motion for a recall (i.e. discharge) of the Interdict, on the basis among other things of an English jurisdiction clause in the Debenture. Cubefunder's motion was listed to be heard before Lord Richardson (who had also granted the interim order) at 09.30 on 25 March 2025. Papers in support of that application were apparently served on Phlo's solicitors by Cubefunder's solicitors at 11.14 on 24 March 2025.

18. There was an exchange of emails between Addleshaw Goddard, Scotland on behalf of Phlo and Dentons, acting for Cubefunder in Scotland, on 24 March 2025 which is material to Cubefunder's application to discharge the Injunction. This is described in the witness statement of Lynsey Walker ("**Ms Walker**") of Addleshaw Goddard, Scotland in her witness statement dated 6 May 2025, served in response to a witness statement of Mr Miller-Cheevers in support of discharging the Injunction. At [15], Ms Walker says this (page references are to the bundle for the hearing before me):

> "15. As set out in Cubefunder's Answers, Cubefunder took a jurisdiction point in the Scottish Proceedings in which it argued that due to clause 22 of the Debenture a dispute which involved the Debenture had to be tried in England. On the 24 March 2025 at 09:28 I emailed Dentons to ask them to confirm whether, given their own arguments on jurisdiction, they "*would be agreeable to a short continuation of Tuesday's hearing in order to allow such orders to be sought in England – and any objections to the same put forward*?" noting that this would "avoid the risk of duplication of process" [LW1/254]. ("Continuation" here is a Scottish term equivalent to "adjournment".) At 10:06 on the 24 March 2025, Dentons responded

> noting that they would take client instructions [LW1/253]. We did not hear from Dentons again until 15:58 on 24 March 2025, where they informed us that: "*Further to the below I can confirm that our client does not agree to the proposed continuation. Separately, it is our understanding that our client would instruct Howard Kennedy LLP (who we understand you have already had dealings with) in respect of any English proceedings which your client may raise*" [LW1/253]. As a result of this exchange with its solicitors, Cubefunder was on notice that Phlo was about to apply in England for an injunction. I consider that it should have been obvious, given the Scottish Recall Hearing the next day, that this would be done imminently." [Italics in original].

19. At [16], Ms Walker then says this in relation to the decision to apply in the High Court in England for an interim injunction on the evening of 24 March 2025:

> "16. Given that CubeFunder did not consent to continuing the Scottish Proceedings, and the real risk that Phlo would lose the benefit of the Interim Interdict at the Scottish Recall Hearing on the grounds of jurisdiction, it was necessary to seek an urgent interim injunction in England on the same terms as the Interim Interdict. At that point in time post 15:58 on 24 March 2025, I did not know whether it would be possible to obtain a hearing before this Court prior to the Scottish Recall Hearing. Papers for Phlo were with our senior counsel, Roddy Dunlop KC ("RD") for placing before this Court at 21:51 on 24 March 2025. Roddy Dunlop KC was first formally instructed in relation to the Scottish Proceedings in the late afternoon of 21 March 2025 owing to Phlo's original senior counsel being unavailable to appear on behalf of Phlo at the Scottish Recall hearing. As Roddy Dunlop KC is qualified in both Scotland and England and Wales, he was also instructed to appear on Phlo's behalf in relation to the present proceedings. An out of hours hearing was ultimately accommodated by Mrs Justice Joanna Smith who heard the matter on the 24 March 2025 at 23:55 ("Recall Hearing"). I understand from reading Roddy Dunlop KC's note of the Recall Hearing ("Note") that he first made a call to the Royal Courts of Justice at 21:52. Roddy Dunlop KC did not receive a call back from Ms Caroline Reid, Chancery Clerk, until 23:07, after which papers were emailed to Ms Reid at 23:21.Given the nature and timing of the Recall Hearing this proceeded solely between RD and Mrs Justice Joanna Smith. Neither I, nor any of my team or anyone from AG, were in attendance. Even if CubeFunder had known that the out of hours hearing was happening, they would not have been able to attend so it made no difference that they were not told that the hearing was happening."

20. As Ms Walker states, the without notice hearing before Joanna Smith J proceeded by telephone and was attended only by Phlo's dual-qualified leading counsel, Mr Roddy Dunlop KC and the judge. Mr Dunlop has produced an (unsigned) note of the hearing, which was served on Cubefunder and which I have seen ("**the Note**"). The main evidence relied on at that telephone hearing was a witness statement from Mr Hunter with exhibited documents, which was substantially based on his evidence in the Scottish proceedings. Joanna Smith J granted the Injunction sought. I will refer below where relevant to what was said during that telephone hearing, as recorded in the Note.

21. The Injunction was continued by Marcus Smith J at the initial return date on 1 April 2025, Cubefunder having indicated that it wanted more time to prepare its case for discharge on grounds of breach of the duty of fair presentation and failure to give even short notice of the hearing before Joanna Smith J. It was at the initiative of Marcus Smith J that fortification of the cross undertaking was provided.

22. Phlo has since served a short second witness statement from Mr Hunter dated 31 March 2025. On 8 April 2025 it served a statement from Phlo's Finance Director, Christopher Cullen ("**Mr Cullen**") relating to the financial status of Phlo. On the same day it filed and served its PoC setting out in detail its case as to the unenforceability of the loans, Mr Sarwar's lack of authority, and Cubefunder's knowledge of that lack of authority.

