

ENGLAND AND WALES / JUDGMENT

Sabrina Khan v Kevin Ashley Goldfarb

COURT
IN THE HIGH COURT OF JUSTICE

BEFORE
MR JUSTICE MICHAEL GREEN

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Source record

Neutral Citation Number: [2025] EWHC 874 (Ch)
Case No: CF055/2024CA
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN CARDIFF
ON APPEAL FROM THE COUNTY COURT SITTING IN CARDIFF
(HIS HONOUR JUDGE JARMAN KC)
Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET
Thursday, 30 January 2025
Appellant
Respondent

BEFORE: MR JUSTICE MICHAEL GREEN

BETWEEN: -----
MS SABRINA KHAN
- and -
MR KEVIN ASHLEY GOLDFARB

MR R HOCKING appeared on behalf of the Appellant
MR J HANNANT appeared on behalf of the Respondent

JUDGMENT

(Draft for Approval)

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1. MR JUSTICE MICHAEL GREEN: This is an appeal from the order of HHJ Jarman KC ("the judge"), dated 14 September 2023, a long time ago, and it is brought by the appellant, Ms Sabrina Khan, with the permission of Zacaroli J, as he then was. 2. The hearing and order of 14 September 2023 was the return date of a without notice application that had been made to the judge on 17 August 2023 when he made a proprietary injunction against the appellant and her mother, Ms Mui Lan Khan. The appellant sought to set aside or vary the injunction at the return date hearing but apart from adjusting the cross-undertaking in damages, the appellant's application was dismissed, the injunction was continued and the appellant was ordered to pay the costs. 3. There was also a separate appellant's notice prepared by the appellant alone and filed in respect of the appellant and her mother which has had a somewhat chequered history, but as all the issues were effectively covered by the main appellant's notice and that was the only one on which counsel was instructed and on which I have heard submissions, I will decide this appeal by reference to that appellant's notice. I was told that there had now been a finding that Ms Mui Lan Khan lacks mental capacity. 4. The respondent, a Mr Kevin Goldfarb, is the trustee in bankruptcy of Mr Sabz Ali Khan. Mr Khan is the appellant's father and he was made bankrupt on 8 September 2017 on the petition of Mr Stephen Hunt, acting as the trustee of another bankrupt, a Mr Abdol Pakzad. Mr Hunt is in the same firm as the respondent. The petition debt was £112,244,62 which was a mixture of unpaid costs and court and tribunal orders. Mr Khan has been very litigious, including against the respondent since his appointment. An ECRO was entered against him on 16 November 2022. 5. The respondent is represented by Mr James Hannant of counsel and Mr Ryan Hocking of counsel represented the appellant. I am grateful to them both for their clear and helpful written and oral submissions. 6. On 1 August 2023, the respondent applied for proprietary injunctions against the appellant and her mother, supported by a witness statement dated 31 July 2023 from the respondent. This was, of course, a long time after the bankruptcy order had been Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ made and an even longer time from the transactions that the respondent was seeking to impugn. The application related to the following properties.

- (1) the property registered at HM Land Registry under title number WA456135 and known as 2 Oakfield Road, Newport, NP9 4LY ("2 Oakfield Road");
 - (2) the property registered at HM Land Registry under title number WT237171 and known as 2 Wharf Road, Wroughton, Swindon, SN4 9LB ("2 Wharf Road");
 - (3) the property registered at HM Land Registry under title number WA319932 known as 15 Leckwith Place, Canton, Cardiff ("15 Leckwith Place");
 - (4) the property registered at HM Land Registry under title number WA909151 known as Church House Inn, Portland Street, Newport ("Church House").
7. The appellant is the sole legal owner of the latter three properties. The respondent's case against the appellant is that the transactions whereby she acquired the properties were transactions at an undervalue within the meaning of section 339 of the Insolvency Act 1986 ("IA 1986") or alternatively were transactions defrauding creditors under section 423 IA 1986. The respondent says that the properties were transferred by Mr Khan to his daughter, the appellant, at a time when he was insolvent and facing claims from third parties who were taking steps to enforce against his assets. 8. The impugned transactions were as follows.
- (1) on 3 February 2016, a transfer deed dated 13 March 2015 was registered at HM Land Registry transferring the freehold title of 2 Wharf Road from the joint proprietorship of Mr Khan and the appellant to the sole proprietorship of the appellant, stating that the consideration paid by the appellant was £10,000. The respondent has alleged that the transfer form was backdated, that the consideration of £10,000 was never in fact paid and that, in any event, it was at an undervalue. This is obviously disputed by the appellant but she accepts for the purposes of the application and this appeal that there is a serious issue to be tried on the disputed

facts.