23. Mr Miller-Cheevers provided a witness statement in response dated 28 April 2025.

24. On 6 May 2025 Phlo filed and served evidence in reply on the notice and fair presentation issues, from Ms Walker and from its English solicitor Benjamin Lowans ("**Mr Lowans**"); plus a statement from Mr Munn primarily setting out his account of the meeting on 7 August 2024; and a further statement from Mr Cullen. This second statement from Mr Cullen exhibited financial documents relating to Phlo, specifically (a) a "Board Pack" provided to Phlo's directors in March 2025 which included draft monthly profit and loss figures to March 2025 and a budget and forecast to March 2026; draft budget monthly balance sheet and cashflow also to March 2026; (b) details of a contract between Phlo and a major supermarket; and (c) draft financial statements for Phlo for the year ending 31 March 2025. Finally Mr Hunter has served a third witness statement dated 19 May 2025 in response to Cubefunder's allegation that he misled the court as to the financial position of Phlo in his first statement.

Submissions on behalf of Phlo

25. Mr Simon Goldstone, appearing with Mr Jonathan Schaffer-Goddard for Phlo, submitted that, applying *American Cyanamid* principles:

    i) There was a serious issue to be tried as to whether any of the loan agreements secured by the Debenture were enforceable or void, and also as to whether the Debenture itself was enforceable or void;

    ii) Damages would be an insufficient remedy for Phlo because it would be unable to continue in business or pursue its claim if an administrator was appointed by Cubefunder;

    iii) The balance of convenience favoured continuing the injunction because otherwise the issues raised in its claim would never be considered by a court or resolved and the appointment of an administrator would have a catastrophic effect on its developing business, including on its employees, premises and supply contracts. In contrast, Cubefunder would merely have to wait for the claim to be resolved one way or the other.

26. As to Cubefunder's application to discharge the Injunction:

i) The application to Joanna Smith J had been extremely urgent and there had been no real time to give even very short notice to Cubefunder and its representatives. The decision not to do so had been a reasonable judgement call.

ii) There was no material non-disclosure. The email of 7 December 2024 had been referred to in Mr Hunter's first statement and anyway was not an admission: it was a without prejudice offer to settle the whole claim. Mr Dunlop had known what Cubefunder's defence was from the Scottish proceedings, and the Note should be taken at face value that he had fairly summarised the points made therein. The failure to mention the meeting on 7 August 2024 in evidence was not material because it was a preliminary discussion. The financial position of Phlo had not been misrepresented by Mr Hunter in his first statement. Phlo had substantial support and funds from its investors and its financial profile was typical of a startup which was reinvesting operating profits into its infrastructure. Its financial problems were the consequence of Cubefunder's loans, and Cubefunder should not be able to rely on such consequential financial problems. Creditors other than Cubefunder were being paid and if Phlo was required to find the funds to repay Cubefunder, it could do so; this would merely mean slowing its growth strategy to do so.

Submissions on behalf of Cubefunder

27. Mr David Chivers KC, appearing with Ms Anna Scharnetzky for Cubefunder, submitted that, as to the general *American Cyanamid* principles, there was no serious issue to be tried because, applying *BCPMS (Europe) Ltd v. GMAC Commercial Finance Plc* [2006] EWHC 3744 (Ch) ("***BCPMS***"), a holder of a qualifying floating charge ("**QFC**") is entitled to appoint administrators pursuant to paragraph 14(1) of Schedule B1 to IA 1986 even if the debt which it is seeking to enforce is disputed in good faith and on substantial grounds, and even though the appointment will only be valid if the QFC is valid. Since Phlo had admitted at least the principal in its solicitors' email of 7 December 2024 and recognised in its draft financial statements for the year ending 31 March 2024 a liability to repay the principal to Cubefunder (with only fees and interest being recorded as a contingent liability), some of the sums secured by the Debenture were indisputably due. Further Phlo could not realistically dispute the enforceability of the Debenture when Mr Hunter had accepted its validity in his first statement, as Phlo had also done in Scotland.

28. Further there were strong grounds to discharge the Injunction in any event because:

i) The failure to give Cubefunder even short notice of the application to Joanna Smith J was a grotesque breach of the rules, particularly CPR rules 25.8(1) as to the requirements for an application without notice and rule 25.3(3) regarding the necessity for evidence as to the reasons why notice has not been given. If she had been taken to those provisions, she would have refused the Injunction. The evidence of Ms Walker and Mr Lowans had wrongfully tried to play down these breaches, and the Note did not record that Mr Dunlop had addressed the issue at all, as he should have done. Since Mr Dunlop had not put in any witness statement or expanded note, the court could only conclude that Phlo had no answer to the criticisms made on this point. Since Ms Walker did not make any reference in her statement to having overlooked the requirement for notice or having made a

judgement call, the court should conclude she had decided not to do so. The importance of giving at least short notice except in cases where secrecy was required had been repeatedly emphasised in the authorities.

ii) There were other material breaches of Phlo's duty to give full and frank disclosure on the without notice application in that:

a) Phlo had failed to draw Joanna Smith J's attention to the offer to pay the principal in its email of 7 December 2024 and the acceptance of liability for the principal in its draft accounts, which showed the principal was not seriously disputed.

b) Phlo failed to make any reference to the meeting on 7 August 2024, during which the loans and the Debenture were discussed by Mr Miller-Cheevers with the other directors of Phlo. Phlo knew what Cubefunder's position was about this meeting, from the Scottish proceedings.

c) Mr Hunter made a misleading and inaccurate assertion about Phlo's financial position when he said in his first statement at [99]:

> "The accounts for Phlo for the year ending 31 March 2023 are at [AH1/429-442]. These show that Phlo had a net asset position of £2,764,141. In light of the Misappropriations these accounts will not be fully accurate however, in high level Phlo was then and remains now in profit and able to meets its debts as and when they fall due."

This was misleading because the Board Pack exhibited to Mr Cullen's second statement included draft profit and loss statements showing Phlo was increasingly loss-making; and negative cash flow and balance sheets for March 2024 to March 2026, with negative assets throughout. Mr Cullen acknowledged in his first statement that Phlo had been "*loss making throughout its trading history*". The draft annual accounts for the year to 31 March 2024 also included a substantial downwards adjustment to net assets for the year ending 2023.

29. On balance of convenience, Mr Chivers submitted that the further evidence about the increasingly negative financial position of Phlo pointed firmly towards lifting the Injunction. Given Phlo's present negative net asset position and increasing projected losses, this was an insolvent company which was continuing to trade at the expense of its creditors and whose investors had already lost £30M to date. Its cash was rapidly disappearing. Cubefunder would rather reach a structured settlement than appoint an administrator, but the Injunction was allowing Phlo to avoid paying anything with impunity. Even if a trial was expedited, Phlo would be in a significantly worse position in 3-4 months' time. However, if the Injunction was continued, Phlo should be required to provide unlimited fortification of its undertaking in damages from a wholly and sufficiently solvent third party.

The law

30. The established principles for determining whether to grant or as appropriate to continue an interim injunction are set out in *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and are as follows:

    i) The applicant must satisfy the court that there is a serious issue to be tried;

    ii) The court must consider whether damages would be an adequate remedy for either party;

    iii) Assuming this is not the case, and a cross-undertaking in damages and any necessary fortification is offered, the Court must consider the "balance of convenience", and in particular the course which would appear to do the least harm if wrong.

31. Lord Diplock said further in *American Cyanamid* at 407: "*It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration*…"

32. I also bear in mind the need for caution, as expressed for example by Hoffman J (as he then was) in *Films Rover International v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680:

> "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described..."

33. In *BCPMS* Lewison J (as he then was) considered the test to be applied on an application for an injunction to prevent the out of court appointment of an administrator. In particular he considered whether it was the same as the test on an application to restrain the presentation of a winding up petition, where an injunction will be granted if the debt is wholly disputed in good faith and on substantial grounds.

34. Lewison J held that it was not the same test. In the case before him the company was claiming that the relevant contract and the debenture had been entered into as a result of fraudulent misrepresentation by the lender (see [35]). The judge accepted, at [49] that there was a dispute in good faith and on substantial grounds. However he held that this did not mean the company was automatically entitled to an injunction (analogous to a winding up petition). Rather, he concluded, whether to grant or refuse an injunction should be decided on *American Cyanamid* principles. In other words, so long as there was a triable issue as to whether the security existed and had become enforceable, the court should proceed to consider stages 2 and 3 of *American Cyanamid* and in particular

the balance of convenience. This had been the position under earlier law concerning granting an interim injunction to prevent the appointment of a receiver by a bank, and the same principles applied to an interim injunction to prevent the out of court appointment of an administrator. This was so even though it would not be resolved until the trial whether the QFC was enforceable or not (at [65]), so it might ultimately prove to be the case that the appointment of an administrator had been wrongful.

35. At [66] – [68] Lewison J expanded on some of the reasons for this approach:

> "66. The appointment of an administrator by a secure creditor is often a hostile act proposed by the company's management. In my judgment it would be a serious impediment to the realisation of assets for the payment of secure creditors if they could be precluded from appointing an administrator merely because the debt was disputed, even if the dispute was in good faith.
>
> 67. Schedule B1 is part of a package of measures intended to encourage enterprise. That package includes the facilitation of the raising of credit. Part of the quid pro quo was to make it easier for creditors to appoint administrators, hence the current power to appoint administrators without having to apply to the court. I do not consider that Mr Lyon's analogy with bankruptcy and winding up petitions is a sound one.
>
> 68. A debenture and the powers of a debenture holder derive from a contract between the lender and the borrower. The borrower consents to the grant to a lender of powers of enforcement, including the appointment of administrators, formerly administrative receivers. Therefore, I reject Mr Lyon's submission that the appointment of the administrators was necessarily invalid merely because of the existence of a dispute in good faith on substantial grounds.
>
> 69. Mr Lyon's fallback submission on this point is that if administrators are appointed in the face of a disputed debt, it is inevitable that an injunction would be applied for. If applied for, it is inevitable that it would be granted. I reject this submission too. If the administrators are appointed and an injunction is applied for, the grant or refusal of an injunction will, in my judgment, be decided on familiar American Cyanamid principles…"

36. Reliance was placed by Mr Chivers on the requirements for applications without notice in the current CPR rule 25.8(1). However an entirely new Part 25 was substituted by the Civil Procedure (Amendment) Rules 2025 (SI 2025/106) with effect from 6 April 2025, which included this new rule 25.8. Since the without notice application was made on 24 March 2025, I need to consider the rules as they existed prior to those recent amendments.

37. Formerly, most of the requirements for without notice applications for interim injunctions were contained in Practice Direction 25A. Paragraph 4 concerned "*Urgent applications and applications without notice*" and stated so far as material:

> "4.2 These applications are normally dealt with at a court hearing but cases of extreme urgency may be dealt with by telephone.