- (2) The second transaction relates to 15 Leckwith Place and it was a transfer of the freehold from Mr Khan to the appellant by a transfer deed dated 15 October 2012 Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ that was registered at HM Land Registry on 22 January 2013. The consideration was stated to be £1 and to be a birthday gift to the appellant.
- (3) The third transaction was a transfer deed dated 30 November 2012 which was registered at HM Land Registry on 1 March 2013, transferring the freehold title of Church House from Mr Khan to the appellant, again, for a consideration of £1 and stated on the transfer deed to be a birthday gift to the appellant.

9. There was another property that I have referred to, 2 Oakfield Road, in which the respondent made allegations against Ms Khan, the mother, but for the reasons already stated, I do not deal with that in this judgment.
10. As I have said, the respondent seeks to challenge these transactions under sections 339 and 423 IA 1986. He has also issued CPR Part 7 proceedings on 3 August 2023 which he has subsequently amended to include claims that the transactions were shams. Those amendments were after the order under appeal so cannot be relevant to the issues I have to decide. Obviously, if those claims of sham are correct, that will mean that the transfers were void ab initio. 11. The without notice order and as continued at the return date was a proprietary rather than freezing injunction. It prevented the appellant from in any way disposing of, dealing with or diminishing the value of the three properties that I have mentioned. At the without notice hearing, the judge accepted the respondent's cross-undertaking in damages limited to the funds in the bankrupt's estate but he also knew that there were no assets within the bankrupt's estate. By the time of the return date, the respondent had obtained indemnity insurance at a level of £130,000 and that was why the cross-undertaking was then varied to introduce £130,000 as the upper level of the respondent's liability under the cross-undertaking. There is no appeal from that order although the way that issue was dealt with at the without notice hearing does fall under the third ground of appeal that I am about to set out. 12. The grounds of appeal are threefold and can be summarised as follows. Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/
- (1) Ground 1 is that the judge erred in law in finding that the respondent had established a sufficiently strong case that the respondent had and has a proprietary interest in the properties;
- (2) Ground 2 is that the judge erred in law in not deciding that point;
- (3) Ground 3 is that the judge below erred in law or alternatively in the exercise of his discretion in not discharging the injunction by reason of the alleged failure to make full and frank disclosure and/or a fair presentation of the application.
13. The first two grounds concern whether this really was an appropriate case to make a proprietary injunction based on the claim that the respondent is making under sections 339 and 423 IA 1986. Mr Hocking, on behalf of the appellant, concentrated in his submissions on testing whether the respondent's case under sections 339 and 423 really could ever establish a sufficient proprietary interest in the properties at the time of the application that would justify the grant of a proprietary injunction. That assumes that it is necessary to establish a presently existing proprietary interest in order to obtain a proprietary injunction. However, there is no authority, as both parties accepted, that defines exactly what sort of proprietary interest is required so as to give jurisdiction to the court to grant a proprietary injunction. It seems to me that the relevant question is whether these sorts of claims can support a proprietary rather than freezing injunction. 14. The main difference between the two types

of injunction are that for a proprietary injunction, the applicant does not need to prove a risk of dissipation; nor does the applicant need to explain away any delay in making the application. Such an application is decided on traditional American Cyanamid principles, namely, serious issue to be tried and the balance of convenience. The respondent applied for a proprietary injunction although he did also adduce evidence as to the risk of dissipation so as to justify the application being made without notice.

15. With that introduction, I turn to the way Mr Hocking attractively presented this ground of appeal. He first referred to the wording of the relevant sections. Sections 339 and 342 IA 1986 relevantly state as follows. Section 339 is headed, "Transactions at an undervalue." Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ "(1) Subject as follows in this section and sections 341 and 342, where an individual is made bankrupt and he has, at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.
- (2) The court shall, on such application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction." The remaining subsections in section 339 deal with further conditions for the grant of relief under section 339, which I do not need to set out. 16. Section 342 is headed, "Orders under section 339, 340." "(1) Without prejudice to the generality of section 339(2) or 340(2), an order under either of those sections with respect to a transaction or preference entered into or given by an individual who is subsequently made bankrupt, may (subject as follows) --
 - (a) require any property transferred as part of the transaction or in connection with the giving of the preference to be vested in the trustee of the bankrupt's estate as part of that estate;
 - (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred." The remaining subparagraphs provide for further relief which are not particularly material to the appeal before me. Turning to subsection (2) of section 342, that says as follows: "(2) An order under section 339 or 340 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or as the case may be, the person to whom the preference was given; but such an order --
 - (a) shall not prejudice any interest in property which was acquired from a person other than that individual and was acquired in good faith and for value or prejudice any interest deriving from such an interest, and Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/
 - (b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the trustee of the bankrupt's estate except where he was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of that individual." 17. Turning to section 423, which

in material respects is very similar to the provisions that I have just quoted from, section 423 is headed, "Transactions defrauding creditors." Subsections (1) and (2) say as follows: "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if --