> 4.3… (3) except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application."

38. The terms of CPR rule 25.3 have also been modified. The old version, in force as at 24 March 2025, provided:

> "25.3.—(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.
>
> (2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.
>
> (3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given."

39. The courts have repeatedly emphasised the importance of the principle that both sides should be given a hearing, in the context of urgent applications for relief. In *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16; [2009] 1 WLR 1405 (guidance also applicable in England and Wales), Lord Hoffmann said at [13]:

> "13 First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act… Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

40. In the case of *L v K (Freezing Orders: Principles and Safeguards) (Fam D)* [2014] 2 WLR 914, after citing *Olint* and considering comparable cases in the family jurisdiction, Mostyn J said this at [40] – [41], on the importance of giving at least short notice:

> "**Short notice**
>
> 40. An extremely important provision, reflecting the final sentence of the quotation from Lord Hoffmann [in *Olint*] set out above, is paragraph 4.3(c) of Practice Direction 20A - Interim Remedies supplementing FPR Pt 20, which requires that "except in cases where it is essential that the respondent must not be aware of the application, the applicant should take steps to notify the respondent informally of the application". The corresponding provision in the Civil Procedure Rules is paragraph 4.3(3) of Practice Direction 25A supplementing CPR Pt 25, the force of which has been strongly emphasised by Tugendhat J in two cases. In *O'Farrell v O'Farrell* [2013] 1 FLR 77, paras 66—67, he stated:

> '66. Like Mostyn J, I too have been shocked at the volume of spurious ex parte applications that are made in the Queen's Bench Division. The number of occasions on which CPR r 25.2and CPR r 15.3(1) and (3) and PD 25A, para 4(3) are flouted is a matter of real concern. In these days of mobile phones and e-mails it is almost always possible to give at least informal notice of an application. And it is equally almost always possible for the judge hearing such an application to communicate with the intended defendant or respondent, either in a three-way telephone call, or by a series of calls, or exchanges of e-mail. Judges do this routinely, including when on out of hours duty. Cases where no notice is required for reasons given in PD 25A, paragraph 4.3(3) ['where secrecy is essential'] are very rare indeed.
>
> 67. The giving of informal notice of an urgent application is not only an elementary requirement of justice. It may also result in a saving of costs. The parties may agree an order, thereby rendering unnecessary a second hearing on a return date.'
>
> [the second of Tugendhat J's cases, *B v Barristers Benevolent Association Ltd* [2011] EWHC 3413(QB) at [28], was to identical effect.]"

41. In the case of *Franses v. Al Assad* [2007] EWHC 2442 (Ch), Henderson J (as he then was) similarly referred at [69] to the importance of the principle of not making an order without hearing both sides, and accepted at [70] – [71] the arguments of the respondent that the circumstances of the case "*came nowhere near justifying the making of the application out of hours on the Friday evening without any notice at all to any of the respondents*." At [72] he also observed that it was symptomatic of the weakness of this part of the applicant's case that the question of notice did not seem to have been directly raised as a separate subject during the without notice telephone hearing. At [74] he concluded: *"I can readily understand how, in the heat of the moment, the decision was taken to proceed in this way, but I must nevertheless say that it was in my view a serious error of judgment*." At [85] he held:

> "… I have found, by a narrow margin, that the application to Morgan J met the substantive requirements of a good arguable case and a real risk of dissipation of assets. However, I have also found that the application was improperly made without notice, that it suffered from severe procedural flaws, and that the duty of full and frank disclosure was breached in two respects. Looking at the matter in the round, I am satisfied that the cumulative effect of these deficiencies justifies an award of costs on the indemnity basis…"

42. At [102] – [106], Henderson J went on to consider whether despite those circumstances, he should nevertheless exercise his discretion to grant a more limited freezing injunction. He described that exercise of discretion in the following terms, referencing the leading decision in *Brink's Mat Ltd v Elcombe* [1988] 1WLR 1350, to which the parties before me also referred:

> "(c) Discretion

102. I turn finally to the question whether I should exercise my discretion in favour of the grant of the proposed injunction. For the reasons I have already given, I feel no doubt that this is in principle a suitable case for the grant of a limited injunction in the terms sought… However, the question of substance remains whether it is appropriate for the Court to grant the injunction where it replaces, albeit on a much more limited basis, the freezing order made by Morgan J which I have found to be flawed in a number of significant respects.

103. The relevant principles were stated by Balcombe LJ in *Brink's Mat Ltd v Elcombe* [1988] 1WLR 1350 at 1358C, as follows:

> "The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained … But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained … I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon LJ in [another case] that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction."

104. In *Behbehani v Salem*, reported as a note at [1989] 1WLR 723, the Court of Appeal reiterated that it was undesirable to apply hard and fast rules and that it was preferable for each case to be considered on its own merits. However, Woolf LJ went on to say at 729E:

> "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 fresh injunctions, it is most important that the Court assesses 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."

105. In applying these principles, I begin by asking myself how serious and culpable the non-disclosure to Morgan J actually was. In my judgment it falls towards the lower end of the scale, both in extent and in culpability… However, I am satisfied that the failures to take these steps were no more than errors of judgment by Mr Mallin, and that there was no intention on his part, or that of anybody else, to omit or withhold information which was thought to be material (see *Behbehani v Salem* at 736E-F, where Nourse LJ said that this was the relevant test of innocent non-disclosure laid down by all three members of the Court in the

> *Brink's Mat* case). The cumulative effect of these errors of judgment was serious, but it caused no substantive injustice to Mr Al Assad. Furthermore, none of the defaults were in my view of central importance to the order made by Morgan J. It is quite possible that he, or another Judge, might still have been persuaded to make the order, even if the application had been made on notice. The application was a weak and speculative one, but not in my judgment so weak and speculative that it was bound to fail. Disclosure of the funding arrangement might have persuaded the Judge to exact a more stringent cross-undertaking in damages, but it is equally likely that he would have regarded the limited undertaking as sufficient to hold the position until the first return date…
>
> 106. In these circumstances I take the view that this is a case where the public policy requiring full disclosure on without notice applications, and the need for a suitable deterrent, can be sufficiently met by an award of indemnity costs, and that the deficiencies in the original application are not so grave that the Court should refuse to grant the more limited injunction now sought…" [Henderson J then proceeded to make a more limited freezing order].

43. The parties are agreed as to the import of the authorities on the applicant's duty of full and frank disclosure on a without notice application, as set out in particular in *Brink's Mat* at 1356F-1357. Mummery LJ in *Memory Corporation plc v Sidhu (No 2)* [2000] 1 WLR 1443 at 1460A-B also emphasised the importance of the now standard practice of counsel producing a full written account of their recollection of the hearing as close in time to the events as possible. The principles as to the duty of full and frank disclosure and fair presentation were conveniently summarised by Carr J (as she then was) in *Tugushev v. Orlov* [2019] EWHC 2031 (Comm) at [7], as follows, so far as material:

> "7. The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
>
> i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;
>
> iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

… ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the

> facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
>
> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.
>
> (See in particular *Memory Corporation plc and another v Sidhu and another (No 2)* [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)"

Conclusions

Serious issue to be tried

44. On the question of whether there is a serious issue to be tried, my conclusion is that there is real dispute as to whether all and any of the loans to Phlo, UPL and/or Holdings are enforceable or are void as against Phlo, as to which both parties have a realistic prospect of success. There is a substantial dispute of fact and law, unsuitable for summary determination, as to Mr Sarwar's authority on behalf of Phlo, as to Mr Miller-Cheever's knowledge of any lack of authority and as to apparent authority.

45. I consider that this extends to Phlo's liability on all of the loans, despite Phlo's solicitors' email of 7 December 2024 and despite the contents of Phlo's draft accounts for the year ending 31 March 2024. The email was a without prejudice offer to settle all proceedings against Phlo which Phlo could reasonably have wished to make for commercial reasons without there being any necessary implication that it admitted the principal sums. That conclusion is not undermined by the fact Phlo chose to waive privilege in the email for the purposes of this application. While the apparent acceptance in notes 7 and 11 to the 2024 draft accounts that the principal sums under the loans were sums due to creditors, whereas the fees and interest were disputed as contingent liabilities, can no doubt be relied upon as evidence by Cubefunder, Phlo has with the benefit of legal representation served detailed PoC which contest the enforceability of both principal and interest on

substantial and particularised grounds, supported by witness evidence. I do not consider that it would be right to conclude on this application that there is no real prospect of Phlo successfully contesting the principal sums.

46. In those circumstances I do not consider it necessary to consider whether Phlo also has realistic prospects of establishing that the Debenture is void despite Mr Hunter's acceptance of it in his first statement, as to which Phlo has filed a draft amended Claim Form to bring its case in line with the PoC. On the face of it, the same arguments as to authority and Mr Miller-Cheevers' knowledge are likely to apply to the Debenture as to the loans. The validity of the Debenture was not contested before Joanna Smith J, so this issue was not relevant to her decision.

47. Applying *BCPMS,* this is therefore a case where all of the loans are disputed in good faith and on substantial grounds. This means that on the one hand, there is a serious issue to be tried as to whether Cubefunder is entitled to appoint an administrator pursuant to its claimed QFC, but on the other hand that dispute does not mean Phlo was and is automatically entitled to an injunction. Rather I must proceed to consider stages 2 and 3 of *American Cyanamid,* and also whether there has been a breach of the duties of full and frank disclosure and fair presentation and so whether the Injunction should be discharged.

48. As to stage 2 of *American Cyanamid*, I do not consider that damages would be a sufficient remedy for either party. Phlo objects on substantial grounds based on evidence from Mr Cullen and Mr Hunter that the appointment of an administrator would substantially if not completely impair Phlo's ability to run its business and would also effectively stifle its claim. Mr Chivers disputes these assertions and also contends that the evidence is not admissible. I do not accept those submissions. I consider that Mr Hunter and Mr Cullen are able to draw on their own experience of running Phlo to provide direct evidence as to the likely impact of an administration on suppliers, employees, landlords and major contracts and it is clearly credible that such an appointment would have a very negative impact on Phlo's business.

49. Equally however, as outlined in *BCPMS*, the ability to appoint an administrator gives a lender such as Cubefunder important powers for which a claim in damages is not a sufficient substitute, especially where as here, losses are increasing month on month.