- (a) he makes a gift to the other person or he otherwise enters into a transaction with him on terms that provide for him to receive no consideration;
- (b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or
- (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value in money or money's worth of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for --

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction." 18. Section 425 is headed, "Provision which may be made by order under section 423," and it says as follows: "(1) Without prejudice to the generality of section 423, an order made under that section with respect to transactions, may (subject as follows) -- Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/

(a) require any property transferred as part of the transaction to be vested in any person either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

(b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of the property so transferred or the money so transferred." The remaining subparagraphs, like in section 342, continue to provide for further relief. Subsection (2) is also very similar to subsection (2) of section 342 and deals with third parties acquiring property in good faith, and I will not read it out. From what I have quoted, it can be seen that there are very clear parallels between the two sections, particularly in relation to the relief that can be granted. 19. It was common ground before the judge and me that the requirements for a proprietary injunction are set out in *Madoff Securities International Limited v Raven* [2011] EWHC 3102 (Comm) ("Madoff") where the differences with a freezing injunction are there explained. The main difference between the parties is whether the respondent needed to prove a present proprietary interest in the properties or whether it is sufficient that the respondent may be granted such an interest by way of relief if he is successful in his substantive application.

20. At the hearing, Mr Hannant's position was that it is sufficient if the respondent is seeking proprietary relief in his claim. He did also submit that because the respondent is claiming a declaration that the transfers were void, that that would establish that he had a present proprietary right. But if he is correct that it is sufficient for there to be a claim to proprietary relief and that there is a serious issue to be tried on that, the former point is no longer necessary.
21. Mr Hannant referred to Bryan J's decision in *AA v Persons Unknown* [2019] EWHC 3556 (Comm) which concerned an application for a proprietary injunction. That judgment is principally concerned with whether Bitcoins should be considered a form of property that could be subject to such a claim and proprietary injunction. The causes of action in that case were said to be proprietary claims in restitution and constructive trust and Mr Hannant latched on to the fact that a restitutionary claim, albeit combined with a constructive trust claim, was relied on to support a proprietary injunction. *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ Mr Hocking said that this was in reality a fraud and/or unlawful duress claim and that was the real reason why it was sufficient to support a proprietary injunction. 22. In my view, Bryan J was treating the claims as proprietary claims in respect of which there was a serious issue to be tried - see paragraphs 63 and 64 of the judgment to that effect. But he did not really consider whether it was necessary to establish a present proprietary interest.
23. Mr Hannant relied on two further cases in the Chancery Division. The first was the judgment of Nugee J, as he then was, in *Kea Investments Limited v Watson and Others* [2020] EWHC 472 (Ch) ("*Kea Investments*") at paragraph 36 which actually concerned the scope of a freezing injunction and whether the enjoined person could draw on a disputed fund that was in its name for the purposes of paying legal expenses. It is some way from this case and the requisite grounds for a proprietary injunction. But in the course of the judgment, Nugee J considered whether it was necessary to prove a present proprietary interest in order to obtain a proprietary injunction. At paragraph 36, he said: "If the claimant wins the action, it will become apparent that the assets were not the ostensible owner's at all and he therefore will be shown to have had no right to spend them either on his legal expenses or his living expenses or anything else. In fact, he will be shown to have been a trustee of them and it will have been a breach of trust to spend the monies for his own benefit. Now of course the claimant does not, in such a case, have a present beneficial interest in the fund
- that is indeed why it is not a simple case of a straightforward proprietary claim - but this is just as much a case of a disputed fund as the case of a proprietary claim and it seems to me that the principle is that whereas a defendant cannot generally be prevented from spending his own money on defending himself, it is very different if the money that he proposes to spend arguably belongs to someone else. Why should he be at liberty to spend what may be someone else's money on defending himself? Long before the *Mareva* injunction existed, the Chancery courts were very ready to intervene to preserve a disputed fund pending

litigation to resolve entitlement to it. And although the claimant does not have a present beneficial interest in the money, if it is in truth held for the benefit of the judgment debtor (there Mukhtar, here Mr Watson) the claimant as a judgment creditor of that debtor has a much better claim to it than the ostensible owner who has no claim to it at all. Moreover, the claimant (in both Ablyazov and the present case) not only brings a claim designed to resolve the Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ ownership of the disputed fund, but also claims in the action the appointment of a receiver by way of equitable execution over the fund. That means that if the claim is successful, the claimant will not just obtain relief in the form of a simple money judgment (indeed, he may not be entitled to a simple money judgment as such) but will obtain actual possession of the fund (through the medium of the receiver). That may not strictly be a present proprietary claim, but it is very close to one as the very gist of the action is to assert a right to possession of the disputed fund." (emphasis added)

24. Mr Hocking said that Nugee J was dealing with a disputed fund in which it was accepted that the defendant did not have an interest in the assets in question. That should be contrasted with the present case where the appellant has currently the full beneficial interest in the properties. Furthermore, it was not about whether the injunction should be granted. Nevertheless, Nugee J did strongly suggest that a claimant does not need to show a present proprietary interest and it is enough that it is claiming a proprietary interest such that if vindicated, it would effectively be shown that it did have a proprietary interest at the time.
25. The final case in this series is Leech J's short judgment in *Allen v Bulatovic* [2023] EWHC 612 (Ch), a similar to case to this one, where a trustee sought an injunction to preserve a property that at the time of the application was beneficially owned by the respondent to the application, having been apparently purchased by funds derived from the bankrupt and with the trustee intending to issue proceedings under section 339 IA
1986. Citing the decision in *Kea Investments*, Leech J held that it was at least arguable that the claim brought by the trustee under section 339 could support a proprietary injunction such that there was no need for the trustee to demonstrate a risk of dissipation. At paragraph 4, he said as follows: "Counsel for the trustee submits that the present case is on all fours with that statement and in particular, that if Mr Allen is successful in his claim under section 339 of the Insolvency Act, then the property itself effectively represents the disputed fund and he will be entitled to an order vesting the property in him. I accept that submission. In my judgment, it is at the very least arguable that the American Cyanamid test applies and that the question whether it is necessary to demonstrate a real risk of dissipation is not required to *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ be satisfied on this application. I therefore approach the application on the basis that it is what I will call an application for a quasi-proprietary injunction rather than a true freezing injunction and apply that test."

26. Mr Hocking dismissed this judgment as being made on an ex parte application without the benefit of full argument. He also said that it was plain wrong. But I am not so sure. Leech J seemed to have well in mind the need to show some form of proprietary interest and he picked up on Nugee J's concept of a quasi-proprietary interest and decided that such a claim under section 339 would be likely to give rise to a vesting order if it succeeds, and that will effectively grant a proprietary interest in the asset which will be returned to the estate. 27. If this is the correct way of looking at the matter, the debate that we had about whether it is necessary for the respondent to show that he has an arguable case that the transactions are void ab initio or at best voidable, falls away. 28. The first basis for the application, so Mr Hannant argued, was that the relief sought in the substantive application included a claim for a declaration that the impugned transactions are void, meaning void ab initio, and that therefore the respondent did have a present proprietary interest. He argued that it was perfectly feasible to contemplate that the court might make such a declaration.
29. He referred to section 339's predecessor which is section 42 of the Bankruptcy Act 1914, and also to the breadth of the relief that is now available under the IA 1986 and in particular under section 342. Section 42 of the Bankruptcy Act 1914 stated in terms that the particular transactions specified in it were "void against the trustee in bankruptcy". As Mr Hocking pointed out, this works against the respondent because when section 42 was superseded by section 339, those words do not appear and the statute does not itself render the transaction void.
30. Mr Hannant, though, referred to the breadth of the relief available under sections 339 and 423 which would allow the court to declare the transfers void. Section 339(2) IA 1986 makes clear that the primary relief is to: Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ "make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into the transaction." That is a clear indication that such a claim is principally about returning property to the estate and essentially turning the clocks back to the situation before the impugned transaction occurred. Section 342 then, in setting out the particular relief that may be ordered, starts by saying that this is without prejudice to the generality of section 339(2), that the court can then go on to make a vesting order or the like. Similar provisions can be found in sections 423(2) and 425(1) IA 1986.
31. Mr Hannant therefore submitted that it is well within the scope of those sections for the court ultimately to declare that the transfers were void. He said that this would naturally flow from the predecessor section, namely, section 42 of the Bankruptcy Act 1914, and there would be no reason to think that the court's powers of granting such relief would in any way be limited. 32. I questioned what the point of making such a declaration would be when a vesting order would be just as good and Mr Hannant could not think of a specific purpose of making such a declaration. But he said that it is something that is within the court's armoury and that that was what was being sought, as was made clear in the application and the supporting evidence of the respondent. 33. This was vigorously challenged by Mr Hocking

who compared sections 339 and 423 with section 284 IA 1986 which expressly provides for a transaction to be void, similarly to section 42 of the Bankruptcy Act 1914. He relied in his skeleton argument on a Privy Council authority, *Skandinaviska Enskilda Banken AB v Conway* [2020] AC 111, particularly at paragraphs 60 to 62 but he did not pursue that in his oral submissions, presumably because he recognised that that was dealing with a different statute in a different jurisdiction, namely, the Cayman Islands Company Law [2013 Rev]. 34. Instead, Mr Hocking referred to *Re Rathore* [2018] BPIR 501 where ICC Judge (then Ms Registrar) Barber held that: *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ "Transactions which offend section 339 on the other hand are valid unless and until set aside by the court."