50. Before considering the balance of convenience, I will turn to Cubefunder's application to discharge the Injunction.

Short notice

51. Dealing first with the question of notice, this was clearly a situation of extreme urgency, since the Interdict was liable to be lifted on jurisdiction grounds at or shortly after 09.30 on 25 March 2025. In the absence of an injunction, Cubefunder would then be able immediately to appoint an administrator out of court. Equally however, while the Interdict was still in place, there was not in my view a need for secrecy. Rule 4.3(3) of PD 25A, as then applied, provided in mandatory terms that Phlo and its representatives therefore had to notify Cubefunder informally of the application in England. It is apparent from Ms Walker's evidence that the decision to apply in England was taken shortly after

she received Dentons' email at 15.58 on the 24th that they were not going to agree to a continuation of the Interdict pending the hearing of an application in the English court.

52. Ms Walker asserts that her email exchange with Dentons on the 24th was sufficient to put Cubefunder on notice that Phlo was about to apply imminently for an injunction in England. I reject that assertion. While Dentons may have suspected that Phlo might take steps in England to protect its position, this was no substitute for Addleshaw Goddard informing Dentons and/or Howard Kennedy that Phlo would be applying for an injunction out of hours in England that day, and providing copies of the material being relied upon and details of the hearing once known. The email exchanges could not possibly have amounted to "informal notice" as the phrase is used in paragraph 4.3(3) of PD 25A and the authorities. Informal notice must mean giving sufficient information about when and where the hearing is happening, what it is for and providing copies of the material relied upon, to allow the other party to attend and participate.

53. This is what I consider the relevant rules, and the principles outlined in *Olint* and *L v K* required Phlo and its solicitors to do. As Mostyn J said in the latter case (decided in 2014), which is even more true now the courts regularly hold remote hearings by Teams or CVP as well as telephone, it is readily possible to give urgent short notice by email and/or mobile phone call, and foreseeable that the court will be able to accommodate a remote hearing in the evening or early morning if the matter is genuinely urgent. Mr Chivers said that if Howard Kennedy had been notified in this way in the afternoon of 24th March, he or Ms Scharnetzky could have made themselves available that evening, and even at very short notice they would have been able materially to contribute to the hearing on behalf of their client. I have no doubt that this is true, especially since both sides had had lawyers engaged in this dispute since before January.

54. As to giving an explanation to Joanna Smith J for the failure to give short notice, Mr Lowans says this was overlooked. It is certainly notable that the evidence put before her did not give any reasons why notice had not been given, which was a breach of CPR rule 25.3(3). Furthermore, although the Note refers to the judge's enquiry as to why the matter was urgent and whether it could be heard on the 25th, in response to which Mr Dunlop explained that the Recall hearing was listed for 09.30 the next morning, there is no record of any submissions or discussion of any reasons why no notice had been given. I proceed on the basis that Mr Dunlop's Note is complete and so I conclude that there was no such explanation or discussion. This is despite the judge asking whether there was anything which needed to be stated in terms of full and frank disclosure. Again, Mr Dunlop should have provided an explanation to her for the fact no notice had been given to Cubefunder.

55. As to the actual reasons why no notice, not even very short notice, was given, Mr Chivers asks me to infer from Ms Walker's evidence, and in particular, he submits, from her lack of any explanation, that she considered whether to inform Cubefunder and decided not to do so. Mr Goldstone replied that it was completely unacceptable to raise an allegation of bad faith for the first time in submissions, and Ms Walker had given an explanation, even if it was not accepted, which was that she considered Cubefunder were on notice. Mr Hunter's evidence does not give any explanation of the lack of notice; on the contrary at [82] it says that the application is "*made on short notice and the Respondent may not*

be in a position to appear at the hearing of the application". This rather suggests that those who drafted that statement anticipated that some notice would be given.

56. I do not consider that Ms Walker made any deliberate decision to flout the rules on notice, but I have concluded that the position is more nuanced than either Mr Chivers or Mr Goldstone allow. Ms Walker says in her statement at [16] that "… *At that point in time post 15:58 on 24 March 2025, I did not know whether it would be possible to obtain a hearing before this Court prior to the Scottish Recall Hearing*…" She also says that Mr Dunlop called the Chancery Division at 21:52, that he did not receive a call back until 23:07, and that "*even if CubeFunder had known that the out of hours hearing was happening, they would not have been able to attend so it made no difference that they were not told that the hearing was happening*".

57. I infer from this, and from the emphasis placed on obtaining a hearing before 09.30 on the 25th, that Ms Walker and probably others in Phlo's legal team were not willing to give Cubefunder any specific information about their intended application before they knew whether the High Court could actually accommodate an out of hours hearing before 09.30 on the 25th, and that by the time this was confirmed at 23.07, Mr Dunlop assumed (probably correctly) that this was too late.

58. In other words, in my view Phlo's team treated the situation as being one where secrecy was essential, even though this was patently not the case if an out of hours hearing could be obtained before 09.30 on the 25th. Given what they should have known about the likelihood that the Chancery Division would be able to arrange an out of hours hearing by Teams or telephone on a Monday evening, or prior to 09.30 on a Tuesday morning, I consider that the failure to give proper short notice to Howard Kennedy at least by the early evening of the 24th that Phlo was making an application, followed by copies of the evidence when it was ready, was a significant error of judgement by Phlo's legal team. In my view the rules required Phlo and their legal team to give notice to Cubefunder's legal team once they knew they would be applying for an injunction in England on the 24th, together with providing the necessary information and evidence to allow Cubefunder's counsel to attend and participate, and Phlo was not entitled to wait and see if a hearing could be arranged before giving that notice. However I do not consider that there was a deliberate decision by them to breach the rules to gain an advantage.