35. But Mr Hocking mainly relied on *Stonham v Ramrattan* [2011] EWCA Civ 119,

[2011] 1 WLR 1617, a Court of Appeal decision concerned with the complicated interaction of the so-called "use it or lose it" provisions in section 283A IA 1986 and also sections 283 and 339 IA 1986. It was nothing to do with proprietary injunctions, but the Court of Appeal did have something to say about the nature of the interest in the subject-matter property during the course of section 339 proceedings. The bankrupt was arguing that the trustee had "become aware of the bankrupt's interest" in the matrimonial home for the purposes of section 283A(5) at the time the trustee knew of the section 339 claim against the transferee of the property. The Court of Appeal rejected that argument on the basis that there was no interest in the property vested in the bankrupt at the time of the bankruptcy order notwithstanding that it might be recovered for the benefit of the estate under section 339. At paragraph 37, Lloyd LJ said as follows: "Nor can I accept that property which is ordered to be transferred pursuant to an order under section 342(1)(a) is thereby treated as forming part of the bankrupt estate at the commencement of the bankruptcy. Mr Mather argued that such retrospective effect would be the natural consequence of the court seeking to restore the position to what it would have been if the transaction had not been entered into as required by section 339(2). However, it seems to me that it would read a great deal too much into the words of that section. The effect of an order of whatever kind under section 342 will depend on the terms of the order to some extent. If, as it might very well have been in the present case, the effect of the order is to require the property transferred to be vested in the trustee as part of the bankrupt's estate, it seems to me that that vesting takes effect as from the date of the order and no earlier. Ancillary provision might be made by other provisions of the order in respect, for example, of benefits obtained in the meantime but the actual vesting does not seem to me to have a retrospective effect by virtue of section 342." 36. I do not think that this goes as far as Mr Hocking suggested it did. Lloyd LJ caveated his conclusion on it being dependent on the actual terms of the order that was made. He said that, if a vesting order was made, that it would only take effect from the date of the order, but that was Mr Hannant's alternative way of putting the respondent's case and therefore my previous comments apply. But insofar as this is relied upon by *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ Mr Hocking to dispute the first way that the respondent puts his case, that is that the

court can make a declaration that the transfers were void, this authority seems to allow for such a possibility. Furthermore, this is dealing with not just the operation of sections 339 and 342, but how that is to be interpreted along with sections 283 and 283A and whether the bankrupt had an interest in the property prior to the bankruptcy, not whether the trustee on behalf of the estate has a proprietary interest sufficient to be able to apply for a proprietary injunction.

37. Mr Hocking also said that there are other contra-indications in the Insolvency Act that show that these impugned transactions would never be declared void ab initio, such as the fact that third party purchasers from the transferee who purchase in good faith get good title. But I do not think those answer the point that the court may, in due course, be asked to and will in fact make a declaration that the transfers were void and that they were never effective to transfer the beneficial interest. 38. In any event, I have decided that in respect of both ways that the respondent pursues his claim, that they establish a sufficient proprietary or, dare I say it, quasi-proprietary interest to ground an application for a proprietary injunction. I do not consider that it is incumbent on the respondent to demonstrate a present proprietary interest and, if the claim is for a proprietary interest that may be granted by the court and there is a serious issue to be tried as to whether that relief will be granted, that is sufficient to be able to ask the court to grant an interim proprietary injunction. That injunction protects the subject matter of the action and ensures that the properties remain available to be restored to the bankrupt's estate should the respondent establish that these were indeed transactions at an undervalue within either sections 339 or 423 IA 1986.
39. Accordingly, I reject ground 1 of the appeal. I do not think the judge erred in law in finding that the respondent had established a sufficiently strong case for the purposes of granting a proprietary injunction over the properties. 40. The second ground of appeal is slightly odd. Mr Hocking said that it is pursued as an alternative to the first ground and would only arise in the event that I concluded that the judge below made no determination in relation to the legal issue raised by ground 1 and was not therefore wrong. The basis for this must be that I had found that the judge was *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ not wrong on the proprietary interest issue because he wrongly did not decide the issue. However, as it has turned out, this ground does not help the appellant and Mr Hocking seemed to accept this. If I had found in favour of the appellant on ground 1, it is not needed by her. But if I had found against her on ground 1, as I have, it means that I have necessarily decided that the judge was right on the law as to whether he had jurisdiction to grant a proprietary injunction. In those circumstances, the judge decided the point and I have agreed with him.
41. Accordingly, I need say nothing further about this ground and I reject ground 2 of the appeal. 42. The third ground of appeal concerns whether the judge was wrong in not discharging the without notice order by reason of the failure to make full and frank disclosure and/or to give a fair presentation of the application by the respondent at that hearing. 43. There is no dispute as to the importance of the duty of full and frank disclosure.

Mr Hocking referred in his skeleton argument to some of the authorities on this, including: *Memory Corp Plc v Sidhu* (No 2) [2000] 1 WLR 1443; and *Brinks Mat Limited v Elcombe* [1988] 1 WLR 1350 ("Brinks Mat"), from which it is clear the heavy onus on both the applicant and his legal advisors to disclose all relevant matters, including additional information which he would have known if he had made reasonable and proper inquiries and also to disclose matters adverse to the application. 44. In addition to the duty to make full and frank disclosure, the applicant must present a without notice application fairly see *Bank Mellat v Nikpour* [1985] FSR 87. In *Marc Rich and Co Holding GmbH v Krasner*, an unreported decision of 18 December 1998, Carnwath J, as he then was, stated: "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. Once that confidence is undermined, he is lost."

45. Both parties also referred to what Carr J, as she then was, said in *Tugushev v Orlov* [2019] EWHC 20131 (Comm) ("Tugushev") where she set out the applicable principles in paragraph 7, building on what Popplewell J, as he then was, said in *Fundo Soberano Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* [www.epiqglobal.com/en-gb/de-Angola v dos Santos](http://www.epiqglobal.com/en-gb/de-Angola-v-dos-Santos) [2018] EWHC 2199. The duty is also referred to explicitly in the Chancery Guide at paragraphs 15.32 and 15.33.
46. Mr Hocking emphasised that an erroneous legal submission does not breach the duty of full and frank disclosure but it may amount to a breach of the duty of fair presentation, and he cited *Lasytsya v Koumettou* [2020] EWHC 660 (Ch). He went on to say that it is clear from the authorities that a material non-disclosure will generally lead to a discharge of the injunction for the reason stated by Balcombe LJ in *Brinks Mat*. There is a discretion not to discharge the injunction despite breaches of the duties but, as Carr J said in *Tugushev*, this will be exercised sparingly. Mr Hocking severely criticised the judge's finding that the respondent's presentation of the application in relation to the proprietary interest issue was not "so unfair as to justify the discharge of the injunction". He said that the judge was applying far too high a threshold for discharging an injunction in these circumstances.
47. Mr Hannant accepted the full force and importance of the duties but said that its extent is not unbounded. He referred to *Wild Brain Family International Limited v Robson and Another* [2018] EWHC 3163 (Ch) where the deputy judge, HHJ Klein, said at paragraph 48: "Without seeking to diminish the importance of the fair presentation obligation in any way whatever, it seems to me that there must be some limit to that obligation. To take an example, just because a respondent might have taken the court to a number of cases to reinforce a legal proposition, so long as the applicant has fairly drawn to the court's attention the principle derived from those cases, I do not think the applicant is required to take the court to those cases in the way the respondent would have done. To repeat what Popplewell J noted in the *Fundo* case, the ultimate touchstone is whether the presentation of the application is fair in all material respects." 48. It must be very much borne in mind that this is an appeal from a refusal of the judge to discharge the order on the grounds of a

breach of the duty. I will have to be satisfied either that he was wrong in law in doing so or that the exercise of his discretion was outside the wide ambit afforded to him. As Males LJ said in *Derma Med Limited v Ally*

[2024] EWCA Civ 175 at paragraph 28: *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ "This is in large part an appeal against evaluative or discretionary decisions made by the judge and accordingly, as the claimants accept, they face a high hurdle. This court will in general only interfere with such decisions where the judge has taken into account immaterial factors, failed to take account of material factors, erred in principle or come to a conclusion which was not reasonably open to him."

49. Mr Hocking relied on a number of alleged breaches of the duty that he says should have led the judge to discharge the injunction. His first criticism was that the judge looked at each of the breaches in isolation, whereas he should have stood back and looked at the cumulative effect in considering the seriousness of the breaches. 50. Some of the breaches have not been pursued by the appellant and have fallen by the wayside but the ones that he did pursue at the hearing are essentially threefold.
- (1) The proprietary interest issue with the respondent going no further than bare assertions that the transfers were void ab initio or might become so.
 - (2) the potential defences that the appellant might have raised - the only one ultimately relied upon was that her father might not have been insolvent at the time of the transfers.
 - (3) As to the cross-undertaking in damages, the respondent did not adequately address the court on the legal effect of the decision in *Hunt v Ubhi* [2023] EWCA Civ 417.
51. As to proprietary interest, the appellant says that the respondent was in no position either at the without notice hearing or the return date hearing to address this issue. He had had plenty of time to prepare for that and yet he only seemed to think about the issue when he saw the appellant's skeleton argument for the return date hearing. By then, it was too late and he said that he had had no time to properly explore the points raised in the skeleton. 52. I do not think that is a fair characterisation of the way the respondent dealt with this issue. Mr Hannant took me through how this was done. It started with the respondent's fourth witness statement in which he delineated the two bases upon which the respondent was asserting a proprietary interest. At paragraph 9.2, he said: *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ "If the court makes a finding that a transaction was a transaction at an undervalue or a transaction defrauding creditors, in either case, the court has a discretion to declare the transaction void, in which case, the effect of that declaration would be that the relevant property interests always vested in me." At paragraph 9.3, he set out his alternative case as being: "If the court makes a finding that a transaction was a transaction at an undervalue or a transaction defrauding creditors, there are other remedies available that would create a future proprietary interest that would vest in the bankruptcy estate on the making of that order." 53. In the respondent's