59. Mr Chivers says that if informal notice had been given, counsel for Cubefunder would have been able to attend and would have been able to make significant points against any grant of the Injunction, even at such short notice. While it is not easy to predict what Joanna Smith J would have done if counsel for both sides had attended, I do consider it probable that she would have been willing to grant an injunction for a very short period to "hold the ring" until proper argument could be heard. In this sense I consider that following the correct procedure probably would not have affected the immediate outcome, although it might have saved a hearing or allowed the parties to agree directions more efficiently.

Full and frank disclosure

60. Aside from the points about lack of notice, Cubefunder makes three main allegations of failure by Phlo to give full and frank disclosure: (a) failure to mention the meeting on 7 August 2024; (b) insufficient reference to the email of 7 December 2024 and (c) misleading presentation of Phlo's financial position. Of these the third is the most significant.

61. As to the meeting on 7 August 2024, Cubefunder relies on the fact that Mr Hunter's first statement makes no specific reference to that meeting. Although his statement does not really deal with what defences Cubefunder might wish to put forward, the Note does state that in response to the judge's request for anything which needed to be stated in terms of full and frank disclosure, "*RDKC responded by summarising the Written Submissions for D lodged in advance of the recall hearing. He indicated that in terms thereof D was arguing that there was nothing to put D on notice to the oddity of Mr Sarwar's actions at all, and certainly prior to March 2024, such that loans before then were in a different position. RDKC conceded that C's position was weaker for those loans; but not so weak as to fail to show good arguable case*." This case was relatively unusual in that Mr Dunlop already knew in some detail what Cubefunder's likely defences would be, since it had already made arguments against an equivalent interdict in Scotland, a case in which Mr Dunlop had been involved. I accept what Mr Dunlop says in the Note about having summarised for the judge Cubefunder's case as set out in its Scottish Written Submissions.

62. There is no dispute that the meeting on 7 August 2024 happened and that it was a significant point in the history, in that it was the first proper contact between Mr Miller-Cheevers and the other directors of Phlo at a time when they all had knowledge of at least some of Mr Sarwar's alleged wrongdoing. There is a divergence between the parties as to what was communicated at that meeting, and in particular whether discussions of a potential refinance related to Cubefunder providing further lending to Mr Sarwar or Phlo obtaining funding to repay Cubefunder. However in circumstances where Mr Dunlop did summarise Cubefunder's defences in Scotland, and where the differences in account of that meeting might not have been anticipated insofar as they did not feature in those Written Submissions, I consider it was not a breach of Phlo's duty of full and frank disclosure for Mr Hunter not to have specifically referred to this meeting in his evidence. This is an example in my view of undue hindsight by Cubefunder.

63. As to the email of 7 December 2024, this was explicitly referred to in Mr Hunter's first statement, as a without prejudice offer made on a commercial basis. I consider that it did not thereby amount to an admission to which specific attention should have been drawn, and I therefore consider the extent to which it was disclosed was sufficient to meet Phlo's duty of full and frank disclosure. I consider there was therefore no breach in this respect.

64. As to the third allegation of breach of the duty to make full and frank disclosure, the most problematic part of Phlo's evidence was Mr Hunter's statement at [99] in his first statement that "*The accounts for Phlo for the year ending 31 March 2023 are at [AH1/429-442]. These show that Phlo had a net asset position of £2,764,141. In light of the Misappropriations these accounts will not be fully accurate however, in high level*

Phlo was then and remains now in profit and able to meets its debts as and when they fall due," combined with the disclosure only of those 2023 accounts. This paragraph was included in the context of evidence as to Phlo's cross undertaking in damages.

65. This is clearly a matter which concerned Joanna Smith J, because the Note records that "*JSJ enquired as to the cross-undertaking as the most recent financial details for C are now two years old. RDKC indicating that he had nothing more recent but that it was difficult to see what substantial loss could be suffered by D in a 7 day hiatus on appointment of administrators*."

66. Although I accept Mr Goldstone's point that Phlo's directors had not at that point received the draft accounts for the year ending 31 March 2024 (since exhibited by Mr Cullen to his statement of 6 May 2025), as I understand it they had received the Board Pack of March 2025. This included the monthly profit and loss, balance sheet and cashflow reports for the previous 12 months and forecasts for the coming 12 months. In view of this material, Mr Hunter's statement that "*Phlo was then [in 2023] and remains now in profit*" was not true, and from the Board Pack Mr Hunter should have known this. Mr Goldstone submits, on the basis of Mr Cullen's subsequent evidence, that Phlo is able to meet its debts as and when they fall due in that it is following an aggressive growth strategy, including spending substantial amounts on marketing and capital expenditure, and this is the reason for the increasing losses shown in its draft financial statements, but that it can curb this spending if it needs to pay creditors. He also submits that Phlo's revenue is increasing very fast (expected to exceed £70M in the current year) and it is anticipating becoming profitable by around March 2026.

67. Mr Chivers objects that even if Phlo is able to meet its debts (other than to Cubefunder, which it is disputing) as and when they fall due, this is only one of the tests for solvency. He says Phlo is balance sheet insolvent, and the failure to disclose this was a significant breach of the duty to make full and frank disclosure. This criticism has force. While Mr Hunter's evidence was produced under tight time pressure, and so was substantially based on his evidence in the Scottish proceedings, he should have been asked by his legal team whether he had any more recent information as to Phlo's financial position, subsequent to the 2023 accounts. This ought to have led to disclosure of and reference to the Board Pack, and the making of consequent changes to his evidence. As reflected in the authorities I have quoted above, the duty of full and frank disclosure extends to matters of which the applicant would have been aware had reasonable enquiries been made (see *Tugushev* at 7(iv)). While Mr Hunter's evidence did acknowledge that the misappropriations by Mr Sarwar meant that the 2023 accounts were not fully accurate, the Board Pack tells a story of increasing losses which are not solely the result of Mr Sarwar's actions.