skeleton argument for the without notice hearing, he identified the following:

- (1) The need for the respondent to establish a proprietary entitlement in the properties;
 - (2) That the requirement of establishing a proprietary interest was termed the "prior question" in the skeleton argument.
 - (3) At paragraph 48 of his skeleton, he set out the respondent's cases as regards the properties in the two ways that it was put in the respondent's fourth witness statement, namely, the declaration that they were void or a vesting order.
 - (4) The concluding submission in the skeleton was that the respondent's position: "is that in so far as it prevails on the claim, he will indeed have established a proprietary interest in the subject properties such that the court's jurisdiction to grant a proprietary injunction is engaged."
54. In oral submissions at the without notice hearing, Mr Hannant took the judge to the decision in *Madoff Securities* and expressly identified the need for the respondent to establish a proprietary interest in the properties. The note of Mr Hannant's submissions on the point discloses that the respondent once again put his argument on the two grounds identified at paragraphs 9.2 and 9.3 of the respondent's fourth witness statement and the respective paragraphs of the skeleton argument and says as follows: "In relation to 2 Wharf Road, we seek declaratory relief, either a transaction at an undervalue or a transaction defrauding creditors and also invite the court to declare the transfer as void which is within the jurisdiction that the court has. That is set out in the *Epiq Europe Ltd*, Lower Ground, 46 Chancery Lane, London WC2A 1JE [www.epiqglobal.com/en-gb/ Insolvency Act application](http://www.epiqglobal.com/en-gb/Insolvency%20Act%20application) and alternatively, we seek a vesting of the property in the trustee in bankruptcy such that would have a proprietary interest. Our primary case is the transfers are void such that we have a present proprietary interest. In relation to 15 Leckwith Place and The Church House Inn, what we say is the same." He was therefore upfront about the case that if the transactions were declared void, then they would be void ab initio or, on his alternative case, if a vesting order was granted, then the respondent would acquire a proprietary interest in the properties. 55. The judge realised this distinction as he held, according to the transcript: "2 Wharf Road, it is alleged by the trustee in bankruptcy was transferred to the second respondent as a transaction at an undervalue or transaction defrauding creditors and he seeks an order that the transfer was void or vested pursuant to section 424(1)
- (a) IA 1986. This is again said in relation to Leckwith and Church House Inn with similar relief sought." 56. Therefore, it seems to me that the judge's attention was drawn to the issue of the need to establish a proprietary interest and/or remedy for the court's jurisdiction to be engaged in both of the respondent's skeleton argument and in oral submissions. This was not hidden or misrepresented to the judge. The judge said that presentation could have been fuller but ultimately, he concluded effectively that nothing had been withheld from him and he had not been misled, such that there was insufficient material before him on the return date that would require the injunction to be discharged on this ground. I think that the judge

was perfectly entitled to come to that

conclusion.