68. This should have been brought to Joanna Smith J's attention, and at the very least would probably have led to a requirement for fortification of any injunction at that stage, rather than only when the matter came before Marcus Smith J. It is harder to say whether it would have led to a refusal of the Injunction, although it seems to me more likely than not that Joanna Smith J would have wanted to preserve the position pending a fully argued on-notice hearing, especially since an Interdict with the same effect had been in place since January 2025.

69. Given the pressured circumstances in which this statement was produced, I do not consider that the evidence suggests that this failure to disclose the Board Pack or to provide this more recent financial information was a deliberate attempt to provide misleadingly incomplete financial information or that there was an intention to gain an advantage by doing so. However it was in my view a significant breach of the duty to make full and frank disclosure and the duty of fair presentation. The court will therefore be astute to ensure that Phlo is deprived of any advantage which it has derived by doing so (*Tugushev* at 7(ix)).

70. My starting point is therefore that I should discharge the Injunction, since this was a substantial non-disclosure, even though I consider it would probably not have affected the immediate outcome before Joanna Smith J and was not in my view deliberate. However, I nevertheless have a discretion to continue the Injunction despite the failure to disclose. While this should be exercised sparingly, the overriding consideration is the interests of justice, including (a) the importance of the facts not disclosed to the issues; (b) the need to encourage proper compliance and discourage non-compliance; (c) whether the failure was culpable and (d) the potential injustice to Phlo if the Injunction is discharged (*Tugushev* at 7(x) – (xii)).

71. The main relevance of the facts not disclosed is to the cross undertaking in damages and to the balance of convenience. It is also relevant that in my view the non-disclosure although substantial was not deliberate and that the need to encourage compliance and discourage non-compliance can be reflected in other ways such as costs. Factor (d), the potential injustice, also overlaps in my judgement with the balance of convenience on the facts of this case. I will therefore turn to that now.

Balance of convenience

72. Mr Goldstone's position is that the balance of convenience points clearly in favour of continuing the Injunction pending trial and that discharging it would cause irremediable damage to Phlo. He says that Phlo is a rapidly growing business which would probably be immediately sold if Cubefunder appoints administrators. He says that such an appointment would stifle the claim and prevent there being any proper investigation into the allegations of wrongdoing against Mr Sarwar and by extension Cubefunder, which would not be in the interests of justice. On the basis of Mr Cullen's evidence, he also says that the appointment of administrators would probably result in extensive redundancies of Phlo's employees and breaches of its contracts with suppliers and landlords. Insofar as this would be based on a failure to repay loans which Phlo says, with reasonable prospects of success, are void, this should be prevented until those claims have been resolved.

73. Mr Chivers' position is that given the evidence as to Phlo's financial position, including further projected losses in the next few months and apparent balance sheet insolvency, the balance of convenience points towards lifting the injunction.

74. In my view the most significant factor is that discharging the injunction and permitting Cubefunder to appoint administrators will almost certainly stifle the claim and prevent the allegations against Mr Sarwar, and the defence to the claims by Cubefunder on the

loans, from being considered and resolved. If Phlo is right, then this is not in truth a case, as posited by Lewison J in *BCPMS* where Phlo entered into a bargain with Cubefunder under which it borrowed money on the security of a debenture, because those agreements are void. In this situation it seems to me that the balance of convenience points in favour of continuing the Injunction, to prevent the appointment of administrators until those issues are resolved. Further, I do accept that such an appointment would have a very serious effect on Phlo's continued ability to trade at all, let alone grow.

75. I accept that there is a very real risk that Phlo will be in a worse position financially at the end of a trial than it is now, but I do not consider that that risk outweighs those pointing the other way, and I consider that the risks to Cubefunder can also be mitigated through fortification of the cross undertaking and by the fact that Cubefunder is still able to apply to the court for the appointment of an administrator under ss.10-12 IA 1986. To continue the Injunction is also to continue the status quo which has existed since January 2025. While Mr Miller-Cheevers says that he does not intend to appoint administrators immediately, but wishes to have that option available, that would create a situation of permanent jeopardy for Phlo during the progress to trial which would be as likely to impede as to encourage resolution of this dispute. I do also consider that the trial should be expedited.

76. As Lord Hoffmann said in *Olint* at [17]:

> "In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

77. My view here is that, for the reasons I have outlined, lifting the injunction is clearly more likely to cause irremediable prejudice and injustice than continuing it. For that reason, even though my starting point is that the Injunction should be lifted on grounds of material non-disclosure, I have concluded that the right course is nevertheless to continue it until trial or further order. I consider that the right way to express the court's disapproval of the failure to give short notice and what I have held to be material, albeit not deliberate non-disclosure, is through an order for indemnity costs in favour of Cubefunder in relation to the first two hearings, subject to any further submissions from counsel.

78. In addition I consider that there should be appropriate fortification of the Injunction as a condition of its continuation. Unless the extent of this fortification and the way it should be provided can be agreed between the parties, there will need to be a hearing to deal with this and any other consequential matters, including costs more generally.