57. The next matter concerned one of the appellant's potential defences, namely, the solvency of Mr Khan at the time of the transfers and it was said that this was not raised before the judge on the without notice hearing. Mr Hannant's general answer to this was that the appellant had accepted that there is a serious issue to be tried on the substantive claim and the appellant was not relying on this or any other defence at the return date hearing, so how could there have been any obligation on the respondent to have raised this defence at the without notice hearing? Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ 58. In any event, he says that the point was fairly raised. At paragraph 104 of the respondent's fourth witness statement, he confirmed that he was aware that for the purposes of section 339, Mr Khan's financial position at the relevant time was relevant and he set out in some detail the dates at which the respondent considered that Mr Khan was insolvent. In Mr Hannant's skeleton argument, it was acknowledged that the respondent would need to establish that Mr Khan was insolvent or otherwise became insolvent as a result of the transaction before noting that where the transferee is an associate of the bankrupt, insolvency is to be presumed under section 341(2) IA 1986.
59. At paragraph 55 of the skeleton, Mr Hannant summarised the respondent's evidence at paragraph 101 of his fourth witness statement and made the point, adverse to the respondent's case, that: "If the court were to find that the transfer took place on 12 March 2015, then any claim under section 339 but not section 423 is likely to fail. However, T's position is that it has met the "low bar" of establishing a serious question to be tried as regards the TUV claims." 60. In his oral submissions to the judge, Mr Hannant said as follows: "I have taken you to evidence of undervalue. There is a question regarding solvency, so the evidence is that the transfer of 2 Wharf Road on 3 February 2016, that is, the date of registration, and we say the Form TR1 was backdated and if that is the case the bankrupt became insolvent as a result of transferring 2 Wharf Road to R2. For all of those reasons, the transactions were at an undervalue and the fact they took place at the relevant time, we say, are the necessary ingredients to make our case under section 339 and certainly, all the evidence we have is that there is an issue to be tried. As regards section 423, that is set out in the skeleton argument. Again, this requires an undervalue. The key differences are that for section 423, there is no look back period and no requirement for insolvency..." 61. The judge was fully alive to the issue of insolvency with a note of his judgment on the without notice application recording the following: "As to the first issue, I am satisfied there is a serious issue to be tried on the issues and on the merits before me. The relevant period Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ is five years, ending with the day of presentation of the petition. It is also necessary to show the bankrupt became insolvent. Where there is an associated transferee, insolvency is presumed." 62. Therefore, insolvency was clearly raised as an issue that may be relevant and in which the point that the appellant might wish to argue is identified. That is sufficient in

my mind to fulfil the duties incumbent on the respondent at the without notice hearing. 63. The final matter is the cross-undertaking point and whether there was adequate citation from Hunt v Ubhi. While it is accepted that reference was made to Hunt v Ubhi, the complaint from Mr Hocking is that the relevant paragraph, paragraph 29 of the Court of Appeal judgment, was not specifically referred to and that is where the relevant principles in this regard are set out. 64. To my mind, there is nothing in this point. Furthermore, the appellant does not now complain about the cross-undertaking that was accepted at the return date hearing nor is that appealed. This is purely whether there should have been a fuller explanation of the effect of Hunt v Ubhi at the without notice hearing. 65. The judge was taken to paragraph 46 of Hunt v Ubhi where the Court of Appeal explained that a liquidator is normally required to give a full undertaking and would have to justify a departure from that default position. In Hunt v Ubhi, the liquidator had said the opposite to the judge, namely, that it was usual to limit a provisional liquidator's undertaking to the assets in the estate. 66. The judge in this case read that paragraph and then Mr Hannant submitted: "Ubhi makes clear that we need to justify any departure from a full undertaking. What we say is that the TOB has no assets in hand, had numerous unpaid costs orders in their favour and has no reasonable entitlement to recoupment out of the insolvent estate." 67. The judge's judgment in relation to the issue of a cross-undertaking read as follows: "A connected point is the undertaking in damages that the trustee in bankruptcy has offered to compensate the respondents. However, the trustee in bankruptcy seeks a limited undertaking, limited to assets in the bankruptcy estate. It is clear from authority Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ that the mere fact that the applicant is a trustee in bankruptcy is not usually enough to persuade the court to accept an undertaking in damages which is limited. Newey LJ said that one point is whether the creditors could be called upon. In this case, Mr Hannant has pointed out that, after some five years of bankruptcy, no assets have been recovered, there have been costs orders that have not been paid and the petitioning creditor is himself a trustee in bankruptcy of a creditor of Mr Khan. Accordingly, it appears unlikely any indemnity would be possible. For those reasons, I am persuaded that the undertaking should be limited." 68. The judge was therefore aware of the point raised by Newey LJ in paragraph 29 of Hunt v Ubhi to which the appellant says the respondent should have referred the court regarding indemnities from creditors, but he considered them unlikely to be available. 69. In my view, the judge was right to conclude that the alleged examples of where the respondent was said to have breached the duty of full and frank disclosure and the duty of fair presentation have not been made out to any material extent. The relevant points were before the judge on the without notice application and he seems to have been fully aware of the relevant issues that arose. There is therefore no basis for interfering in his evaluative judgment in this respect and the appeal is dismissed on this ground also. 70. In the circumstances, the appeal is dismissed, the injunction continues and costs, it seems to me, should follow the event. Any submissions that the parties wish to make about the amount of costs or whether they should be assessed on a summary basis, or whatever, should be made in writing, given the lack of time to be able to deal with it today and can I

ask the parties to limit that writing to three pages each on costs and for them to be filed within seven days. Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof. Lower Ground, 46 Chancery Lane, London WC2A 1JE Email: civil@epiqglobal.co.uk Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/

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Prepared on 22 October 2026 · Esheria